

Rethinking Article 6

*Rethinking Article 6:
The Criminal Fair Trial Rights Case Law of
The European Court of Human Rights*

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Abstract

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This thesis is a critique of the European Court of Human Rights' case law on the right to a fair trial in criminal cases. It is the result of a focussed and extensive survey of Article 6 case law, and, unlike other work on Article 6, does not analyse each component right of Article 6 one-by-one. Instead, the thesis considers 'cross-cutting' themes common to all, or many, of the Article 6 component rights: how the Court interprets Article 6, how the Court sees its role in Article 6 cases, how the Court approaches Article 6's internal structure, the Court's implied rights jurisprudence, and how the Court assesses alleged Article 6 violations. In considering how the Court assesses alleged violations of Article 6, the thesis charts the Court's attempts to solve 'the puzzle of Article 6': how should violations of Article 6 be assessed in the absence of an express metaprinciple? In this regard the thesis examines notions such as the proceedings as a whole test, counterbalancing and defect-curing, the 'never fair' jurisprudence, and the extent to which the public interest may justify restrictions on Article 6. The thesis uses a rule of law framework to test the Article 6 case law for its ability to provide guidance to citizens, lawyers and officials. It argues that the case law is marked by considerable uncertainty, inconsistency, and incoherence, with the result that the ability of that case law to provide guidance is significantly undermined. Indeed, the thesis establishes that there is inconsistency and uncertainty within the various tools and approaches used by the Court, and that there is significant incoherence between those approaches. To the extent the thesis makes a normative argument, it constitutes a robust and targeted call for the Court to adopt in this area of law a renewed, rejuvenated approach that is more consistent, more coherent, and better explained.

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INTRODUCTION

This thesis is a critique of the European Court of Human Rights' case law dealing with the right to a fair trial in criminal cases. It explores the extent to which the European Court's case law in this area is consistent, predictable, transparent, and coherent.

Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') provides protection for the right to a fair trial in civil and criminal proceedings. Article 6 includes multiple 'component' rights, some explicitly listed in the Convention, and others recognised by the European Court as implicit in the text. The explicitly listed component rights range from the right 'to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' to the right, for those 'charged with a criminal offence...[to] be presumed innocent until proved guilty according to law' and the right to have 'the free assistance of an interpreter'. Examples of implicit rights include the accused's right 'to communicate with [the accused's] advocate out of hearing of a third person'¹ and the right 'to silence and...not to incriminate oneself'.² Article 6 occupies a prominent place in the Convention system: between 1959 and 2009, more than half of the European Court judgments in which a violation was found included an Article 6 violation, either criminal or civil.³ This thesis looks at the case law concerning criminal

¹ *S v Switzerland* (App 12629/87) (1992) 14 EHRR 670 at [48].

² *Saunders v United Kingdom* (App 19187/91) (1997) 23 EHRR 313 at [68].

³ European Court of Human Rights, *The European Court of Human Rights: Some Facts and Figures: 1959-2009* (Council of Europe, Strasbourg 2009), 6. See D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2007), 202.

proceedings from the beginning of the Court's operation through to 2011.⁴ In this Introduction, we frame the scope of the thesis' argument, consider the measuring stick against which the case law will be assessed, and outline the ways in which the central argument of the thesis will be developed.

1.1 Framing the scope of the argument

There is significant scholarship on Article 6, either focussing directly on Article 6⁵ or dealing with it in the course of a broader European Convention survey.⁶ Usually, these works approach Article 6 as a series of component rights, and their treatment is divided into chapters or sections, each devoted to one or several component rights. These works are important and useful. This thesis does not aspire to be an exhaustive guide to any of Article 6's components, let alone to all of them. Instead, this thesis takes a different approach. It pursues an original doctrinal approach to the Article 6 material, and aims to provide a complement to the existing scholarship that will be of use to practitioners and scholars alike. It does so in the following ways.

First, this thesis adopts a thematic approach rather than a right-by-right approach. It aims to consider those ideas, difficulties and debates that are common to

⁴ Although primary research ceased in June 2011, the thesis makes reference to a significant number of late 2011 and early 2012 case law.

⁵ See, eg, S Stavros, *The guarantees for accused persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff, London 1993); S Trechsel, *Human Rights in Criminal Proceedings* (OUP, Oxford 2006); SJ Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Hart, Oxford 2007); B Emmerson, A Ashworth and A Macdonald, *Human Rights and Criminal Justice* (2nd edn Sweet & Maxwell, London 2007).

