THEMIS GRAND FINAL

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WRITTEN REPORT

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1. **What issues are raised in the described scenario under the umbrella of Article 6 of the Convention of Human Rights?**

The described case falls certainly within the scope of the European Convention of Human Rights (ECHR), and in particular under the prevision of Article 6, on different levels and under different forms of protection of the fundamental right to a fair trial.

Even though the concept of a "*criminal charge*" has an "*autonomous*" meaning for the ECHR, independent of the categorisations employed by each national legal system, we have to take into account that the case concerned is one of those not involving any kind of dispute on the meaning of "criminal charge". In fact, the applicant was clearly indicted on charges of rape before a criminal court and sentenced to two and a half year imprisonment. Therefore, in the case concerned, the fact that the offence with which the applicant was charged is classified as criminal by the domestic law gives a sufficient indication in order to put the case under the scope of the Convention and its Article 6 in particular. So we can affirm that the offence charged in the case belongs to the criminal law as the HCHR has definitely outlined in the famous *Engel and others v. the Netherlands*[1].

Moreover, the European Court of Human Rights considers criminal proceedings as a whole, as clearly set out in *Imbrioscia v. Switzerland* [2]. Although investigating judges do not determine a "*criminal charge*", the steps taken by them have a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial.

Therefore, some requirements of Article 6, such as the reasonable time or the right of defence, may also be relevant at this stage of proceedings in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.

In this scenario, many issues are at stake, stressing the relevance of the protection provided by Article 6 of the Convention.

a) **Violation of Article 6 par. 1 in conjunction with Article 6 par. 3 (c): right to remain silent and right to be effectively defended by a lawyer**

The applicant – after his arrest, so after having been charged with a criminal offence – "*was questioned by an investigating judge … actually in absence of a defence lawyer*". As mentioned, this gives rise to an issue under the umbrella of Article 6(c) of the Convention, as the applicant has been deprived at the outset of his right to be defended "*through a legal assistance of his own choosing*".

[1] *Engel and others v. the Netherlands, 5100/71*. For Article 6 to be held applicable, it is sufficient that the offence in question is by its nature to be regarded as "criminal" from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the "criminal" sphere.

[2] *Imbrioscia v. Switzerland,* Application no. 13972/88, judgment of 24 November 1993.

It shall be noted that the right set out in Article 6 paragraph 3 (c) is one element of the concept of a fair trial in criminal proceedings contained in Article 6(1), as repeatedly affirmed by the Court[3]. It follows that the provision of Article 6 paragraph 3 (c) shall be read in conjunction with Article 6 paragraph 1, in particular for what concerns the accused's right to remain silent and not to incriminate him/herself (to be considered as "*generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6*")[4].

This is of the utmost importance in the present case. Indeed, during the questioning, the applicant "*admitted to having had sexual intercourse with Edith in his car but argued that it had been consensual*"; and he also contended that "*the abrasions on his right arm and leg were the result of friction during the intercourse*". In other words, the applicant – in the absence of his lawyer – waived his right to remain silent as he decided to answer to the investigating judge's question by offering his own version of the facts.

Having clarified this, reference shall be made to the case law concerning Article 6 paragraph 3 (c). In fact, since the case of *Murray v. UK*, it is a well-established principle that "*Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation*"[5].

More recently, the Court has also specified that, in order to make the right to a fair trial sufficiently "*practical and effective, access to a lawyer should, as a rule, be provided from the first time a suspect is questioned 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*" (see *Salduz v. Turkey*)[6].

In the case at issue, as already noted, the applicant was questioned by an investigating judge (so at a later stage compared to police investigation) and he made statements concerning his alleged criminal responsibility without the assistance of a lawyer of his own choosing.

It follows that the applicant was undoubtedly directly affected by the denial of access and the ensuing interference with the rights of the defence. Article 6 of the Convention has therefore been violated.

b) Article 6(1): right to a trial within a reasonable time

The reasonableness of the length of the proceedings is to be assessed according to the singular case and its circumstances.

