



**JUSTICE**



**International Commission of Jurists, JUSTICE, and Nederlands Juristen Comité  
voor de Mensenrechten**

**Briefing on the European Commission Proposal for a Directive on the  
strengthening of certain aspects of the presumption of innocence and of the  
right to be present at trial in criminal proceedings**

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## 1. INTRODUCTION

The presumption of innocence is a right long recognised and protected in international human rights law, and in the national legal systems of the Member States of the European Union. It lies at the heart of fair criminal proceedings. It is articulated in international human rights treaties binding the Member States of the EU, including the International Covenant on Civil and Political Rights<sup>1</sup> (ICCPR) and the European Convention on Human Rights<sup>2</sup> (ECHR),<sup>3</sup> and is a norm of customary international law.<sup>4</sup> It is a non-derogable right, which cannot be limited in any circumstances, including public emergency.<sup>5</sup>

The presumption of innocence is further protected by the EU Charter of Fundamental Rights.<sup>6</sup> In agreeing the Roadmap on Procedural Rights<sup>7</sup> and setting out the Stockholm Programme, the Member States invited the European Commission to examine further procedural rights, for instance the presumption of innocence.<sup>8</sup> All Member States of the EU recognised the right to silence, a right inherent in the presumption of innocence, in EU law in the adoption of the Directive on the right to information in criminal proceedings in 2012,<sup>9</sup> which came into force across the Member States in June 2014, and requires all suspected and accused persons to be informed of this right.<sup>10</sup> Yet as the recent Impact Assessment of the Commission<sup>11</sup> accompanying the proposed Directive indicates, its protection across the Member States differs markedly in practice and has been breached in practice in a significant number of states. It records the numerous judgments of the European Court of Human Rights (ECtHR) finding violations of the right to the presumption of innocence by Member States in the name of investigative and procedural expediency.

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<sup>1</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 14(2).

<sup>2</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 6(2).

<sup>3</sup> See also, Article 11 Universal Declaration on Human Rights (“UDHR”); Article 40(2)(b) Convention on the Rights of the Child; Article 18(2) Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“Migrant Workers Convention”).

<sup>4</sup> UN Human Rights Committee (“HR Committee”), General Comment 24, para. 8; ICRC Study on Customary International Law, Vol 1 Rule 100, pp. 357-358.

<sup>5</sup> HR Committee, General Comment 24, para.8; HR Committee, General Comment 29, para 11; HR Committee, General Comment 32, para 6.

<sup>6</sup> European Union, *Charter of Fundamental Rights of the European Union*, OJ C 364, 18.12.2000, p1, Article 48.

<sup>7</sup> Council of the European Union, *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, OJ C 295, 4.12.2009, p. 1.

<sup>8</sup> European Council, *The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens*, OJ C 115, 4.5.2010, p 1 at 10.

<sup>9</sup> *Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (“Directive on the right to information in criminal proceedings”)*, OJ L 142, 1.6.2012, p. 1.

<sup>10</sup> Article 3, *Directive on the right to information in criminal proceedings*.

<sup>11</sup> European Commission, Impact assessment SWD(2013) 478 final, 27.11.2013.

Likewise, the right to be present at trial is an integral part of the right to a fair trial, encompassing the right to take part in the hearing,<sup>12</sup> and closely linked to the right to a defence. It can be limited only on grounds of strict necessity and when subject to adequate safeguards.

The International Commission of Jurists (ICJ), JUSTICE and Nederlands Juristen Comité voor de Mensenrechten (NJCM) welcome the aim of the initiative of the Commission to protect both the presumption of innocence and the right to be present at trial in EU law. However, there are some aspects of the Commission Proposal that we consider should be strengthened.

The ICJ, JUSTICE and NJCM are also concerned that some of the proposed amendments made by the Council in its General Approach would unduly limit the rights guaranteed in the Directive, so that they offer less protection than that provided under international human rights law, including the ECHR, in accordance with the jurisprudence of the European Court of Human Rights.

EU action has the opportunity to concretely enhance ECHR protections amongst the 28 EU Member States and we are disappointed to see attempts to instead limit those protections. The ICJ, JUSTICE and NJCM therefore welcome the elements of the Draft Report<sup>13</sup> of Rapporteur Nathalie Griesbeck on behalf of the LIBE Committee of the European Parliament that aim to enhance protection and the strong commitment to upholding the presumption of innocence and right to presence at trial reflected in the Committee's proposed amendments.

Below the ICJ, JUSTICE and NJCM make drafting proposals for amendment to the Commission's proposal, taking into account the Council's General Approach. Proposals for amendment relate to the Commission's proposal, except where otherwise indicated. The ICJ, JUSTICE and NJCM believe these proposals will strengthen the rights described in the Directive and we invite the European Parliament and Council to accept these in the final adoption of the Directive.

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<sup>12</sup> Article 14(3)(d) ICCPR; Article 6 ECHR and Article 6(3)(c),(d) and (e) ECHR as to elements of participation; see also *Colozza v Italy*, ECtHR, Application No. 9024/80, Judgment 12 February 1985; *Hermi v Italy*, ECtHR [GC], Application No. 18114/02, Judgment of 18 October 2006, para 59.

<sup>13</sup> EP LIBE Committee, Draft Report on the proposal for a directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, 21 January 2015 ("Draft Report").

## 2. COMMENTARY ON THE PROPOSED DIRECTIVE

### ARTICLE 2: SCOPE

The scope of the Directive is defined to apply from the moment a person is suspected of having committed an offence until the final determination. In the view of the ICJ, JUSTICE and NJCM, in order to ensure that the Directive accurately reflects international law, it should also expressly provide for the continuing respect of the presumption of innocence where a person is acquitted of an offence. The ECtHR has found violations of the presumption of innocence as a result of statements made by courts or other public authorities following acquittal.<sup>14</sup> Extending the protection of the Directive following acquittal would ensure that in any subsequent public statements or compensation proceedings the person is also entitled to the benefit of treatment consistent with the presumption of innocence.

