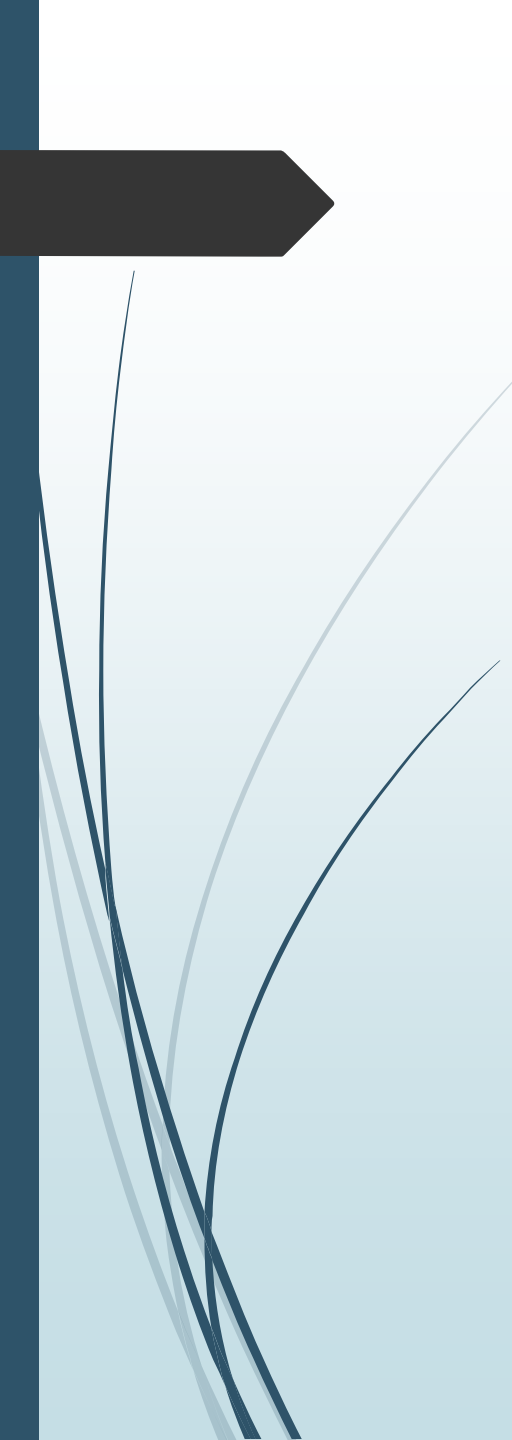




The guarantees under Art. 6 § 3 „d" ECHR



Art. 6 & 3 „d” guarantee the accused person the right to participate in the examination or require the examination of witnesses for the prosecution and require that the summoning and examination of the witnesses of the defense be carried out under the same conditions as the witnesses of the prosecution

- ▶ So we have two elements –
- ▶ 1) right to request the summoning of witnesses and to participate in the examination of prosecution witnesses and
- ▶ 2) the summoning and examination of the witnesses of the defense be carried out under the same conditions as the witnesses of the prosecution
- ▶ The both elements raise the question of the fairness of the process in certain cases



Field of application:

