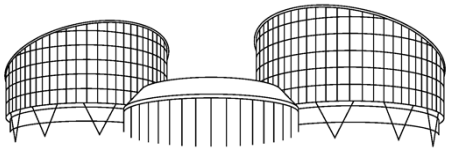

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF SIMEONOVI v. BULGARIA

(Application no. 21980/04)

JUDGMENT

STRASBOURG

12 May 2017

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

In the case of Simeonovi v. Bulgaria,

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

András Sajó, *President,*
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Angelika Nußberger,
Nebojša Vučinić,
André Potocki,
Paul Lemmens,
Helena Jäderblom,
Ksenija Turković,
Dmitry Dedov,
Robert Spano,
Jon Fridrik Kjølbro,
Yonko Grozev,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 6 July 2016 and 18 January 2017,

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

PROCEDURE

1. The case originated in an application (no. 21980/04) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Bulgarian nationals, Mr Lyuben Filipov Simeonov and Ms Nelly Nikolova Simeonova and Mr Filip Lyubenov Simeonov ("the applicants"), on 8 June 2004.

2. The applicants were represented by Ms S. Margaritova-Vuchkova, a lawyer practising in Sofia. The Bulgarian Government ("the Government") were represented by their Agent, Ms R. Nikolova, of the Ministry of Justice.

3. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 23 August 2011 a Chamber of that Section declared the application partly admissible, rejecting all the complaints raised by the second and third applicants and some of the complaints raised by the first applicant, Mr Lyuben Filipov Simeonov ("the applicant"). The applicant's complaints under Article 3 concerning the lack

of medical care in prison, his conditions of detention and the allegedly excessive strictness of his prison regime, as well as the complaints under Article 6 §§ 1 and 3 (c) relating to the lack of assistance from a lawyer for the first few days of his detention, were communicated to the Government.

4. On 20 October 2015 a Chamber of the Fourth Section composed of Guido Raimondi, President, Päivi Hirvelä, George Nicolaou, Ledi Bianku, Paul Mahoney, Krzysztof Wojtyczek, Yonko Grozev, judges, and Françoise Elens-Passos, Section Registrar, delivered a judgment unanimously declaring the application partly admissible and finding a violation of Article 3 on account of the conditions of detention and the prison regime imposed on the applicant, and no violation of Article 6 §§ 1 and 3 (c) on account of the lack of assistance from a lawyer for the first few days of his detention.

5. On 12 January 2016 the applicant requested the referral of the case to the Grand Chamber under Article 43 of the Convention and Rule 73. The panel of the Grand Chamber acceded to that request on 14 March 2016.

6. The composition of the Grand Chamber was determined in accordance with the provisions of Articles 26 §§ 4 and 5 of the Convention and Rule 24.

7. On 20 May 2016 the President of the Grand Chamber gave leave to the non-governmental organisation Association for the Prevention of Torture, based in Geneva (Switzerland) to submit written documents on the right to legal assistance.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 July 2016 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms M. KOTSEVA, *Agent*,
Ms M. DIMITROVA, *Agent*;

(b) *for the applicant*
Mr J. MCBRIDE, *Counsel*,
Ms S. MARGARITOVA-VUCHKOVA, *Counsel*
Ms N. SIMEONOVA.

The Court heard addresses by Mr McBride, Ms Kotseva and Ms Dimitrova, and the replies of Mr McBride and Ms Dimitrova to the questions put by the judges.

9. On 15 July 2016 the President of the Grand Chamber decided to grant the applicant legal aid.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1975 and is detained in Sofia Prison.

A. Criminal proceedings against the applicant

1. The applicant's arrest and detention in police custody

11. On 2 July 1999 two armed individuals burst into a bureau de change in Burgas. Shots were fired and two staff members were killed. The criminals fled with a sum of money. On the same day the Burgas investigation department instigated criminal proceedings against a person or persons unknown for armed robbery and homicide.

12. The bodies responsible for the criminal investigation implemented a number of investigative measures: inspection of the premises, autopsies on the victims and questioning of witnesses. The investigators quickly made a connection with the applicant and a certain A.S.

13. By decision of 9 July 1999 a police officer ordered the applicant's detention for twenty-four hours, in accordance with the relevant provisions of the Ministry of the Interior Act. The order mentioned the detainee's right to assistance from a lawyer as from the time of his arrest. It also stated that a copy of the order should be presented to the arrestee. The copy of the relevant order in the case file is not signed by the applicant, who was on the run and being sought by the police at that time.

14. On 3 October 1999 the applicant was arrested in Sofia. None of the case papers indicate whether he received a copy of the 9 July 1999 order after his arrest. He remained in detention in Sofia that day and the next.

15. On 4 October 1999 an investigator from Burgas, on the basis of Article 202 of the Code of Criminal Procedure, ordered the applicant's detention for twenty-four hours from 8 p.m.

16. On 5 October 1999 the applicant was transferred to Burgas. His detention was extended by a prosecutor that same day.

17. The document containing the two decisions of 4 and 5 October 1999 does not mention the applicant's right to the assistance of a lawyer and does not bear his signature.

18. The applicant affirmed that he had submitted four requests, on 3, 4, 5 and 6 October 1999, for contact with a lawyer, Mr V. Mihailov, and that the authorities had not acceded to those requests.

19. He stated that he had been questioned by the officers in charge of the investigation over the period from 3 to 6 October. While being questioned he had explained that he had taken part in the hold-up at the bureau de change but denied having committed the two murders.

20. The criminal case file contains no written trace of any such questioning. On the other hand, it includes a handwritten statement by A.S., the applicant's presumed accomplice, dated 3 October 1999, in which A.S. explained that the applicant had instigated the hold-up, that he himself had agreed to cooperate with the applicant and that the latter had used a gun during the incident.

21. On 6 October 1999 the investigator in charge of the investigation appointed an official lawyer for the applicant. At noon, assisted by his officially appointed lawyer, the applicant was formally charged with the double murder and the hold-up in the bureau de change in Burgas. When questioned immediately after being charged, he made the following statements:

> "I have read the charge sheet in the presence of my officially appointed lawyer, D. Todorov.
>
> I have been informed of my rights and obligations as a charged person and of my right to refuse to give evidence.
>
> I shall make no submissions concerning the charges until my parents, who have been informed, have had time to engage a lawyer."

2. Continuation of the criminal proceedings against the applicant

22. On 7 October 1999 A.S. was questioned by the investigator in the presence of a lawyer. A.S. related the circumstances surrounding the preparation, execution and aftermath of the hold-up, and explained how he had helped the applicant at all those stages. He affirmed that it had been the applicant who had killed both victims.

23. On 8 October 1999 the applicant engaged a lawyer practising in Burgas, Mr Kanev. During his questioning in the presence of that lawyer on 12 October 1999 he remained silent and stated that he would give evidence at a later date.

24. On 21 October 1999 the applicant confessed in the presence of his lawyer, Mr Kanev. He admitted that he had prepared and committed the hold-up at the bureau de change and claimed that the two victims had been killed by A.S.

25. On 22 December 1999 the applicant engaged a second lawyer, this time practising in Sofia, Ms Zheleva.

26. Subsequently, the officers responsible for the investigation gathered several different types of evidence, that is to say witness statements and medical, scientific, physical and documentary evidence.

27. On 4 January 2000 the applicant and A.S., assisted by Counsel, took cognisance of the case papers. They retracted their confessions, and their lawyers requested that their clients be questioned once again.

28. On 16 February 2000 the Burgas regional prosecutor returned the file to the investigator for further inquiries. He asked him, in particular, to

conduct several investigative measures and to formally charge both suspects afresh.

29. On 7 March 2000 the applicant was charged with an additional offence, namely the unlawful purchase of the firearm which had been used during the robbery of 2 July 1999. On the same day the two suspects were questioned in the presence of their lawyers. In his statement the applicant related a version of events to the effect that the robbery and murders in question had been committed by a certain V., an Iranian national, aided and abetted by an unknown second person.

30. On 17 May 2000 the regional prosecutor's office drew up the indictment and committed the applicant and his presumed accomplice for trial before the Burgas Regional Court.

31. The Regional Court considered the criminal case between 25 July 2000 and 14 June 2001. During the proceedings the applicant, who was assisted by a lawyer, submitted that he and his presumed accomplice had indeed been in Burgas on 1 July 1999 and that they had indeed intended to commit a robbery in the bureau de change, but that they had changed their minds and returned to Sofia the same day.

32. On 14 June 2001 the Burgas Regional Court delivered its judgment. The applicant was found guilty of armed robbery in the Burgas bureau de change, committed jointly with A.S. and resulting in the murder of two persons. He was also found guilty of the unlawful purchase of a pistol and ammunition for it. The Regional Court imposed the heaviest sentence available under the Bulgarian Criminal Code, namely a whole-life sentence. In accordance with section 127b (1) of the Execution of Punishments Act, the Regional Court ordered the applicant's placement under the "special" prison regime.

33. Drawing on the evidence gathered during the preliminary investigation and at the trial, the Regional Court established the facts as follows: the applicant's former partner, D.K., had started work as a cashier in the bureau de change in question in 1997 when she was still living with him. While working there she had met the first victim, a certain N.B., who was a close relative of the owner and an employee in the same establishment. In June 1999 D.K. had left the applicant and moved in with N.B. in Burgas. The applicant had then decided to kill N.B. and to steal the cash kept in the bureau de change. He had acquired a "Makarov" pistol, a silencer and ammunition. The applicant had persuaded a friend, A.S., to take part in the robbery. On the afternoon of 1 July 1999 the applicant and A.S. had arrived in Burgas by coach. They had then gone to the building in which the bureau de change was located, and had gone up to the top floor to spend the night there. The next morning, just before 9 a.m., they had gone down to the floor on which the bureau de change was located and noted that N.B. was in the premises alone. A.S., who had been carrying the pistol, had burst into the premises and fired one point-blank shot at the victim's left

temple. The victim had died instantly. The two accomplices had then placed the money found in the bureau de change in a bag which they had brought with them. Meanwhile the armed security guard of the bureau de change, a certain P.I., had rushed into the premises where the first victim had been killed. A.S. had fired two shots at him, hitting him in the face. The security guard had been killed instantly. A.S. and the applicant had left the building. They had then concealed the murder weapon under a rubbish bin, thrown away the clothes they had been wearing and hidden the stolen money. Some time later the two men had ordered a certain E.E. to fetch the money for them, which he had done.

34. The applicant appealed against that judgment. He complained that insufficient reasons had been given for the conviction, that his guilt had not been established, that the first-instance court had reached an erroneous decision, that there had been several breaches of procedural and substantive rules under domestic law and that the Regional Court had shown bias.

35. The applicant's lawyer requested the withdrawal of all the judges of the Burgas Court of Appeal. He argued that the media coverage of the criminal case had created a climate of intolerance and hostility towards his client. The defence called for an additional witness to be summoned, the re-examination of one of the witnesses already heard by the trial court, and several additional expert opinions. On 4 December 2001 the reporting judge responsible for the criminal case rejected the requests for further evidence-gathering as irrelevant. He dismissed the challenge to the judges of the Court of Appeal for lack of any evidence of bias.

36. The Court of Appeal considered the criminal case between February and July 2002. It examined a new witness and received additional conclusions from psychiatric experts on the mental state of the two accused.

37. On 6 August 2002 the Court of Appeal upheld the judgment of the first-instance court, giving its full backing to the latter's factual and legal findings. The evidence gathered during the preliminary investigation, presented before the first-instance court and produced for the first time before the Court of Appeal had demonstrated that the two accused had planned and carried out the robbery in the bureau de change and that the two victims had been killed by A.S. Yet the applicant had been the instigator of those crimes and had provided the weapon used by his accomplice. The Court of Appeal drew on the statements of the many witnesses questioned during the assessment of the case, on the results of the ballistic, technical and accountants' reports and the medical and psychiatric opinions, and also on the physical and documentary evidence gathered.

38. The Court of Appeal observed that the accused's initial statements during the preliminary investigation had differed considerably from their submissions to the first-instance court. The initial statements had corroborated the finding concerning their participation in committing the criminal offences in issue, whereas the subsequent ones set out a version of

events to the effect that an Iranian national had committed those offences. The Court of Appeal gave credence to the accused's initial statements, which had been made to an investigator in their lawyers' presence after they had been formally charged. The two individuals thus charged had been advised that their statements could be used in court with a view to establishing the facts, and their prior medical examination had revealed no sign of physical violence, which contradicted the defence lawyer's allegation that the applicant's initial confession had been extracted from him.

39. The Court of Appeal turned its attention to the applicant's version of events to the effect that the two murders and the robbery had been committed by a certain V., an Iranian national, and that the applicant himself had been at his place of work in Sofia at the material time. Checks carried out in the Ministry of the Interior database had shown that no Iranian national of that name was present in Bulgaria. It was true that the applicant had been at his place of work in Sofia on 2 July 1999. However, he had been working as a night watchman and the robbery and murders had been committed early in the morning, which had given him enough time to cover the distance between Burgas and Sofia and to arrive at work the same evening. The Court of Appeal deemed unconvincing the statement by the only witness who had corroborated the applicant's version of events.

40. The Court of Appeal noted that the judgment of the first-instance court displayed none of the procedural defects mentioned by the defence. The factual and legal findings of the Regional Court had not been exclusively based on the accused's confessions but on the whole body of consistent evidence gathered during the criminal proceedings. The applicant had participated actively in the proceedings and his lawyers had submitted several requests linked to the progress of the trial and the gathering of evidence. The Regional Court had responded to all those requests and had provided full reasons for its procedural decisions. There had, moreover, been no sign of bias on the part of the judges who had examined the case, and the proceedings had been conducted in such a way as to safeguard the parties' interests.

41. The Court of Appeal excluded a statement by one witness from the evidence for non-compliance with the procedural rules, but did not consider that statement decisive in terms of the factual and legal conclusions in the case. It held that even though the Regional Court had been dilatory in issuing the grounds for its judgment, the defence had nonetheless been able to submit additional observations on appeal after having secured a copy of those grounds.

42. The applicant lodged an appeal on points of law, reiterating his submissions to the Court of Appeal. In that appeal, which ran to forty pages, his lawyer raised seventy-four objections concerning the gathering and the interpretation of various pieces of evidence, as well as the factual and legal

findings of the lower-level courts. In paragraph 33 of his submissions the lawyer contested the admissibility of a record of a reconstruction of the events of 7 October 1999, arguing that on that day his client had not been assisted by a lawyer of his choosing. At the time his client had been assisted by an officially appointed lawyer who had not been nominated by the local bar association, as required by the applicable legislation. The applicant's lawyer added that his client had undeniably been deprived of a defence lawyer on 4 October 1999, when he had been taken into custody; he regarded this as an infringement of the provisions of section 70(4) of the Ministry of the Interior Act and of the Constitution. That was the only sentence relating to the circumstances of the applicant's detention in police custody.

43. By a judgment of 17 December 2003 the Supreme Court of Cassation dismissed the applicant's appeal on points of law. It found that none of the circumstances mentioned by the defence demonstrated the existence of bias on the part of the judges who had considered the criminal case. The applicant had had an opportunity to defend himself effectively during the criminal proceedings: he had given evidence and challenged the evidence against him. Some of his requests for further evidence-gathering had been accepted by the lower-level courts, and proper reasons had been given for their rejection of other requests by the defence for evidence to be taken.

44. Furthermore, in endorsing the Court of Appeal's other arguments, the Supreme Court of Cassation considered that the facts had been well established, that the substantive and procedural rules had been appropriately applied and that the accused's rights had been fully respected.

B. The applicant's conditions of detention

45. The applicant was held in Burgas Investigation Detention Facility from 5 October 1999 to 27 January 2000, and again from the beginning of March to 14 April 2000. He was incarcerated in Burgas Prison from 27 January 2000 to the beginning of March 2000, and again from 14 April 2000 to 25 February 2004. On the latter date he was transferred to Sofia Prison, where he is still being held.

1. Burgas Investigation Detention Facility

46. The applicant submitted that he had been held in a cell without windows, a toilet or running water. The premises had had poor ventilation and lighting. He had not been allowed to exercise in the open air. Access to sanitary facilities had been restricted and the time allowed for washing had been insufficient. The applicant emphasised that the conditions of hygiene in the detention facility had been deplorable. He had subsequently been

moved to another cell with two other detainees. The three detainees had had to take turns sleeping because the cell only had one bench.

47. According to a rapport by the Director General of Prisons submitted by the Government, at the time the only furniture in the cells in Burgas Investigation Detention Facility had been a bench. The cells had had no windows and the only daylight had entered through holes in metal plates affixed to the doors. The facility in question had only had one shared washroom and lacked any open-air facilities for detainees. The report also mentioned that between 2002 and 2009 the facility had been completely renovated and redeveloped to bring the conditions of detention into line with the detainees' human dignity.

2. Burgas Prison

48. The applicant alleged that his cell in Burgas Prison had had a surface area of 6 sq. m. It had contained a bed and a metal rack. There had been neither running water nor a toilet in his cell. He had used a plastic bucket for his bodily functions. Like all the prisoners he was allowed out of his cell for thirty minutes three times a day, in order to empty the bucket and fill his water bottle. The applicant submitted, in support of those allegations, a statement by his co-accused A.S., who had been detained with him under the same conditions in Burgas Prison. The applicant added that he had been forced to wear a convict's uniform even though he should have been allowed to wear his own clothes, under the prison rules.

49. The applicant explained that at the beginning of his term in Burgas Prison he had been deprived of open-air exercise. According to A.S.'s statement (see paragraph 48 above), prisoners were allowed one-hour's open-air exercise every other day. The applicant was not involved in any organised activities in Burgas Prison. He had submitted several requests to the prison authorities to allow him to join in the various vocational training and occupational programmes and had applied for a transfer to Sofia Prison in order to be closer to his family, but no action had ever been taken on his requests.

50. According to a report by the governor of Burgas Prison submitted by the Government, the applicant had problems adapting to the prison regulations; his attitude to the wardens and the prison authorities had been refractory and disrespectful. However, the applicant had enjoyed all the rights afforded to persons deprived of their liberty. He had board and lodging in accordance with normal prison standards. He had open-air exercise every day and free access to the prison library. He had consulted a psychologist on several occasions and had had a number of meetings with the prison's activity coordinator.

3. Sofia Prison

51. Following his transfer to Sofia Prison the applicant was subject to the "special" prison regime, involving virtually total isolation from the rest of the prison population.

52. The applicant submitted that over the period from February 2004 to summer 2006 he had been confined to a cell measuring 4 m by 2 m, which he had shared with another prisoner. The two beds had taken up most of the floor area, leaving the two prisoners with a free area of only 2 sq. m. There had been no running water in the cell and the prisoners had used a bucket as a toilet.

53. The applicant stated that he had spent most of the day sitting on his bed for lack of free space in the cell. He had eaten his meals in the cell and had been allowed to walk in the prison yard for one hour every day. His access to the prison library had been limited to the few minutes it took to choose and borrow a book, after which he had been immediately taken back to his cell. He had been allowed to attend the prison chapel twice a year, at Easter and Christmas, although not during worship so that he would not meet other prisoners.

54. Up until 2005 the high-security wing of the prison had been overcrowded and ill prisoners had not been held separately from other prisoners, which had fostered the transmission of infectious diseases. The physical conditions had improved somewhat after the renovation work in the high-security wing in 2005 and 2006. In December 2008 the applicant's prison regime had relaxed. However, like all prisoners in his category, he had still been kept separate from the rest of the prison population and his cell had been kept locked during the day. In 2004 and 2005 he had occasionally worked in his cell folding envelopes. Since 2010 he had been allowed into an activities room, where he could talk to other life prisoners and read books.

55. According to a report by the governor of Sofia Prison dated 11 October 2011, the high-security wing of Sofia Prison had been completely renovated in 2005 and 2006. On the date of the report in question the applicant had been held in an individual cell measuring 7.7 sq. m., with a bed, a table, a rack, a shower and a private toilet. His cell had been heated and had running water and proper lighting.

56. Apart from the restrictions imposed by his prison regime, the applicant had access to all the activities provided to other prisoners: he could work, visit the library and the prison chapel, receive visits from his relatives, and write and receive letters. He was also eligible for relaxation of his prison regime under section 198 of the Prisons Act, subject to a favourable opinion from the relevant special panel, and could ultimately be accommodated with the rest of the prison population.

57. Furthermore, in 2010 the applicant applied to have a number of the provisions of the implementing regulations of the Prisons Act declared void

as regards the conditions for the execution of his life sentence. His application was dismissed with final effect by a judgment of 14 September 2011 delivered by the Supreme Administrative Court, which found that the impugned provisions of the implementing regulations were not contrary to the Prisons Act and that the adoption of the regulations had not involved any irregularities justifying their being declared void.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Conditions for the execution of life sentences, and compensatory remedies under the 1988 State and Municipalities Responsibility for Damage Act

58. The relevant domestic law and case-law concerning the regulations on the execution of life sentences and actions for damages in respect of poor conditions of detention were summarised in *Harakchiev and Tolumov v. Bulgaria* (nos. 15018/11 and 61199/12, §§ 108-135 and §§ 136-146 respectively, ECHR 2014 [extracts]).

B. The right to the assistance of a lawyer in criminal proceedings and information to be provided to detainees concerning their rights

1. The Ministry of the Interior Act and its implementing regulations

59. The Ministry of the Interior Act 1997 and its 1998 implementing regulations allowed the police to arrest persons suspected of having committed criminal offences and detain them for twenty-four hours. Arrestees were entitled to legal assistance from the time of their arrest. The relevant provisions of the Act and the implementing regulations, in the version in force at the time of the applicant's arrest, read as follows:

Section 70 of the 1997 Act

"(1) The police may detain persons:

1. who have committed criminal offences ...