The ICJ, JUSTICE and NJCM note that Recital 6 to the Directive also seeks to limit the application of the Directive by expressly excluding administrative proceedings that can lead to a sanction. It is important in this regard that the Directive is consistent with and reflects the autonomous meaning of “criminal charge” or proceedings contained in the jurisprudence of the ECtHR, as well as prior EU directives establishing procedural safeguards,<sup>15</sup> rather than excluding any proceedings defined in national law as “administrative proceedings”. In *Deweere v Belgium*<sup>16</sup> the ECtHR held that a substantive rather than formal interpretation of “criminal charge” is required to ensure that the application of the Convention is practical and effective.

As recommended by Rapporteur Griesbeck, the ICJ, JUSTICE and NJCM consider it is therefore necessary to look behind the appearances and categorisation of a procedure in national law, to investigate the realities of the acts in question and the nature and severity of the possible penalties in order to ascertain whether they are criminal in nature, in accordance with international law. This would ensure that any proceedings that would be deemed criminal under international law due to their nature or possible sanctions are included within the scope of the Directive. Among other things, this means that the safeguards provided by the Directive should apply in all proceedings in which restrictive measures, involving deprivation of liberty or sanctions of equivalent severity, are liable to be imposed as a punishment, except those, which by their nature, duration or manner of execution cannot be appreciably detrimental.<sup>17</sup>

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<sup>14</sup> *Allen v UK*, ECtHR [GC], Application No. 25424/09, Judgment of 12 July 2013.

<sup>15</sup> In particular *Directive on the right to information in criminal proceedings*, Recital 17; and *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*, OJ L 294/1, 6 November 2013, Recitals 16 and 17.

<sup>16</sup> *Deweere v Belgium*, ECtHR, Application No. 6903/75, Judgment of 27 February 1980, para 44.

<sup>17</sup> *Engel and Others v the Netherlands*, ECtHR, Application Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Judgment of 8 June 1976, para 82; *Ezeh and Connors v UK*, ECtHR [GC], Applications Nos. 39665/98 and 40086/98, Judgment of 9 October 2003, para 82.

Moreover, in *Saunders v UK*<sup>18</sup>, the ECtHR held that the subsequent use in criminal proceedings of statements made by the accused obtained by company inspectors infringed the right not to incriminate oneself. It should not therefore be possible to admit in evidence in criminal proceedings statements made by the suspect or accused person during administrative proceedings falling outside the protections of the Directive.

The ICJ, JUSTICE and NJCM also note that the scope of the proposed Directive has been limited to natural persons only. The Commission's justification for this in the Explanatory Memorandum to the Directive is that the right to be presumed innocent encompasses different needs and degrees of protection for natural and legal persons.<sup>19</sup> It relies on two decisions of the Court of Justice of the European Union to support this contention.<sup>20</sup> The ICJ, JUSTICE and NJCM are unable to see how these cases justify the exclusion of legal persons from the scope of the Directive. These cases refer to competition proceedings, and the obligation to comply with Commission investigations, and do not comment on the presumption of innocence in the context of criminal proceedings. Nevertheless, in each case they refer to the principle established in *Orkem v Commission*,<sup>21</sup> and prior cases, in which the Court accepted the need to safeguard certain rights of the defence, which the Court has held to be a fundamental principle of the Community legal order.<sup>22</sup> In *Orkem* the Court held that:

Although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected even during the preliminary inquiry.<sup>23</sup>

The Court further concluded in the context of whether a legal person could be compelled during a competition investigation that:

[T]he Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.<sup>24</sup>

In the view of the ICJ, JUSTICE and NJCM it appears that the CJEU has therefore recognised protection against self-incrimination as a right of legal persons in the context of non-contentious proceedings. Moreover, although the Court was not required to decide whether the proceedings were criminal or civil in nature, the ECtHR has also applied the defence safeguards contained in article 6 ECHR to legal persons in

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<sup>18</sup> *Saunders v UK*, ECtHR [GC], Application No. 19187/91, Judgment of 17 December 1996.

<sup>19</sup> Explanatory Memorandum, p. 6.

<sup>20</sup> Case C-301/04 P *Commission v SGL Carbon* [2006] ECR I-5915; Case T-112/98 *Mannesmannröhren-Werke v Commission* [2011] ECR II-732.

<sup>21</sup> Case 374/87 *Orkem v Commission* [1989] ECR 3283.

<sup>22</sup> Case 322/82 *Michelin v Commission* [1983] ECR 3461, para 7.

<sup>23</sup> *Orkem v Commission*, para 33.

<sup>24</sup> *Ibid*, para 35.

the context of a competition investigation.<sup>25</sup> The consequences of self-incrimination are yet more significant in contentious proceedings, in particular in criminal proceedings. As Rapporteur Griesbeck sets out in the Draft Report of the European Parliament, since EU prosecutorial measures in the area of criminal law can apply to both natural and legal persons, so should the EU procedural safeguards.<sup>26</sup> We consider therefore that the rights of the defence, as a fundamental principle of EU law, should extend to legal persons and the Directive must give effect to this principle.

**The ICJ, JUSTICE and NJCM therefore recommend that Article 2 and Recital 8 be amended as follows:**

#### **Article 2**

This Directive applies to natural **and legal** persons who are suspected or accused in criminal proceedings. It applies from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the final determination of the question whether the person has committed the offence concerned and that decision has become final. **If the person is acquitted of the offence, articles 3 and 4 of this Directive shall continue to apply for all purposes and proceedings connected with the acquittal.**

#### **Recital 8**

This Directive should apply to natural **and legal persons** who are suspected or accused of having committed a criminal offence...