[3] The Strasbourg Court affirmed this principle in many decisions. Please see, *inter alia*, *Artico v. Italy*, application no. 6694/74, judgment of 13 May 1980, paras. 32-33.

[4] See, among others, *Saunders v. UK*, application no. 19187/91, application 17 December 1996, para 68.

[5] See *Murray v. UK*, application no. 14310/88, judgment f 28 October 1994, para. 66). With reference to the right to be assisted by a lawyer since the pre-trial stage, please see also *Magee v. UK*, application no. 28135/95, judgment of 20 June 2000, and *Imbrioscia v. Switzerland*, Application no. 13972/88, judgment of 24 November 1993.

[6] See *Salduz v Turkey*, application no. 36391/02, judgment 27 November 2008, para. 54.

The applicant was arrested in 2003, for the alleged rape of a woman, and he was released shortly afterwards. He was then indicted on charges of rape in 2005 and the first instance decision was delivered after 21 October 2009.

As stated in the case of *Wemhoff v. Germany*[7] the "reasonable time" may begin to run prior to the case coming before the trial court, that is from the time of arrest. The period to be taken into consideration lasts at least until acquittal or conviction, even if that decision is reached on appeal *Neumeister v. Austria*[8].

In our case, the first instance decision was delivered more than six years after the applicant's arrest.

Therefore, the time elapsed from the arrest to the final decision clearly raises an issue concerning the applicant's right to be judged "*within a reasonable time*". It is now necessary assess whether a breach of Article 6 paragraph 1 of the Convention actually occurred in the circumstances.

In order to determine whether the duration of criminal proceedings has been reasonable, the Court usually regards to factors such as the complexity of the case, the applicant's conduct and the conduct of the relevant administrative and judicial authorities.

For instance, in above mentioned *Neumeister v. Austria* the Court considered the case "complex" as various Countries were involved by the investigations, requiring the assistance of Interpol and the implementation of Treaties on mutual legal assistance, and twenty-two persons were concerned, some of whom were based abroad. A similar reasoning as regards complexity may be found in the case of *Milasi v. Italy.*[9]

In the case at issue, however, the fact is straightforward, as it involves a single charge of rape against one single person.

Nor issues of complexity concern the applicant's conduct. Indeed, he has been arrested on the very day of the fact, and he immediately underwent interrogation by the investigating judge. He always attended at the hearing.

The Court held that there was violation of the right to trial within a reasonable time in cases in which the trial lasted around 5 years (see *B v. Austria*[10] and *Rouille v. France*[11]).

In the aforementioned case of *Neumeister v. Austria*, the Court found no violation for a trial lasted 7 years and 4 months only because of its extraordinary complexity.

Based on these precedents, it must be considered a violation of Article 6 in the case at issue, as the trial lasted around 7 years and there was no specific reason able to justify such a lengthy timing.

[7] 27 June 1968, Series A no. 7
[8] 27 June 1968, Series A no. 8
[9] 25 June 1987, Series A. No. 119
[10] 28 March 1990, Series A. no. 175
[11] No. 526899, 6 January 2004

c) Article 6 par. 3 (d) in conjunction with Article 6 par. 1: right to cross-examinate the witness

Please see *infra* par. 3.

2.What is the relevance of the fact that the crime was of a sexual nature and what is the Strasbourg Court`s approach to sexual crimes?

The procedural relevance of a sexual offence allegation derives from substantial considerations. Since, according to the Court of Strasbourg, the very essence of the Convention is respect for human dignity, freedom and personal autonomy (see *Christine Goodwin v. UK*)[12], sexual abuses are to be seen as major offences, especially for the debilitating effects on the victim[13].

With this regard, criminal proceedings concerning sexual offences are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. Therefore, in the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim.