⁶ See, eg, P van Dijk and GJH van Hoof, *Theory and practice of the European Convention on Human Rights* (4th edn Intersentia, Antwerp 2006); Harris, O'Boyle and Warbrick; R Clayton and H Tomlinson (eds), *The Law of Human Rights* (2nd edn OUP, Oxford 2009); C Ovey and R White, *Jacobs and White: The European Convention on Human Rights* (4th edn OUP, Oxford 2006); S Greer, *The European Convention on Human Rights: achievements, problems and prospects* (2nd edn CUP, Cambridge 2006).

many, or all, of the Article 6 component rights and to examine how the European Court deals with those challenges. By examining these ‘cross-cutting’ issues, it is hoped that the thesis will more easily contextualise, and emphasise points of similarity and difference among, the Court’s approaches to the Article 6 rights. As such, this thesis is intended to provide a useful supplement to the existing accounts of Article 6. The cross-cutting approach also uncovers new points of contention and disagreement in the way that the Court approaches Article 6 criminal fair trial case law.

Second, the thesis is critical of the Court. It challenges the notion that ‘the judgments of the Court are exceptionally well reasoned’.⁷ Indeed, the central argument of this thesis is that the Article 6 criminal fair trial case law of the European Court is incoherent, undertheorised, and poorly explained. The thesis argues that there are inconsistencies in the way that the Court approaches issues, and that the Court often does not acknowledge the significant complexity inherent in its own judgments. Later in this Introduction, this central argument is outlined further.

Third, this is a doctrinal thesis rooted in the detail of the European Court’s case law. It focuses almost exclusively on the Court’s case law, and is the result of an extensive survey of Article 6 criminal cases identified through the Court’s HUDOC system.⁸ This focus on the Court’s case law means that this thesis is limited insofar as it

⁷ F Ost, 'The Original Canons of Interpretation of the European Court of Human Rights' in M Delmas-Marty and C Chodkiewicz (eds), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff, Dordrecht 1992), 284.

⁸ HUDOC is accessible at <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>. The thesis focuses on European Court decisions rather than Commission decisions or the Committee of Ministers’ practice, but reference to Commission decisions is made wherever relevant. Similarly, the focus is on

does not consider the ways in which domestic courts have applied Article 6, or the ways in which domestic courts apply European Court case law. The targeted focus on the case law itself also means that the thesis does not attempt to identify institutional, political, or sociological explanations for the approaches taken by the European Court. As Christoffersen acknowledges, focusing on the case law in this way is not necessarily designed 'to describe the law as it stands in a given area of the [European Convention]';⁹ and in this case, the existing Article 6 scholarship cited above does an admirable job of providing such a description. Instead, as Christoffersen puts it, the goal is 'to provide the basis for a better understanding of the Court's caselaw'.¹⁰ In this way the thesis aims to act as a *complement* to, and not a *replacement* for, the work of other doctrinal authors such as Trechsel, van Dijk and van Hoof, or Harris, O'Boyle and Warbrick. Furthermore, there is considerable analysis and debate in the scholarly and policy literature on the theoretical and institutional functioning of the Court,¹¹

Article 6 criminal fair trial rights decisions, but reference is made to civil Article 6 cases and other European Convention cases where appropriate.

⁹ J Christoffersen, *Fair balance: proportionality, subsidiarity and primarity in the ECHR* (Martinus Nijhoff, Leiden 2009), 29.

¹⁰ *Ibid.*, 29.

¹¹ See, as some examples, M-B Dembour, "'Finishing off' cases: the radical solution to the problem of the expanding European Court of Human Rights caseload" [2002] EHRLR 604; M-B Dembour and M Krzyzanowska-Mierzevska, 'Ten Years On: The Voluminous and Interesting Polish Case Law' [2004] EHRLR 517; S Greer and L Wildhaber, 'Reflections of a former President of the European Court of Human Rights' [2010] EHRLR 165; R White, 'Judgments in the Strasbourg Court: Some Reflections' 2009 SSRN Working Paper Series <http://ssrn.com/abstract=1435197>; A Lester, 'The European Court of Human Rights after 50 years' [2009] EHRLR 461; C Gearty, *Civil Liberties* (OUP, Oxford 2007); C Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview' (1993) 52 Cambridge Law Journal 89; R White and I Boussiakou, 'Separate opinions in the European Court of Human Rights' (2009) 9(1) Human Rights Law Review 37; G Letsas, 'Judge Rozakis's Separate Opinions and the Strasbourg Dilemma' 2011 SSRN Working Paper Series <http://ssrn.com/abstract=1872384>; K Dzehtsiarou, 'Consensus from within the Palace Walls' 2010 University College Dublin Working Papers in Law, Criminology & Socio-Legal Studies Paper 40/2010 <http://ssrn.com/abstract=1678424>; E Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102(4) American Political Science Review 417; Y Lupu and E Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' [2011] British Journal of Political Science 1; B Cali, 'The purposes of the European Human Rights System: one or many?' [2008] EHRLR 299.

and on the Court's relationship with the courts of Council of Europe states.¹² Such debates are interesting, and of vital importance, but they are beyond the limits of this thesis: the thesis does not make any claims about the desirability or otherwise of particular methods of constitutional or legislative protection of human rights in the United Kingdom or elsewhere. Its scope is narrower.