**If the person is acquitted of the offence, the presumption of innocence should continue to apply for all purposes and proceedings connected with the acquittal.**

**The ICJ, JUSTICE and NJCM further recommend that Recital 6 be deleted and the inclusion of provisions in a new Recital, to read:**

#### **Recital 6**

**In light of the autonomous meaning of "criminal" in the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union, safeguards provided for by this Directive should apply to all proceedings which, due to their nature or the nature and severity of the possible punishment, would be considered as criminal under international law. Among other things, this means that the safeguards should apply in all proceedings in which restrictive measures, involving deprivation of liberty or sanctions of equivalent severity, are liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. In addition,**

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<sup>25</sup> *Fortum Oil and Gas Oy v Finland*, ECtHR, Application No. 32559/96, Judgment of 12 November 2002.

<sup>26</sup> EP LIBE Committee, Draft Report, p. 23.

**the safeguards in this Directive should apply to proceedings liable to give rise to a criminal record.**

**Statements made by the suspect or accused person during administrative proceedings that do not conform to the protections provided by this Directive shall not be admissible in subsequent criminal proceedings.**

#### **ARTICLE 4: PUBLIC REFERENCES TO GUILT BEFORE CONVICTION**

The first paragraph of Article 4 of the Commission Proposal provides that Member States shall ensure that, before a final conviction, public statements and official decisions from public authorities do not refer to suspects or accused persons as if they were convicted. Article 4(1) of the Council General Approach expands upon this by requiring Member States to take the *necessary measures* to ensure that public statements by public authorities do not refer to guilt prior to conviction. The ICJ, JUSTICE and NJCM welcome these provisions, which reflect the jurisprudence of the ECtHR that statements made by judges, prosecutors or other officials will offend the presumption of innocence if they indicate an opinion that a charged or accused person is guilty before this has been proven in accordance with law.<sup>27</sup>

However, not only public statements, or a decision can be seen as premature declarations of guilt; certain actions or treatment may also bear inferences of guilt that are inconsistent with the presumption of innocence. For instance a particular security arrangement during trial might do so, such as showing the accused person to the public in prison garments during bail proceedings,<sup>28</sup> or detaining them during the trial in a barred dock (such as a metal cage with a barred ceiling) surrounded by hooded and armed security guards.<sup>29</sup> The UN Human Rights Committee has also held in relation to the right to be presumed innocent set out in Article 14 ICCPR that,

“[I]t is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during the trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals”.<sup>30</sup>

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<sup>27</sup> *Ismoilov v Russia*, ECtHR, Application No. 2947/06, Judgment of 24 April 2008, para166; *Minelli v Switzerland*, ECtHR, Application No. 8660/79, Judgment of 25/03/1983, para 37; *Alenet de Ribemont v France*, ECtHR, Application No. 15175/89, Judgment of 10 february 1995, paras 38-41.

<sup>28</sup> *Samoila and Cionca v Romania*, ECtHR, Application No. 33065/03, Judgment of 4 March 2008

<sup>29</sup> *Ramishvili v Georgia*, ECtHR, Application No. 1704/06, Judgment of 27 January 2009.

<sup>30</sup> HR Committee, General Comment No. 32, *Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007). See also UN, *Standard Minimum Rules on the Treatment of Prisoners*, Rules 17 and 94; UN GA, *Body of Principles on Persons Deprived of Their Liberty*, Principle 36(1).

Provision should therefore be made to prevent actions and treatment as well as statements from inferring guilt. It is also important that the prohibition on public statements encompasses imagery, visual and audio footage.

Moreover, the Article and related recitals do not adequately address measures to prevent and provide remedies for violations of an individual's right to presumption of innocence, including as a result of media reports that are inconsistent with the right to freedom of expression and information. Member States should take measures that, while consistent with the right to respect for freedom of expression and the public's right to information, aim to ensure that media organisations are aware of and respect the right to the presumption of innocence. The UN Human Rights Committee has affirmed the duty of the media to refrain from statements in violation of the presumption of innocence,<sup>31</sup> while the European Court of Human Rights has recognised that a "virulent press campaign" may prejudice the presumption of innocence in certain cases.<sup>32</sup>

Both the Commission and the Council proposals make provision for measures to be taken in the event of breach of the obligation of public officials not to refer to suspects or accused as if they were guilty, prior to their final conviction. The Commission's proposed Article 4 stipulates that Member States "shall ensure that appropriate measures are taken" in the event of such a breach, whereas Article 4(3) as proposed by the Council in its General Approach states that Member States shall ensure that appropriate measures are available in the event of a breach. The requirement should reflect the need for the authorities to ensure that effective remedies are available for violations of the right occasioned by treatment or action of public authorities. To increase the usefulness of the Directive, in the view of the ICJ, JUSTICE and NJCM, an indication that the remedy should seek, where possible, to prevent a breach of the right to a fair trial, should be added. This would reflect the fact that there is no conviction at that stage and any prejudice caused by the reference to the suspected or accused person may be able to be rectified, for example, by a correction of the public statement, or where this would have no impact, a re-trial or trial in another location.

Furthermore, in reference to the suggestion by the Council of the inclusion of Article 4(4), whilst the ICJ, JUSTICE and NJCM understand that it may be necessary to disseminate information about an alleged crime or criminal proceedings to the public in order to further enquiries, any such reference should make clear that this must comply with the presumption of innocence.

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<sup>31</sup> HR Committee, General Comment 32, para 30.

<sup>32</sup> *Hauschildt v Denmark*, ECtHR [Commission], Application No. 10486/83, Decision on admissibility of 9 October 1986, p. 101.



**The ICJ, JUSTICE and NJCM therefore recommend that Articles 4(1), 4(3) and 4(4) and Recital 13 be amended as follows:**

**Article 4(1) as proposed by the Council General Approach**

Member states shall take the necessary measures to ensure that, **unless or until** suspects or accused persons have been proven guilty according to law, **the actions, treatment of persons,** public statements and official decisions **of** public authorities do not refer to **or represent** the suspects or accused persons as if they were guilty.