This is extremely significant because it forms a "*protective exception*" in the application of Article 6: indeed, Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, such interests are protected by other, substantive provisions of the Convention (see for instance Article 8), which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled; consequently, principles of fair trial also require that in appropriate cases, such as sexual abuses, the interests of the defence are balanced against those of witnesses or victims called upon to testify.

For the reasons above mentioned, criminal proceedings regarding sexual crimes have "*special features*" (see *S.N. v. Sweden*)[14]. In particular, the Court has constantly stated that:

- the obligation under art. 6 to secure fair trial for persons accused of sexual abuse has to be balanced against the obligation to protect victims of abuse (see *Baegen v. the Netherlands*)[15];
- defence rights may (and in some circumstances must) be reasonably limited in the interests of persons who are, or who are presumed to be, victims of sexual abuse;

[12] See Christine Goodwin vs. UK (28957/1995), judg. 11.7.2002.

[13] Also in the European Union context, the directive 2012/29/EU, 25th October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, has specifically addresse the rights of sexual abuse victims.

[14] See *S.N. vs. Sweden* (34209/96), judg. 2.7.2002; see *Owen Oysten vs. UK* (42011/1998, judg. 22.01.2002;

[15] See *Baegen v. the Netherlands*, judgment of 27 October 1995, Series A no. 327-B, opinion of the Commission, p. 44, § 77.

- however, in securing the rights of the defence, the judicial authorities may be required to take measures which counterbalance the handicaps under which the defence labours (see *Doorson* v. the Netherlands) [16].

Naturally, the main way to protect the victim is to maintain his/her presence during the trial only as long as it is strictly necessary; this test can lead even to exclude the ordinary cross-examination at trial, protected by Article 6 (3)(d) ECHR, when the victim has already been interviewed during the preliminary investigation.

With this regard, the *S.N. v. Sweden* judgement is extremely significant: it was a case of child abuse, where the Court expressed principles generally applicable to sexual crimes. In the quoted case, the minor was interviewed by the police, without the direct intervention of the applicant's counsel (who however accepted the manner in which the interview was to be conducted)[17]. The Court stated that, having regard to the special features of criminal proceedings concerning sexual offences, Article 6(3)(d), cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means. According to the Court, the fact since the videotapes of the police interviews of the minor were shown and read out during the trial and appeal hearings were to be considered sufficient to have enabled the applicant to challenge victims' statements and his credibility in the course of the criminal proceedings.

However, the evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care (see *Doorson*, cited above) and must meet high standards with regard to procedure and content. Those principles are clearly reaffirmed in the above quoted *Baeger vs. Netherlands* judgement. In that case, concerning a woman raped by two man and remained anonymous during the trial, the Court stated that all evidence must be normally produced in the presence of the accused at a public hearing with a view to adversarial arguments. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with parr. 3 (d) and 1 of Article 6, provided that the rights of the defence have been respected. As a rule, these rights require that the defendant must be given an adequate and proper opportunity to challenge and question

[16] See *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 471, § 72, and *P.S. v. Germany*, no. 33900/96, § 23, 20 December 2001). In particular, for instance, the duty to protect however does not bar states from establishing a reasonable time-limit for bringing criminal charges and civil claims on the basis of sexual abuse.

[17] This particular is important because in a similar case the Court stated that The viewing of a video recording of a witness account cannot be regarded alone as sufficiently safeguarding the rights of the defence where no opportunity to put questions to a person giving the account has been afforded by the authorities (see *D. v. Finland*, no. 30542/04, § 43, 7 July 2009).

a witness against him either when he was making his statements or at a later stage of the proceedings (see *Saidi v. France*, 1993)[18].

In conclusion, sexual offences constitute a "*protective exception*" in the system of Article 6 of the ECHR because the rights of the accused are to be balanced against the need to protect the victim; the Court seems to strike a balance between these two opposite instances as far as the accused is granted the possibility to challenge, often only subsequently, evidence brought by the victim and his/her credibility (see *P.S. v. Germany*[19]).