(4) Detained persons shall be entitled to legal assistance as of the time of their arrest."

Regulation 54 of the Act's implementing regulations

"(1) A detention order shall be made in respect of the persons mentioned in section 53 (1).

(2) Orders made under (1) above shall mention:

...

5. the rights secured to the person concerned under section 70(3) and (4) of the Ministry of the Interior Act.

(3) The order must be signed by the police department and the detainee.

...

(6) A copy of the order shall be presented to the detainee."

60. At the time of the applicant's arrest domestic legislation did not provide for presenting detainees with a separate document setting out their rights, including the right to legal assistance.

61. On 6 March 2002 the Minister of the Interior issued an internal instruction stating that, immediately after their arrest, detainees had to sign two copies of a statement setting out their rights, including the right to legal assistance.

62. In 2003 Implementing Regulation 54(3) of the Ministry of the Interior Act (see paragraph 59) was amended. The amended regulation provided for the presentation to detainees of a "declaration of rights" which they had to sign, stating, in particular, their intention either to avail themselves of or to waive their right to legal assistance. The new wording of the paragraph was as follows:

"(3) The detainee shall fill in a declaration indicating that he has been informed of his rights and stating whether or not he intends to use his rights under paragraph (2) (5) (b)-(e)."

63. The domestic legislation and regulations introduced in this sphere since that time have incorporated a reference to the "declaration of rights" which detainees must sign after their arrest.

2. Code of Criminal Procedure

64. At the time of the proceedings in issue, the 1974 Code of Criminal Procedure allowed investigators responsible for criminal cases to order the suspect's detention for twenty-four hours. The detention period could be extended by a prosecutor up to a maximum of three days. The legislative provisions on such detention and the rights conferred on the suspect during detention read as follows:

Article 202

"(1) The investigator may, even without the prosecutor's authorisation, order preliminary detention for a criminal offence which is subject to mandatory prosecution and for which a preliminary investigation is compulsory where:

1. the person in question was arrested at or just after the time of commission of the offence;

2. an eyewitness has identified the person as the perpetrator of the offence;

3. visible traces of the offence have been discovered on the person's body or clothing or in his place of residence;

4. the person in question has attempted to flee ...”

Article 203

“(1) The investigator must inform the prosecutor of the detention within twenty-four hours, mentioning the reasons for it.

(2) The prosecutor must immediately confirm or revoke the detention order. Under the circumstances set out in Article 202 § 1, points 1 and 3, where detention has been ordered for a serious crime which is subject to mandatory prosecution, the prosecutor may extend the period of detention up to a maximum of three days.

(3) If, on expiry of the period set out in paragraphs 1 and 2 above, the person concerned has not been charged with an offence, the investigator must release him.

...”

Article 206

“(1) Individuals who are under a detention order ... within the meaning of Article 202 shall have the following rights: to be informed of the offences of which they are suspected; to make statements; to take action ... to challenge measures taken by the authorities responsible for the preliminary investigation ...

2) As regards the statements ... mentioned in the previous paragraph, the provisions of Articles 73 [and] 87 ... shall be applicable *mutatis mutandis*.”

65. During the preliminary investigation the suspect is formally notified of the charges against him by means of an indictment. This confers on him official defendant *(обвиняем)* status. From then on the person’s statements can be recorded for use in evidence in the criminal proceedings. The defendant has several procedural rights, including the right to the assistance of a lawyer at the preliminary investigation stage. The relevant provisions of the 1974 Code of Criminal Procedure read:

Article 50

“The defendant is a person who has been charged under the conditions and according to the procedures set out in the present Code.”

Article 51

“(1) The defendant has the following rights: to know the charges against him and the evidence on which those charges are based, to give statements on the charges, to have access to the case file and obtain the requisite copies of case papers, to submit evidence, to take part in the criminal proceedings, to submit requests ..., to speak last during questioning, to challenge the decisions of courts and preliminary investigation bodies infringing his rights and legitimate interests and to be assisted by a defence lawyer. At the defendant’s request, the defence lawyer shall be present during the implementation of the investigative measures.

...”

Article 67

“(1) The defence lawyer may be a person practising the legal profession.

...”

Article 70

“(1) Participation by a defence lawyer in the criminal proceedings is mandatory where:

...

3. the criminal case concerns a crime punishable by the death penalty, life imprisonment or a prison sentence of at least ten years.

(3) When participation by a defence lawyer is mandatory, the competent authority shall be required to appoint a person practising the legal profession as defence lawyer.

(4) The officially appointed defence lawyer shall be excluded from the criminal proceedings if the defendant engages a different defence lawyer.”

Article 72

“(1) The defendant may, at any stage in proceedings, waive his right to the assistance of a defence lawyer, except in the situation mentioned in Article 70 § 1, paragraphs. 1 to 3.

...”

Article 73

“(1) The defence lawyer may take part in the criminal proceedings as of the time the person concerned has been arrested or charged.

(2) The authority responsible for the preliminary investigation must inform the defendant of his right to the assistance of a defence lawyer and permit him to contact such lawyer. That authority cannot implement any investigative measures before having fulfilled that obligation.

...”

Article 85

“(1) Evidence shall be established on the basis of the defendant’s statements, the suspect’s statements, witness statements, records of the investigative and procedural steps and by other means as laid down in this Code.

(2) Evidence which has not been gathered or drawn up in conformity with the rules of the present code shall be declared inadmissible.

...”

Article 87

“(1) The defendant shall give evidence orally and directly before the competent authority. The defendant shall give evidence in the presence of a defence lawyer if he so requests. That request shall be recorded in minutes and the defence lawyer shall be invited to attend the questioning.

...

(3) The defendant may refuse to give evidence.

...”

Article 91

"(1) The indictment and the conviction cannot be based solely on the defendant's confessions.

(2) Confessions by the defendant shall not release the competent authorities from their obligation to gather other evidence in the course of the proceedings."

3. Case-law

66. Under the established case-law of the Bulgarian Supreme Court of Cassation, if the authorities responsible for criminal investigations fail to formally charge the suspect in accordance with the requirements of the Code of Criminal Procedure, that omission amounts to a restriction of the rights of the defence and forces the courts to refer the case back to the preliminary investigation stage and the aforementioned authorities so that they can remedy the omission (*Тълкувателно решение № 2 от 7.10.2002 г. на ВКС по т. н. д. № 2/2002 г., ОСНК*).

67. By the same token, the absence of a defence lawyer during the charging of the suspect and the implementation of the subsequent investigative measures, when legal assistance is mandatory under the Code of Criminal Procedure, amounts to a major procedural flaw which necessitates the referral of the case back to the authorities responsible for the preliminary investigation (*Решение № 68 от 21.04.1992г. по н.д. № 986/91г. на ВС, I н.о.*). In that situation those authorities are required to repeat the investigative measures in question in the presence of a defence lawyer (*Решение № 604 от 31.10.1991г. по н.д. № 436/91г. на ВС, I н.о.)*.

68. Under the established case-law of the Bulgarian courts, evidence gathered in breach of the rules set out in the Code of Criminal Procedure, including statements made to the police, has no probative value and is excluded from the case file (*Решение № 179 от 21.11.1997г. на ВКС по н.д. № 182/1997г. ВК* ; *Решение № 361 от 8.07.2003г. на ВКС по н.д. № 123/2003г.,III н.о.* ; *Решение № 518 от 21.01.2009г. на ВКС по н.д. № 435/2008г., II н.о., НК).*

III. RELEVANT INTERNATIONAL AND EUROPEAN UNION LAW

A. United Nations

69. Article 14 of the 1966 International Covenant on Civil and Political Rights ("the Covenant") protects the right to a fair trial. The relevant parts of that provision read as follows:

Article 14

"...

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

...

(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 ..."

70. The Human Rights Committee (HRC) is the body responsible for monitoring the implementation of the Covenant by means of periodic State reports and individual communications.

71. The HRC considers that legal assistance should be possible not only at the trial stage but at all stages in proceedings (see *Kelly v. Jamaica*, 1991, 253/1987, § 5.10., and *Borisenko v. Hungary*, 2002, 852/1999, § 7.5), including during police questioning (see *Gridin v. the Russian Federation*, 2000, 770/1997, § 8.5). However, in *Levinov v. Belarus* (2011, 1812/2008, § 8.3) the HRC held that in the absence of any investigative measure during the period when the suspect had had no access to a lawyer Article 14 § 3 (b) of the Covenant had not been infringed by the authorities.

72. As regards the right to be informed of the right to a lawyer, in its concluding observations on the 4th periodic report concerning the Netherlands ((2009), UN doc. CCPR/C/NDL/CO/4, § 11), the HRC considered that States should give full effect to the right to contact counsel before police questioning and ensure that individuals suspected of criminal offences were informed, on their arrest, of their right to legal assistance.

73. Moreover, in a number of cases the HRC has found a violation of Article 14 § 3 (d) of the Covenant owing to the failure to inform the accused of his right to legal assistance (see *Saidova v. Tajikistan*, 2004, 964/2001, and *Khoroshenko v. the Russian Federation*, 2011, 1304/2004).

B. European Union

74. Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings was adopted on 22 May 2012. The deadline for its transposition into the legislation of the European Union Member States was 2 June 2014. The relevant provisions of the Directive read as follows:

Article 1
Subject matter

"This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them ..."

Article 2
Scope

"1. This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings ..."

Article 3
Right to information about rights

"1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

(a) the right of access to a lawyer ...

2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons."

Article 4
Letter of Rights on arrest

"1. Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty ..."

75. Directive 2013/48/EU of the European Parliament and of the Council on, *inter alia*, the right of access to a lawyer in criminal proceedings was adopted on 22 October 2013. The deadline for its transposition into the legislation of the European Union Member States was 27 November 2016. The relevant provisions of the Directive read as follows:

Article 1
Subject matter

"This Directive lays down minimum rules concerning [the right] of suspects and accused persons in criminal proceedings ... to have access to a lawyer ..."

Article 2
Scope

"1. This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings ..."

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.

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

(a) before they are questioned by the police or by another law enforcement or judicial authority;

(b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;

(c) without undue delay after deprivation of liberty;

(d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned;

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

(i) identity parades;

(ii) confrontations;

(iii) reconstructions of the scene of a crime.

4. Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons.

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 and 10:

(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.

2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.

3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made."

IV. REPORTS OF THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT)

76. The Burgas Investigation Detention Facility was visited in 1999 by a CPT delegation. The relevant part of the report published after that visit was quoted in paragraph 54 of the Chamber judgment.

77. Burgas Prison was visited by a CPT delegation in April 2002. The relevant part of the report published by the delegation was quoted in paragraph 55 of the Chamber judgment.

78. Sofia Prison was visited by a CPT delegation in September 2006, December 2008, March and April 2014 and February 2015. The four visit reports were published. The relevant parts of the reports on the first three visits were quoted in paragraphs 57-59 of the Chamber judgment.

79. The relevant part of the last report on a visit to this prison, in 2015, reads as follows:

"3. Conditions of detention

a. material conditions

...

39. At the time of the visit, the closed section of *Sofia Prison* was holding 816 prisoners for an official capacity of 650. The closed section of *Varna Prison* was accommodating 422 prisoners for an official capacity of 350. And as for *Burgas Prison*, at the time of the visit, there were 579 prisoners in the closed section for an official capacity of 371.

In the three prisons, the overwhelming majority of the cells were extremely overcrowded ... The situation at Sofia and Varna prisons remained similar to that

observed in the past, with most inmates having just a little more than 2 m² of living space per person.

40. The situation was aggravated even more by the fact that material conditions in all the three prisons visited in 2015 still demonstrated an ever-worsening advanced state of dilapidation and insalubrity, despite some last-minute cosmetic efforts observed. Most of the common sanitary facilities at Sofia, Burgas and Varna prisons were totally dilapidated and unhygienic. Moreover, they were accessible to prisoners only during the day; at night the majority of the inmates had to resort to buckets (one for each cell).

The cells were mostly equipped with two-tier and three-tier bunk beds and access to natural light and ventilation was poor. Walls were covered with mould, floors were damaged, and ceilings leaking; cells were infested with cockroaches, bedbugs and other vermin. It should be noted in this regard that no cleaning materials were made available to the prisoners.

Heating was functioning only a couple of hours a day (the delegation measured some 14° C in cells and 10° C in in-cell toilets at Sofia Prison ...

It can thus be stated that most parts of these establishments were unfit for human accommodation and represented a serious health risk both for inmates and staff. Despite the repeated criticism, no progress was observed as regards the implementation of the CPT's recommendations made after its visits in 2010, 2012 and 2014. To sum up, in the CPT's opinion, the material conditions alone in the three prisons visited could be seen as amounting to inhuman and degrading treatment.

…

b. Regime

...

43. Possibilities for purposeful activities in *Sofia, Varna and Burgas prisons* were very limited. The cells were unlocked during the day (with the exception of the high security and admission units) and most prisoners just roamed the corridors or stayed in their cells watching TV or playing board games with other inmates. All inmates had access to a library and a multi-faith area.

The only activity for most prisoners was daily outdoor exercise, usually lasting one hour at Varna Prison, one-and-a-half hours at Sofia Prison and two hours at Burgas Prison.

44. As regards work, at Sofia Prison, 258 prisoners had jobs (but 120 of the work places were unpaid), most of them on general prison maintenance services. ... Educational activities were offered to 78 prisoners at Sofia and 49 prisoners at Varna Prison. Other activities included language courses and IT classes (with 225 inmates attending at Sofia Prison) ..."

80. On 26 March 2015 the CPT issued a public statement on Bulgaria under Article 10 § 2 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The statement reads as follows (footnotes omitted):

"1. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has carried out ten visits to Bulgaria since 1995. In the course of those visits, delegations of the Committee have visited all but

one prison, several investigation detention facilities (IDFs) and numerous police establishments in the country.

2. Major shortcomings have been identified during the above-mentioned visits, especially as concerns the police and penitentiary establishments. Repeated recommendations have been made over the last 20 years concerning these two areas.

In its reports, the CPT has many times drawn the Bulgarian authorities' attention to the fact that the principle of co-operation between State Parties and the CPT, as set out in Article 3 of the Convention establishing the Committee, is not limited to steps taken to facilitate the tasks of a visiting delegation. It also requires that decisive action be taken to improve the situation in the light of the CPT's recommendations.

The vast majority of these recommendations have remained unimplemented, or only partially implemented. In the course of the Committee's visits to Bulgaria in 2010, 2012, 2014, and 2015, the CPT's delegations witnessed a lack of decisive action by the authorities leading to a steady deterioration in the situation of persons deprived of their liberty.

3. In the report on its 2012 visit, the Committee expressed its extreme concern about the lack of progress observed in the Bulgarian prison system and stressed that this could oblige the CPT to consider having recourse to Article 10, paragraph 2, of the European Convention on the Prevention of Torture or Inhuman and Degrading Treatment or Punishment.

This procedure was set in motion after the March/April 2014 visit; indeed, the Committee's findings during that visit demonstrated a persistent failure by the Bulgarian authorities to address certain fundamental shortcomings in the treatment and conditions of detention of persons deprived of their liberty. The visit report highlighted a number of long-standing concerns, some of them dating back to the very first periodic visit to Bulgaria in 1995, as regards the phenomenon of ill-treatment (both in the police and the prison context), inter-prisoner violence, prison overcrowding, poor material conditions of detention in IDFs and prisons, inadequate prison health-care services and low custodial staffing levels, as well as concerns related to discipline, segregation and contact with the outside world.

4. The responses of the Bulgarian authorities to the report on the CPT's 2014 visit and to the letter by which the Committee has informed the authorities of the opening of the procedure set out in Article 10, paragraph 2, of the Convention have, to say the least, not alleviated the CPT's concerns. In particular, the responses were succinct, contained very little new information and failed to address the majority of the Committee's recommendations, usually merely quoting the existing legislation and/or explaining the lack of action by referring to budgetary constraints. Further, most of the information contained in the CPT's report as concerns ill-treatment and inter-prisoner violence was simply dismissed.

The 2015 visit was therefore an opportunity for the Committee to assess the progress in the implementation of its long-standing recommendations and to review, in particular, the treatment and detention conditions of persons held at Sofia, Burgas and Varna Prisons, as well as at Sofia IDF (located on G.M. Dimitrov Boulevard).

Regrettably, the findings made during the aforementioned visit demonstrate that little or no progress has been achieved in the implementation of key recommendations repeatedly made by the CPT.

For these reasons, the Committee has been left with no other choice but to make a public statement, pursuant to Article 10, paragraph 2, of the Convention; it took this decision at its 86th plenary meeting in March 2015.

Police ill-treatment

5. In the course of the 2015 visit, the Committee's delegation received a significant number of allegations of deliberate physical ill-treatment of persons detained by the police; the number of such allegations had not decreased since the 2014 visit but was even on the rise in Sofia and Burgas. The alleged ill-treatment generally consisted of slaps, kicks, and in some cases truncheon blows. The delegation concluded that men and women (including juveniles) in the custody of the police continued to run a significant risk of being ill-treated, both at the time of apprehension and during subsequent questioning.

6. Very little progress, if any, has been made as regards the legal safeguards against police ill-treatment, and the CPT's key recommendations in this sphere are still to be implemented. In particular, access to a lawyer remained an exception during the initial 24 hours of police custody and the *ex officio* lawyers did not perform their function as a safeguard against ill-treatment. Further, persons in police custody were still rarely put in a position to notify promptly a person of their choice of their detention, and were not systematically informed of their rights from the outset of their custody.

...

Detention in the Ministry of Justice's establishments

8. The situation as regards physical ill-treatment of prisoners by staff remains alarming in the three prisons visited in 2015. Many allegations of deliberate physical ill-treatment (usually consisting of slaps, punches, kicks and truncheon blows) were again heard at Sofia and Burgas Prisons and, at Varna Prison, the Committee's delegation was flooded with such allegations. In a number of cases, the delegation found medical evidence consistent with the allegations received.

...

12. Overcrowding remains a very problematic issue in the Bulgarian prison system. For example, at Burgas Prison, the vast majority of inmates had less than 2 m² of living space in multi-occupancy cells, with the notable exception of the remand section. The situation at Sofia Prison remained similar to that observed in the past, with most inmates having just a little more than 2 m² of living space per person.

13. The material conditions at Sofia, Burgas, and Varna Prisons remained characterised by an ever-worsening state of dilapidation. In particular, most of the sanitary facilities in these three prisons were totally decrepit and unhygienic, and the heating systems functioned for only a few hours per day. The majority of prisoners still did not benefit from ready access to a toilet during the night and had to resort to buckets or bottles to comply with the needs of nature. The kitchens at Burgas and Varna Prisons (and the dining hall at Varna Prison) remained filthy and unhygienic and infested with vermin, with leaking and over-flowing sewage pipes, and walls and ceilings covered in mould. Most parts of the establishments visited were unfit for human accommodation and represented a serious health risk for both inmates and staff. To sum up, in the Committee's view, the material conditions alone in the three prisons visited could be seen as amounting to inhuman and degrading treatment.

14. The vast majority of inmates (including almost all the remand prisoners) in the three prisons visited in the course of the 2015 visit still had no access to organised out-of-cell activities and were left in a state of idleness for up to 23 hours per day.

...

Concluding remarks

17. In its previous reports, the Committee has taken due note of the repeated assurances given by the Bulgarian authorities that action would be taken to improve the situation of persons placed in the custody of the police, or held in establishments under the responsibility of the Ministry of Justice. However, the findings of the 2015 visit demonstrate again that little or nothing has been done as regards all the above-mentioned long-standing problems. This state of affairs highlights a persistent failure by the Bulgarian authorities to address most of the fundamental shortcomings in the treatment and conditions of detention of persons deprived of their liberty, despite the specific recommendations repeatedly made by the Committee. The CPT is of the view that action in this respect is long overdue and that the approach to the whole issue of deprivation of liberty in Bulgaria should radically change.

18. The Committee fully acknowledges the challenges that the Bulgarian authorities are facing. In the CPT's view, there is a real need to develop a comprehensive prison policy, instead of concentrating exclusively on material conditions (which, as should be stressed, have only improved to an extremely limited extent). Having in place a sound legislative framework is no doubt important. However, if laws are not backed by decisive, concrete and effective measures to implement them, they will remain a dead letter and the treatment and conditions of persons deprived of their liberty in Bulgaria will deteriorate even further. As regards the treatment of persons detained by law enforcement agencies, resolute action is required to ensure the practical and meaningful operation of fundamental safeguards against ill-treatment (including the notification of custody, access to a lawyer, access to a doctor, and information on rights).

The Committee's aim in making this public statement is to motivate and assist the Bulgarian authorities, and in particular the Ministries of the Interior and Justice, to take decisive action in line with the fundamental values to which Bulgaria, as a member state of the Council of Europe and the European Union, has subscribed. In this context, the CPT's long-standing recommendations should be seen as a tool that helps the Bulgarian authorities to identify shortcomings and make the necessary changes. In furtherance of its mandate, the Committee is fully committed to continuing its dialogue with the Bulgarian authorities to this end."

THE LAW

I. SCOPE OF THE GRAND CHAMBER'S JURISDICTION

81. In his memorial submitted to the Grand Chamber and in the course of the hearing, the applicant asked the Grand Chamber to reverse the decision given on 23 August 2011 by the Chamber declaring inadmissible his complaint under Article 3 of the Convention relating to his whole-life sentence.

82. The Government opposed that request. They submitted that it was contrary to the Court's case-law to the effect that the case which was

referred to the Grand Chamber was the application as declared admissible by the Chamber.