**Article 4(3) as proposed by the Council General Approach**

Member States shall ensure **the availability of** appropriate **remedies** in the event of a breach of the obligation set out in paragraph 1 not to refer to **or treat** a person as if they were guilty. **Such remedies should include, where possible, measures to prevent an interference with the right to a fair trial.**

**Recital 13**

The presumption of innocence is violated if, without the accused's having previously been proved guilty according to law, **an action, the treatment of an individual,** a judicial decision or a public statement by judicial or other public authorities presents the suspects or accused persons as if they were convicted. **Such actions and treatments shall include the overt and disproportionate use of security arrangements during court proceedings.**

**Member States shall take appropriate steps, consistent with the right to freedom of expression and the public's right to information, to inform the media about, and encourage the media to respect, an individual's right to the presumption of innocence.**

**Public statements shall encompass written, audio and visual information relating to the suspected offence.**

**Member States shall ensure that in the event of a breach of the presumption of innocence, an appropriate and effective remedy is provided, including appropriate measures to ensure that the suspected or accused person is able to receive a fair trial, such as, for example, publishing a public statement in correction of the statement in breach, and/or re-location of the trial to a different locality and/or a re-trial.**

**Article 4(4)**

The obligation set out in paragraph 1 not to refer to or treat persons as if they were guilty shall not prevent public authorities from publicly

disseminating information on the criminal proceedings when this is necessary for reasons relating to the criminal investigation or for the public interest, **so long as references to the suspected or accused person do not directly or indirectly indicate, opine or infer that that a particular individual is guilty.**

## **ARTICLE 5: BURDEN OF PROOF AND STANDARD OF PROOF REQUIRED**

Article 5 of the Commission's proposal requires the prosecution to bear the burden of proof, which is a welcome statement of the appropriate burden. However, the Council in its General Approach has conflated Articles 5(1) and 5(3) to include both the burden and standard of proof. In doing so it has in the view of the ICJ, JUSTICE and NJCM diminished the clarity and protection offered by Article 5(3) by stating that 'any doubt is to benefit the suspected or accused person' rather than specifying the consequences of the doubt. In our view, Article 5(3) of the Commission Proposal should be retained, to ensure a distinction between burden and standard of proof, and also to clearly specify that the consequences of reasonable doubt are that the person should be acquitted.

The UN Human Rights Committee has clarified that the presumption of innocence requires that guilt cannot be presumed in the absence of proof beyond reasonable doubt<sup>33</sup> and the European Court of Human Rights has held that the burden to prove guilt is on the prosecution,<sup>34</sup> applying the standard of beyond reasonable doubt in its assessment of facts presented to demonstrate breach of the Convention.<sup>35</sup> If this point is not specified in the Directive, it could allow national courts to unfairly convict a person notwithstanding the fact that a reasonable doubt has been established.

Article 5(2) of the Commission proposal also provides for a reverse burden of proof by allowing presumptions of fact or law that a suspected or accused person is to rebut. A reverse burden of proof can directly contravene the presumption of innocence that the proposed Directive intends to protect unless it is applied in a circumscribed way. In the view of the ICJ, JUSTICE and NJCM the Commission proposal does not sufficiently limit the circumstances in which a reverse burden may be applied. The ECtHR has specified that such reverse burdens are only permissible where states "confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".<sup>36</sup> Although the Council's General Approach has attempted to strengthen the protections further than in the Commission Proposal by

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<sup>33</sup> Human Rights Committee, General comment 32, para.30. See also Article 66 of the Rome Statute of the International Criminal Court, which provides that the onus is on the prosecutor to prove guilt and that in order to convict the Court must be convinced beyond reasonable doubt.

<sup>34</sup> *Barbera, Messegue and Jabardo v Spain*, ECtHR, Application No.10590/83, Judgment of 6 December 1988, para.77

<sup>35</sup> *Avşar v Turkey*, ECtHR, Application No. 25657/94, Judgment of 10 July 2001, (considering Articles 2 and 3 ECHR); *Europapress Holding d.o.o. v Croatia*, ECtHR, Application No. 25333/06, Judgment of 22 October 2009 (considering Article 10 ECHR).

<sup>36</sup> *Radio France v France*, ECtHR, Application No. 53984/00, Judgment of 30 March 2004, para 24, endorsing *Salabiaku v France*, ECtHR, Application No. 10589/83, Judgment of 7 October 1988, para 28.

reflecting the Strasbourg jurisprudence, in our view, the suggested safeguards included in the General Approach are insufficiently precise to ensure an EU wide protection of which suspects and accused persons can be confident will apply to them in any Member State.

There are two ways a reverse burden of proof may arise in practice. It is clear from the ECtHR jurisprudence that the first is where the presumption is contained within the ingredients of the offence brought by the prosecution. The circumstances when a reverse burden may be permitted here should be limited to a narrow set of offences where it is justified because an unlawful action has on the face of it been objectively made out by real evidence (rather than a witness' account, or the requirement of a particular intent of the suspect or accused person), any defence is solely within the suspect's knowledge and could only be raised upon rebuttal, and a particular public interest requires the presumption in order to prosecute the crime.<sup>37</sup>

Examples of such instances are:

Drugs found in the possession of the suspected or accused person where the reverse burden requires the person to show they were not aware of the drugs<sup>38</sup>;

A driving offence caused by a car, which leaves the scene where the reverse burden requires the registered owner to show they were not the driver.<sup>39</sup>

The second way a reverse burden of proof may arise, as provided by all Member States, is where a suspect or accused person raises a defence to a crime of their own volition, or the evidence comes out from other witnesses. This will be the case when defences such as self-defence, duress, or alibi are raised. They are not required in order to disprove the offence, as the examples above are, but if raised they nevertheless require the defence to bear the burden.

In either circumstance, in the view of the ICJ, JUSTICE and NJCM only an *evidential* burden should apply to the suspect or accused person – i.e. a burden to adduce evidence that creates doubt about the presumption. Any admissible evidence may suffice for these purposes, not only new evidence, as suggested in the Council's proposed Recital 15. Once such evidence is adduced, the burden returns to the prosecution to prove beyond reasonable doubt that the defence is false. Otherwise, the suspect or accused person faces an undue burden of disproving the case against them, which would lead to a violation of the right to a fair trial. The Commission Proposal includes this and in our view the words there must be retained in the Directive.