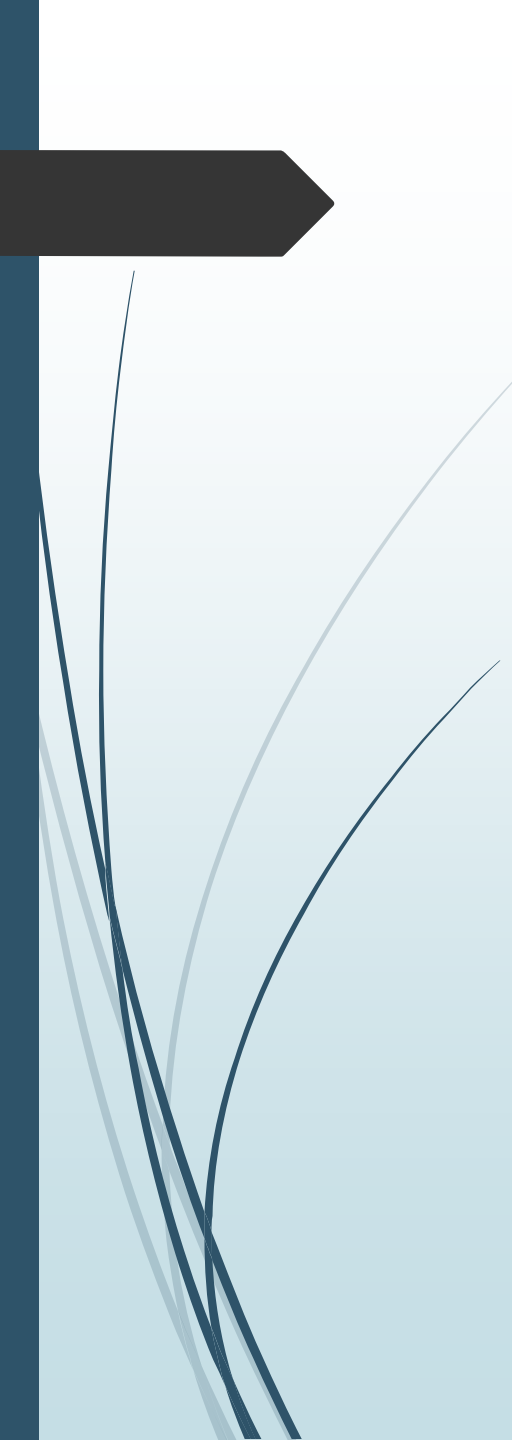
- ▶ This guarantee is only applicable to criminal cases where there is a charge within the meaning of the Convention.
- ▶ It does not apply to the pre-trial phase.
- ▶ This right under Art. 6 § 3 b "e" ECHR applies to all courts.
- ▶ In this sense, the decision *Can v Austria* *Vaturi v. France* – There is a violation of Art. 6 § 3 b. e, when the defendant is not allowed to question a witness in the first-instance and subsequent court proceedings.




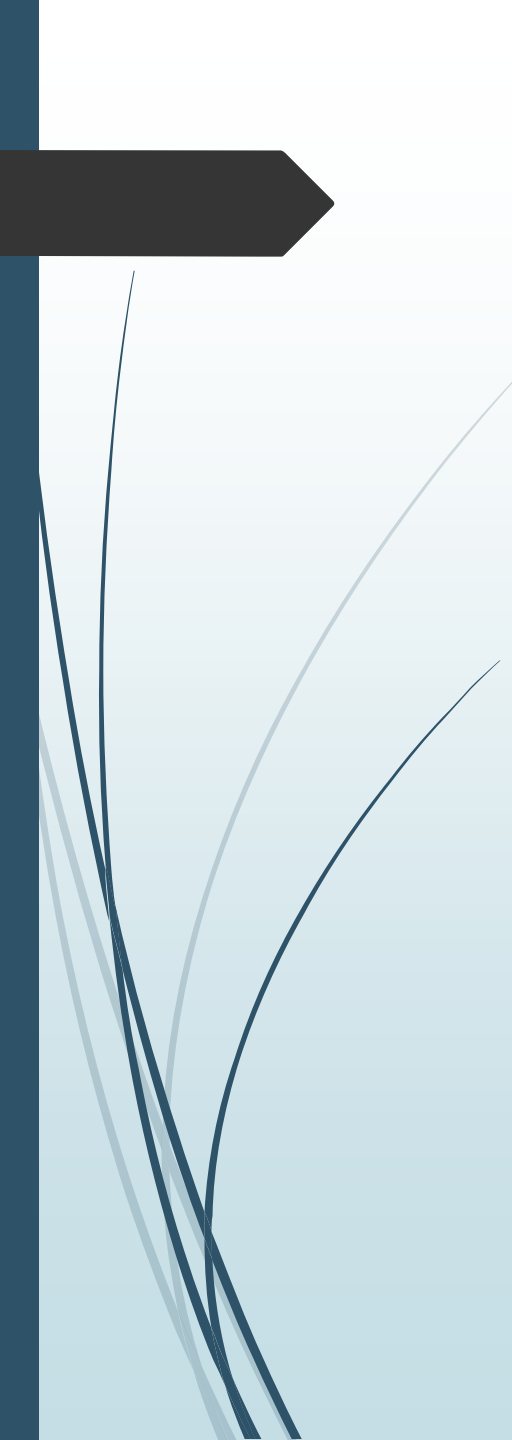
The term "witness" has an autonomous meaning under the Convention.