83. The Court reiterates that the content and scope of the "case" referred to the Grand Chamber are delimited by the Chamber's decision on admissibility (see, in particular, *K. and T. v. Finland* [GC], no. 25702/94, §§ 140 and 141, ECHR 2001-VII; *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III; *Kurić and Others v. Slovenia* [GC], no. 26828/06, §§ 235 and 236, ECHR 2012 (extracts); and *Murray v. the Netherlands* [GC], no. 10511/10, § 86, ECHR 2016). This means that the Grand Chamber cannot examine those parts of the application which have been declared inadmissible by the Chamber. The Court sees no reason to depart from that principle in the present case.

84. Accordingly, in the framework of the present case, the Court has no jurisdiction to adjudicate on the complaint raised under Article 3 of the Convention concerning the imposition of a whole-life sentence on the applicant.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

85. The applicant complained of the physical conditions of his detention and of the prison regime in the Burgas Investigation Detention Facility and in Burgas and Sofia Prisons. He relied on Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

86. The applicant invited the Grand Chamber to endorse the Chamber's conclusion that there had been a violation of Article 3 of the Convention.

87. The Government submitted no observations on this complaint before the Grand Chamber. However, they pointed out that a wide-ranging programme to reform the Bulgarian prison system was currently being implemented. The programme would ultimately facilitate the application of the European standards on prisoner treatment, including in terms of conditions of detention.

B. The Court's assessment

88. The Court notes that the Chamber found that there had been a violation of Article 3 of the Convention (see paragraphs 88-95 of the Chamber judgment). The Chamber stated in particular:

"89. The applicant has been incarcerated since October 1999. Since that date he has been held in three different establishments: the Burgas Investigation Detention Facility, Burgas Prison and Sofia Prison.

90. The Court notes that the parties agree on the inadequacy of the material conditions which prevailed in the Burgas Investigation Detention Facility between October 1999 and April 2000, when the applicant was held there ... The report on the 1999 CPT visit corroborates this finding ...

91. The applicant was subsequently transferred to Burgas Prison, where he remained from 2000 to 2004 ... In the report on its 2002 visit the CPT delegation stated that the wing for life prisoners in Burgas Prison where the applicant's cell was located had recently been refurbished, that the individual cells had an area of 6 m2 each and had adequate ventilation and lighting. The main problem noted by the CPT delegation had been the restricted access to the shared sanitary facilities and the use of buckets as toilets by the prisoners ...

92. On 25 February 2004 the applicant was transferred to Sofia Prison, where he continued to serve his sentence. According to the reports of the 2006, 2008 and 2014 CPT visits to that prison, all the cells in the prison's high-security wing had in-cell sanitary facilities ... According to information presented by the Government, this section of the prison was renovated in 2005 and 2006, and the applicant benefited from a decent-sized individual cell ... However, the report of the CPT's visit in 2014 once again singles out the general dilapidation of the area of Sofia Prison reserved for prisoners serving life sentences, and the lack of daylight and insufficient hygiene in the premises ...

93. The Court notes that throughout his years in prison the manner and method of executing the applicant's life sentence, as determined by the prison regime assigned to him, were highly restrictive. The applicant had initially been assigned a so-called special prison regime: he had spent twenty-three hours a day locked up in his cell, mostly on his bed; his access to the prison library had been limited to the few minutes it took to choose and borrow a book; he had been allowed to attend the prison chapel twice a year, with a ban on meeting other prisoners ... In 2008 his prison regime was relaxed ... However, like all prisoners in his category, he was still kept separate from the rest of the prison population and his cell was kept locked during the day (*ibid*.). The successive CPT reports show that the prisoners in the high-security wing of Sofia Prison have very few out-of-cell activities and are kept separated from the other prisoners ...

94. In the light of the foregoing facts and as it noted in the recent judgment in the case of *Harakchiev and Tolumov*, cited above, §§ 203-214, the Court considers that the applicant's poor conditions of detention taken in conjunction with the restrictive regime under which he is serving his life sentence and the length of the prison term in question, subjected the applicant to an ordeal far exceeding the suffering inherent in the execution of a prison sentence. The Court therefore finds that the severity threshold required for the application of Article 3 of the Convention was exceeded in the present case. The applicant was placed in an ongoing situation of infringement of his right not to be subjected to inhuman and degrading treatment.

95. There has therefore been a violation of Article 3 of the Convention."

89. The Court sees no reason to depart from the Chamber's conclusions. Moreover, it observes that the report of the CPT's last visit to Bulgaria and

its public statement of 2015 mention that the poor conditions of detention noted in Sofia Prison persist (see paragraphs 79 and 80 above).

90. Like the Chamber, the Court considers that the applicant's conditions of detention taken in conjunction with the restrictive regime under which he is serving his life sentence and the length of the prison term (since 1999), have subjected him to an ordeal exceeding the suffering inherent in the execution of a prison sentence and amount to inhuman and degrading treatment.

91. There was therefore a violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

92. The applicant alleged that he had not been assisted by a lawyer for the first few days of his detention. He relied on Article 6 §§ 1 and 3 (c), which reads as follows:

Article 6

"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 ..."

93. The Government contested that argument.

A. The Chamber judgment

94. Having reiterated the principles emerging from the Court's case-law concerning legal assistance, the Chamber considered that a distinction should be made between the present case and that of *Dayanan v. Turkey* (no. 7377/03, 13 October 2009) inasmuch as, unlike Turkish legislation at the material time, the relevant Bulgarian legislation did not restrict the right of detainees to be assisted by lawyers of their choosing from the time of their arrest. However, the Chamber noted that the applicant had not actually benefited from this legal safeguard for the first three days of his detention, but stated that it was unable to determine whether that situation had been due to the authorities' acting *mala fide* or the applicant's own passivity.

95. The Chamber lastly concluded that the fairness of the proceedings had not been infringed, for the following reasons: (i) there was no indication in the file that the applicant had been questioned during the first three days of his detention; (ii) all his interrogations had taken place after he had been

formally charged on 6 October 1999, in the presence of a lawyer; (iii) no other investigative measure involving the applicant had been implemented during that initial period of detention; (iv) the applicant had confessed to the offences a few days later, when he had been assisted by a lawyer of his choosing and had known that that confession could be used in evidence against him in support of a possible conviction; (v) his conviction had been based not solely on that confession but on a whole body of consistent evidence; (vi) the applicant had amply benefited from his right to defend himself with a lawyer's assistance and the domestic courts had delivered reasoned judgments (see paragraphs 113-116 of the Chamber judgment).

B. The parties' submissions

1. The applicant

96. The applicant invited the Grand Chamber to conclude that there had been a violation of Article 6 on the grounds that he had not been assisted by a lawyer while in police custody from 3 to 6 October 1999 at noon.

97. He submitted that he had made several requests between 3 and 6 October 1999 to consult a lawyer but that the authorities had rejected them. He stated that he had been questioned during that time, and maintained that his allegations were not ill-founded. He alleged that it would have been quite illogical for the authorities not to attempt to question him during that time, and the lack of any written trace of those interrogations corroborated his allegation that he had been pressured by the investigators to confess.

98. The applicant argued that the fact that he had remained silent when questioned on 6 and 12 October 1999 could not be deemed decisive. He explained that he had not had an opportunity to consult the lawyers before the questioning or to obtain guidance from them. That was also why the fact that he had been assisted by a lawyer of his choosing when he had confessed on 21 October 1999 could not be held against him. The lawyers' presence during those interrogations did not mean that they had provided him with any effective assistance.

99. Finally, the applicant affirmed that the right to legal assistance laid down in Article 6 § 3 (c) was autonomous from the requirement of a fair trial enshrined in Article 6 § 1. A finding of a violation or no violation of that autonomous right in the present case depended solely on the answer to the following question: were there any reasons justifying the restriction of his access to a lawyer while in police custody? If there were no such reasons, the fact that the conviction had not been exclusively based on the applicant's confession and the fact that he had had the effective assistance of one or more lawyers for the rest of the criminal proceedings were of no consequence in relation to Article 6 § 3 (c).

2. The Government

100. The Government invited the Grand Chamber to follow the Chamber's example by declaring that in the instant case there had been no violation of the relevant provisions of the Convention.

101. They observed that under domestic legislation the applicant had been entitled to legal assistance as of the time of his arrest, and that it had been the police officers' legal duty to inform him of that right. The Government affirmed that in the absence of any proof to the contrary, that obligation had been honoured. In any event the applicant's allegations themselves indicated that he had been aware that domestic legislation entitled him to legal assistance.

102. Moreover, there was no evidence to corroborate the applicant's allegations that while in police custody he had asked to speak to a lawyer and his request had been refused by the authorities. Domestic legislation at the material time had not provided for the preparation of written documents recording the detainee's wish to consult a lawyer or his waiver of that right. Furthermore, the applicant had not, at any stage in the criminal proceedings before the domestic courts, raised his complaint concerning the absence of a lawyer during his time in police custody.

103. The Government further submitted that there was no evidence to support the applicant's allegation that he had been questioned in police custody before being charged. At the hearing before the Grand Chamber the Government added that even supposing such a conversation or interrogation had taken place while the applicant was in police custody, it would have been conducted informally and could not have had any impact on the course of the criminal proceedings. At no stage in the proceedings had the authorities referred to any statements given by the applicant between 3 and 6 October 1999 at noon. Furthermore, his conduct during that period had not been taken into account in the ensuing criminal proceedings. During that time the applicant had been arrested, transferred to Burgas, taken to the Burgas detention facility and been subjected to medical examinations. At no stage in the domestic proceedings had he alleged that he had been questioned in police custody, and his observations on the subject before the Court had been inconsistent, contradictory and lacking in detail.

104. Lastly, the Government observed that the right to legal assistance as secured under Article 6 § 3 (c) was one of the aspects of the right to a fair criminal trial guaranteed by Article 6 § 1 of the Convention. They therefore submitted that the Court should seek to establish whether the overall fairness of the criminal proceedings in the present case had been affected by the fact that the applicant had not had the assistance of a lawyer while in police custody. The Government invited the Grand Chamber to uphold the Chamber's finding that the criminal proceedings in the applicant's case had generally been fair. He had been assisted by lawyers of his choosing, a body of evidence had been gathered and the case had been scrutinised by courts at

three levels of jurisdiction, which had addressed the arguments put forward by the defence. No statement by the applicant or other piece of evidence that might have been used as a basis for his conviction had been gathered during his time in police custody without a lawyer.

3. Third-party submissions

105. In its observations to the Grand Chamber, the Association for the Prevention of Torture emphasised that making legal assistance available as soon as a suspect was detained was one of the fundamental safeguards for the fairness of criminal proceedings. In its case-law the Court had found violations of Article 6 §§ 1 and 3 (c) where confessions obtained during detention in the absence of a lawyer had subsequently been used to convict the person in question (citing *Salduz v. Turkey* [GC], no. 36391/02, ECHR 2008), but also where the detainees had opted to remain silent (citing *Dayanan v. Turkey*, cited above) or to deny their involvement in the offences with which they were charged (citing *Yeşilkaya v. Turkey*, no. 59780/00, 8 December 2009). The bodies responsible for human rights protection within the United Nations system had also emphasised the importance of legal assistance from the first few hours of detention.

106. Legal assistance at that early stage in criminal proceedings, even before the initial questioning, was essential in order to safeguard an arrested suspect's right not to incriminate himself where he had not been informed of the charges against him. Legal assistance also helped guarantee the exercise of the other fundamental rights of the accused, such as those secured under Article 5 §§ 3 and 4 of the Convention. Thus, even if the detainee made no statement, the mere absence of a lawyer during the first few hours of detention was detrimental to the fairness of proceedings. That was particularly true in cases where the allegations were extremely serious and where the detainee was in a particularly vulnerable position.

107. With reference to various European, national and international legal instruments, the third party pointed out that it was widely accepted that an effective right of access to a lawyer required the following: the accused had to be informed in advance of his right to speak to a defence lawyer; access to the lawyer had to be provided as soon as the person was arrested, and at all events before the initial police questioning; the lawyer had to be able to perform all the services necessary for his work, such as being able to hold private talks with his client, discuss all the facts of the case, be present during questioning, put questions and ask for clarifications.

108. The third party reminded the Grand Chamber of the approach used by the Chamber in the case of *Leonid Lazarenko v. Ukraine* (no. 22313/04, § 57, 28 October 2010), in which the right to a fair trial had been found to have been irretrievably prejudiced by the fact that a confession obtained without access to a lawyer had been used for a conviction, even if they had not been the sole basis for it.

109. Lastly, the third party observed that even if a refusal by the authorities to allow the suspect to speak to a lawyer at the beginning of his detention had not impaired the overall fairness of the proceedings, such a situation could nevertheless amount to a violation of Article 6 § 3 (c).

C. The Court's assessment

1. General principles

(a) Applicability of Article 6 in its criminal aspect

110. The protections afforded by Article 6 §§ 1 and 3 apply to a person subject to a "criminal charge", within the autonomous Convention meaning of that term. A "criminal charge" exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Deweer v. Belgium*, 27 February 1980, §§ 42-46, Series A no. 35; *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51; *McFarlane v. Ireland* [GC], no. 31333/06, § 143, 10 September 2010; and, more recently, *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 249, ECHR 2016).

111. Thus, for example, a person arrested on suspicion of having committed a criminal offence (see, among other authorities, *Heaney and McGuinness v. Ireland*, no. 34720/97, § 42, ECHR 2000-XII, and *Brusco v. France*, no. 1466/07, §§ 47-50, 14 October 2010), a suspect questioned about his involvement in acts constituting a criminal offence (see *Aleksandr Zaichenko v. Russia*, no. 39660/02, §§ 41-43, 18 February 2010; *Yankov and Others v. Bulgaria*, no. 4570/05, § 23, 23 September 2010; and *Ibrahim and Others*, cited above, § 296) and a person who has been formally charged, under a procedure set out in domestic law, with a criminal offence (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 66, ECHR 1999-II, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 44, ECHR 2004-XI) can all be regarded as being "charged with a criminal offence" and claim the protection of Article 6 of the Convention. It is the actual occurrence of the first of the aforementioned events, regardless of their chronological order, which triggers the application of Article 6 in its criminal aspect.

(b) The right to legal assistance and the overall fairness of the criminal proceedings

112. The Court reiterates that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, as guaranteed by Article 6 § 3 (c), is one of the fundamental features of a fair trial (see *Salduz,* cited above, § 51, and *Dvorski v. Croatia*

[GC], no. 25703/11, § 76, ECHR 2015). Prompt access to a lawyer constitutes an important counterweight to the vulnerability of suspects in police custody, provides a fundamental safeguard against coercion and ill-treatment of suspects by the police, and contributes to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused (see *Salduz*, cited above, §§ 53-54, and *Ibrahim and Others*, cited above, § 255).

113. Article 6 § 3 (c) does not therefore secure an autonomous right but must be read and interpreted in the light of the broader requirement of fairness of criminal proceedings, considered as a whole, as guaranteed by Article 6 § 1 of the Convention. In particular, compliance with the requirements of a fair trial must be examined in each case with regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings (see *Ibrahim and Others*, cited above, §§ 250 and 251). Article 6 § 3 (c) leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial system, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Salduz*, cited above, § 51).

114. Like the other guarantees of Article 6, the right to legal assistance is applicable from the moment that a "criminal charge" exists within the meaning of this Court's case-law (see paragraphs 110 and 111 above) and may therefore be relevant during pre-trial proceedings if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to observe it (see *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275; *Dvorski*, cited above, § 76; and *Ibrahim and Others,* cited above, § 253).

(c) Waiver of the right to legal assistance

115. The Court reiterates that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. That also applies to the right to legal assistance (see, among other authorities, *Dvorski*, cited above, §§ 100 and 101, and *Sakhnovskiy v. Russia* [GC], no. 21272/03, § 90, 2 November 2010). However, if it is to be effective for Convention purposes, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance. Such a waiver need not be explicit, but it must be voluntary and constitute a knowing and intelligent relinquishment of a right (see *Pishchalnikov v. Russia*, no. 7025/04, § 77, 24 September 2009, and paragraph 119 below). Before an accused can be said to have

implicitly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (*Pishchalnikov,* cited above, § 77 *in fine)*. Moreover, the waiver must not run counter to any important public interest (see *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A, and *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-II).

(d) Temporary restriction of the access to a lawyer for "compelling reasons"

116. The Court also reiterates that access to a lawyer during the investigation phase may be temporarily restricted where there are "compelling reasons" for doing so. In paragraph 55 of its *Salduz* judgment (cited above), the Court held as follows concerning the restriction of the access to a lawyer for "compelling reasons" during detention in police custody:

> "... the Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' ... Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

117. In its recent judgment in the case of *Ibrahim and Others* (cited above), the Court specified and fleshed out the criteria laid down in the *Salduz* judgment. It stated, in particular, that restrictions on access to legal advice were permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case. Where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to compelling reasons to restrict access to legal advice for the purposes of Article 6 of the Convention. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2 and 3 and Article 5 § 1 of the Convention in particular. When assessing whether compelling reasons have been demonstrated, it is important to ascertain whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying them (*ibid*., §§ 258 and 259).

118. The Court went on to point out that the absence of "compelling reasons" for restricting access to a lawyer did not lead in itself to a finding

of a violation of Article 6 §§ 1 and 3 (c) of the Convention (*ibid*., § 262). In the absence of "compelling reasons", the Court must apply a very strict scrutiny to its fairness assessment: the Government's failure to point to any compelling 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). The onus will then be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice (*ibid*., § 265). Where, on the contrary, compelling reasons for restricting access to a lawyer have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were "fair" for the purposes of Article 6 § 1 (*ibid*., § 264).

(e) The right to be informed of the right to legal assistance

119. In *Ibrahim and Others* (*ibid*., §§ 272-273), the Court also found that it was inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance that a person "charged with a criminal offence" for the purposes of Article 6 had the right to be notified of these rights. Consequently, Article 6 § 3 (c) of the Convention must be interpreted as also safeguarding the right of persons charged with an offence to be informed immediately of their right to legal assistance, irrespective of their age or specific situation and regardless of whether they are represented by an officially assigned lawyer or a lawyer of their own choosing. Moreover, respect for that right may well influence the validity of any waiver of the right to legal assistance (see paragraph 115 above).

(f) Relevant factors for the assessment of the overall fairness of proceedings

120. Since the fairness of criminal proceedings is assessed in each case with regard to the conduct of the proceedings as a whole, the Court set out a non-exhaustive list in *Ibrahim and Others*, cited above, § 274, of factors to be taken into account, where appropriate, in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings. Those factors are as follows:

(a) whether the applicant was particularly vulnerable, for example by reason of his age or mental capacity;

(b) the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair;

(c) whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use;

(d) the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion;
(e) where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found;
(f) in the case of a statement, the nature of the statement and whether it was promptly retracted or modified;
(g) the use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case;
(h) whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions;
(i) the weight of the public interest in the investigation and punishment of the particular offence in issue; and
(j) other relevant procedural safeguards afforded by domestic law and practice.

2. Application of those principles to the instant case

(a) Starting-point for the application of Article 6 in the present case

121. Turning to the facts of the present case, the Court observes that the applicant had been wanted by the investigating authorities and the police since the beginning of July 1999, when his arrest had been ordered on the grounds that he was suspected of having committed armed robbery and two murders and that he had been on the run for almost three months (see paragraph 13 above). The Court, however, considers that the date of the applicant's arrest by the police on 3 October 1999 should be taken as the starting-point for the application of the safeguards set out in Article 6 of the Convention. The arrest was based on suspicions that the applicant had committed criminal offences, and substantially affected the applicant's situation by enabling the authorities to conduct investigative measures in which he participated. It was therefore on 3 October 1999 that the right to legal assistance provided for in Article 6 § 3 (c) became applicable in the present case.

(b) Whether the applicant waived his right to legal assistance

122. The Court notes that the lack of legal assistance for the applicant while in police custody was a limitation which did not follow from domestic law, since Bulgarian legislation authorised him to have access to a lawyer as of the time of his arrest, on 3 October 1999 (see paragraph 59 above). Thus, if the applicant had asked for leave to speak to a lawyer on 3, 4, 5 and

6 October 1999 (before 12 noon), the authorities would have been under a legal obligation to grant that request.

123. The parties disagree on whether the applicant requested contact with a lawyer (see paragraphs 97 and 102 above). There is nothing in the file to corroborate the applicant's assertion that he submitted such a request. At the material time Bulgarian legislation did not yet require a detainee's request to consult a lawyer or his waiver of that right to be recorded in writing (see paragraphs 60-62 above).

124. The Court reiterates that in order to assess this evidence, it adopts the standard of proof "beyond reasonable doubt", but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, among many other authorities, *Ireland v. the United Kingdom*, 18 January 1978, § 161 *in fine*, Series A no. 25). The Court finds it unfortunate that the applicant's first three days of detention were not properly documented so as to avoid any doubts as to whether the applicant did ask for a lawyer or not (see, *mutatis mutandis*, *Dvorski*, cited above, § 105 *in fine*). Consequently, several years on from the events at issue and in the absence of any prima facie evidence, the Court is not in a position to ascertain whether the applicant did in fact request a consultation with a lawyer.

125. The Court must nevertheless seek to establish whether in the particular circumstances of the case, the lack of objective evidence that the applicant requested legal assistance while in police custody might point to an implicit waiver of that right.

126. In that regard the Court observes that in a legal system such as that which was in force in Bulgaria at the material time, in which the assistance of a lawyer during detention in police custody requires an express request from the suspect, it is essential that the latter be promptly informed of that right so as to enable him to rely on it (see paragraph 119 above). This is especially important where, as in the present case, the accused is suspected of serious offences and is liable to a heavy penalty. It is in the face of the heaviest penalties that respect for the right to a fair trial must be ensured to the highest possible degree by democratic societies (see *Salduz*, cited above, § 54). That raises the question whether the applicant was duly informed of his right to legal assistance as of the time of his arrest, as domestic law in fact provided (see paragraph 59 above).