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<sup>37</sup> See *Salabiaku v France*.

<sup>38</sup> *Ibid.*

<sup>39</sup> *O'Halloran and Francis v UK, ECtHR [GC]*, Application Nos. 15809/02 and 25624/02, Judgment of 29 June 2007.

**The ICJ, JUSTICE and NJCM therefore recommend that Article 5(2) and Recital 15 be amended as follows:**

**Article 5(2) as proposed by the Council General Approach**

Member States may provide for the use, within reasonable limits, of presumptions of facts or law concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence.

**Presumptions of fact may be raised only where they are contained in the elements of the offence, objective facts make out the offence, any defence is solely within the defendant's knowledge and the presumptions are justified in the public interest. All such presumptions of fact must be rebuttable. They shall be deemed as rebutted when evidence is adduced to raise a reasonable doubt regarding the relevant element of the offence.**

**Recital 15 as proposed by the Council General Approach**

Member States may provide for the use of presumptions of facts or law concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence. Such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence. The means employed have to be reasonably proportionate to the legitimate aim sought to be achieved. The presumptions should be rebuttable ~~for example by means of new evidence on extenuating circumstances or on a case of force majeure~~ by admissible evidence; in any case, the presumptions may only be used provided the rights of the defence are respected.

**The ICJ, JUSTICE and NJCM further recommend that Article 5(3) as proposed by the Commission be retained:**

**Article 5(3)**

**Member states shall ensure that where the trial court makes an assessment as to the guilt of a suspect or accused person and there is reasonable doubt as to the guilt of that person, the person shall be acquitted.**

**ARTICLES 6 AND 7: RIGHT NOT TO INCRIMINATE ONESELF AND NOT TO COOPERATE AND RIGHT TO REMAIN SILENT**

Article 6 of the proposed directive requires the Member States to ensure respect for the rights of suspects or accused persons not incriminate themselves and not to cooperate with criminal proceedings against them. Article 7 requires the Member States to ensure that suspects or accused persons have the right to remain silent when

questioned during criminal proceedings against them and that they are promptly informed thereof. The Council General Approach proposes merging Article 6 and 7 into a single Article.

These articles reflect the right to remain silent and privilege against self-incrimination, long standing rights in nations around the world and codified in international human rights law. Article 14(2) ICCPR, Article 40(2)(b)(i) CRC and Article 6(2) ECHR set out the right to be presumed innocent until guilty according to law. Article 14(3)(g) ICCPR and Article 40(2)(b)(iv) assert the right not to be compelled to give testimony against oneself or to confess guilt. Although the ECHR does not specifically set out this right, Article 3 ECHR on the prohibition of torture, inhuman or degrading treatment must be respected. Moreover, the case law of the ECtHR has made clear that they,

“[A]re generally recognised international standards which lie at the heart of the notion of a fair procedure under art. 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of art. 6.”<sup>40</sup>

Further, the ECtHR has held that compulsion cannot be exerted in defiance of the will of the accused person and must be confined to circumstances where evidence exists independently of their will (for example in relation to the taking of breath or blood samples for analysis).<sup>41</sup>

Although Article 6 sets out an important right, if amended as proposed by the Council, it would not provide the mechanism for this right to be practical and effective in practice, namely that the suspect or accused person be informed of the right. The requirement set out in the Commission Proposal at Article 7(2) should therefore be retained. The obligation to promptly provide information about the right to silence has already been established in EU law by the Member States and set out in Article 3(1)(e) to the Directive on the Right to Information. It is necessary in the view of the ICJ, JUSTICE and NJCM to reinforce it here, in fuller detail, so that the right is not limited to the initial stage of arrest or detention, as could be inferred from that Directive, and applies in the face of all police or judicial questioning of the suspected or accused person.

The ICJ, JUSTICE and NJCM are particularly concerned that the Council in the General Approach has proposed amendment of Recital 20b to allow for the exercise of silence to be used against a person where national rules or systems allow a court or judge to take account of their silence as an element of corroboration of evidence obtained by other means. In our view, silence can never corroborate other evidence since it is not a positive action, it produces no evidence of itself. To attempt to use silence in this way

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<sup>40</sup> *Funke v France*, ECtHR, Application No. 10828/84, Judgment of 25 February 1993.

<sup>41</sup> *Saunders v UK*, ECtHR [GC], Application No. 19187/91, Judgment of 17 December 1996.

would be wholly in breach of the right to silence and the freedom from self-incrimination as it infers guilt through guesswork and the subjective preference of the trier of fact.

Moreover, Article 6(4) of the Commission Proposal, which provides a remedy for breach of the right not to self-incriminate and to remain silent, has been proposed for deletion by the Council. The reasons for this proposal are unclear, particularly as Article 4(3) provides specifically for appropriate measures to be available in the event of breach of the presumption of innocence by public statement, and Article 9 specifically provides for a re-trial where a trial takes place in breach of the Article 8 right to be present at trial.

Article 6(5) of the Council's General Approach appears to seek exclusion of suspects and accused persons facing minor offences from the protection of the Directive. As we set out above in relation to Article 2 of the Proposal, no criminal proceedings, as defined in international law, should be excluded from the scope of the Directive.

In the view of the ICJ, JUSTICE and NJCM, as proposed by the Commission, Article 6 should also provide a specific remedy for breach of the right not to incriminate oneself and the right to remain silent. The appropriate remedy must be that the evidence is excluded, unless the admission of such evidence would not prejudice the overall fairness of the proceedings for the accused person. This is the test set out in the Commission Proposal -- save for clarification that the test of fairness must address the accused person rather than proceedings as a whole, which may otherwise take into account the needs of the prosecution, for example, a speedy and cost effective trial.