3. Do you think the Court would find a violation or no violation of Article 6 paragraph 3 (d) in conjunction with Article 6 paragraph 1?

Once analysed the peculiar features of criminal proceedings concerning sexual abuses (see *infra* for application to the present case), it is clear that, as stated above, also an issue of violation of Article 6(3)(d) in conjunction with Article 6 paragraph 1 arises[20].

Article 6(3)(d) states that everyone charged with a criminal offence has the right "*to examine or have examined witnesses against him and to obtain his attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*"[21].

According to the Court, the provision enshrines the principle that before the accused can be convicted, all evidence must normally be produced in his presence at a public hearing, with a view to adversarial argument (see *ex multis Trofimov v. Russia*)[22].

However, exceptions to this principle are possible but must not infringe the rights of the defence and meet two requirements: first, there must be a good reason for the non-attendance of a witness; second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or have examined, the rights of the defence may be (not automatically is) restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "*sole or decisive rule*", *see Al-Khawaja and Tahery v. UK*)[23]; any measures restricting the rights of defence should be strictly necessary[24].

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[18] *Saïdi v. France*, judgment of 20 September 1993, Series A No. 261-C, p. 56, par. 43.

[19] P.S. v. Germany, no. 33900/96, 20 December 2001.

[20] The Court has constantly held that the guarantees in Article 6 § 3 (d) of the Convention are specific aspects of the right to a fair trial set forth in the first paragraph of the Article; this is the reason why the complaints are usually examined under the two provisions taken together (see, among other authorities, *Asch v. Austria*, judgment of 26 April 1991, Series A no. 203, p. 10, § 25).

[21] The provision expressly refers to the right to examine a "witness": according to the Court case-law, "*witness*" has an autonomous meaning in the Convention system, regardless of classification under national law; where a deposition may serve to a material degree as the basis for a conviction, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 (1) and (3)(d) of the Convention apply (see *Kaste and Mathisen v. Norway*, applications nos. 18885/2004 and 21166/04, judg. 9 Novembre 2006). Therefore, the provision is clearly applicable in the case at issue.

[22] *Trofimov v. Russia*, Judgment of 2 March 2009, Application No. 1111/02.

[23] *Al-Khawaja and Tahery v. UK*, appl. n. 26766/05, judg. 15 December 2011.

[24] The Court has clarified that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them; the Court's task under the Convention is only

The importance of these principles in the present case is clear: in the described scenario, the applicant has been found guilty on the basis of the sole statements of the victim, given in a pre-trial stage and without cross-examination. The concrete circumstances of the case have to be examined in order to establish whether a breach of the applicants' right to a fair trial occurred.

Preliminarily, it must be stressed that determined whether the judge made any reasonable effort in securing the attendance of the witness. As a matter of fact, according to the Court case-law, the above mentioned requirement that there be a good reason for the non-attendance of a witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive; when witness do not attend to give live evidence, there is a duty to enquire whether their absence is justified (*see Al-Khawaja and Tahery v. UK*[25]*).*

In particular, as for concerns the event that the impossibility of examining the witnesses or having them examined is due to the fact that they are missing, the authorities must make a reasonable effort to secure their presence (*see Karpenko v. Russia* and *Damir Sigbatullin v. Russia*[26]); however, since *impossibilium nulla est obligation*, the authorities cannot always be accused of a lack of diligence in their efforts to afford the defendant an opportunity to examine the witnesses in question; consequently, the witnesses' unavailability as such does not make it necessary to discontinue the prosecution (see *Gossa v. Poland*)[27].

In applying these principles to the present case, it can be said, on the one hand, that the victim, at the hearing in 2008, although properly summoned, failed to appear, stating that she was living abroad. Then, she again failed to appear. The authorities tried to summon her at the addresses above by using the means of international legal assistance; even the Court at trial stage requested that edith be summoned to a hearing by means of international legal assistance in criminal matters through the authorities and this was not possible. However, on the other hand, they didn't fine her for non-attendance nor did they attempt to reach her by telephone.