127. In their observations and at the hearing, the Government, with reference to the relevant provisions of domestic law requiring the authorities to inform persons charged with a criminal offence of their rights (see paragraph 101 above), submitted that the applicant had received that information just after his arrest. Yet the case file contains no written trace of such a measure and the Government have not supported their allegation with any further evidence. The Court can only note that the order for the applicant's detention, which mentioned his right to legal assistance, had not

been signed by him and that there is no evidence to show that he was issued with a copy of the order after his arrest (see paragraphs 13 and 14 above). It must therefore be assumed that he was never properly served with the order. As a result, the applicant was not verifiably informed of his procedural rights before the date on which he was charged, that is to say 6 October 1999 (see paragraph 21 above).

128. The Court reiterates that the receipt of such information by the accused person is one of the guarantees enabling him to exercise his defence rights and allowing the authorities to ensure, in particular, that any waiver by the accused of the right to legal assistance is voluntary, knowing and intelligent. That information therefore guarantees the effective possibility of exercising that right and – moreover – the validity of any waiver under the Convention (see paragraphs 115 and 119 above). Accordingly, even supposing that the applicant did not expressly request the assistance of a lawyer while in police custody, as provided in Bulgarian law at the material time, he cannot be deemed to have implicitly waived his right to legal assistance, since he had not promptly received such information after his arrest. His right to legal assistance was therefore restricted.

(c) Whether there were "compelling reasons" to restrict access to a lawyer

129. The Court reiterates that restrictions on access to a lawyer for "compelling reasons" are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see paragraph 117 above).

130. However, the Government mentioned no such exceptional circumstances, and it is not the Court's task to assess of its own motion whether they existed in the present case. It therefore sees no "compelling reason" which could have justified restricting the applicant's access to a lawyer while he was in police custody: there were no allegations of imminent danger to the lives, physical integrity or security of other persons (see, to converse effect, *Ibrahim and Others*, cited above, § 276). Furthermore, domestic legislation on access to a lawyer during detention in police custody did not explicitly lay down any exceptions to the application of that right (see paragraphs 59 and 64 above). It would appear that the events in the instant case correspond to a practice on the part of the authorities which has also been severely criticised by the CPT (see the CPT's 2015 public statement, paragraph 80 above).

131. The Court observes in that connection that such a practice on the part of the authorities would be difficult to reconcile with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles (see *Stafford v. the United Kingdom* [GC], no. 46295/99, §63, ECHR 2002-IV).

(d) Whether the overall fairness of the proceedings was ensured

132. The Court must seek to ascertain whether the absence of a lawyer while the applicant was in police custody had the effect of irretrievably prejudicing the overall fairness of the criminal proceedings against him. The lack of "compelling reasons" in the present case requires the Court to conduct a very strict scrutiny of the fairness of the proceedings. It is incumbent on the Government to demonstrate convincingly that the applicant nonetheless had a fair trial (see paragraph 118 above).

133. In that connection, the Government referred to the following circumstances: the applicant had not been formally questioned in the absence of a lawyer during his time in police custody; no statement that the applicant might have made during that time had been taken into account or subsequently used in evidence against him; his conduct while in police custody had not been taken into account by the prosecuting authorities or the relevant courts; he had at no stage complained to the authorities of having been forced to confess while in police custody; he had benefited from a wide range of procedural safeguards during criminal proceedings which had had all the attributes of a fair trial (see paragraph 103 above).

134. The Court notes that the parties disagree on whether the applicant was questioned in the absence of a lawyer over the period from 3 to 6 October 1999. Drawing on the absence of any document mentioning this point, the Government submitted that even supposing a conversation or interrogation had taken place while the applicant was in police custody, it would have been conducted informally and could not have had any impact on the course of the criminal proceedings (see paragraph 103 above). The applicant, for his part, stated before the Grand Chamber that he had been questioned and that it would have been illogical for the authorities to have missed such an opportunity to obtain further evidence (see paragraph 97 above).

135. The Court notes in that connection that the version of events set out by the applicant during the proceedings before it has changed as the case had unfolded. In his application to the Court the applicant was very vague on this subject. It was not until he submitted his memorial before the Grand Chamber that he provided a number of more specific details, affirming, for example, that he had made statements while in police custody, and disclosing the content of those statements and the name of the lawyer whom he had asked to contact. The Court also observes that the applicant did not mention his lack of legal assistance while in police custody in the proceedings before the Burgas Court of Appeal (see paragraph 34 above) and that his appeal on points of law referred only marginally to the absence of a lawyer on 4 October 1999 in the context of a separate plea relating to the exclusion of evidence obtained in the presence of his officially assigned lawyer (see paragraph 42 above). Moreover, whereas the handwritten statement of his presumed accomplice, A.S., dated 3 October 1999, was

included in the case file (see paragraph 20 above), there is no prima facie evidence for the Court to conclude that the applicant was formally or informally questioned while in police custody.

136. Be that as it may, the Court attaches decisive importance to the fact that during that period of about three days no evidence capable of being used against the applicant was obtained and included in the case file. No statement was taken from the applicant. No evidence in the file indicates that the applicant was involved in any other investigative measures over that period, such as an identification parade or biological sampling. Furthermore, the applicant did not personally allege before the Court that the domestic courts had possessed evidence presented during that period and used it at the trial in order to secure his conviction.

137. It should be emphasised here that the domestic law and the domestic courts' case-law provided for the exclusion of evidence obtained in a manner incompatible with the rules of the Code of Criminal Procedure (see paragraph 68 above). In the applicant's case, because he was liable to a life sentence, legal assistance during questioning was also a *sine qua non* for the admissibility in evidence at the trial of any statement on his part (see paragraph 65 above).

138. In addition, unlike in the cases of *John Murray v. the United Kingdom* (8 February 1996, *Reports of Judgments and Decisions* 1996-I) and *Averill v. the United Kingdom* (no. 36408/97, ECHR 2000-VI) the failure of the accused to make any statement would have had no impact on the ensuing stages of the criminal proceedings. The applicant could even have benefited from remaining silent if he had not opted to confess at a subsequent stage in the proceedings, when he had already secured the assistance of a lawyer of his choosing.

139. On 21 October 1999, two weeks after he had been formally charged, the applicant voluntarily confessed (see paragraphs 21 and 24 above). In assessing the voluntary nature of that confession, the Court has regard to the fact that the applicant had already been questioned on two occasions, on 6 and 12 October 1999, with the assistance of a lawyer, and that he had remained silent on both those occasions (see paragraphs 21 and 23 above). During both these interrogations, and when he confessed on 21 October 1999, he had already been informed of his procedural rights, particularly the right not to incriminate himself (see paragraph 21 above). At that time, moreover, he was in receipt of the advice and assistance of a lawyer of his choosing (see paragraphs 23 and 24 above).

140. It is not disputed that only the confession made by the applicant on 21 October 1999 was used in order to convict him. No causal link was ever posited, either before the domestic courts or before the Court, between the absence of a lawyer from 3 to 6 October 1999 and the applicant's confession two weeks after the end of that period in the presence of a lawyer of his choosing (see, *mutatis mutandis*, *Gäfgen v. Germany* [GC],

no. 22978/05, § 180, ECHR 2010). Consequently, the absence of a lawyer during the applicant's time in police custody in no way prejudiced his right not to incriminate himself.

141. The Court further notes that the applicant actively participated at all stages in the criminal proceedings: he subsequently retracted his initial statements, presenting a different version of events, and his defence lawyers obtained exculpatory evidence and contested the incriminating evidence (see paragraphs 27, 29, 31, 35 and 42 above).

142. Moreover, the applicant's conviction was not based exclusively on his confession of 21 October 1999, which he made in the presence of the lawyer of his choosing, but on a whole body of consistent evidence, including the statements of a large number of witnesses who had been questioned during the assessment of the case, the results of ballistic, technical and accountants' reports and medical and psychiatric opinions, and also on the physical and documentary evidence gathered (see paragraphs 26, 33, 36-41 and 43 above).

143. The case was examined at three levels of jurisdiction, by a regional court, a court of appeal and the Supreme Court of Cassation. All these courts gave due consideration to the evidence available, including the statements of the many witnesses questioned during the assessment of the case, the results of the ballistic, technical and accountants' reports and the medical and psychiatric opinions, as well as the physical and documentary evidence gathered. Their decisions, which were properly reasoned in factual and legal terms, also duly assessed whether the applicant's procedural rights had been respected (see paragraphs 31-44 above).

144. In the light of these findings, the Court considers that the Government provided relevant and sufficient evidence to demonstrate that the overall fairness of the criminal proceedings against the applicant had not been irretrievably prejudiced by the absence of legal assistance while he had been in police custody, from 3 to 6 October 1999.

(e) Conclusion

145. In conclusion, there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

146. The applicant invited the Court to indicate to the Government, as it had done in the case of *Harakchiev and Tolumov* (cited above, § 280), measures for the execution of a finding of violation of Article 3 of the Convention owing to the material conditions of detention and the regime applicable to life prisoners.

147. The Government did not state a position on that matter.

148. The relevant part of Article 46 of the Convention reads as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution ..."

149. Under Article 46 the Contracting Parties have undertaken to abide by the final judgments of the Court in cases to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter* alia, that a judgment in which the Court finds a violation of the Convention or the Protocols thereto imposes on the respondent State the legal obligation not just to pay those concerned the sums awarded by way of just satisfaction pursuant to Article 41 of the Convention but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures which it considers appropriate to incorporate into domestic law in order to put an end to the violation found by the Court and to redress as far as possible the effects. It is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used under its domestic law to comply with that obligation. However, with a view to helping the respondent State in that task, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see, among other authorities, *Stanev v. Bulgaria* [GC], no. 36760/06, §§ 254-255, ECHR 2012).

150. The Court reiterates that it set out the following recommendations in its *Harakchiev and Tolumov* judgment (cited above, § 280):

> "The breach of Article 3 of the Convention found in the present case in relation to the regime and conditions of the applicants' detention flows in large part from the relevant provisions of the 2009 Execution of Punishments and Pre-Trial Detention Act and its implementing regulations ... It discloses a systemic problem that has already given rise to similar applications (see *Chervenkov [v. Bulgaria*, no. 45358/04], §§ 50 and 69-70[, 27 November 2012], and *Sabev [v. Bulgaria*, no. 27887/06], §§ 72 and 98-99[, 28 May 2013]), and may give rise to more such applications. The nature of the breach suggests that to execute this judgment properly, the respondent State would be required to reform, preferably by means of legislation, the legal framework governing the prison regime applicable to persons sentenced to life imprisonment with or without parole. That reform, invariably recommended by the CPT since 1999 ..., should entail (a) removing the automatic application of the highly restrictive prison regime currently applicable to all life prisoners for an initial period of at least five years, and (b) putting in place provisions envisaging that a special security regime can only be imposed – and maintained – on the basis of an individual risk assessment of each life prisoner, and applied for no longer than strictly necessary."

151. The Court observes that in the present case it found a violation of Article 3 of the Convention on account of the applicant's conditions of detention taken in conjunction with his restrictive prison regime and the length of his period of imprisonment (see paragraphs 90 and 91 above). Those circumstances, as well as the applicable domestic legislation, are identical to those which led the Court to find a violation of Article 3 on

account of the material conditions of detention and the prison regime in the *Harakchiev and Tolumov* judgment, cited above. It therefore considers it appropriate to reiterate the recommendations which it set out in paragraph 280 of that judgment concerning: (a) removing the automatic application of the special prison regime to life prisoners, and (b) putting in place provisions permitting the imposition of that regime on the basis of an individual risk assessment.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

152. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

153. The applicant clamed 10,000 euros (EUR) in respect of non-pecuniary damage sustained owing to his prison regime and his conditions of detention.

154. The Government made no observations before the Grand Chamber on that matter.

155. In its judgment of 20 October 2015 the Chamber awarded the applicant EUR 8,000 under this head.

156. The Court considers that the applicant sustained non-pecuniary damage owing to the poor conditions to which he was exposed in the custodial facilities in which he was held and the restrictive prison regime to which he was subject. Like the Chamber, the Court considers that he should be awarded EUR 8,000 under this head.

B. Costs and expenses

157. The applicant claimed EUR 2,160 in respect of lawyer's fees and 767 Bulgarian levs (BGN) in respect of the other costs and expenses incurred during the proceedings before the Chamber, as well as EUR 6,420 in respect of lawyer's fees, EUR 927.27 in respect of travel expenses and BGN 1,929 in respect of other costs and expenses incurred during the proceedings before the Grand Chamber.

158. The Government made no observations on that point.

159. In its judgment the Chamber awarded the applicant EUR 2,589.50 in respect of costs and expenses.

160. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and to its case-law, the Court considers the sum of EUR 8,000 reasonable in respect of all the expenses incurred during the proceedings before the Chamber and the Grand Chamber, less EUR 2,952.52 received from the Council of Europe in respect of legal aid, and awards that sum to the applicant.

C. Default interest

161. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention;

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

3. *Holds*, by fourteen votes to three,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
      (i) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 8,000 (eight thousand euros), less EUR 2,952.52 (two thousand nine hundred and fifty-two euros and fifty-two cents) paid by the Council of Europe in respect of legal aid, plus any tax that may be chargeable to the applicant, in respect of costs and expenses incurred before the Convention institutions;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 12 May 2017.

Johan Callewaert	András Sajó
Deputy to the 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) Partly dissenting opinion of Judges Sajó, Lazarova-Trajkovska and Vučinić, joined by Judge Turković;

(b) Partly dissenting opinion of Judge Serghides.

A.S.
J.C.

PARTLY DISSENTING OPINION OF JUDGES SAJÓ, LAZAROVA-TRAJKOVSKA AND VUČINIĆ JOINED BY JUDGE TURKOVIĆ

To our regret, contrary to the majority, we cannot conclude that in the present case the Government have discharged the burden of proof imposed on it by virtue of the standards set out in *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, ECHR 2016. While we join the majority in finding a violation in respect of Article 3, we respectfully dissent as regards Article 6 § 3 taken in conjunction with Article 6 § 1, and would find a violation.

We are concerned about the implications of this judgment. Today the Court not only turns a blind eye to practices that target the very core of the rights of the criminally accused, but also grants police officers and prosecutors broad opportunities for undocumented, unregulated abuse. Under the reasoning of the majority, suspects can be detained, kept in isolation and potentially intimidated, provided that no written record of these events is left behind. This judgment also unwittingly projects the *Ibrahim* finding beyond the contours of that judgment. In that case, retrenchments on Article 6 § 3 defence rights could be justified *exceptionally* where "compelling reasons" existed for doing so. Here, by contrast, there are no exceptional facts or special circumstances, no reasons adduced by the Government to justify restrictions on the applicant's rights, and a host of unexplained omissions in the Government's submissions.

The applicable standard for overall fairness of a criminal trial

The applicable standard as determined in the recent *Ibrahim and Others* judgment is very clear: where there are no compelling reasons for restricting access to legal advice, the Court must apply a very strict scrutiny to its fairness assessment. The respondent Government's failure to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the scales in favour of finding a breach of Article 6 §§ 1 and 3 (c). Consequently, the onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice (see *Ibrahim and Others*, cited above, § 265).

The overarching purpose of Article 6 is to guarantee the procedural rights that secure a fair trial for each and every accused person. For Article 6 to remain both "practical and effective" (see, among many other authorities, *Salduz v. Turkey* [GC], no. 36391/02, § 51, 27 November 2008, and *Dvorski v. Croatia* [GC], no. 25703/11, § 82, 20 October 2015), the

minimum procedural rights guaranteed to each person cannot be restricted in the absence of compelling and convincing reasons.[1]

The core issue in the present case is whether the Government have proved, in line with the standards of very strict scrutiny, that the overall fairness of the proceedings was not irretrievably prejudiced on account of the Bulgarian authorities' failure to: (i) duly notify the applicant of his defence rights and of the charges against him on his arrest, (ii) keep adequate records of the applicant's period of police custody from 3 to 6 October 1999; (iii) grant the applicant access to legal assistance during his detention in custody; (iv) grant the applicant an opportunity to appoint a lawyer of his own choice; and (v) protect the applicant's privilege against self-incrimination in order to ensure that his confession was fully voluntary and informed and made with the benefit of adequate access to legal advice and services. Furthermore, in the light of the Bulgarian courts' failure to assess whether these numerous procedural violations irretrievably prejudiced the case, we are unable to agree with the majority's conclusion that the Government have proved that the overall fairness of the proceedings was *not* irretrievably prejudiced.

Facts surrounding the applicant's detention and pre-trial custody

The applicant was arrested and detained on 6 October 1999. The Government have observed that the applicant was entitled to legal assistance as of the time of his arrest, and that it had been the police officers' duty to inform him of that right (see judgment, § 101). However, the only arrest order of 9 July 1999 that referenced his right to legal assistance was not signed by the applicant; it must therefore be assumed that the applicant was never properly served with this order (see judgment, §§ 60, 128). Moreover, the applicant was not provided with a lawyer at the time of his arrest or detention.

Thereafter, the applicant was kept in custody for three days. He was allegedly kept incommunicado during this time; the fact is that his parents were only informed about his arrest three days after he was taken into custody (see the applicant's submissions, § 56). The applicant's and the Government's testimonies diverge as to whether the applicant was interrogated during this period. The applicant alleges that he was repeatedly

[1] We do not take a position on the question to what extent the rights under Article 6 § 3 are specific or stand-alone rights. However, in a number of cases, the lack of access to a lawyer during the initial period of police detention, regardless of whether the subject made self-incriminating statements, was enough to find a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 (see *John Murray v. the United Kingdom,* 8 February 1996, § 45, *Reports of Judgments and Decisions* 1996-I; *Mehmet Şerif Öner v. Turkey*, no. 50356/08, § 21, 13 September 2011; *Lopata v. Russia*, no. 72250/01, §§ 137, 140-144, 13 July 2010; and *Averill v. the United Kingdom,* no. 36408/97, § 60, ECHR 2000-VI).

questioned on the occasion of informal invitations into the investigator's office to smoke. The Government allege that no "formal interrogation" took place, without expressly rejecting the allegation that "informal" questioning took place (see Oral Pleadings of the Government of Bulgaria, p. 6).

A public defender was appointed for the applicant on 6 October 1999, notwithstanding the applicant's claim that he had submitted four separate requests for a lawyer of his own choosing between 3 and 6 October 1999 which the authorities had ignored (see judgment, § 18). The applicant was officially charged and interrogated at noon on 6 October. He remained silent during this interrogation, as the interrogation record shows. On 7 October, the applicant's co-accused confessed to having been an accessory to the double murder and robbery and that the applicant had killed both victims. On 8 October, the applicant engaged a private lawyer practising in Burgas. This lawyer had not met the applicant before a second interrogation which was conducted on 12 October, when in the presence of the lawyer of his choice, he again chose to remain silent. On 21 October, the applicant confessed in the presence of his lawyer, with whom he had had no opportunity to have confidential or other conversation. He alleged at that time that his co-accused had killed the victims. Subsequently, on 22 December, the applicant hired a second lawyer practicing in Sofia. On 4 January 2000, the applicant and the co-accused, assisted by counsel, retracted their confessions, and their lawyers requested that their clients be questioned once again.

This Court has explained that where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons injured while in custody, *strong presumptions of fact will arise*. The burden of proof then falls upon the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim (see *Bouyid v. Belgium* [GC], no. 23380/09, § 83, ECHR-2015; *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII; and *Rivas v. France*, no. 59584/00, § 38, 1 April 2004; see also, among other authorities, *Turan Cakir v. Belgium*, no. 44256/06, § 54, 10 March 2009; *Mete and Others v. Turkey*, no. 294/08, § 112, 4 October 2011; and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 152, ECHR- 2012). In the absence of such explanation, the Court can draw inferences which may be unfavourable for the Government (see, among other authorities, *El-Masri*, cited above, § 152).

Placing the evidentiary burden upon the Government is justified by various considerations. First, persons in custody are in a vulnerable position, as this Court has repeatedly acknowledged, and the authorities are under a duty to protect them (see, among other authorities, *Salman*, cited above, § 99). The investigation stage may be particularly decisive as regards the course to be taken by the ensuing criminal proceedings (see *John Murray*

v. United Kingdom, 8 February 1996, § 63, *Reports of Judgments and Decisions* 1996 I; *Martin v. Estonia*, no. 35985/09, § 79, 30 May 2013). The fact of isolating detainees and depriving them of information may be compounded by complex legislation on criminal procedure, notably with regard to the rules governing the gathering and use of evidence (see *Salduz*, cited above, §§ 52 and 54; *Dvorski*, cited above, § 77; and *Ibrahim and Others*, cited above, § 253). Detained persons cannot document evidence of their treatment short of what the State can provide (through medical examinations, written records, and so forth). Finally, because in this instance the applicant's defence rights were restricted (see judgment, § 128) without compelling reasons, the onus is on the Government to demonstrate convincingly why the overall fairness of the trial was not prejudiced by the restriction on access to legal advice (see *Ibrahim and Others*, cited above, § 265).

For these reasons, a proper application of the *Ibrahim* framework would compel the Bulgarian Government to prove that no coercion or compulsion was exerted upon the applicant during the three-day period that preceded his formal charging and interrogation.

The defence rights of the applicant

It is well established that Article 6 guarantees the individual the right to be *notified* of his defence rights once he is the subject of a "criminal charge"[2]; these rights include the right to remain silent and the right not to incriminate oneself (see *Bykov v. Russia* [GC], no. 4378/02, § 92, 10 March 2009; *John Murray,* cited above, § 45; and *Serves v. France*, 20 October 1997, § 47, *Reports of Judgments and Decisions* 1997-VI). Secondly, he has the right to legal assistance once he is subject to a criminal charge (see *Deweer v. Belgium*, 27 February 1980, §§ 42-46, Series A no. 35; *Eckle v. Germany*, 15 July 1982, § 73, Series A no. 51; and *McFarlane v. Ireland* [GC], no. 31333/06, § 143, 10 September 2010). These rights are echoed in European Union law[3] and the International Covenant on Civil and Political Rights.[4]

The fairness of proceedings also generally requires that an accused be able to obtain *the whole range* of services specifically associated with legal

[2] A "criminal charge" exists from the time when an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see judgment, §§ 110-111; and *Ibrahim,* cited above, § 249).