Use of evidence in breach of the right set out in Article 6 would otherwise allow prejudicial evidence to be used against the accused person at trial which would be contrary to the right to a fair trial. The Directive cannot condone such a course. To do so would fall short of the right articulated in international human rights law, including by the European Court of Human Rights, for example in the case of *Allan v UK* where the Court found a breach of Article 6 ECHR because evidence of the accused's answers given in breach of the right not to incriminate oneself were adduced at trial.<sup>42</sup> Furthermore, without a specific remedy there would be no mechanism by which to prevent admission of self-incriminatory evidence obtained by forms of compulsion that violate the prohibition on torture or other ill-treatment.<sup>43</sup>

**The ICJ, JUSTICE and NJCM therefore propose the addition of a new article in the Directive, to read:**

### **Article 6(1b)**

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<sup>42</sup> See in particular *Allan v UK*, ECtHR, App. No. 48539/99, Judgment of 5 November 2002.

<sup>43</sup> See for example, Report of the Special Rapporteur on Human Rights and Counter-Terrorism, UN Doc.A/63/223 (2008) para 45.

**Member States shall upon arrest or detention of the suspected or accused person and prior to any questioning by law enforcement or judicial authorities inform the suspect or accused person of their right to remain silent, and explain the content of this right and the consequences of renouncing or invoking it.**

**The ICJ, JUSTICE and NJCM also recommend that Recital 20(b) as proposed by the Commission, as well as Article 6(5) as proposed by the Council's General Approach, be deleted.**

**The ICJ, JUSTICE and NJCM further recommend that Articles 6(4) and 7(4) be amended as follows:**

**Article 6(4)**

Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings **for the accused person.**

**Article 7(4)**

Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings, **for the accused person.**

**ARTICLE 8: RIGHT TO BE PRESENT AT ONE'S TRIAL**

The Commission Proposal for Article 8, on the right to be present at trial, replicates the right set out in Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27.3.2009, p. 24), now Directive pursuant to Protocol 36 of the Treaty on the Functioning of the European Union. This again reflects rights guaranteed in international human rights law, including under the ICCPR (Article 14(3)(d)) and the jurisprudence of the ECtHR.<sup>44</sup>

It seems that the Council considered the right as proposed to be set out by the Commission to be too detailed and it has attempted to simplify it in the General Approach. In the view of the ICJ, JUSTICE and NJCM, however, rather than simply summarise, the Council's proposed revision has removed important protections that were accepted in the Framework Decision. In particular, the method by which a suspect or accused person is deemed to have received notice of their trial, has been summarised to 'has been informed in due time'. This removes the concrete safeguards

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<sup>44</sup> Article 14(3)(d) ICCPR; Article 6 ECHR and Article 6(3)(c),(d) and (e) ECHR as to elements of participation. See also *Colozza v Italy*, op cit; *Hermi v Italy*, op cit.

contained in the Framework Decision which entitles a person to not only be informed in due time but to (1) be 'summoned in person' or to have 'actually received official information in a manner that unequivocally established that he or she was aware' and (2) of the scheduled date and time of the trial.

Likewise, the General Approach has sought to revise Article 8(3) in which the possibilities to enforce a decision taken at an *in absentia* trial are set out. In doing so a key condition of what a 'new trial' or 're-trial', or 'other legal remedy', must include, is missing. The Commission Proposal requires that the person either expressly state that they do not contest the decision or do not request a re-trial or appeal within a reasonable time frame.

The General Approach has moved the conditions into new Recitals (22c) and (22e). However, the absence of these conditions from the operative Article provides the possibility of an *in absentia* trial that does not conform with international human rights law or with the agreed standards set out in the earlier Framework Decision. These are critical parts of protecting the right to be present at one's trial which are otherwise insufficiently precise and could lead to the suspected or accused person's trial unfairly taking place in their absence. The ECtHR has made clear that a person convicted *in absentia* has a right to a retrial in their presence, in particular if they were not made aware of the initial trial.<sup>45</sup>

In addition, the Council's General Approach would also insert Article 8(4) to create a further exception to the right to be present. It would allow for a judge to temporarily exclude the suspected or accused person 'when this is necessary in the interest of securing the smooth operation or the proper course of the criminal proceedings.' Recital (22a) suggests that this could be where the suspect or accused person disturbs the hearing or prevents the proper hearing of a witness. The ICJ, JUSTICE and NJCM are concerned by the addition of this Article. We do not agree that such a final exception is required to deal with this type of concern. The right to be present at one's trial is a fundamental and integral part of the right to a fair trial. Without hearing the evidence against them, a suspect or accused person cannot defend themselves.<sup>46</sup> Exclusion of a person from their own trial for even their intentional, repeated and continuous disruption of the proceedings must be heavily circumscribed and a measure of last resort. During any such period of exclusion, which may not last any longer than is strictly required, the court must take measures to ensure that the rights of the

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<sup>45</sup> As occurred in *Colozza v Italy*, op cit. The ECtHR considered that "Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the attempts made to trace him were inadequate", para 28.

<sup>46</sup> See *Colozza v Italy*, op cit, in which the Court held that: "Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to 'everyone charged with a criminal offence' the right 'to defend himself in person', 'to examine or have examined witnesses' and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court', and it is difficult to see how he could exercise these rights without being present," para 27.



accused and the defence are adequately protected. Mechanisms that allow the accused to listen to the proceedings and to communicate confidentially with his or her counsel from and while outside of the courtroom, for example through a video link, are recommended.<sup>47</sup>

However, there is no justifiable reason to exclude a person from their own trial for witness protection purposes and this should not be provided by the proposed Directive. Witnesses can be ably protected by safeguards provided to support them, such as screening, or giving evidence by video link. The mechanism at the European Union level to establish such measures was provided by Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.<sup>48</sup>

Finally, neither the Commission Proposal nor General Approach articulate a right to be notified of the trial date and location. This is implied by the provisions as to trial *in absentia* but is not expressly stated in Article 8(1) where the right should first be set out. As international human rights law, including the ECtHR case law cited above, provides, a trial held in the absence of the accused, without notification, will violate the right to be present.<sup>49</sup>

**The ICJ, JUSTICE and NJCM therefore recommend that Articles 8(1), 8(2)(a), 8(3) and 8(4) as proposed by the Council General Approach be amended as follows:**

**Article 8(1) as proposed by the Council General Approach**

Member States shall ensure that suspects or accused persons have the right to be present at their trial **and be notified of the scheduled date, time and location at which it will take place and that a decision may be taken in their absence.**

**Article 8(2)(a) as proposed by the Council General Approach**

**the suspect or accused person having in due time been informed, either in person or by other official means actually received, of the date, time and place of the trial and that a decision as to guilt or innocence may be made if he or she does not appear;**

**Article 8(3) as proposed by the Council General Approach, at end insert:**

**The person must expressly refuse to contest the decision and refuse a new (de novo) trial at which the accused is present and the rights**

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<sup>47</sup> Article 63(2) of the ICC Statute states that “If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required”.