Fourth, this thesis does not make a normative argument that the European Court should implement or seek out a broader, more expansive protection of criminal fair trial rights, or implement any particular theoretical or philosophical framework in its judgments. Equally, it does not make a normative argument that the Court should implement or seek out a narrower or more restrictive approach to criminal fair trial rights. The aim of the thesis is more modest. It considers the degree to which the European Court's case law in these areas provides citizens, lawyers, and officials with a consistent, coherent and theorised approach to the law. To the extent that the thesis offers a normative argument, therefore, it is an argument that the Court should adopt a rejuvenated approach that is more consistent, more coherent, and better explained – regardless of whether this may result in a more expansive or more restrictive protection of human rights on a particular issue or in a particular case – and where that is not possible or desirable, we argue for greater and more plain explanation of why.

¹² See, as some examples, N Bratza, 'The relationship between the UK courts and Strasbourg' [2011] EHRLR 505; M Lasser, *Judicial Transformations: the Rights Revolution in the Courts of Europe* (OUP, Oxford 2009), 90-115; C Gearty, *Principles of Human Rights Adjudication* (OUP, Oxford 2005); C Gearty, 'The Human Rights Act - an academic sceptic changes his mind but not his heart' [2010] EHRLR 582; A Lester, 'The ECtHR and the HRA: British Concerns' (2012) 17 *Judicial Review* 1; Lord Hoffman, 'The Universality of Human Rights' (Judicial Studies Board Annual Lecture 19 March 2009); C Gearty, *Can human rights survive?* (CUP, Cambridge 2006); M Pinto-Duschinsky, *Bringing Rights Back Home* (Policy Exchange, London 2011); J Sumption QC, 'Judicial and Political Decision-Making: The Uncertain Boundary' (FA Mann Lecture 8 November 2011); G Clayton and H Wray, 'Editorial: Othman v United Kingdom (2012)' (2012) 26 *Journal of Immigration, Asylum and Nationality Law* 2; S Briant, 'Dialogue, diplomacy and defiance: prisoners' voting rights at home and in Strasbourg' [2011] EHRLR 243.

Importantly, the thesis does *not* involve any sort of political or institutional attack on the European Court of Human Rights, or on the European Convention: it is, instead, a robust but narrowly-targeted call for a reinvigorated sense of consistent, clear, and properly explained reasoning in the Court's Article 6 cases.

1.2 Framing the measuring stick against which the European Court's case law will be tested

In considering the European Court's treatment of Article 6 criminal fair trial cases, this thesis adopts a critical approach. In order to structure that criticism, a measuring stick is needed. As is foreshadowed above, the measuring stick in this thesis is: to what extent does the Court's case law provide a clear, stable, predictable, consistent and understandable sense of the current state of European human rights law? To what extent does the case law provide citizens, lawyers and officials with adequate guidance as to their position under the law?

This thesis does not aspire to be a work of legal theory or of philosophy, but we draw support for these criteria from the accounts that a number of legal philosophers have provided of the indicia of the rule of law. Any reference to 'the rule of law' inevitably conjures up a variety of politically- and legally-charged meanings.¹³ It is, as

¹³ The rule of law is also, of course, an idea inherent in the fair trial, and has been used by the European Court in several cases: see, eg, Gearty, *Principles of Human Rights Adjudication*, 68 et seq; S Foster, *Human Rights & Civil Liberties* (2nd edn Pearson Education, Harlow 2008), 54, citing *Thynne, Wilson and Gunnell v United Kingdom* (App 11787/85) (1990) 13 EHRR 666 *T and V v United Kingdom* (App 24724/94; 24888/94) (2000) 30 EHRR 121 and *Stafford v United Kingdom* (App 46295/99) (2002) 35 EHRR 32. It is also 'a core concept in international human rights instruments jurisprudence': ME Badar, 'Basic Principles Governing Limitations on Individual Rights, and Freedoms in Human Rights Instruments' (2003) 7 *International Journal of Human Rights* 63, 65.