[3] See, in particular, Directive 2012/13/EU on the right to information in criminal proceedings and Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings (see judgment, §§ 74-75).

[4] See, in particular, Article 14 and the decisions of the Human Rights Committee (see judgment, § 71).

assistance, which include, without restriction, the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention (see *Dayanan v. Turkey*, no. 7377/03, § 32, 13 October 2009, and *Bogumil v. Portugal*, no. 35228/03, §§ 48-49, 7 October 2008). The defence rights protected under Article 6 serve to preserve the equality of arms between the State and individuals accused of criminal offences (see *Foucher v. France*, 18 March 1997, § 34, *Reports of Judgments and Decisions* 1997-II; *Bulut v. Austria*, 22 February 1996, § 47, *Reports of Judgments and Decisions* 1996-II; *Bobek v. Poland*, no. 68761/01, § 56, 17 July 2007; and *Klimentyev v. Russia*, no. 46503/99, § 95, 16 November 2006).

This Court has held that the vulnerability of detained persons during the investigative stage "can only be properly compensated by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself" (see *Salduz*, cited above, § 54).

Where access to a lawyer is delayed, there is a greater need for the investigative authorities to notify the suspect of his right to a lawyer, his right to remain silent and his privilege against self-incrimination. *A fortiori,* it is all the more important that persons in police custody be granted the assistance of a lawyer when they have not previously been informed by the authorities of their right to remain silent (see *Brusco v. France*, no. 1466/07, § 54, 14 October 2010, and *Navone and Others v. Monaco*, no. 62880/11 and two others, § 74, 24 October 2013).[5] Moreover, a failure to notify an applicant of his defence rights is considered a particularly significant defect (see *Ibrahim,* cited above, § 303) and will make it even more difficult for the Government to rebut the high threshold of the presumption of unfairness that arises where there are no compelling reasons for delaying access to legal advice (see *Ibrahim and Others*, cited above, §§ 273 and 311).

In Bulgarian law legal assistance is a right *from the time of arrest* (see section 70 of the 1997 Ministry of the Interior Act and Articles 70 and 73 of the 1974 Code of Criminal Procedure). The right to legal counsel cannot be waived in cases involving offences carrying a sentence of over ten years imprisonment, as in the present case (see Article 70 of the 1974 Code of

[5] *Navone and Others*, "74. [The Court] reiterates that it flows from its case-law cited above that an individual held in police custody has, first of all, the right not to incriminate himself and to remain silent, and secondly, the right to legal assistance during all questioning and interrogations. Accordingly, contrary to the Government's submissions, these are two separate rights: any waiver of one of them does not, therefore, imply a waiver of the other. Moreover, the Court emphasises that this does not make those rights any less complementary, since it has already held that individuals held in custody must, *a fortiori*, benefit from the assistance of a lawyer where they have not been informed in advance by the authorities of their right to remain silent (see *Brusco*, cited above, § 54)."

Criminal Procedure). Under the established case-law of the Bulgarian Supreme Court of Cassation, where the authorities have failed to formally charge a suspect in accordance with the requirements of the Code of Criminal Procedure, that omission amounts to a restriction of the rights of the defence and forces the court to refer the case back to the preliminary investigation stage (see judgment, § 66).

Assessment of overall fairness of the trial

We cannot agree with the majority's conclusion that the overall fairness of the trial was convincingly established because the evidence on which the applicant was convicted was not affected by the absence of a lawyer when he was detained. The Government have provided little or no evidence concerning the applicant's pre-trial detention, during which the Government have acknowledged violating the applicant's rights under domestic and EU law and under this Convention (see judgment, §§ 59 and 101). The Government have not rebutted the applicant's allegations that he was informally questioned in detention, which information could have been used to charge him in the first place. Nor have the Government proved that the procedural violations which they committed, in combination, did not affect the voluntariness of the accused's confession, which he later retracted. Since the applicant has repeatedly alleged that he was questioned by the authorities when he was in custody, we cannot agree with the majority that no causal link was *posited* by the applicant before the domestic courts or this Court concerning the absence of a lawyer during his detention from 3 to 6 October and the confession he made on 21 October (see judgment, § 140). Nor can we agree with the majority's conclusion that consequently, the absence of a lawyer during the applicant's time in police custody in no way prejudiced his right against self-incrimination (see judgment, § 140).

This Court has traditionally acknowledged that restricting access to legal advice during the investigative stage, when the applicant is at his most vulnerable, can affect the overall fairness of the proceedings. Neither subsequent legal assistance nor the adversarial process of the ensuing proceedings will necessarily cure defects which occur during the applicant's pre-trial custody period (see *Mehmet Şerif Öner v. Turkey*, no. 50356/08, § 21, 13 September 2011; *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 57, 28 October 2010; *Salduz*, cited above, § 58; and *Płonka v. Poland*, no. 20310/02, §§ 39-41, 31 March 2009).[6]

[6] In its observations to the Grand Chamber, the Association for the Prevention of Torture stated that in cases of pre-trial detention, even if the detainee made no statement, the mere absence of a lawyer during the first few hours of detention was detrimental to the fairness of proceedings. That was particularly true in cases where the allegations were extremely serious, and where the detainee was in a particularly vulnerable position (see judgment, § 106).

The approach of the majority concentrates solely on the evidence which was used to convict the applicant, which is inconsistent with the requirement to examine the proceedings as a whole and not on the basis of an isolated consideration (see *Ibrahim*, cited above, § 251). Moreover, such an approach permits the Government to focus only on evidence used to convict the applicant when discharging its burden to prove that overall fairness was maintained. This approach is, firstly, inconsistent with the requirements of *Ibrahim*, according to which the Court is required to take into account the cumulative effect of the procedural shortcomings when assessing whether or not the Government have proved that the overall fairness of the trial was not irretrievably prejudiced by the decision not to caution him and to restrict his access to legal advice (see *Ibrahim*, cited above, § 311).[7] Secondly, this approach risks rendering the procedural rights protected under Article 6 theoretical and illusory by conflating the issue of proving that the applicant received a fair trial with that of the applicant's substantive guilt.

According to the well-established case-law of this Court, the prosecution must prove a case without resort to evidence obtained through coercion or in defiance of the will of the accused (see, among many authorities, *Saunders v. the United Kingdom,* 17 December 1996, § 68, Case-law Reports 1996-VI; *Jalloh v. Germany* [GC], no. 54810/00, § 100, ECHR 2006-IX; and *Schmid-Laffer v. Switzerland,* no. 41269/08, § 38, 16 June 2015). The voluntariness and validity of the applicant's ensuing confession are called into question when, as here, the procedural rights of the applicant are violated during pre-trial detention (see, *mutatis mutandi, Bouyid,* cited above, § 83; *John Murray*, cited above, § 45; *Mehmet Şerif Öner*, cited above, § 21; *Lopata*, cited above, §§ 137, 140-44; and *Averill,* cited above, § 60).

In this case, a number of the applicant's rights under this Court's case-law and domestic law were violated by the Bulgarian investigating authorities, as the Court concedes (§ 122, 124, 127). The Government failed to present the applicant with his order of arrest and to inform him of his defence rights upon arrest (see judgment, § 127), to assign him a lawyer upon arrest (see judgment, § 101), to promptly notify his parents of his detention, and to keep proper records of his custody.[8] Failure by a State to

[7] We note that a violation of Articles 6 §§ 1 and 3 (c) was found in respect of the fourth applicant in *Ibrahim* on the basis that the UK Government (i) had no compelling reasons to restrict his access to legal advice during his pre-trial detention, (ii) had not cautioned the applicant, (iii) had not informed him of his defence rights. The Government was therefore unable to rebut the presumption of unfairness or prove why overall fairness was not irretrievably prejudiced (see §§ 301 and 311).

[8] According to the CPT Report of 1999, Bulgarian law in force at the time made no provision for the right to notification of police custody to relatives, which was often had been refused or significantly delayed (see §§ 29-30). Systematic failures by the police to keep custody records were also reported (see § 43).

keep proper records in relation to the events surrounding an accused's detention, the reasons for it, and its duration, as well as regarding whether the accused was duly notified of his defence rights upon arrest has been held by this Court to constitute a violation of Article 5 (see *Smolik v. Ukraine*, no. 11778/05, § 45, 19 January 2012, and *Menesheva v. Russia*, no. 59261/00, § 87, ECHR 2006‑III).[9]

The applicant, furthermore, was also initially assigned a court-appointed lawyer not of his own choosing and questioned almost immediately thereafter, such that it was impossible for him at this stage to confer with his defence counsel in order to prepare his defence. In this connection, the applicant's claim that he was unable to have confidential meetings with his lawyer, as an investigator always remained present during his legal consultations, is almost an afterthought. Without evidence from the Government to prove the contrary, these facts constitute a breach of the applicant's right to effective assistance of counsel (see *Bogumil*, cited above, § 48; *Dvorski,* cited above, § 79; *Dayanan,* cited above, § 32; *Bonzi v. Switzerland*, Commission decision, no. 7854/77, 12 July 1978; and *Can v. Austria*, Commission report, § 52, no. 9300/81, 30 September 1985).

This Court has consistently held that 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 *Dvorksi*, cited above, § 79; see also *Meftah and Others v. France* [GC], no. 32911/96 and two others, § 45, ECHR 2002-VII; *Mayzit v. Russia*, no. 63378/00, § 66, 20 January 2005; *Klimentyev*, cited above, § 116; *Vitan v. Romania*, no. 42084/02, § 59, 25 March 2008; *Pavlenko v. Russia*, no. 42371/02, § 98, 1 April 2010; *Zagorodniy v. Ukraine*, no. 27004/06, § 52, 24 November 2011; and *Martin*, cited above, § 90). Where such grounds are lacking, as in the present case, a restriction on the free choice of defence counsel would entail a violation of Article 6 § 1 together with paragraph 3 (c) if it adversely affected the applicant's defence, regard being had to the proceedings as a whole (*Dvorski*, cited above, § 79 see also *Meftah and Others*, cited above, §§ 46-47; *Vitan*, cited above, §§ 58-64; *Zagorodniy*, cited above, §§ 53-55; and *Martin*, cited above, §§ 90-97). Taken together, these factors give reason to doubt that the applicant had effective access to legal counsel prior to his confession, especially as the applicant and his co-accused immediately retracted their confessions on engaging a different lawyer and obtaining access to their case files (judgment, § 27).

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[9] We submit that the Bulgarian authorities' failure to prove that the applicant was promptly notified of the reasons for his arrest and the charges against him constitutes in itself a violation of Article 5 § 2 ("Everyone who is arrested shall be informed promptly … of the reasons for his arrest and of any charge against him."). Unfortunately, the applicant did not allege this violation in his pleadings before this Court.

Beyond these clear-cut violations, the Government's own submissions are riddled with errors and omissions. The Government's contention that no interrogations of the applicant took place between 3 to 6 October is contradicted, not only by the Chamber judgment ("During that time the officials ... questioned [the applicant] about the robbery and the two murders committed in Burgas" [see judgment, § 9]), but indeed, by their own pleadings ("Mr President, it is possible that a conversation, or even questioning, took place between the applicant and police officers or an investigator in Sofia. This questioning, however, was not objectified in any form." (Oral Pleadings of the Government of Bulgaria, p. 6)). According to this Court, any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as "informal questioning," even if the authorities claim not to have relied on information provided by such questioning (see *Martin*, cited above, §§ 95-97, and *Titarenko v. Ukraine*, no. 31720/02, § 87, 20 September 2012).

Other established facts in this case give reason to doubt that the applicant freely exercised his privilege against self-incrimination. First, during the three days in question, interrogations were conducted of a witness to the crime and the applicant's co-accused, a signed confession from whom was entered into the case file on 3 October 1999 (see judgment, § 20). In the light of those interrogations, the applicant, who was being detained separately from his co-accused, would have been trapped in a classic Prisoner's Dilemma – a situation expressly designed to apply pressure upon a detainee with the aim of eliciting a confession or another incriminating admission. In this situation, the applicant's restricted access to legal representation was such as to leave him exposed to such pressure in a manner inconsistent with the right to be free from self-incrimination (see *Brusco*, cited above, § 54). The 1999 Report of the Committee for the Prevention of Torture (CPT) confirms that it was standard practice at the time for Bulgarian police officers to have an initial "talk" with a person taken to the police station, lasting up to 3 hours.[10] Detained persons were often not informed of their right of access to a lawyer, and such access "was rarely – if ever – granted to persons throughout their period of custody."[11] In 2015, the CPT updated this report, expressing concern for "persistent failure by the Bulgarian authorities to address most of the fundamental shortcomings in the treatment" of detained persons. In particular, access to a lawyer during the initial phase of police custody was routinely denied prisoners (see judgment, § 79). This Court admits that "[i]t would appear that the events in the present case correspond to a practice on the part of the authorities which has been severely criticised" (see judgment, § 130). It

[10] CPT Report 1999, § 11.
[11] *Ibid*, §§ 33-34.

observes, further, that "such a practice on the part of the authorities would be difficult to reconcile with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles" (see judgment, § 131), but goes no further than these brief comments.

The majority further relies on the contention that the applicant's conviction was not based exclusively on the confession made on 21 October 1999, but on a whole body of evidence (see judgment, § 142). The Court concludes that it is "unfortunate that the applicant's first three days in detention were not properly documented" (see judgment, § 124) so as to avoid the evidentiary gaps with which this Court contends in the present case, but it summarily concludes that "no causal link" (see judgment, § 140) exists between the absence of a lawyer and the applicant's confession two weeks later. It is far from clear that there is no causal link between this wider body of evidence, the applicant's confession, and the absence of a lawyer during the applicant's time in police custody. As mentioned above, the police had obtained a confession from the co-accused and a witness while the applicant was held in custody. Further, the police only gathered a larger body of evidence *after* the applicant had confessed on 21 October (see judgment, § 26). The Government have not demonstrated that this evidence was gathered independently from whatever knowledge or insights the police had gained from the applicant's confession.

Given the inadequacy of the information presented by the Government and the failure of the domestic courts to address any of these points satisfactorily in their respective judgments, the Court cannot determine that the confession was not decisive in convicting the applicant. This Court has emphasised that in determining whether the proceedings as a whole were fair, regard must also be had as to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubts on its reliability or accuracy. In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (see *Gäfgen v. Germany* [GC], no. 22978/05, §§ 164 and 165, ECHR 2010, and *Khan v. the United Kingdom*, no. 35394/97, §§ 35 and 37, ECHR 2005). Given that this Court has held that an accused's right to silence and privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of fair procedure under Article 6 (see *Brusco,* cited above, § 44; and *John Murray*, cited above, § 45), we cannot agree that the Government have proved the fairness of the trial, since they cannot prove that they did not violate the applicant's rights under Article 6 in obtaining the confession and subsequent evidence.

We emphasise that, notwithstanding serious doubts concerning the conduct of the investigation, we are not called upon to establish the bad faith of the investigative authorities. Yet in the light of the absence of reasons for delaying access to a lawyer, the Government's reliance on the *absence of proof* of a violation of the applicant's rights to effective counsel (see judgment, § 101) is insufficient to demonstrate that the applicant's right to a fair trial was not irretrievably prejudiced. This Court has held that a Government's failure to provide an explanation as to why an accused was denied legal assistance when being held in police custody constitutes a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 (see *Galip Doğru v. Turkey*, no. 36001/06, §§ 83-85, 28 April 2015).[12] These omissions and equivocations are particularly serious in the light of the multiple procedural violations committed by the Bulgarian authorities during the applicant's period of pre-trial detention, as recognised by this Court.

The applicant's right to a fair trial under Article 6 was also prejudiced by the review conducted by Bulgarian courts, which failed to identify and assess a number of procedural violations. Firstly, the defence had raised several breaches of procedural rules under domestic law before the Regional Court, but these do not appear to have been addressed in its judgment (see judgment, §§ 37-41). Furthermore, in his appeal before the Supreme Court of Cassation, the applicant alleged that his right to a lawyer under domestic law and the Constitution had been violated, but this argument was not considered either (see judgment §§ 43-44). The Supreme Court of Cassation considered that the facts had been well-established and the relevant procedural legislation appropriately applied (see judgment, § 44). It is hard

[12] "83. The Court reiterates that it has already had occasion to adjudicate a complaint concerning the absence of a lawyer during an applicant's police custody, finding a violation of Article 6 § 1 and 3 (c) of the Convention on that head (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 45-63, ECHR 2008). It also reiterates that it has held that the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance (see *Dayanan v. Turkey*, no. 7377/03, § 32, 13 October 2009). In that connection, the absence of a lawyer during the implementation of investigative measures amounts to a breach of the requirements of Article 6 of the Convention (see, in particular, *İbrahim Öztürk v. Turkey*, no. 16500/04, §§ 48-49, 17 February 2009, and *Karadağ v. Turkey*, no. 12976/05, § 46, 29 June 2010).

84. In the circumstances of the present case, the Court notes that the applicant had an opportunity to consult a lawyer and to be assisted by him for some of his time in custody. That being the case, in the light of the evidence contained in the case file, it would appear that the applicant had no legal assistance during the implementation of certain procedural measures during his custody, such as his transport to the locations in question for a reconstruction of events and his statements to the police. Nor have the Government provided any explanation for that lack of assistance.

85. Having assessed the present case in the light of the principles set out in its case-law (see paragraph 83 above), the Court holds that the Government have failed to present any factual element or argument conducive to any other conclusion. It therefore finds a violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention."

to conceive how it could have reasonably arrived at this conclusion given that the Government had provided *no evidence* to support the assertion that it had duly complied with all the procedure steps which it was legally obliged to conduct. Under Bulgarian law, where investigating authorities fail to comply with the obligation to inform the accused of the legal basis of the accusation in accordance with procedure, or fail to provide the accused with a defence lawyer, a trial court would have grounds to terminate the court proceedings and refer the case back to the investigation stage (see judgment, § 66). Thus, we cannot conclude with the majority that the domestic courts at all levels of jurisdiction duly assessed whether the applicant's procedural rights had been respected (see judgment, § 143).

Secondly, the Government offered no proof to rebut the applicant's allegations that he had been questioned without a lawyer before the police charged him with murder. In *Martin*, cited above, the Court held that there was nothing to prevent the use of pre-trial statements as "general knowledge" to form the basis of the charge against an accused and the investigative measures that were subsequently carried out. Thus, the use of such statements to support a charge would necessarily compromise the overall fairness of the proceedings and render any subsequent evidence (such as the confession) inadmissible (see § 95). In light of the Government's admission of "informal questioning", supported by the CPT Report's documentation of such systematic practices among investigators, we disagree with the majority that no evidence capable of being used against the applicant was obtained by the authorities during the three-day period at the start of the applicant's detention, even if there was no decisive reliance on said evidence in the final judgment (see judgment, § 137).

Thirdly, it is clear that the domestic courts did not deal with the matter of legal assistance in any meaningful sense, despite the fact that the applicant consistently raised this claim before the domestic courts, and both parties agree that the applicant was denied legal assistance during his time in custody. This Court has ruled, in similar factual circumstances, that where "the relevant [domestic] court decisions contain no meaningful ruling on the issue of legal assistance ... the Court is not satisfied that the applicant's grievance received an appropriate response from the national courts and considers that fair procedures for making an assessment of the issue of legal assistance proved non-existent in the present case" (see *Vanfuli v. Russia,* no. 24885/05, §§ 103-105*,* 3 November 2011, and *Nechto v. Russia*, no. 24893/05, §§ 111-113, 24 January 2012).

Accordingly, we conclude that the domestic courts failed to conduct an adequate review of the applicant's case under domestic law. Therefore, even in the absence of evidence from the Government that the confession was fully informed and voluntary, we maintain that they have failed to prove that the applicant's treatment at the hands of the Bulgarian authorities did not irretrievably prejudice the overall fairness of the trial.

Implications of the overall fairness framework in the context of Article 6 § 3

In a very recent decision, this Court stressed "the need to look beyond appearances and the language used and to concentrate on the realities of the situation" (see *Blokhin v. Russia* [GC], no. 47152/06, § 180, ECHR 2016). Today's judgment disregards the invitation to do just that, with deeply troubling implications. What, we might ask, are the incentives provided to police officers when, as today, this Court legitimates a potential legal black hole in which the applicant is detained for an unspecified length of time with no rights to information or legal counsel, so long as he is not officially questioned?

This Court acknowledges that the right to access to legal counsel, a "fundamental safeguard against ill-treatment," should be provided "as from the first interrogation of a suspect by the police" (see *Salduz*, cited above, §§ 54, 55). However, as Judge Bratza wrote in a prescient concurrence in *Salduz*, "[i]t would be regrettable if the impression were to be left by the judgment that no issue could arise under Article 6 as long as a suspect was given access to a lawyer at the point when his interrogation began or that Article 6 was engaged only where the denial of access affected the fairness of the interrogation of the suspect."[13] To deny an accused person access to a lawyer from the beginning of their detention may irretrievably prejudice that person's rights of defence, whether or not such prejudice stems from the interrogation of the suspect.