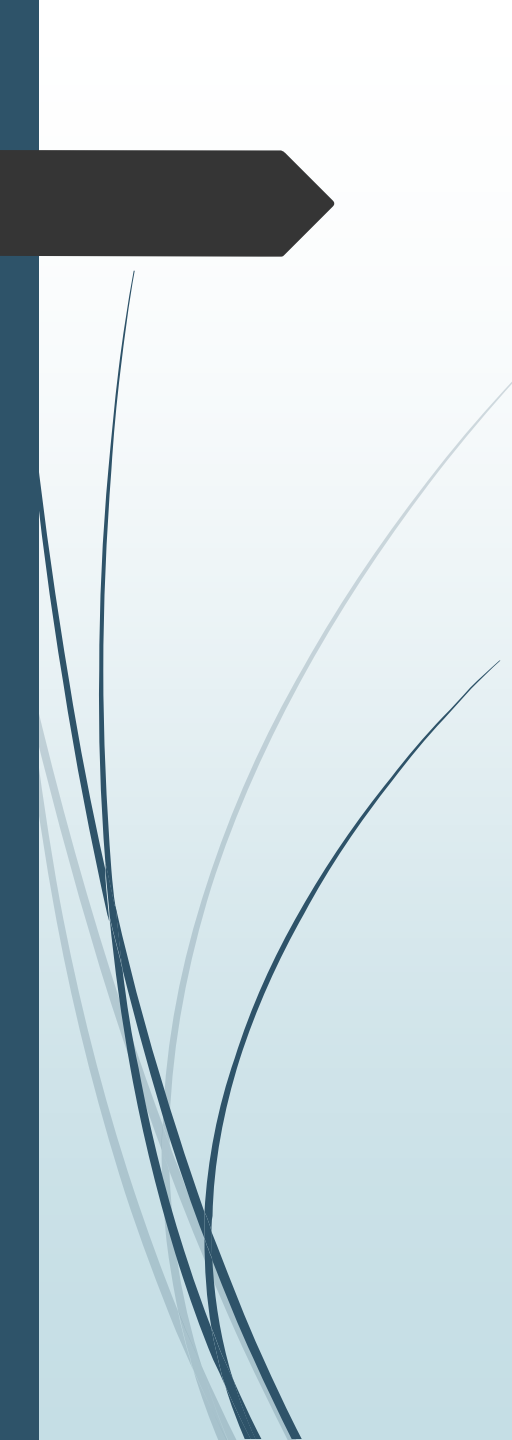
It also includes, incl. another defendant, as well as the experts.

In this regard, more interesting in the matter of how the issue with the implementation of the considered guarantees under Art. 6 § 3 b. "e" in relation to the examinations, the experts in the criminal trial.

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- The Bulgarian court has always emphasized the difference between experts and witnesses as independent procedural figures.
 - Experts give conclusions based on special knowledge they possess, and witnesses reproduce personal perceptions about the subject of evidence.
 - However, in certain scenarios, experts may fall within the scope of the concept of "prosecution witnesses" in the sense of the Convention. These are cases where the presented conclusion is evaluated as evidentiary material in support of the accusation.
 - In our country, in practice, the bodies of the pre-trial proceedings - the prosecutor and the investigative bodies - appoint experts to be experts who decide the case. Based on them, the subsequently committed crime is qualified and the subject of proof in criminal cases is outlined.
 - For example, according to Art. 144, para. 2 of the Code of Criminal Procedure, as a result of an expert opinion, the act can be qualified as murder, serious or moderate bodily harm.