Jennings wrote, ‘apt to be rather an unruly horse’.¹⁴ This thesis does not attempt to tame the horse, but instead draws upon formalist accounts of the rule of law to explain the measuring stick against which we assess the European Court’s case law. Both Raz and Fuller, for example, identify factors which ‘can be derived from the basic idea of the rule of law’¹⁵ or which are ‘distinct standards by which excellence in legality may be tested’.¹⁶ Importantly for our purposes, both Raz and Fuller argue that law should be prospective, open, clear, and relatively stable.¹⁷ Indeed, as Raz explains, law:

must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it.¹⁸

Of course, such insights are not those of Raz and Fuller alone. Hayek, for example, highlighted the importance of ‘rules fixed and announced beforehand’:

government in all its action is bound by *rules fixed and announced beforehand* – rules which make it *possible to foresee* with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.¹⁹

It is not the aim of this thesis to provide an exhaustive account of different views on the rule of law, or to deal with the complexities involved in that area of legal philosophy. Instead, these statements provide a useful tool with which to analyse the case law of the European Court, and with which to consider the extent to which the European Court’s case law is capable of providing citizens, lawyers, judges and national courts with guidance and reasonable certainty as to the state of the law.

¹⁴ I Jennings, *The Law and the Constitution* (5th edn University of London Press, London 1959), 60.

¹⁵ J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford 2002), 214.

¹⁶ L Fuller, *The Morality of Law* (Yale University Press, New Haven 1964), 42.

¹⁷ Raz, 214; Fuller, 49-65, 79.

¹⁸ Raz, 214 (emphasis in original).

¹⁹F Hayek, *The Road to Serfdom* (Routledge Classics, London 2001), 75-76.

We can, however, qualify and clarify this account of our rule of law measuring stick in five ways. First, we can acknowledge that no legal system can be perfect,²⁰ but that, as Endicott argues, these rule of law factors are ideals to aspire to, even if they cannot be attained.²¹ Second, and as a related point, we can consider the notion of ‘guidance’ more closely. In assessing the extent to which the European Court’s case law is capable of providing guidance, our standards are not overly demanding: as Endicott puts it, we are concerned with the extent to which the case law may be used ‘as a guide’, and not the extent to which the case law ‘dictate[s] an outcome in every possible case’.²² As we will see, the thesis argues that the case law lacks these characteristics in a number of crucial respects, and that this undermines its ability to provide the sort of guidance that Endicott describes.

Third, the accounts of the rule of law outlined above may be thought to have special application in the human rights context. Indeed, in the human rights context there can be said to be an ‘onus of justification’ on ‘the judiciary and all public authorities to justify limitations of human rights’; the rule of law requires that limitations on rights comply with principles of legality and be ‘accessible, certain, and foreseeable’.²³ Most relevantly for our purposes, Lazarus argues that this onus of justification requires that:

²⁰ Raz, 222; Fuller, 41-42.

²¹ T Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1.

²² *Ibid.*, 18.

²³ L Lazarus, 'Conceptions of Liberty Deprivation' (2006) 69 *Modern Law Review* 738, 740-741, drawing on H Mountfield, 'The Concept of a Lawful Interference with Fundamental Rights' in J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (Hart, Oxford 2001).

judicial reasoning around human rights is transparent, consistent and clear. If citizens are to engage fully and critically with rights reasoning – be it legislative, executive or judicial – they must at the very least know why rights are asserted or limited.²⁴

Thus if we adopt this framing of the onus of justification, and take it together with the more general statements about the rule of law outlined earlier, we form a clear picture of what we require of the European Court’s case law: reasoning that is transparent, consistent, clear, coherent, and capable of acting as a guide to citizens, courts, and officials.

Fourth, in terms of the particular importance of coherence, a point on which we will argue that the European Court’s case law falls down all too often, there is considerable philosophical and theoretical scholarship on this point.²⁵ This thesis is not a work of legal theory. Nonetheless, in framing the argument to follow, it may be emphasised here that our real concern here is with what Raz describes as ‘local coherence’, what Levenbook describes as ‘area-specific’ coherence, and what Tobin terms ‘internal system coherence’.²⁶ That is to say, we are concerned with the application of a test of coherence to ‘a subset, to a group of legal standards and decisions constituting a branch of law’ rather than any more ‘global’ sense of coherence.²⁷ The goal of local coherence is one that ‘judges with limitations of

²⁴ L Lazarus, 'Mapping the Right to Security' in B Goold and L Lazarus (eds), *Security and Human Rights* (2nd edn, Hart, Oxford 2007), 326.

²⁵ See, as examples, J Raz, 'The Relevance of Coherence' in J Raz (ed) *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon, Oxford 1995); BB Levenbook, 'The Role of Coherence in Legal Reasoning' (1984) 3 *Law and Philosophy* 355; L Moral Soriano, 'A Modest Notion of Coherence in Legal Reasoning: A Model for the ECJ' (2003) 16 *Ratio Juris* 296; J Tobin, 'Seeking to persuade: A constructive approach to human rights treaty interpretation' [2010] *Harvard HR Journal* 1.

²⁶ See Raz, 'The Relevance of Coherence', 317-319; Levenbook, 371; Tobin, 37.