The language of Article 6 § 3 is clear: everyone charged with a criminal offence has the right to be "informed promptly" of the charges against him and to have "adequate time and facilities" for the preparation of his defence. In *Ibrahim,* the UK government invoked "compelling reasons" for delaying access to legal counsel, namely "an urgent need to avert serious adverse consequences for life, liberty or physical integrity" (§§ 258-259). In that case, an "imminent" threat, documented by a member State Government, led to an "exceptional" relaxation of the right of four suspected terrorists to be questioned only in the presence of a lawyer. Here, we have no exceptional situation, no compelling public interest in limiting the applicant's fair-trial rights, and no Government explanation for why this departure from procedure was justified. 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.

It is true, of course, that the absence of compelling reasons is not sufficient of itself to found a violation (see *Heaney and McGuinness v. Ireland*, no. 34720/97, § 47, ECHR 2000-XII; *Weh v. Austria*,

[13] Concurring opinion of Judge Bratza. See also the concurring opinion of Judge Zagrebelsky, joined by Judges Casadevall and Türmen.

no. 38544/97, § 46, 8 April 2004; *O'Halloran and Francis v. the United Kingdom* [GC], nos. 15809/02 and 25624/02, § 53, ECHR 2007-III; and *Dvorski,* cited above, § 79). However, as we have stated, the finding of a violation is over-determined in the present case, in the light of the vitiation of the accused's "practical and effective" rights to legal assistance and the clear statutory violations committed by the Bulgarian police which passed unnoticed by the domestic courts.

In the present case, the applicant's fundamental rights of defence were violated without compelling reason and without counterbalancing elements. Pre-trial prisoners find themselves in one of the most vulnerable situations an individual can face during criminal proceedings, especially when they are denied access to legal assistance and information on their rights. We regret that today's judgment only serves to weaken that position further still.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. Like the rest of my colleagues, I consider that there has been a violation of Article 3 of the Convention in the present case, but to my regret, I am unable to agree with the majority in finding that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention, for the reasons explained below.

A. Whether an overall fairness assessment is required where there are no compelling reasons for restricting the right of access to a lawyer

2. Though I agree with the majority that there were no compelling reasons for restricting the applicant's right of access to a lawyer for three days, from 3 to 6 October 1999, I disagree, with all due respect to them, that the question of the need for an overall fairness assessment should be answered in the affirmative.

3. I will examine below the leading Grand Chamber judgments concerning this issue in chronological order.

4. In *John Murray v. the United Kingdom* (8 February 1996, *Reports of Judgments and Decisions* 1996-I) the accused was without a lawyer for two days (a shorter period than the time during which the applicant in the present case had no access to a lawyer) and chose to remain silent during his interrogation. The Court stated clearly (*ibid*., § 66, emphasis mine) that this was incompatible with the provisions of Article 6 of the Convention, "*whatever the justification for such denial*" – that is, irrespective of whether or not there were compelling reasons for the restriction on access to a lawyer:

> "To deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is – *whatever the justification for such denial* – incompatible with the rights of the accused under Article 6."

The Court added in the same judgment (*ibid*., § 68, emphasis mine):

> "However, *it is not for the Court to speculate on what* the applicant's reaction, or his lawyer's advice, would have been had access not been denied during this initial period. As matters stand, the applicant *was undoubtedly directly affected by the denial of access* and the ensuing interference with the rights of the defence. The Court's conclusion as to the drawing of inferences does not alter that..."

5. In *Salduz v. Turkey* ([GC], no. 36391/02, ECHR 2008) the Court made it clear that it would proceed to evaluate the overall fairness only if the restriction was justified, or otherwise if there were compelling reasons for it.

6. The following passages from *Salduz* (*ibid*., §§ 52 and 55) are relevant, and in particular, the wording emphasised by me gives a clear illustration of what has been said above:

> "... The question, *in each case*, has therefore been *whether the restriction was justified and, if so*, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances ..."

> "...the Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' (see paragraph 51 above), Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. *Even where compelling reasons* may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ..."

7. The phrases "if so" (in the French text of the judgment "*dans l'affirmative*") and "Even where compelling reasons ..." (in French "*Même lorsque des raisons impérieuses* ...") in the above statements from *Salduz* leave no doubt in my view that an overall assessment is required only when there are compelling reasons for the restriction. The phrases in question indicate when the door opens for proceeding to examine the overall fairness, which occurs only when there are compelling reasons for the restriction.

8. At the end of paragraph 56 of its judgment in *Salduz*, under the subheading "(b) Application of the above principles to the present case", the Court stated the following, which is fully consistent with the principle it enunciated in paragraph 52 and repeated in paragraph 55 (emphasis mine):

> "Thus, no other justification was given for denying the applicant access to a lawyer that the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, *this already falls short of the requirements of Article 6 in this respect, as set out at paragraph 52 above*."

9. However, instead of stopping at the end of paragraph 56 in view of the above – that is, after finding that there were no compelling reasons for the restriction and that this fell short of the requirements of Article 6 – the Court in *Salduz* nevertheless proceeded to examine the substance of the case. It is apparent that the very brief statements it made about the substance of the case were guided purely by excessive caution, *ex abundanti cautela*. This could be supported by the following arguments:

(a) Paragraph 57 starts with the words "The Court *further* observes that" (emphasis mine), and from then until the end of the subsection, the Court made a number of observations, probably in my view (a) by way of underlining that in this particular case there had been a violation of the principle that the guarantees of Article 6 §§ 1 and 3 (c) of the Convention must be practical and effective, since the applicant was not provided with a lawyer, and (b) by way of showing that the facts of the case were able to support this finding. This is strengthened by what the Court said in paragraph 55 of its judgment:

> "Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' (see paragraph 51 above), Article 6 § 1 requires that, *as a rule*, access to a lawyer should be provided ..." (emphasis mine)

(b) It would not be reasonable to argue that the Court in *Salduz* intended to contradict itself, and more precisely to revoke the principle it had so clearly enunciated before.

(c) Even though it dealt with the substance of the case, the Court made no mention of the need for an "overall fairness assessment", and nor did it use any similar terminology.

(d) The Court in *Salduz* made it clear that what it was saying could not change or affect its conclusion that there had been a violation owing to the lack of compelling reasons for the restriction. This is supported by the passage from paragraph 56 (already quoted), as well as from the following passage from paragraph 58:

> "However, it is not for the Court to speculate on the impact which the applicant's access to a lawyer during police custody would have had on the ensuing proceedings."

10. In *Dvorski v. Croatia* ([GC], no. 25703/11, ECHR 2015) the principle set forth in *Salduz* seems to have been reversed, without any explanation.

11. The principle established in *Dvorski* is that the Court examines the overall fairness *only* if there were not sufficient grounds for the restriction, and this is supported by the following passage from paragraph 82 of *Dvorski* (emphasis mine):

> "... the Court considers that *the first step* should be to assess whether it has been demonstrated in the light of the particular circumstances of each case that *there were relevant and sufficient grounds* for overriding or obstructing the defendant's wish as to his or her choice of legal representation. *Where no such reasons exist*, the Court should proceed to evaluate the overall fairness of the criminal proceedings. In making its assessment, the Court may have regard to a variety of factors, including the nature of the proceedings and the application of certain professional requirements ..."

12. *Dvorski*, however, differs from *Salduz* and the present case, since the issue arising in the former was not a restriction of the applicant's right to a lawyer, but to a lawyer of his choosing.

13. In *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, §§ 263-65 and 301, ECHR 2016) the principle set forth was different from those principles set forth in the previous three cases, respectively. According to *Ibrahim and Others*, the overall fairness test must be examined in every case, irrespective of whether or not there were compelling reasons for the restriction. The only difference between cases where there were and where there were not compelling reasons for the restriction lies in the standard of evidential proof and which of the parties has to meet it.

14. The approach followed by the Court in *Ibrahim and Others* is clear from the following passages (emphasis mine):

> "256. However, it has long been recognised that there is scope for access to legal advice to be, exceptionally, delayed (see, for example, *John Murray*, cited above; *O'Kane v. the United Kingdom* (dec.), no. 30550/96, 6 July 1999; and *Magee* and *Brennan*, both cited above). After reviewing the existing case-law in this area, the Court in *Salduz,* cited above, § 55, said:
>
> '... [T]he Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective' ..., Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.'
>
> 257. The test set out in *Salduz* for assessing whether a restriction on *access to a lawyer is compatible with the right to a fair trial* is composed of two stages. *In the first stage* the Court must assess whether there were compelling reasons for the restriction. *In the second stage*, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. *In other words*, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.
>
> ...
>
> 262. The Court accordingly reiterates that in assessing whether there has been a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves (see paragraphs 250-251 above). *The absence of compelling reasons does not, therefore, lead in itself* to a finding of a violation of Article 6 of the Convention.
>
> *(iv) The impact on the fairness assessment of the presence or absence of compelling reasons*
>
> 263. The fact that the absence of compelling reasons is *not, in itself, sufficient* for a finding of a violation of Article 6 of the Convention *does not mean that* the outcome of the 'compelling reasons' test is irrelevant to the assessment of overall fairness.
>
> 264. *Where compelling reasons are found* to have been established, a holistic assessment of the entirety of the proceedings must be conducted to determine whether they were 'fair' for the purposes of Article 6 § 1 ...
>
> 265. *Where there are no compelling reasons* for restricting access to legal advice, the Court must apply a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling 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). The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice."

15. That the burden of proof is shifted to the respondent State in the absence of compelling reasons is clear from paragraph 301 of *Ibrahim and Others* (cited above):

> "It falls to the Court to examine the criminal proceedings in respect of the fourth applicant as a whole in order to determine whether they were fair, within the meaning of Article 6 § 1. However, as noted above (see paragraph 265), in the absence of compelling reasons for the restriction of the fourth applicant's right to legal advice, the burden of proof *shifts to the Government* to demonstrate *convincingly why, exceptionally* and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice." (emphasis mine)

16. Though the Court in *Ibrahim and Others* used neither the terminology of the standard of proof applied in civil cases, namely "on the balance of probabilities", nor the terminology applied in criminal cases, namely "beyond reasonable doubt", what it said, however, seems to be, to put it simply, that the former standard applies to the applicant when there were compelling reasons, and the latter standard to the respondent State where there were no compelling reasons.

17. With all due respect, however, the Court in *Ibrahim and Others* overlooked, *inter alia*, the clear literal meaning of the words "if so" and "Even where compelling reasons" in paragraphs 52 and 55 respectively of *Salduz*, as if this wording was not included in the relevant passages of that judgment. By bypassing this wording, it assuredly did not follow the Latin legal maxim of interpretation, namely "*interpretatio fienda est ut res magis valeat quam pereat*" (that interpretation is to be made that the thing may stand rather than fall – see Jenkins, *Centuries or Reports*, 198), which usually applies in interpreting statutes and contracts but is also one of the manifestations of the principle of effectiveness, and therefore applies in interpreting a treaty and is itself embodied in Article 31 § 1 of the 1969 Vienna Convention on the Law of Treaties (see *The Vienna Convention on the Law of Treaties – Travaux Préparatoires*, Frankfurt, 1978, at pp. 239-40; see also, regarding the "*règle de l'effet utile*" and the "*règle de l'efficacité*", Georges Berlia, "Contribution à l'interpretation des traités", in *Collected Courses of the Hague Academy of International Law*, 114 (1965-1), pp. 396 et seq.).

What better principle could one apply in understanding or interpreting words in a judgment which are absolutely clear than this principle, which gives full weight and meaning to every word used? Also quite pertinent are the following legal maxims of interpretation, which are based on common sense and which leave no doubt on the point at issue: "*interpretatio cessat in claris*" (interpretation stops when the text is clear); "*quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est*" (when there is no ambiguity in the words, then no exposition contrary to the words is to be made – see Coke, *On Littleton*, 147 a); "*absoluta sententia expositione*

non indiget" (an absolute sentence needs no exposition – see 2 Justinian, *Institutes*, 533, and Emer De Vattel, *Law of Nations,* Bk. 2, § 263: "it is not allowable to interpret what has no need of interpretation"); "*expressio facit cessare tacitum*" (to state a thing expressly ends the possibility that something inconsistent with it is implied – see Coke, *On Littleton*, 210 a, and F.A.R. Bennion, *Bennion on Statutory Interpretation: A Code*, fifth edition, London, 2008, section 389, pp. 1249-50).

But it is not only the above wording in *Salduz* that is important: the *Salduz* judgment does not in any way say or suggest that the two stages of the test to which *Ibrahim and Others* refers are compulsory or indispensable in every case.

18. In the judgment in the present case, under the heading "(*d) Temporary restriction on the access to a lawyer for 'compelling reasons'*" (see paragraphs 116-18), the majority follow the approach adopted in *Ibrahim and Others*, by again citing (as that judgment does) the same passage from *Salduz* (§ 55), which, with all due respect, not only does not support the interpretation provided in *Ibrahim and Others* and followed in the present case, but in fact says something completely different.

19. The majority do not give any reason as to why they have departed from *Salduz* and this is probably because they simply followed *Ibrahim and Others*. With all due respect, they have repeated the incorrect reading of *Salduz* by referring to two compulsory stages of the assessment, whereas *Salduz* clearly indicates that stage two is required only if there are compelling reasons for the restriction.

20. It is to be noted that both *Ibrahim and Others* and *Salduz* are Grand Chamber judgments. *Ibrahim and Others* is subsequent to *Salduz*. However, *Salduz* was adopted unanimously on the relevant issue, whereas *Ibrahim and Others* was adopted by an overwhelming majority (fifteen votes to two).

21. Indeed, judgments of the Grand Chamber have a highly persuasive value and force, and the Court cannot depart from a previous judgment, unless good reasons are given in a subsequent case before the Grand Chamber. In the present case, which is a new Grand Chamber case, the Court, with all due respect, should have, firstly, acknowledged that *Ibrahim and Others* was based on an incorrect reading of *Salduz*; secondly, acknowledged that the approach in the two cases was different; and lastly, decided which of them, if any, to follow, by giving good reasons. If the *Ibrahim and Others* judgment was reached as a result of an incorrect reading of *Salduz* or *per incuriam*, it would have sufficed for the Court in the present case to explain this and to depart from *Ibrahim and Others* by applying the correct reading of *Salduz*, unless, irrespective of the incorrect interpretation of *Salduz*, the Court were to find the approach in *Ibrahim and Others* – that is, the two compulsory stages – more justifiable and legally

correct, and to follow it by giving further reasons why not to follow *Salduz* and by applying a new approach.

22. In addition, the Court could have differentiated the present case from *Ibrahim and Others* on the facts and followed the proper reading of *Salduz*. The present case is more similar to *Salduz* than to *Ibrahim and Others*, since the Court decided that there were no compelling reasons for the restriction. The same was decided in *Salduz*, but not in *Ibrahim and Others*, where the Court found in respect of the first three applicants that there were compelling reasons for the restriction. As regards the fourth applicant in *Ibrahim and Others*, although there were no compelling reasons for the restriction, the case was different from the present one, since that applicant had not initially been interviewed by the police as a suspect, but as a witness. So, since in *Ibrahim and Others* there were compelling reasons for the restriction, what the Court said in that case in interpreting and applying *Salduz*, as to whether it should proceed to assess the overall fairness even in the event of finding that there were no compelling reasons for the restriction, was not the *ratio decidendi* of the judgment but was simply an *obiter dictum*. Therefore, even if the Court were to follow the strict common-law approach of *stare decisis* in the present case, it would not be bound to follow its principle in *Ibrahim and Others* in a case where, as in the present case, there were no compelling reasons for the restriction.

B. Whether the *Ibrahim* approach with two compulsory stages or tests in every case should be preferred as more justifiable or legally tenable or correct than the *Salduz* approach with only one compulsory stage or test

23. With all due respect, the answer to the above question, I believe, should be in the negative, for reasons which will be explained below.

24. If there are no compelling reasons for restricting a person's right to defend himself through legal assistance of his own choosing, which is one of the minimum rights under Article 6 § 3 (c) of the Convention for everyone charged with a criminal offence, this amounts to a serious violation of the said provision by itself and runs counter to the rule of law, and there is no need to examine anything else. That was the logic of *Salduz* and that is why a situation where there were compelling reasons for such a restriction must be distinguished from a situation where there were no compelling reasons. On the other hand, the *Ibrahim* approach, by requiring an overall fairness assessment even in cases where there were no compelling reasons for the restriction, makes no substantial distinction between these cases and cases where there were compelling reasons.

25. The *Ibrahim* approach, with all due respect, does not take into consideration, as it should, the fact that not only was the right to have a lawyer denied, but also that the respondent State violated the rule of law,

one of the most significant principles of the Convention and of a democratic society. The endeavour of the Court in *Ibrahim and Others* to find a way to distinguish between the consequences of restrictions with no compelling reasons and with compelling reasons, other than finding a violation in the former case and proceeding to assess the overall fairness in the latter case, shows the difficulty of proceeding in a different way from the *Salduz* approach, ultimately reducing the issue from a matter of substance to a matter of evidential proof.

26. Though the right to be represented by a lawyer under Article 6 § 3 (c) of the Convention is a minimum right (and not just a relevant factor or consideration), being an intrinsic part or aspect of the right to a fair trial, which is an absolute right (apart from its aspect concerning the public delivery of judgments), and therefore should not be burdened by implied qualifications or restrictions, the case-law nevertheless considers that it is not an absolute right (see *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A, and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008).

27. However, and rightly so, the case-law considers the right to have a lawyer "one of the fundamental features of a fair trial". In *Poitrimol* (cited above, § 34) the Court held that "[a]lthough not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial". In *Panovits v. Cyprus* (no. 4268/04, §§ 65 and 66, 11 December 2008) the Court held that the right to be assisted by a lawyer should be available from the initial stages of proceedings and was an issue of particular importance in assessing matters such as the protection against self-incrimination.

28. The importance of the role of a lawyer for the defence of an applicant in a criminal case was highlighted by the Court in the following passage from *Artico v. Italy* (13 May 1980, § 33, Series A no. 37), which has been reproduced in many other cases (see, for example, *Kamasinski v. Austria*, 19 December 1989, § 65, Series A no. 168, and *Luchaninova v. Ukraine*, no. 16347/02, § 63, 9 June 2011):

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

> sub-paragraph (c) and the structure of Article 6 taken as a whole; in many instances free legal assistance might prove to be worthless."

29. Furthermore, the necessity of having a lawyer from the initial stage of the preliminary investigation was highlighted by the former European Commission of Human Rights in *Can v. Austria* (no. 9300/81, Commission's report of 12 July 1984, § 55), where it also enumerated the tasks a lawyer should have at this preliminary stage:

> "In order to find out whether Art 6 (3) (c) requires that the remand prisoner be given a right to communicate in private with his defence counsel at the initial stage of the preliminary investigations, it is important to consider the functions which the defence counsel has to perform during this stage of the proceedings. They include not only the preparation of the trial itself, but also the control of the lawfulness of any measures taken in the course of the investigation proceedings, the identification and presentation of any means of evidence at an early stage where it is still possible to trace new relevant facts and where the witnesses have a fresh memory, further assistance to the accused regarding any complaints which he might wish to make in relation to his detention concerning its justification, length and conditions, and generally to assist the accused who by his detention is removed from his normal environment."

Also, in *A.T. v. Luxembourg* (no. 30460/13, § 64, 9 April 2015) the Court very pertinently held:

> "The fairness of criminal proceedings under Article 6 of the Convention requires that as a rule, a suspect should be granted access to legal assistance from the moment he is taken into police custody or otherwise remanded in custody, whether interrogations take place or not. The Court emphasises in that respect that the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance, pointing out that discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention were fundamental aspects of the defence which the lawyer must be able to exercise freely ..."

30. That it is paramount for an accused to have a lawyer from the initial stages of the police investigation is also clear from the passage quoted above from *John Murray* (§§ 66 and 68 – see paragraph 4 above).

31. A very good overview of the importance of the right to legal assistance, the purpose of legal assistance and the role of the accused's lawyer is provided by Dr Stephanos Stavros in *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights – An Analysis of the Application of the Convention and a Comparison with Other Instruments*, Dordrecht/Boston/London, 1993 (International Studies in Human Rights, vol. 24), at pp. 201-202:

> "The right to legal assistance is one of the most important rights guaranteed under the fair trial clause of the human rights instruments under examination. The purpose of legal assistance, as recognized by the European Commission in App. Nos. 7572/76. 7586/76 and 7587 v. FRG, is to ensure 'that both sides of the case are actually heard'. However, professional assistance does not only ensure that the defence of the accused

> is properly prepared and presented. It also guarantees respect of the latter's procedural rights, which might be inadvertently, or even purposefully threatened. The role of the accused's lawyer as the 'watchdog of procedural regularity' as acknowledged by the Commission in App. Nos. 7572/76, 7586/76 and 7587/76, is invaluable."

32. In view of the above, one should be very reluctant to alienate, or detract from the essence of, the right to have a lawyer. It is unfortunate, however, that, as emerges from the above analysis of Grand Chamber cases in chronological order, the level of protection of the right to have a lawyer has steadily declined.

33. Though Article 6 § 3 (c) of the Convention does not distinguish between compelling reasons and non-compelling reasons for restricting the right to be represented by a lawyer – and according to the Latin maxim *ubi lex non distinguit, nec nos distinguere debemus* (7 Coke's *Reports*, 5), the guarantees of that right should be applied in every case unconditionally, as the Court said in *John Murray* (cited above) – the principle set out in *Ibrahim and Others* that the fairness assessment must be carried out in all cases, irrespective of whether the reasons for the restriction were compelling or not, amounts to a severe qualification, or indeed restriction, of a right which, though not absolute, "is one of the fundamental features of a fair trial". As indicated above, this qualification is severe, firstly, because it ignores the fact that the respondent State may have violated the rule of law, and, secondly, because it places a burden on the applicant to prove that overall his case was not fair, overlooking the fact that he may have been deprived of his right to have a lawyer.