<sup>48</sup> OJ L 315, 14.11.2012, p. 57.

<sup>49</sup> *Colozza v Italy*, op cit. See also HR Committee, General Comment 32, para 36.

**of the defence are respected, prior to the decision being enforced. Such refusal shall be recorded by a judicial authority.**

#### **Article 8(4) as proposed by the Council General Approach**

Member States may **as a measure of last resort** provide that the judge or the competent court can temporarily exclude a suspect or accused person from the trial **when, in the exceptional circumstances of the person's intentional, repeated, and continuous obstruction of the proceedings, it is impossible to continue the trial**, provided measures are taken to ensure the rights of the defence are respected and protected during any period of exclusion, which shall last no longer than is strictly required.

#### **ARTICLE 9: RIGHT TO A RETRIAL**

Article 9 sets out the right to re-trial as a remedy for a breach of the right to be present at one's trial and what this should contain. Although international human rights tribunals have held that trial *in absentia* may be permissible in certain exceptional circumstances, where the accused has been notified of the trial but fails to appear, in such circumstances they have found that there is a right to a retrial, which must encompass a re-hearing of the evidence. As the ECtHR has established in its case-law, a "person should, once he becomes aware of the proceedings, be able to obtain from a court which has heard him, a fresh determination of the merits of the charge."<sup>50</sup>

However, the General Approach would limit this right to one of *request* only and inserts after the right to a new trial 'or other legal remedy.' This limitation will allow Member States to place further conditions upon the availability of a re-trial than those already set out in Article 8. As noted above, the ECtHR has held that a person convicted *in absentia* has a right to a retrial in their presence, in particular if they were not made aware of the initial trial.

In the view of the ICJ, JUSTICE and NJCM, Member States must make available the right to *actual de novo* re-trial before an independent and impartial tribunal where the right to be notified of the trial against the suspect or accused person has been breached. The General Approach would also remove from Article 9 the right to be present at, and participate in, that re-trial. This is a key component, without which the re-trial will continue to breach the right to be present at one's trial.<sup>51</sup> In the recent case of *Sanader v Croatia*<sup>52</sup> the ECtHR underlined the importance of effective participation:

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<sup>50</sup> *Colozza v Italy*, op cit, para. 29; *Krombach v France*, ECtHR, Application No. 29731/96, Judgment of 13 February 2001, para 85. The ECtHR also ruled in *Sejdovic v Italy* that "although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself", ECtHR [GC], Application No. 56581/00, Judgment of 1 March 2006, para 82.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Sanader v Croatia*, ECtHR, Application No. 66408/12, Judgment of 12 February 2015, para 93.

“[T]he applicant, who was tried in absentia, had no opportunity to put the evidence on which his charges were based to adversarial argument or to contest his conviction before the competent courts of appeal. By the use of the remedy under Article 501 § 1 (3) of the Code of Criminal Procedure he was essentially required, simply in order to obtain a retrial, to challenge the factual findings of the final judgment by which he was convicted by submitting new facts and evidence of such a strength and significance that they could at the outset convince the court that he should be acquitted or convicted. Such demand appears disproportionate to the essential requirement of Article 6 that a defendant should be given an opportunity to appear at the trial and have a hearing where he could challenge the evidence against him...”

The Commission Proposal should be retained. Moreover, in the view of the ICJ, JUSTICE and NJCM, both the Commission Proposal and the General Approach insufficiently describe the evidence that can be considered at that trial. In our view ‘a fresh determination of the merits of the case’ should encompass a fresh re-examination of the available relevant admissible evidence including evidence not admitted at the earlier trial, in order to ensure that the suspect or accused person has the opportunity to meaningfully defend all the allegations made against them. Finally, the provision in Article 9 acknowledging that the original decision may be reversed ought to reflect that a new proceeding will vacate the original conviction entirely. The de novo proceeding will thereby reach a new verdict.

**The ICJ, JUSTICE and NJCM therefore recommend that Article 9 as proposed by the Council General Approach be amended as follows:**

**Article 9 as proposed by the Council General Approach**

Member States shall ensure that suspects or accused persons who were not present at the trial referred to in Article 8(1) and who allege that the conditions laid down in Article 8(2) were not met, have the right **to a new (de novo) trial at which they have the right to be present and participate and which allows a fresh determination of the merits of the case, including examination of all relevant admissible evidence. Where a suspect or accused person requests a re-trial the original conviction shall be vacated.**

## RECOMMENDATIONS

The ICJ, JUSTICE, and NJCM make the following recommendations on the proposed Directive:

### Article 2 should be amended to read:

This Directive applies to natural **and legal** persons who are suspected or accused in criminal proceedings. It applies from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the final determination of the question whether the person has committed the offence concerned and that decision has become final. **If the person is acquitted of the offence, articles 3 and 4 of this Directive shall continue to apply for all purposes and proceedings connected with the acquittal.**

### Recital 8 should be amended to read:

This Directive should apply to natural **and legal persons** who are suspected or accused of having committed a criminal offence...