²⁷ Levenbook, 371; Raz, 'The Relevance of Coherence'.

knowledge and time can be expected to achieve'.²⁸ Raz also makes the point that while the application of local coherence can overlap with a doctrine of *stare decisis*, that should not disguise the fact that a concern for coherence is applicable 'even in countries which do not have a formal doctrine of precedent'.²⁹

Fifth, and related to the previous point, it must be emphasised that there is no part of the argument in this thesis that relies on common law principles of *stare decisis*. Indeed, the European Court does not operate under any binding system of precedent.³⁰ Nonetheless, as the Court said in *Stafford v United Kingdom* (and in many cases subsequently):

While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases.³¹

Similarly, as Roberts put it, even if the Court does not operate under any 'strict doctrine of precedent', that does not discount

the inherent (pre-judicial) rationality of treating like cases alike, and different cases differently, or the impact of collegiate judicial culture

²⁸ Levenbook, 371.

²⁹ Raz, 'The Relevance of Coherence', 318.

³⁰ A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *Modern Law Review* 671, 673; A Mowbray, 'An examination of the European Court of Human Rights' approach to overruling its previous case law' (2009) 9 *Human Rights Law Review* 179, 180-187; P Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' [2011] *Human Rights Law Review* 1. cf Y Lupu and E Voeten, 'The Role of Precedent at the European Court of Human Rights: A Network Analysis of Case Citations' 2010 Paper 12 http://opensiuc.lib.siu.edu/pnconfs_2010/12/.

³¹ *Stafford v United Kingdom* at [68]. See also, eg, *Micallef v Malta* (App 17056/06) (15 October 2009), [81]; *Bayatyan v Armenia* (App 23459/03) (7 July 2011), [98]; *Scoppola v Italy (No 3)* (App 126/05) (22 May 2012), [94]. This statement is often qualified by an acknowledgment of the Court's evolutive approach to interpretation, considered below in Part A.

and institutional incentives, all of which promote consistency in decision-making.³²

The point of this clarification is this: the thesis *does* focus on the Court's case law, and makes arguments on the lack of coherence, consistency, and predictability in that case law. To adapt Gearty's phrase, the thesis makes arguments exploring the Court's 'more relaxed approach to the challenge of internal consistency'.³³ Those arguments are not, however, grounded in any common law notion of *stare decisis*.

Thus, the question is: to what extent does the European Court's criminal fair trial case law measure up against our measuring stick? To what extent is the case law consistent, predictable, locally coherent, and capable of acting as a guide to citizens, lawyers, officials, and judges? As we will see in the next section, and throughout this thesis, the argument made here is that the case law does not measure up well.

1.3 Outlining the structure of the thesis and how the argument is developed

Having described the scope of the argument, and having delineated some theoretical foundations for the measuring stick that will be used to assess the Court's case law, we turn next to sketching the course of the argument in this thesis. In this subsection we first outline the thematic cross-cutting issues that are addressed in the thesis, and then the broad arguments that run through these thematic issues in support of our central thesis.

³² Roberts, 10-11ff.

³³ Gearty, *Principles of Human Rights Adjudication*, 179.

The thesis is divided into five principal Parts, each dealing with a cross-cutting theme that is of relevance to all of the various Article 6 component rights. The Parts are, of course, interrelated. Part A is foundational, and begins the thesis by considering the interpretative techniques used by the European Court in Article 6 criminal cases. It assesses a variety of techniques deployed by the Court, including what will be described as the ‘democratic catchphrase’, and analyses the extent to which the Court has made clear the content of each of those techniques and the relationship between them. In Part B, the focus is on how the Court describes its own role in Article 6 criminal fair trial cases. Part B critiques various manifestations of the ostensibly deferential approach of the Court against our measuring stick. It also includes extensive analysis of the Court’s ‘fourth instance doctrine’, ultimately arguing that the doctrine is riddled with exceptions in a way that significantly undermines its coherence and utility. The complexity of the internal structure of Article 6 is the focus of Part C, as the thesis assesses a number of ways in which the European Court has explained the relationships between the various component provisions and rights that make up Article 6, and demonstrates significant incoherence in this area of law. The examination of the Court’s views on the internal dynamics of Article 6 continues in Part D, in which the thesis looks at the Court’s implied rights jurisprudence. After briefly outlining the implied rights, Part D focuses on assessing the various foundations on which the Court has grounded the implied rights, and argues that its treatment of those foundations fails to meet our rule of law and legality standards.