34. It must also be acknowledged that the *Salduz* approach, to the extent that it requires the examination of overall fairness in cases where there are compelling reasons for a restriction, is a qualification or restriction of the right to have a lawyer, since all that matters in terms of strict literal compliance with Article 6 § 3 (c) of the Convention is access to a lawyer, without any exception, "whatever the justification", as the Court rightly decided in *John Murray* (cited above in paragraph 4). It is true that there is no provision in Article 6 requiring the public interest to be balanced against private interests. In particular, there is no wording such as "necessary in a democratic society in the interests of national security, public safety, ... for the prevention of disorder or crime, ... for the protection of the rights and freedoms of others", as is found in Article 8 § 2 of the Convention and similarly in Articles 9 § 2, 10 § 2 and 11 § 2, to justify limiting on any grounds the right to have a lawyer.

35. However, a judge alone cannot go back on the *Salduz* approach and follow *John Murray*, which is a relatively old case. Only the Grand Chamber could do so. But these are not just theoretical reflections. They may serve to explain and show that the right to be represented by a lawyer cannot be subject to another qualification. In *Salduz* the Court did not state who had the burden of proving the overall fairness – or otherwise – of

proceedings where there were compelling reasons for the restriction. It could be argued that it is the applicant who has the general burden of proving his allegations, but it could also be argued that it is the respondent State which deprived the applicant of his right, irrespective of whether there were compelling reasons for such deprivation. In the case of deprivation of possessions, as in all property matters under Article 1 of Protocol No. 1, just satisfaction is required. It would run counter to the notion of fairness under Article 6 § 3 (c) of the Convention for an applicant who has been deprived of his right to have a lawyer for compelling reasons, instead of being in any way compensated for such deprivation, to have the burden of proving himself that the proceedings were not overall fair for him.

36. The fairness test can logically only be applied to definite facts and not to guesses or hypotheses. Any other approach, with all due respect, would water down the right guaranteed by Article 6 § 3 (c) of the Convention. So the approach in *Ibrahim and Others*, by insisting on the examination of fairness in every case, even if the applicant was without a lawyer for a certain period of time without any compelling reasons, is, with all due respect, precarious and not compatible with the scope of the above provision.

37. The notion of overall fairness should not mean fairness in general but presupposes that all the constituent parts of the proceedings should be fair, starting, as will be seen below, from the arrest. The period of time from the arrest of an accused up to the final judgment of the Court should be compact in terms of the applicant's protection, like the life of an embryo. Article 6 § 3 (c) of the Convention confers on an accused person the right to defend himself or herself with the assistance of a lawyer at all stages of proceedings from the time of the arrest, including the arrest itself, and, of course, the period of detention before interrogation, which forms a part of the proceedings by itself. If this protection stops for any time, the right ceases to have any life. Thus, the three days in detention during which the applicant was deprived of his right to have a lawyer should not be regarded simply as an independent moment or time or procedure and be detached from the rest of the time and procedure when the applicant did have a lawyer. During these three days, many things might have happened without a lawyer being present but cannot be proved, and many things should have happened if a lawyer had been present, but did not because of the lack of access to a lawyer. One cannot excuse the illegality of the lack of compelling reasons for the restriction by later adopting an overall fairness test ignoring the initial part of the proceedings. There is truth and wisdom in the Latin maxim "*quod ab initio non valet, in tractu temporis non convalescet*" (what is not good in the beginning cannot be rendered good by time – see Coke, *On Littleton*, 35 a) and it seems that this applies in the present case. The importance of the "beginning" is also depicted in the Latin maxims "*quod non habet principium non habet finem*" (that which has no

beginning has no end – see Coke, *On Littleton*, 345 a) and "*cujusque rei potissima pars principium est*" (of everything the chief part is the beginning – see 10 Coke's *Reports*, 49). Also of relevance may be the Latin maxims "*parte quacunque integrante sublata tollitur totum*" (an integral part being taken away, the whole is taken away – see 9 Coke's *Reports*, 41) and "*sublato fundamento cadit opus*" (remove the foundation, the work falls – see Jenkins, *Centuries or Reports*, 106). Wisdom is also to be found in another Latin maxim which may apply in the present case, "*quae mala sunt inchoata in principio vix bono peraguntur exitu*" (things bad in the commencement seldom end well – see 4 Coke's *Reports* 2).

38. As has been said above, the notion of fairness is associated with the rule of law, which is inherent in the Convention system, and it is also associated with the positive obligation of the respondent State to safeguard the right of the applicant not to be deprived of access to a lawyer without compelling reasons, an obligation which flows from the rule of law and from Article 1 and Article 6 § 3 (c) of the Convention. The idea of fairness and the rule of law must cover, and apply in, all the phases in which the safeguards set out in Article 6 of the Convention are applicable. In paragraph 121 of the judgment it is correctly stated that the date of the applicant's arrest is the "starting-point for the application of the safeguards set out in Article 6 of the Convention". In other words, it is the arrest which triggers the protection of the right to have legal assistance. Otherwise, this right would not have a practical and effective meaning if a person who had been arrested and taken into custody was without a lawyer. If the crucial point in time for the beginning of the exercise of the right to be assisted by a lawyer was not the time of arrest but some subsequent time – let us say the time of bringing the charge or carrying out a formal interrogation – there would be no need for the existence of rules of criminal procedure governing arrest, and the police would be free to do anything they wanted on the issue, disregarding the provisions of Articles 3 and 5 of the Convention. Consequently, it is not possible to disconnect the notion of fairness and the rule of law from the requirement for justifiable reasons restricting the right, or to apply the fairness principle from any point other than the birth of the safeguards of the right, without a devastating impact on the case.

39. Since the safeguards set out in Article 6 applied from the moment of the applicant's arrest, it is apparent that his right to presumption of innocence also started from that moment, and it was therefore imperative for the applicant to have a lawyer to safeguard his presumption of innocence by advising him and determining his line of defence together with him.

40. The rules of criminal procedure apply to a suspect from the moment of his or her arrest. The applicant, who was without a lawyer for three whole days, was deprived of the opportunity to challenge the lawfulness of his detention, as provided for by Article 5 § 4 of the Convention. This point was also raised by the Association for the Prevention of Torture as a third

party in the present case: "Legal assistance also helped guarantee the exercise of the other fundamental rights of the accused, such as those secured under Article 5 §§ 3 and 4 of the Convention" (see paragraph 106 of the judgment).

41. The need to have a lawyer immediately after the arrest can also be understood in view of the fact that the proper preparation of the case is imperative for its success. Article 6 § 3 (b) of the Convention includes having adequate time for the preparation of one's defence as one of the minimum rights for everyone charged with a criminal offence. Nobody can be sure that without the assistance of a lawyer for the first three days of his detention, the applicant would be able to prepare properly for the trial at a later stage. These three days could have been crucial for the future course of his defence if he had had a lawyer immediately from the time of his arrest.

42. If the lack of compelling reasons for restricting this right does not by itself constitute a violation, this will encourage the authorities to restrict the right unjustifiably and to keep suspects in custody indefinitely without a lawyer.

43. The principle of effectiveness, which is inherent in the Convention system and underpins every provision of it, requires that the guarantees of Article 6 § 3 (c) of the Convention must be practical and effective and not theoretical and illusory. As stated above, in *Salduz* the Court referred to this manifestation of the principle of effectiveness, if I can describe it as such. The safeguards of the provision in question would not be practical and effective if, despite the lack of compelling reasons for the restriction, the Court nevertheless proceeded to examine the overall fairness of the proceedings. The effectiveness of Article 6 § 3 (c) of the Convention, as of any other provision of the Convention, is ensured by taking into account its object and purpose in good faith. As the International Law Commission pertinently explained in its 1966 report (*Yearbook of the International Law Commission* [YBILC], 1966, vol. II, p. 219, § 6):

> "... When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation be adopted."

44. In my view, good faith and the objects and purposes of Article 6 § 3 (c) of the Convention require that any restrictions on the right in question should not be unjustifiable. Mention should also be made in this connection of the very profound words by Professor Rudolf Bernhardt, a former President of the Court, in his article entitled "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights" (*German Yearbook of International Law*, vol. 42 (1999), 11 at p. 14):

> "These articles [31 and 32] of the Vienna Convention [on the Law of Treaties] are remarkable in several respects. Firstly, one principle of treaty interpretation, which was often invoked in older text books, is not even mentioned. Namely, the principle that treaties should be interpreted restrictively and in favor of State sovereignty, *in*

> *dubio mitius*. This principle is no longer relevant, it is neither mentioned in the Vienna Convention nor has it ever been invoked in the recent jurisprudence of international courts and tribunals. Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions. Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite to the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other."

45. So, even if, for the sake of hypothesis, one were to be faced with two equally valid or arguable interpretations of Article 6 § 3 (c) of the Convention, it would be preferable to opt for the one which favours the essence of the right (*in dubio in favorem pro libertate*) and, at the same time, does not limit its ambit and application. Any restrictive interpretation contradicts the principle of effectiveness and is not part of international law (see Hersch Lauterpacht, "Restrictive Interpretation and Effectiveness in the Interpretation of Treaties", *BYIL* (1945), 48 at pp. 50-51, 69, and Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford, 2008, repr. 2013, at p. 414). In the present case, if the *Salduz* principle were applied in its proper meaning, there would be a violation of Article 6 § 3 (c) of the Convention *per se*, since there was a lack of compelling reasons for the restriction. This interpretation would favour preserving the essence of the applicant's right. On the other hand, if the *Ibrahim and Others* approach were followed, with its incorrect reading of *Salduz*, the essence of the applicant's right would not be preserved, as the lack of compelling reasons for the restriction would not entail a violation *per se* and a finding of no violation would eventually be reached, as did in fact happen.

46. It should be observed that in any event it would not be fair to apply the principle set forth in *Ibrahim and Others* in an old pending case, such as the present one, in which, the applicable principle at all material times, apart from the time of the delivery of the judgment, was that of *Salduz*, considering also, with all due respect, that the Court should have acknowledged that the understanding of *Salduz* in *Ibrahim and Others* was wrong, and that it had the chance to review it.

47. In the judgment, the principle of effectiveness was rightly used and applied as regards the waiver of the applicant's right to a lawyer:

> "However, if it is to be effective for Convention purposes, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance." (see paragraph 115 of the judgment)

To be consistent all the way through the judgment, this principle of effectiveness should have also been used in finding a violation, given that there were no compelling reasons for the restriction of the right to have a lawyer, as the Court clearly held in *Salduz*.

48. Human dignity is behind almost every Convention right and the Court should take it into account when interpreting Convention provisions (see David Feldman, "Human Dignity as a Legal Value" – part II, *Public Law,* Spring 2000, p. 75). Taking into account human dignity in interpreting Article 6 § 3 (c) of the Convention, the deprivation of the applicant's right for three whole days without compelling reasons would be considered a flagrant violation of the provision in question.

49. The Chamber judgment in the present case was delivered before the pronouncement on 13 September 2016 of the judgment in *Ibrahim and Others*. Also, the request for referral of the present case to the Grand Chamber and the written observations of all the parties, including the third party, were submitted before *Ibrahim and Others* was decided. Moreover, the oral hearing before the Grand Chamber in the present case on 6 July 2016 took place before the *Ibrahim and Others* judgment was delivered. As has already been explained, on the basis of *Salduz* the applicant would probably have won his case as regards his complaints of violations of Article 6 §§ 1 and 3 (c) of the Convention, whereas the majority decided, on the basis of *Ibrahim and Others*, to dismiss his complaints under those provisions. Of course, the Court usually applies its recent case-law which is applicable at the time of the delivery of the judgment. But, with all due respect, in the present case the following considerations make the application of this rule or practice unfair to the applicant: (a) a probable violation, by following *Salduz* in its proper interpretation, was – owing maybe to a delay in the processing of the case – eventually turned by the majority, following the *Ibrahim* approach, into a finding of no violation, without the principle of legal certainty being satisfied; (b) an interpretation of *Salduz* in a manner unfavourable to the applicant was followed by the majority in the light of *Ibrahim and Others*, without all parties having the chance to comment on *Ibrahim and Others* or even to urge a return to the proper interpretation of *Salduz*, by exercising their right under Article 6 of the Convention; and (c) consideration of all that has been said above regarding the *contre-texte* or *per incuriam* interpretation of *Salduz* in *Ibrahim and Others*.

50. By analogy with the above argument, which is based on the principle of legal certainty, Article 7 § 1 of the Convention, which provides that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law *at the time when it was committed*" (emphasis mine) and that "[n]or shall a heavier penalty be imposed than the one that was applicable *at the time* the criminal offence *was committed*" (emphasis mine), is also based on this principle of certainty, and is one of the most fundamental provisions of the Convention. It is to be noted that the dependence of the result of a case which concerned a criminal charge, and which led eventually to the sentencing of the applicant for life

imprisonment, on whether there was a change in the case-law, with the effect that a probable violation was turned into to a finding of no violation of Article 6 §§ 1 and 3 (c) of the Convention, might not, in the final analysis, have very different repercussions from those prohibited by Article 7 of the Convention.

51. The preamble to the Convention states that the Council of Europe's aim is "the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms". This consideration embodies the requisite dynamism and cultivates the idea of advancing human rights. Any lowering of the level of protection of human rights, or any setback of the kind characterised as "devolution" (see Christian Djeffal, *Static and Evolutive Treaty Interpretation – A Functional Reconstruction,* Cambridge, 2016, p. 309), is not only undesirable but is, I believe, outside the scope of the Convention. Justice Oliver Wendell Holmes wisely said that "greatness is not where we stand but in what direction we are moving". The same applies to the future of human rights. I believe that the Convention ship must move forward and not backwards and that every time a case comes before the Court, especially the Grand Chamber, such as the present case, a new voyage of the Convention ship begins, and the compass must always direct it effectively to its promised destination.

C. Whether, even by following the *Ibrahim* approach, the overall fairness assessment would also have led to a violation of Article 6 § 3 (c) of the Convention

52. The Chamber and the majority of the Grand Chamber in this case gave a negative answer to the question as to whether an overall fairness assessment led to a violation of the above-mentioned provision.

53. In its judgment in the present case (*Simeonovi v. Bulgaria*, no. 21980/04, § 116, 20 October 2015) the Chamber unanimously concluded:

> "The Court accordingly finds that the fact that the applicant was not assisted by a lawyer for the first three days of his detention did not diminish his right to defend himself effectively in the framework of the criminal proceedings. His right not to incriminate himself was respected and the fairness of the criminal proceedings was properly ensured. There was therefore no violation of Article 6 § 3 (c) taken in conjunction with Article 6 § 1 of the Convention."

54. The majority in the present case concluded (see paragraph 144 of the judgment):

> "In the light of these findings, the Court considers that the Government provided relevant and sufficient evidence to demonstrate that the overall fairness of the criminal

proceedings against the applicant had not been irretrievably prejudiced by the absence of legal assistance while he had been in police custody, from 3 to 6 October 1999."

55. With all due respect, the answer to the above question should, in my view, have been in the affirmative.

56. The applicant's substantive and procedural rights cannot be said to have been respected when he was without a lawyer for three crucial days, as will be further explained later on.

57. May I emphasise at the outset that the overall fairness of a trial does not depend on its result. Otherwise, we would come to the unacceptable conclusion that there would be no violation of Article 6 § 3 (c) of the Convention in every case where an applicant was acquitted, even if he had been deprived of the right to have a lawyer during the whole of the pre-trial and trial proceedings. In such a hypothetical case, therefore, the fact that the prosecuting authority was unable to discharge its burden of proof effectively and the applicant was acquitted does not mean that the guarantees to which the applicant was entitled under Article 6 § 3 (c) of the Convention were satisfied.

58. The Court's task is to judge according to the facts before it and not to imagine facts, as a novelist has the right to do to make his story better. On this task of a court, see the following relevant legal Latin maxims: "*judicis est judicare, secundum allegata et probata*" (it is the duty of a judge to decide according to the facts alleged and proved – Dyer's *Reports*, 12); "*judex debet judicare secundum allegata et probate*" (the judge should decide according to the allegations and proofs – 2 Bouvier's *Law Dictionary*, 133); "*nihil habet forum ex scena*" (the court has nothing to do with what is not before it – 2 Bouvier's *Law Dictionary*, 141).

In the present case the Court was not in a position to make predictions as to how the result of the trial would have been affected if the applicant had had a lawyer during the first three days of his detention, because: (a) that was impossible; (b) that was not its role; and (c) that would amount in the abstract to negating or diminishing the role of every lawyer. That predictions of this sort are not within the role of the Court could not be put more clearly than in *Salduz* (cited above, § 58): "it is not for the Court to speculate on the impact which the applicant's access to a lawyer during police custody would have had on the ensuing proceedings". Similarly, in *John Murray* (cited above, § 68) the Court held: "it is not for the Court to speculate on what the applicant's reaction, or his lawyer's advice, would have been had access not been denied during this initial period".

59. In my view, predictions of this kind are not like the unknown variable x in a simple mathematical exercise where in the end the variable x can be determined or proved. In the present case, however, the unknown "variable x" could not possibly be revealed or proved; so its unknown effect in itself must have had a certain negative impact on the assessment of the overall fairness of the trial.

60. Every additional minute of detention after the moment of arrest makes such an *ex post facto* prognosis or speculation not only more uncertain, but in the end totally impossible. I consider it pertinent to note the persuasive arguments put forward by the applicant at paragraphs 72-73 of his observations:

> "72. It may be that the assistance of a lawyer during the first three days of interrogation would not have resulted in the Applicant's acquittal. However, this cannot be known for sure as the Applicant might have provided information which would have affected the course of the investigation or the approach adopted in the trial, which could have influenced the assessment of the evidence.
>
> 73. The Applicant does not suggest that this would necessarily have occurred as he, no more than the Court, can predict what would have happened if he had had the assistance of a lawyer – which he repeatedly requested and which he had already made preparation to obtain – during the first three days of his detention."

61. In a footnote relating to paragraph 73 of the applicant's observations, reference is made to paragraph 29 of the observations, where it is stated:

> "When his interrogation of the Applicant began in the evening of 3 October, the Applicant asked Colonel X, who had been assigned to conduct the investigative actions of his case, to be allowed to contact a named lawyer working in private practice. This lawyer was Mr Victor Mihailov, who had agreed to defend the Applicant the previous July at his father's request. The Applicant had given Colonel X. Mr Mihailov's name and phone number but was simply told in response that he had seen too many movies and that this was not America."

62. At paragraph 75 of his observations, the applicant rightly remarks in this connection that "... it is dangerous to link the question of whether or not there has been a violation of the right to the assistance of a lawyer during the initial interrogations to the ultimate conduct of the proceedings as this will encourage the disregard of the right to the assistance of a lawyer at this stage". And he appropriately adds: "The resulting risk of this occurring has implications not only for the outcome of criminal proceedings but also for the effective protection of the right not to be subjected to torture and inhuman and degrading treatment".

63. The judgment (see paragraphs 119 and 127-28, the first paragraph of which also refers to *Ibrahim and Others*, cited above, §§ 272-73) correctly highlights the importance of the right to be informed of the right to legal assistance. As is appropriately stated in paragraph 127 of the judgment:

> "... As a result, the applicant was not verifiably informed of his procedural rights before the date on which he was charged, that is to say 6 October 1999 ..."

64. The failure of the national authorities to keep a record regarding the first three days of the applicant's detention, from 3 to 6 October 1999, and to prove, that, as they alleged, they had indeed informed him of his right to have a lawyer of his choosing, negatively affects the fairness test. This is so because the authorities had a positive obligation to keep such a record. As has been said above, this obligation is derived from the rule of law and from

Article 1 and Article 6 § 3 (c) of the Convention. In *Panovits* (cited above, §§ 72-73) the Court said the following on this issue:

> "... The passive approach adopted by the authorities in the present circumstances was clearly not sufficient to fulfil their positive obligation to furnish the applicant with the necessary information enabling him to access legal representation.
>
> 73. Accordingly, the Court finds that the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant's defence rights."

65. It is clear that what was said above does not apply only to minors, but especially to minors, so it also applies to the applicant in the present case.

66. The applicant alleged that he had not been informed about his rights. Since the burden of proof was on the respondent State, which had the obligation to keep a record, the applicant's version is more tenable than that of the Government. Hence, the omission of the national authorities to inform the applicant of his right to have a lawyer of his choosing meant that the fairness test was failed from the outset. By analogy, the absence of a detention record is considered to entail a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention, securing the right to liberty and security. It discloses a most grave violation of that provision and is incompatible with the requirement of lawfulness and with the very purpose of Article 5 (see *Fedotov v. Russia*, no. 5140/02, § 78, 25 October 2005; *Menesheva v. Russia*, no. 59261/00, § 87, ECHR 2006-III; *Smolik v. Ukraine*, no. 11778/05, § 45, 19 January 2012; and *Kurt v. Turkey*, 25 May 1998, § 125, *Reports* 1998-III). The lack of a proper record of an individual's arrest and detention is thus sufficient for the Court to find that there has been a violation of Article 5 § 1 (see *Anguelova v. Bulgaria*, no. 38361/97, § 157, ECHR 2002-IV, and *Menesheva*, cited above, §§ 87-89). If this formality of keeping an official record is indispensable for guaranteeing a non-absolute right, as it is for the right under Article 5 § 1 of the Convention, one may wonder why such a formality should not be all the more indispensable for guaranteeing an absolute right, namely the right to a fair trial under Article 6 of the Convention.

67. When the authorities do not keep a record showing that they have informed the accused of his right to legal assistance, if they are not to be blamed for not doing so they must prove by other means, in accordance with the standard of proof beyond reasonable doubt, that they provided this information, but no such proof was forthcoming in the present case.