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- At this early stage, there is often no defendant, and no defense attorney. These same experts later appeared in the court proceedings and supported the given conclusions, without the opportunity for the defense to participate and ask to be called for questioning.
 - In such a hypothesis, according to the practice of the ECtHR, a certain amount of "neutrality" of the expert, who raises the question of a violation of the requirement for a fair trial, is missing.
 - For the defense, the possibility remains to request the appointment of a new expertise in the court proceedings, in the sense of which Art. 153 of the Civil Code and the judicial practice.
 - At the same time, it should not be forgotten that the legal regulation of this right is not enough. It is necessary to be able to exercise it effectively. Otherwise, there will be a violation of the principle of equality of arms and the fairness of the trial will be affected.

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- The procedural guarantee under Art. 6 § 3 „e” of the ECHR raises the issue of so-called "private expertise".
 - It is known that in our country and in most of the national legal systems belonging to the continental legal family, the so-called "private expertise" is not allowed in criminal cases.
 - A key decision in this direction is the ECtHR's decision in the case of „Kordorovski and Lebedov” v. Russia.
 - The court in the specific case emphasizes that the opportunities provided in the Russian Criminal Procedure Code for the presentation of written conclusions, opinions, audit reports by specialists engaged by the defense, incl. expert examination before the court brought by the defense are not sufficient to balance the defense and the prosecution.

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- The defendant's right to participate in the examination of witnesses in court proceedings,
 - and the right to demand the summoning of defense witnesses is not absolute.
 - It can be limited, but always respecting the "equality of the parties".
 - "Testimony of an absent witness may be admitted in two cases exceptions': The first requirement is the following:
 - 1) There must be a valid reason for the absence of the witness in the courtroom.
 - 2) The second requirement: to have sufficient compensating factors and procedural guarantees.



There must be a valid reason for the witness's absence from the courtroom.

- ▶ Such is available:
- ▶ -In case of anonymous witnesses, when "the identity of a witness is kept secret in order to be protected against intimidation or threats, for example - „Van Mechelen v Netherlands", 1997; see also „Doorson v Netherland", 1996
- ▶ for deceased witnesses - „Ferrantelli and Santangelo v. Italy"
- ▶ Witnesses who refuse to appear because of fear or other reason – „Vidgen v Netherlands". But subjective fear will not be a reason, objective fear is necessary, supported by evidence – Al Khawaja and Tahery v UK. for a witness, a citizen living abroad refuses to attend - Klymentiev v Russia




To have sufficient compensating factors and procedural guarantees.

- In the sense of the indicated witness statements (the evidence according to Convention and according to the decisions of the ECHR) are not sole and decisive for the outcome of the case;
- To be applied by the court on the balance criterion for relevant facts such as observes whether the defense had an opportunity for confrontation in the pre-trial stage or whether she had other options to compensate for the lack of opportunity to cross-examine the witness in the trial.

For example, *SN v Sweden* (2002):

- ▶ this case, a minor (10-year-old) victim of sexually abused by his teacher. To avoid repeated meetings with the teacher, the court proceedings used a video recording prepared at the earlier stage at the police interrogation.
- ▶ The court considers that there is no violation of Art. 6 § 3 b. e ECHR, tk. counsel for the applicant had the opportunity to participate in his conducting.

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- ▶ The guarantees under Art. 6 § 3 ECHR are also applicable to the supervisory courts.
 - ▶ With a view to ensuring the right to a fair trial, both the appellate and cassation courts should consider the requirement for the balance of the parties' capabilities, always taking the necessary measures to effectively compensate for the less favorable position of the defense vis-à-vis the accused.



In conclusion, I would like to recall an ancient Roman maxim:

- ▶ "Law is the art of the just and the good".
- ▶ Thank you for your attention and a fruitful conference!

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