Part E, which deals with the Court’s approach to assessing alleged infringements or violations of Article 6, is the largest of the thesis’ five Parts. It begins

by setting out what we describe as ‘the puzzle of Article 6’: the complexity created by uncertainty over how to assess Article 6 violations. It then considers a number of tools used by the Court in this context – the assessment of the ‘proceedings as a whole’, the use of counterbalancing and defect-curing, the notion that some infringements render proceedings irretrievably unfair, and the Court’s ‘sole or decisive’ test in the context of evidence – and argues that these tools do not measure up favourably against the standards set out above. As we will see, not only do the tools demonstrate radical uncertainty within themselves, but they also form part of an overall system that is incoherent. Finally, Part E considers the Court’s willingness (or reluctance) to engage in ‘attempts to limit Article 6 rights by reference to the community interest’.³⁴ In this final section of Part E, we consider the inconsistencies plaguing the Court’s case law and the use of tools such as proportionality reasoning and references to ‘the very essence of the right’. The thesis also includes a small appendix, dealing with the (rare) instances in which the Court has invoked the margin of appreciation in the Article 6 criminal context.

In terms of the arguments that run through these cross-cutting thematic areas, there are two broad classes of argument that are used to substantiate our central argument throughout the thesis. The first relates to the Court’s explanation of the details of how individual analytical approaches or interpretative tools work, what their content is, and what their limits are. The individual tools and approaches are often undertheorised, opaque, and poorly explained. As a result, it is argued, they are

³⁴ AC Stumer, *The Presumption of Innocence* (Hart, Oxford 2010), 110.

insufficient to provide guidance, of the sort outlined above, to citizens, lawyers, and officials.

Further, and in the alternative, is the second broad class of argument. If the first of our broad arguments related to the *inner workings* of each of the various analytical approaches and tools, the second of our broad arguments relates to the Court's explanations of how those tools and approaches *relate to one another*. Here, we argue that the Court often deploys a variety of inconsistent contradictory approaches and tools, and does so without acknowledging or attempting to reconcile the inconsistency. As such, it will be argued, the Court provides insufficient guidance to those who seek predictability, consistency, and transparency from its judgments with respect to our various cross-cutting themes. Thus, for example, there is significant uncertainty of this sort as to the Court's views on the internal structure of Article 6 (Part C) or as to the Court's approach to when the public interest may be taken into account in assessing a violation of Article 6 (Part E). The Court's case law, as described in this thesis, provides it with what we may term irrational flexibility: the ability to apply different tests or approaches without explaining why one test or approach is appropriate in one situation but not in another. It should be emphasised here that the thesis definitively accepts that the European Court *could* elect to adopt a highly nuanced series of analytical approaches or interpretative tools, each carefully chosen and adapted to the context of a particular right or a particular factual matrix, or that the Court *could* elect to adopt and explain a nuanced approach on the basis of its position as an arbiter of the philosophical and theoretical place of human rights in European democracy. What the thesis demonstrates, however, is that in key respects

the Court has failed to make and explain any such choice, and that it has failed to explain or acknowledge the inconsistencies where they exist. To put this point more colloquially, the Court *could* elect to adopt a flexible ‘different horses for different courses’ approach; the thesis demonstrates that all too often the Court has adopted an ‘all the horses on the same course without even recognising the traffic jam’ approach.

These two arguments manifest themselves in different ways in the thesis’ various Parts. But taken together, and across the sum of these Parts, they demonstrate significant incoherence and uncertainty in the European Court’s Article 6 criminal fair trial rights case law. This uncertainty undermines the ability of the Court’s case law to provide vital guidance to citizens, lawyers, and officials.

PART A: INTERPRETING ARTICLE 6

Stavros wrote that the ‘interpretation of Article 6 has proved from the outset a very difficult task for the European Convention organs.’³⁵ In a sense, this thesis is entirely about the European Court’s approach to interpreting Article 6. This Part, however, is more focussed. In this Part, we consider what general statements the Court has made in terms of identifying the principles that guide its interpretation of Article 6, what practices it has appeared to employ in its interpretation, and the interpretative importance that the European Court places on the role of Article 6 in a democratic society. These, it will be seen, are ‘cross-cutting issues’ in the sense that the term was explained in the Introduction.

It has been said that the Court has chosen to view ‘the task of interpretation as a single complex operation,’ and as a task for which it is inappropriate to organise interpretative tools into a hierarchy.³⁶ This may be the case. But it is no excuse for incoherence. Moreover, as Greer notes, this ‘unstructured approach’ has been the subject of little rigorous discussion.³⁷ While authors such as Greer have done valuable general theoretical work done on interpretative approaches under the Convention, in this Part our focus is narrower and somewhat more modest: it focuses on Article 6 criminal cases, and on the detail of those cases. It makes two broad arguments.

³⁵ Stavros, 327.

³⁶ See Ovey and White, 40; Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 194; Ost, 285.

³⁷ Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 194.