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to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, *Kostovski v. Netherands*).

[25] In this case, the Court reiterates that it occasionally accepted that the reading out of witness statements obtained at the pre-trial stage was not inconsistent with Article 6 §§ 1 and 3 (d) of the Convention. At the same time, it has seen that situation as an exception which required convincing justification.
It proceeded in three steps. It commenced the review with an examination of the reasons invoked as an exception and determined whether they had actually existed and whether they had been subject to thorough examination by the national authorities. The Court then considered whether the restrictions on the defence rights had been kept to a very minimum, and whether they had been strictly necessary in order to satisfy a legitimate aim. The final step in the Court's review was an examination of whether the shortcomings in safeguarding the rights of the defence were adequately compensated for

[26] *Karpenko v. Russia*, no. 5605/04, 13 March 2012; Damir Sigbatullin v. Russia, no. 1413/05, 24 April 2012. Article 6 (1) taken together with (3) requires the Contracting States to take positive steps to enable the accused to examine or have examined witnesses against him (*see Trofimov v. Russia and Sadak and others v. Turkey nos. 29900/96, 29901/96, 29902/96 and 29903/96, ECHR 2001-VIII*).

[27] *Gossa v. Poland*, no. 47986/99, 9 January 2007.

Therefore, it may be argued that the authorities' efforts to get the testimony of Edith were not totally reasonable, because a phone call would have been more effective than a mere notification or a fine would have had a deterrent effect[28]. In addition, circumstances that the authorities knew at the very beginning of the proceedings, right after interviewing Edith, must be taken into account, because if difficulties in the attendance of the witness were clear during the preliminary investigation, it was up to the prosecution to secure the evidence granting the cross-examination by the accused.

Nevertheless, even if the efforts made by the authorities were considered reasonable, the second test underlined by the Court case-law is to be undertaken. Indeed, once it proves necessary to refer to depositions made during the investigative stage (see *Mirishavili v. Russia*)[29], the fact that a conviction is based solely or to a decisive extent on the statement of an absent witness would constitute a very important factor to weigh in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case (*see Al-Khawaja and Tahery v. UK).*

This principle clearly applies in the case at issue: the statements by the victim are, actually, the only evidence against the applicant. Since the applicant admitted the intercourse but argued that it was consensual, it is straightforward that the challenge to the victim's evidence is crucial. In addition, the fact that Edith was first reached by the notification but failed to appear at the hearing may inevitably undermine the "*sufficient reliability*" which is requested by the Court case-law.

In this scenario, the above mentioned principles applicable to criminal proceedings concerning sexual offences must be taken into account. As already said, the Court clearly stated that Article 6 § 3(d) cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means; so, the fact that the crime is of a sexual nature and the need for a protection of victim's interest may actually be the only means through which assessing the respect of the fair trial in the concrete case.

4. As to the circumstances of the execution of the applicant's prison sentence, is Article 6, par. 1 applicable?

[28] See also art. 8 of the 1959 Convention of Strasbourg on mutual legal assistance.
[29] Mirishavili v. Russia, no. 6293/04, 11 December 2008.

The applicant complained that "*his transfer to Austria from Ireland with a view to serving the remainder of his sentence in that country resulted in a* de facto *ten-month increase in his term of imprisonment*".

In order to assess any perspective violation of Article 6(1), it is preliminary necessary to assess whether such an increase in the applicant's terms of imprisonment falls within the field of application of this Convention provision.

In criminal law, Article 6 applies when a "*criminal charge*" is being determined. Leading case law on this is *Engel v. Netherlands*, according which three criteria apply when deciding whether an offence is criminal: the classification of the offence in the law of the respondent State; the nature of the offence; the possible punishment.[30]

The case of the execution of a sentence, however, involves further consideration to determine the field of application of Article 6. In this perspective, attention shall be drawn to the fact that, because of his transfer from Ireland to Austria, the applicant will suffer ten more month of imprisonment; this, probably, because of the different applicable sentencing regime (*e.g.* different rules with reference to conditional release or *parole*).