**If the person is acquitted of the offence, the presumption of innocence should continue to apply for all purposes and proceedings connected with the acquittal.**

Recital 6 should be deleted and a new Recital 6 included, to read:

### Recital 6

**In light of the autonomous meaning of "criminal" in the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union, safeguards provided for by this Directive should apply to all proceedings which, due to their nature or the nature and severity of the possible punishment, would be considered as criminal under international law. Among other things, this means that the safeguards should apply in all proceedings in which restrictive measures, involving deprivation of liberty or sanctions of equivalent severity, are liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. In addition, the safeguards in this Directive should apply to proceedings liable to give rise to a criminal record.**

**Statements made by the suspect or accused person during administrative proceedings that do not conform to the protections provided by this Directive shall not be admissible in subsequent criminal proceedings.**

Article 4(1) as proposed by the Council General Approach should be amended to read:

Member states shall take the necessary measures to ensure that, **unless or until** suspects or accused persons have been proven guilty according to law, **the actions, treatment of persons**, public statements and official decisions **of** public authorities do not refer to **or represent** the suspects or accused persons as if they were guilty.

**Article 4(3) as proposed by the Council General Approach should be amended to read:**

Member States shall ensure **the availability of** appropriate **remedies** in the event of a breach of the obligation set out in paragraph 1 not to refer to **or treat** a person as if they were guilty. **Such remedies should include, where possible, measures to prevent an interference with the right to a fair trial.**

**Recital 13 should be amended to read:**

The presumption of innocence is violated if, without the accused's having previously been proved guilty according to law, **an action, the treatment of an individual**, a judicial decision or a public statement by judicial or other public authorities presents the suspects or accused persons as if they were convicted. **Such actions and treatments shall include the overt and disproportionate use of security arrangements during court proceedings.**

**Member States shall take appropriate steps, consistent with the right to freedom of expression and the public's right to information, to inform the media about, and encourage the media to respect, an individual's right to the presumption of innocence.**

**Public statements shall encompass written, audio and visual information relating to the suspected offence.**

**Member States shall ensure that in the event of a breach of the presumption of innocence, an appropriate and effective remedy is provided, including appropriate measures to ensure that the suspected or accused person is able to receive a fair trial, such as, for example, publishing a public statement in correction of the statement in breach, and/or re-location of the trial to a different locality and/or a re-trial.**

**Article 4(4) as proposed by the Commission should be amended to read:**

The obligation set out in paragraph 1 not to refer to or treat persons as if they were guilty shall not prevent public authorities from publicly disseminating information on the criminal proceedings when this is necessary for reasons relating to the criminal investigation or for the public interest, **so long as references to the suspected or accused person do not directly**

**or indirectly indicate, opine or infer that that a particular individual is guilty.**

**Article 5(2) as proposed by the Council General Approach should be amended to read:**

Member States may provide for the use, within reasonable limits, of presumptions of facts or law concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence.

**Presumptions of fact may be raised only where they are contained in the elements of the offence, objective facts make out the offence, any defence is solely within the defendant's knowledge and the presumptions are justified in the public interest. All such presumptions of fact must be rebuttable. They shall be deemed as rebutted when evidence is adduced to raise a reasonable doubt regarding the relevant element of the offence.**

**Recital 15 as proposed by the Council General Approach should be amended to read:**

Member States may provide for the use of presumptions of facts or law concerning the criminal liability of a person who is suspected or accused of having committed a criminal offence. Such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence. The means employed have to be reasonably proportionate to the legitimate aim sought to be achieved. The presumptions should be rebuttable ~~for example by means of new evidence on extenuating circumstances or on a case of force majeure~~ by admissible evidence; in any case, the presumptions may only be used provided the rights of the defence are respected.

**Article 5(3) as proposed by the Commission should be retained.**

**A new article should be included in the Directive, to read:**

**Article 6(1)(b)**

**Member States shall upon arrest or detention of the suspected or accused person and prior to any questioning by law enforcement or judicial authorities inform the suspect or accused person of their right to remain silent, and explain the content of this right and the consequences of renouncing or invoking it.**

**Recital 20(b) as proposed by the Commission, as well as Article 6(5) as proposed by the Council General Approach should be deleted.**

**Article 6(4) should be amended to read:**

Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings **for the accused person.**

**Article 7(4) should be amended to read:**

Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings, **for the accused person.**

**The ICJ, JUSTICE and NJCM therefore recommend that Articles 8(1), 8(2)(a), 8(3) and 8(4) as proposed by the Council General Approach be amended as follows:**

**Article 8(1) as proposed by the Council General Approach should be amended to read:**

Member States shall ensure that suspects or accused persons have the right to be present at their trial **and be notified of the scheduled date, time and location at which it will take place and that a decision may be taken in their absence.**

**Article 8(2)(a) as proposed by the Council General Approach should be amended to read:**

**the suspect or accused person having in due time been informed, either in person or by other official means actually received, of the date, time and place of the trial and that a decision as to guilt or innocence may be made if he or she does not appear;**

**At the end of Article 8(3) as proposed by the Council General Approach the following should be added:**

**The person must expressly refuse to contest the decision and refuse a new (de novo) trial at which the accused is present and the rights of the defence are respected, prior to the decision being enforced. Such refusal shall be recorded by a judicial authority.**

**Article 8(4) as proposed by the Council General Approach should be amended to read:**

Member States may **as a measure of last resort** provide that the judge or the competent court can temporarily exclude a suspect or accused person from the trial **when, in the exceptional circumstances of the person's intentional, repeated, and continuous obstruction of the proceedings, it is impossible to continue the trial,** provided measures are taken to ensure the rights of the defence are respected and protected during any period of exclusion, which shall last no longer than is strictly required.

**Article 9 as proposed by the Council General Approach should be amended to read:**

Member States shall ensure that suspects or accused persons who were not present at the trial referred to in Article 8(1) and who allege that the conditions laid down in Article 8(2) were not met, have the right **to a new (de novo) trial at which they have the right to be present *and participate* and which allows a fresh determination of the merits of the case, including examination of all relevant admissible evidence.** Where a suspect or accused person requests a re-trial the original conviction shall be vacated.