First, this Part argues that while the European Court has used a variety of interpretative techniques and tools in Article 6 cases, it has rarely explained *why* it uses a particular technique or tool in a particular case or type of case. The argument is not that the European Court should use only a single interpretative tool, or that the Court should not use different tools in different contexts. The argument is that, in any given case or class of cases, the European Court rarely explains why it uses the tool or tools that it does, and that this generates uncertainty. Second, this Part argues that when we look closely at each of the interpretative techniques or tools, the European Court's jurisprudence is marked by a lack of explanation and considerable uncertainty. This Part argues that this uncertainty and incoherence undermines the European Court's ability to guide likely future interpretations of Article 6, and thus reduces the transparency and predictability of its decisions.

Part A thus provides a preliminary foundation for our analysis of how the European Court approaches Article 6 in criminal cases. This Part is intimately connected to, and should be read with, Parts B to E. Part A begins by considering the interpretative starting points invoked by the European Court, followed by several interpretative techniques employed by the European Court in its Article 6 criminal cases. The second section of this Part considers what will be described as the 'democratic catchphrase': the European Court's frequent references to democracy and democratic societies in interpreting Article 6.

A.1 The European Court uses a variety of interpretative techniques in Article 6 cases

A.1.1 The European Court sometimes seeks guidance from the Vienna Convention in interpreting Article 6

While this thesis does not focus on issues of public international law, nor on the law of treaty interpretation in general, here we briefly consider the ways in which the law of treaties has shaped the European Court's interpretative approach. More detailed analysis of treaty law relevant to the Convention can be found elsewhere.³⁸

The Convention predates the Vienna Convention on the Law of Treaties ('the Vienna Convention').³⁹ The European Convention is, moreover, considered to be 'a treaty of a special kind',⁴⁰ a 'lawmaking treaty',⁴¹ and one that favours individuals' rights rather than state sovereignty.⁴² Notwithstanding these factors, the European Court's position, since *Golder* at least, has been that the European Court considers its interpretative approach to be guided by the Vienna Convention:

The Court...should be guided by Articles 31 to 33 of the Vienna Convention....[which] enunciate in essence generally accepted principles of international law...⁴³

³⁸ Clayton and Tomlinson (eds), *The Law of Human Rights*, 302-308; Ovey and White, 38-40; F Matscher, 'Methods of Interpretation of the Convention' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993), 65-68.

³⁹ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 33 (adopted 23 May 1969, entered into force 27 January 1980). See *Golder v United Kingdom* (App 4451/70) (1979-80) 1 EHRR 524 at [29]-[30].

⁴⁰ Clayton and Tomlinson (eds), *The Law of Human Rights*, 307. See Tobin, 20 et seq.

⁴¹ *Golder v United Kingdom* at [36]. See van Dijk and van Hoof, 557-558; Christoffersen, 50-51.

⁴² See R Bernhardt, 'Thoughts on the interpretation of human-rights treaties' in F Matscher (ed) *Protecting Human Rights: The European Dimension* (2nd edn, Carl Heymanns Verlag KG, Koln 1990), 70-71.

⁴³ *Golder v United Kingdom* at [29]. See Ost, 288; Emmerson, Ashworth and Macdonald, 69-70; Clayton and Tomlinson (eds), *The Law of Human Rights*, 302-308; Ovey and White, 38-40; H Golsong, 'Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna

Shortly after *Golder*, in *Luedicke, Belkacem and Koc v Germany*, the European Court considered the interpretation of Article 6:

For the purposes of interpreting Article 6(3)(e), the Court will be guided...by Articles 31 to 33 of the Vienna Convention....the Court will therefore seek to ascertain 'the ordinary meaning to be given to the terms' of Article 6(3)(e) 'in their context and in the light of its object and purpose'.⁴⁴

As we shall see, the Court tends to focus, ostensibly at least, on ascertaining an Article 6 provision's 'object and purpose'; much more rarely does the Court seek to identify the 'ordinary meaning' of Article 6 terms.

The *Golder* approach was also referred to in *Deumeland v Germany*⁴⁵ and in *Loizidou v Turkey*, in which the Court 'recalled':

that the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention....In the Court's view, the principles underlying the [European] Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction...⁴⁶

It should be noted that it was unclear in *Loizidou*, and subsequently, what effect being 'mindful' of this 'special character' was intended to have on the Court's interpretative approach.

Convention' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993), 147-151.

⁴⁴ *Luedicke, Belkacem and Koc v Germany* (App 6210/73) (1979-80) 2 EHRR 149 at [39], citing *Golder v United Kingdom* at [29]. This approach was applied in *Luedicke* at [46], considered in Stavros, 342-343; Trechsel, 331-332.

⁴⁵ *Deumeland v Germany* (App 9384/81) (1986) 8 EHRR 448 at [12].