As a general rule, Article 6 covers all the stages of proceedings, included the execution of final judgments. The leading case is *Hornby v. Greece*, which concerns delayed execution of an order given by a civil Court. This principle has been applied to criminal proceeding in *Assanidze v. Georgia*, a case concerning the reasonable time guarantee. In that case, the Court held that there was violation of Article 6 because the Georgian administrative authority refused to give execution to the Court order for three years; as a consequence, Mr. Assanidze continued to be detained for three years after his acquittal.

All these cases, however, concern the reasonable time principle. The key argument laid down by the Court in the *Assanidze* case helps in understanding the rationale behind such decisions:

"*If the State administrative authorities could refuse or fail to comply with a judgment acquitting a defendant, or even delay in doing so, the Article 6 guarantees the defendant previously enjoyed during the judicial phase of the proceedings would become partly illusory*".

The present case, however, involves very different issues of potential violation of Article 6.

As mentioned, the *de facto* increase of the applicant's imprisonment is not a consequence of a delay in the execution of a sentence. Indeed, such a *de facto* increase stems from the applicant's transfer to Austria, which delayed the date of his release, due to the different applicable rules.

The topic of the execution of decisions in different countries is regulated by Convention of the Council of Europe on the Transfer of Sentenced Persons of 21 March 1983 and, for what concerns

[30] See *Engel v. Netherlands*, cited above.

EU Member States, by the Council Framework Decision 2008/909/JHA of 27 November 2008. These legal instruments provide common rules for the mutual recognitions of sentences, also for what concerns the terms of imprisonment.

The question to be answered, therefore, is whether the cross-border execution of criminal sentences falls within the scope of Article 6.

In the case of *Aydin v. Turkey*, the Court noted that "*proceedings concerning the execution of a sentence are not covered by Article 6 § 1 of the Convention … and, moreover, there is no right under the Convention to serve a prison sentence in accordance with a particular sentencing regime*".[31] This may be considered a well-established principle in the ECHR case law. In this perspective, reference shall also be made to the case of *Aldiran v Austria*[32], in which the Court clearly stated that the execution of a sentence, and in particular the procedure for the conditional release, does not concern a "criminal charge" nor "civil rights and obligations", so falling out of the scope of Article 6 of the Convention.

Lastly, the Court addressed a similar issue in the case of *Szabò v. Sweden*, where the transfer of a prisoner from Sweden to Hungary, ending up in a *de facto* sixteen-month increase in the applicant's term of imprisonment. In that case, the Court held that there was no violation of Article 6.

In particular, the Court noted that under the relevant international and EU law (such as the aforementioned 1983 Transfer Convention) a transfer is a measure of enforcement of a sentence. Consequently, the transfer of a prisoner for the execution of his/her prison sentence is not a stage of a criminal procedure.

In the same way, it falls outside the Convention the expulsion from Ireland of the applicant. The Court has consistently held, however, that Article 6 § 1 does not apply to proceedings concerning expulsion or extradition, as decisions regarding the entry, stay and deportation of aliens do not concern the determination of civil rights or obligations or of a criminal charge, within the meaning of that Article 6.[33]

For all these reasons, Article 6 of the Convention is not applicable to the execution of the applicant's prison sentence.

[31] See *Aydin v. Turkey*, application no. 41954/98, decision of 14 September 2000, para. 1.
[32] See *Aldrian v. Austria*, application no. 16266/90, decision of 7 May 1990, para. 2.
[33] See, *inter alia*, *Maaouia v. France*, no. 39652/98, judgment of 5 October 2000, and *Sardinas Albo v. Italy*, application no. 56271/00, judgment of 8 January 2004)