68. The fact that the applicant was without a lawyer for three days even though he allegedly asked to have one is a procedural defect. The national authorities denied that the applicant had asked for a lawyer. The judgment

rightly supports the view that the applicant did not waive his right, and I absolutely agree with this finding. But I would proceed a step further and contend that since the respondent State did not keep a record despite having a positive obligation to do so, the applicant's version should not be ignored, also taking into account the fact that he was not provided with the services of a lawyer for the first three whole days of his detention.

69. To put it differently, how is it possible to consider that the Government have discharged their strict burden of proving that the trial was fair overall, since they failed to comply with their positive obligation to inform the applicant of his right to have a lawyer of his choosing, and since they were unable to produce a record in support of their allegation that they did provide this information?

70. The applicant alleged that during the three days when he had not had access to a lawyer, he had been interrogated. This allegation was denied by the respondent Government. It should not be forgotten that the applicant was in a vulnerable situation. He could not have been expected to have the means to produce any evidence, other than his word, that during the first three days of his detention: (a) he had asked for a lawyer and not been given one; (b) he had been informed of his right to have a lawyer of his own choosing; and (c) he had been interrogated. Only the respondent Government, in whose hands all the relevant machinery and evidence lay, could disprove the applicant's allegations and prove the opposite. As the Court held in *Bouyid v. Belgium* ([GC], no. 23380/09, § 83, ECHR 2015), referring also to its settled case-law on this issue:

> "... where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof is then on the Government to provide a satisfactory and convincing explanation by producing evidence establishing facts which cast doubt on the account of events given by the victim (see *Salman*, cited above, § 100; *Rivas v. France*, no. 59584/00, § 38, 1 April 2004; and also, among other authorities, *Turan Çakır v. Belgium*, no. 44256/06, § 54, 10 March 2009; *Mete and Others v. Turkey*, no. 294/08, § 112, 4 October 2012; *Gäfgen*, cited above, § 92; and *El-Masri,* cited above, § 152). In the absence of such explanation, the Court can draw inferences which may be unfavourable for the Government (see, among other authorities, *El-Masri*, cited above, § 152). That is justified by the fact that persons in custody are in a vulnerable position and the authorities are under a duty to protect them (see, among other authorities, *Salman*, cited above, § 99)."

71. What was said in the above statement in relation to allegations of ill-treatment violating Article 3 of the Convention could logically apply to all cases where an applicant is in detention and alleges a violation of any provision of the Convention – such as the applicant in the present case, who alleged a violation of Article 6 §§ 1 and 3 (c) of the Convention – and where the events at issue lie wholly, or in large part, within the exclusive knowledge of the authorities, who nevertheless have refrained from keeping

a record of what happened, and thus are unable to disprove the applicant's allegations.

72. As has been said, the life of the protection afforded by the guarantees of Article 6 § 3 (c) of the Convention starts from the moment of the arrest. The three days during which the applicant was without a lawyer deprived him of the legal assistance provided for in Article 6 § 3 (c) of the Convention for a substantial period of time, which was needed for the preparation of his defence. The preparation of the defence from the initial time of the arrest is extremely important for the determination of the line of defence and its future course and exercise.

73. Since the Government violated their obligation to keep a record informing the applicant of his right to have a lawyer, why would they be expected to have kept a record of whether they had interrogated the applicant, since the same lack of diligence would also have been expected in this matter? Most importantly, it is highly improbable that the police investigating a case of murder and armed robbery would have arrested the applicant as a suspect and not rushed to ask him even one question during the first three days following his arrest and instead displayed total apathy, whereas before the applicant's arrest, as the Government alleged in paragraph 6 of their observations, they had carried out many interrogations and had collected evidence in a systematic matter:

> "... In the period from 2 July until 3 October 1999, when the applicant was arrested, the authorities conducted a series of investigative measures. They interviewed the applicant's accomplice, witnesses, friends of the suspects and anyone who could in some manner relate to the events. Evidential material was gathered in a systematic manner ..."

74. Furthermore, the Government alleged at paragraph 11 of their observations that the applicant underwent two medical checks by two different doctors on 5 October 1999 and was subjected to a body search the same day, which indicates that it is very improbable that anything else was carried out in respect of the applicant and other witnesses, apart from asking him questions as to the robbery and the two killings.

75. The version presented in the Government's observations on the relevant issue is characterised by vagueness. Below are some examples: "No information was found as to when the applicant entered and left the detention facilities in Sofia" (paragraph 10 of the observations), and "There is no trace in the investigation file that the applicant was interviewed by the police or by the investigator in the period between 3 October and 12.10 p.m. on 6 October 1999 ..." (paragraph 13 of the observations). A State governed by the rule of law should know when an arrested person entered and left the detention facilities, and should be able to prove by means of evidence what happened during those three days, rather than simply referring to the absence of any trace of interrogation of the person in the investigation file.

76. From the analysis performed so far, the applicant's version that he was interrogated is more tenable, or to be more accurate, the respondent State's version is not tenable at all. The Government alleged in paragraph 7 of their observations that during the period from 2 July until 3 October 1999 the applicant "was at large and in hiding" and that he "was also declared wanted". So it seems improbable and illogical that he was not subjected to any questioning following his arrest. The applicant alleged (see paragraph 64 of his observations) that Colonel X. had been assigned to conduct the investigative measures in his case on 3 October 1999. He also remarked (see paragraph 64 of his observations) that the approach taken by the authorities "does not seem consistent with normal police practice nor with the obligations arising under Article 5(3) of the Convention to ensure that there is still a reasonable suspicion justifying the continued deprivation of liberty following a person's arrest". He added (see paragraph 65 of his observations) that "the suggestion that there was a complete absence of any interrogation for a period of three days following the Applicant's arrest does not reflect the general practice in Bulgaria, as has been documented in the rulings of the Bulgarian Supreme Court and also in reports by the CPT and others, in which interrogation without a suspect's lawyer following his or her arrest has been found to be a frequent occurrence". He further argued (see paragraph 66 of his observations) that "[t]he fact that there is no documentation of the interrogations in the case file is much more consistent with the exercise of pressure on a suspect to confess, as the Applicant has maintained was what occurred in his case, than with the absence of any interrogation". And he concluded on this point (see paragraph 67 of his observations):

> "In these circumstances, the submission of the Applicant that he was questioned by Colonel X on 3 October 1999 and by other investigators on 4 and 5 October should be regarded as well-founded in the absence of any other cogent explanation for the failure to question him during his first three days of detention."

77. One of the questions put by the Court to the parties (question 5) was:

> "*Was the applicant questioned by the police and the investigating agencies over the period from 3 to 6 October 1999? If so, when? Did he remain silent or did he make any statements? What was their content? The Government are invited to provide a copy of any police or investigation file.*"

78. The applicant's answer to the above question was given in paragraphs 39-43 of his observations and is very important for the assessment of the overall fairness of the proceedings, if what he argues was true:

> "*Question 5 – Interrogation during 3-6 October 1999*
>
> 39. As has already indicated in response to the third question, the interrogation of the Applicant began on the evening of 3 October 1999 and continued over the following days.

40. During his interrogation by Colonel X, the Applicant was told that nobody knew where he was and that he had no alternative but to confess. Indeed this was the situation in which he found himself as he was not allowed to contact his relatives or the lawyer that he wished to represent him. Moreover, his parents were only informed about his arrest 3 days after this occurred, when they learnt that he was in the detention facility of Burgas District Investigation Service.

41. During his interrogations in this period the Applicant gave explanations in response to some of the questions put to him in connection with the alleged offences. In particular, he admitted that he had participated in the robbery together with his co-perpetrator but he denied having committed the murders.

42. As has already been indicated, the Applicant was never informed of his rights including the right to contact a lawyer of his own choosing.

43. No written minutes kept during the questioning during the period 3-6 October 1999 were ever provided to the Applicant and he never signed any document in connection with this questioning. Furthermore, the Applicant does not know whether the police file contained documents and other (video or recording) material but he believes that it is most likely that the investigator of the case from Burgas District Investigation Service would have been acquainted with his confession since he would tell him that, if he failed to give explanations, he would use the confession made in Sofia. Moreover, his familiarity with what he said in Sofia was evident from the questions he had asked."

79. The Government's reply to the same question, amounting to a simple rebuttal and denial of knowledge, is to found at page 10 of their observations:

"*Question No. 5*: Based on the documents found in the police case-file and the criminal case-file, the Government maintain that the applicant was interviewed for the first time on 6 October 1999 at 12.10 in the presence of counsel. His allegations that he was interviewed before that are not supported by any document. Such documents were searched in the Ministry of Interior and were not found. The case-file from the criminal proceedings contains no documents referring to such an interview and statements made during that period.

The documents related to the police detention are enclosed as enclosures no. 1 and 2. The case-file from the pre-trial criminal proceedings is enclosed as enclosure no. 4."

80. The Chamber judgment (cited above, § 9) clearly states the applicant's submission that he was questioned during the first three days of his detention:

"The applicant submitted that despite his express requests he had not been assisted by a lawyer for the first three days of his detention. During that time the officials responsible for the investigation had questioned him about the robbery and the two murders committed in Burgas on 2 July 1999."

81. At paragraphs 103 and 134 of the Grand Chamber judgment, reference is made to what the Government submitted at the oral hearing, namely that there was no evidence to support the applicant's allegation that he had been questioned in police custody before being charged. Reference is also made to a hypothesis put forward by the Government: "even supposing

such a conversation or interrogation had taken place while the applicant was in police custody, it would have been conducted informally and could not have had any impact on the course of the criminal proceedings" (see paragraph 103 of the judgment).

82. The Government's oral argument as to whether the applicant was interviewed, as is apparent from the webcast of the hearing available on the Court's Internet portal, is the following:

> "Having said that, however, the Government maintain that the rights of the applicant under Article 6 of the Convention were not violated for the following reasons:
>
> First, we maintain that judging from all documents in our possession and the applicant's submissions, Mr Simeonov was not formally interrogated during the first three days of his detention.
>
> ... Even assuming that some questioning occurred, it was only oral, informal and had no bearing on the criminal proceedings against the applicant.
>
> ...
>
> Our second submission is that the absence of a lawyer during the impugned period did not lead to arbitrary restrictions of the procedural rights of the applicant. The Government maintain that even assuming that some questioning indeed took place, as Mr Simeonov argues, it was only oral, informal with absolutely no bearing on the criminal proceedings....
>
> Mr President, it is possible that a conversation, or even questioning, took place between the applicant and police officers or an investigator in Sofia. Such questioning, however, was not objectified in any form."

83. From the last statement, it is clear that the Government eventually admitted that it was possible that the applicant was questioned, a significant admission which, however, is omitted from the judgment.

84. What the Government's lawyer said, namely that "the questioning was not objectified in any form", is totally immaterial and contrary to the case-law of the Court. In *Titarenko v. Ukraine* (no. 31720/02, § 87, 20 September 2012) the Court stated:

> "The Court considers that any conversation between a detained criminal suspect and the police must be treated as formal contact and cannot be characterised as 'informal questioning'."

85. And the above applies no matter whether the authorities claim not to have relied on information given through what they regarded as "informal questioning". In *Martin v. Estonia* (no. 35985/09, §§ 95-97, 30 May 2013) the Court stated:

> "95. The Court notes in this context that, despite excluding the applicant's pre-trial statements, the Court of Appeal considered that there was nothing to prevent the use of such 'general knowledge'. ...
>
> 96. The Court considers that the exclusion of the pre-trial statements from the body of evidence reveals the importance that the Court of Appeal attaches to securing a suspect's defence rights from the early stages of the proceedings. Although tainted evidence as such can be left aside in the subsequent proceedings, in the present case

the Court of Appeal's decision nevertheless demonstrated that the consequences of the breach of defence rights had not been totally undone.

97. In the light of the above considerations, the Court concludes that the applicant's defence rights were irretrievably prejudiced owing to his inability to defend himself through legal assistance of his own choosing."

86. There is no evidence that anything said by the applicant during the first three days was used at the trial and had an impact or influence on the result of it. Replying to question no. 6 put by the Court to the parties regarding the use made of the applicant's statements, the applicant gave this answer (see paragraphs 44-45 of his observations):

"44. The statements made by the Applicant to the police before charged could have been used in the pre-trial proceedings as he had the capacity of a 'suspect' within the meaning of Art. 206 of the Criminal Procedure Code, but they are not in the file of the investigation case No. 662/1990.

45. Furthermore, these statements formed the basis of the confession by the Applicant on 21 October 1999 ..."

87. According to the applicant's version, he made statements implicating himself in respect of the crimes with which he was subsequently charged, and revealed information regarding these crimes, without being assisted by a lawyer. I am of the opinion that this, by itself, could have rendered the whole proceedings unfair. It was logical for him to think that these statements he made without a lawyer could be used later on during the trial proceedings. Probably having this in mind, he could not avoid making an official confession later on, even with his lawyer present. If the applicant's version is true, there is no doubt that he was entrapped into making the confession.

88. Consequently, the fact that the applicant was not assisted by a lawyer while in police custody for three days, starting from his arrest, and also that – if his allegations were true – he was interrogated, confessed to having participated in the robbery and gave other important information for the case, infected the whole procedure and therefore, undermined the fairness of the criminal proceedings.

89. As the Association for the Prevention of Torture, a third party in the present case, submitted: "Legal assistance at that early stage in criminal proceedings, even before the initial questioning, was essential in order to safeguard an arrested suspect's right not to incriminate himself where he had not been informed of the charges against him" (see paragraph 106 of the judgment).

90. If it is true that, without a lawyer, the applicant gave, as he alleged, other information and details – besides his confession to having participated in the robbery – which might have assisted the police in building their case against him as regards the two killings as well, one could justifiably come to the opposite conclusion to the Chamber's finding that the right of the applicant "not to incriminate himself was respected" and that "the fairness

of the criminal proceedings was properly ensured" (see paragraph 116 of the Chamber judgment). It is to be noted that the concluding paragraph of the Grand Chamber's judgment on the issue (paragraph 144) is phrased differently from the corresponding paragraph of the Chamber judgment, not stating specifically that the applicant's right "not to incriminate himself was respected" as the Chamber did.

91. It should be made absolutely clear that what matters most, apart from the procedural guarantee of the applicant's right to a lawyer, is whether the proceedings as a whole were likely to have been infected because no lawyer was present when the applicant was interrogated, confessed and gave information which the Government used artfully against him later on during the trial. This of course is distinct from the question whether the result of the trial would have been different if the applicant had had a lawyer, which is immaterial.

92. In view of the above, one wonders whether the principle of equality of arms was respected and secured in the present case. The applicant was deprived of a substantial period for the preparation of his defence, and it is tenable to argue that a lot may have happened during that time, resulting in the use of material against him, as explained before.

93. Even if one assumes that no interrogations took place during the first three days of the applicant's detention, the absence of interrogations would not be of any substantial support for the Government's argument, since, according to the case-law of the Court, "whether interrogations take place or not" is immaterial for the fairness of criminal proceedings under Article 6 of the Convention (see *A.T. v. Luxembourg*, cited above, § 64, relevant passage cited in paragraph 29 above; and see, similarly, *Dayanan v. Turkey*, no. 7377/03, § 32, 13 October 2009).

94. Almost all of the ten relevant factors listed in *Ibrahim and Others* for the assessment of the overall fairness of proceedings were either not taken into account or were not assessed properly by the majority in the present case.

95. Factor (a) of the *Ibrahim* list, concerning the vulnerability of an applicant, was not taken into account sufficiently. In *Salduz* (cited above, § 54) the Court clearly stated:

> "... At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings ..."

The Court also stated in *Salman v. Turkey* ([GC], no. 21986/93, § 99, ECHR 2000-VII):

> "... Persons in custody are in a vulnerable position and the authorities are under a duty to protect them ..."

Similarly, in *Bouyid* (cited above § 107) the Court held:

> "Moreover, persons who are held in police custody or are even simply taken or summoned to a police station for an identity check or questioning – as in the

> applicants' case – and more broadly all persons under the control of the police or a similar authority, are in a situation of vulnerability. The authorities are consequently under a duty to protect them ..."

See also, on the vulnerability of detainees, *Mehmet Şerif Öner v. Turkey* no. 50356/08, 13 September 2011; *Płonka v. Poland*, no. 20310/02, §§ 39-41, 31 March 2009; and *Leonid Lazarenko v. Ukraine*, no. 22313/04, § 57, 28 October 2010.

96. Factor (b) of the *Ibrahim* list, concerning the legal framework governing the pre-trial proceedings, was also, with all due respect, not assessed and applied by the majority. With regard to this factor, serious consideration should have been given to the different reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (a recent one from 2015 was referred to by the applicant in paragraph 24 of his observations) showing that the realisation of the right of access to legal assistance during the interrogation phase remained problematic. Paragraph 130 of the judgment states that "... [i]t would appear that the events in the instant case correspond to a practice on the part of the authorities which has also been severely criticised by the CPT (see the CPT's 2015 public statement, paragraph 80 above)". But most importantly, it could easily have been ascertained that the Bulgarian authorities did not abide by the rule of law in violating section 70(4) of the Ministry of the Interior Act 1997, which provides that "Detained persons shall be entitled to legal assistance as of the time of their arrest" (see also paragraph 59 of the judgment for this provision and the relevant implementing regulations).

97. In addition, factor (d) of the *Ibrahim* list, namely "the quality of the evidence and whether the circumstance in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion", if assessed and applied properly, would have led to a finding of a violation of Article 6 § 3 (c) of the Convention in the present case.

98. In assessing the overall fairness of the proceedings, the majority took into account the applicant's confession (as the national courts did), but they did not take into account either the withdrawal or retraction of the confession or any of the above-mentioned procedural defects regarding the applicant's defence during the first three days which might have influenced his confession in the first place. It may not be irrelevant in this respect to consider what the applicant said at paragraph 69 of his observations: "Indeed, any pressure that might have been applied on him by the investigators to confess could be expected to remain effective". Although relevant factor (f) in the list drawn up by the Court in *Ibrahim and Others* for the assessment of the overall fairness of proceedings and adopted in the present judgment, namely "in the case of a statement, the nature of the statement and whether it was promptly retracted or modified", should have

been considered and applied in the present case by the Court, the majority did not do so. My view is that the applicant's confession and its subsequent retraction in the suspicious circumstances of the present case should have been taken into consideration under factor (f) of the *Ibrahim* list.

Another disagreement I have with the majority concerns the importance they attach to the applicant's confession in assessing the overall fairness of the proceedings, overlooking the fact, however, that, quite apart from the applicant's retraction of the confession: (a) he never confessed to having committed the two murders, his confession being confined to having committed the hold-up at the bureau de change; and (b) he was nevertheless found guilty of armed robbery resulting in the murder of two persons and was sentenced to life imprisonment.

99. Factor (g) of the *Ibrahim* list, namely "the use to which the evidence was put ...", is another factor which could have required a proper assessment, if one were to accept as tenable the applicant's version as to what happened during the first three days while he was without a lawyer. In other words, looking beyond the official confession given by the applicant, factor (g) might be relevant.

100. Furthermore, factor (i) of the *Ibrahim* list, namely "the weight of the public interest in the investigation and punishment of the particular offence in issue", was not assessed by the majority. I believe that the public interest does not favour a trial where there was a breach of the rule of law at the start of the proceedings. It cannot tolerate the detention of a person for three whole days without a lawyer, during which time he allegedly incriminated himself and gave information to the police, despite having asked to have the services of his lawyer and having had his request refused.

101. The list of the ten relevant factors for the assessment of the overall fairness of the proceedings is not exhaustive (see *Ibrahim and Others*, cited above, § 124). In my view, the facts of the present case could have justified adding another factor to the *Ibrahim* list without contravening its spirit, namely the long duration of a person's detention without access to a lawyer, despite his or her wish to have one. It should be borne in mind that every minute in detention without legal assistance may make the defence poorer at a later stage, leading to unpredictable results. Of course, in the present case, this factor should have been taken into account together with the vulnerability of the applicant, which is one of the factors mentioned in the list, and the probability that he was interrogated during his detention without having a lawyer.

102. An applicant who did not have a lawyer for a substantial period starting from the time of his arrest, even though he later had one, may be regarded as an applicant with no defence at all. And proceedings concerning an applicant deprived of any defence at all, against his will, cannot result in a fair trial. This is why the overall fairness assessment may relate to all Article 6 issues, but not to the issue of depriving an applicant of his right to

have a lawyer unless there are compelling reasons for the restriction (in accordance with the correct interpretation of *Salduz*). It should not be forgotten that the applicant's detention without a lawyer lasted for three days, that is, one day longer than the detention of the applicant in *John Murray* (cited above), where the Court found a violation of Article 6 § 3 (c) of the Convention.

103. In this opinion, mention is repeatedly made of the fact that the Government violated the rule of law and their positive obligations. I cannot see the notion of "fairness" independently of the rule of law, and this is one major disagreement I have with the majority. "Fairness" and "breach of the rule of law" are contradictory issues. For me, the notion of "fairness" implies observance of the rule of law and fulfilment of all the obligations of the Government under the Convention to respect and secure human rights, which did not happen in the present case.

104. It is clear from all the above that the Government have not discharged the strict burden of proof required by *Ibrahim and Others*.

D. Conclusion

105. In conclusion, in my view, the respondent State violated Article 6 §§ 1 and 3 (c) of the Convention, whatever approach we may follow: the *Salduz* approach (in its correct interpretation) involving the one compulsory test, or the *Ibrahim* approach with the two compulsory tests.

E. Award in respect of non-pecuniary damage for the violations of Article 6 §§ 1 and 3 (c) of the Convention and legal costs

106. My findings set out above, to the effect that there have been violations of Article 6 §§ 1 and 3 (c) of the Convention, would have led to an increase in the amount of the award in respect of non-pecuniary damage and the legal costs, the determination of which, however, could only be theoretical, since I am in the minority.