⁴⁶ *Loizidou v Turkey* (App 15318/89) (18 December 1996) at [43]. Similar passages have appeared in cases including *Fogarty v United Kingdom* (App 37112/97) (2002) 34 EHRR 12 at [35]; *McElhinney v Ireland* (App 31253/96) (2002) 34 EHRR 13 at [36]; *Al-Adsani v United Kingdom* (App 35763/97) (2002) 34 EHRR 11 at [55]. See also Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 195; van Dijk and van Hoof, 517, 571.

The European Court has also used *Golder* as one of the foundations for its ‘evolutive’ interpretative approach to Article 6.⁴⁷ One example of this approach is evident in the concurring opinion of Judge Morenilla in *Hornsby v Greece*:

...the opinion of the majority is consistent with our case-law, which interprets [Article 6(1)] in accordance with the principles established in its Preamble and in Article 3 of the Vienna Convention...that is to say in a teleological, autonomous and evolutive manner, adapted to social needs.⁴⁸

It is now accepted orthodoxy that the European Court adopts a dynamic, living instrument approach to interpretation of the European Convention.⁴⁹

Article 32 of the Vienna Convention allows for *travaux préparatoires* to be consulted as a supplementary means of interpretation. A detailed study of the Article 6

⁴⁷ J Merrills, *The development of international law by the European Court of Human Rights* (2nd edn Manchester University Press, Manchester 1995), 69.

⁴⁸ *Hornsby v Greece* (App 18357/91) (1997) 24 EHRR 250 at [12] of the Concurring Opinion of Judge Morenilla; cf *Feldbrugge v Netherlands* (App 8562/79) (1986) 8 EHRR 425 at [12] of Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing. See van Dijk and van Hoof, 581.

⁴⁹ See, eg, E Brems, *Human Rights: Universality and Diversity* (International Studies in Human Rights vol 66, Martinus Nijhoff, The Hague 2001), 396-397; Christoffersen, 54-55; Emmerson, Ashworth and Macdonald, 78-82; Ovey and White, 46-47; Clayton and Tomlinson (eds), *The Law of Human Rights*, 304, 308-312; M-B Dembour, *Who Believes in Human Rights?* (CUP, Cambridge 2006), 21, 170-176; Mowbray, 193-194; Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 214. Note Bernhardt’s cautionary assessment of this orthodoxy: Bernhardt, 70; Matscher, 68-70; Ost, 302-303; P Mahoney, ‘Judicial Activism and Judicial Restraint in the ECHR’ (1990) 11 Human Rights Law Journal 57, 61-68; Lord Hoffman, [35]; A Daly, ‘The right of children to be heard in civil proceedings and the emerging law of the ECHR’ [2010] International Journal of Human Rights 1. But, as noted by Christoffersen, compare the warning of Joint Dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens in *Hirst v United Kingdom (No 2)(Grand Chamber)* (App 74025/01) (6 October 2005) at [6]. The first reference to a ‘living instrument’ approach in the Court’s case law came in *Tyrer*, an Article 3 case, in which the European Court offered neither explanation nor doctrinal support for its statement that ‘the Convention is a living instrument which...must be interpreted in the light of present-day conditions’: *Tyrer v United Kingdom* (App 5856/72) (1979-80) 2 EHRR 1 at [31]. See also *Dudgeon v United Kingdom* (App 7525/76) (1981) 4 EHRR 149 at [60]; *Marckx v Belgium* (App 6833/74) (1979-80) 2 EHRR 330 at [41]. See, on *Marckx*, H Golsong, ‘The European Court of Human Rights and the national law-maker’ in F Matscher (ed) *Protecting Human Rights: The European Dimension* (2nd edn, Carl Heymanns Verlag KG, Koln 1990), 242-243.

travaux is not possible within the limitations of this thesis.⁵⁰ For present purposes, it suffices to note that the *travaux* provide only limited guidance on Article 6: ‘no very specific and exact ideas on the scope of [Article 6] emerge from the *travaux*’.⁵¹ That being said, the *travaux* do indicate considerable uncertainty on the part of the drafters as to the role of the European Court, and particularly as to the extent to which it would be prevented from assuming the powers of a supranational appellate court.⁵² The drafters appeared to conclude that the European Court’s overview would be limited to a narrow band of cases,⁵³ and that its powers would be limited.⁵⁴ We will return to the specific theme of uncertainty over the role of the European Court in Part B.

Taking into account the limited guidance provided by the *travaux*, and the European Court’s evolutive approach, it is perhaps unsurprising that the European Court rarely expressly relies on the *travaux* in interpreting Article 6.⁵⁵ The cases in which the *travaux* are even mentioned are few in number and fall into one of several

⁵⁰ Further discussion of the *travaux* contents can be found elsewhere, and, on particular points, in Part E: AWB Simpson, *Human Rights and the End of Empire* (OUP, Oxford 2001); D Nicol, ‘Original Intent and the European Convention on Human Rights’ (2005) Public Law 152; Emmerson, Ashworth and Macdonald, 86-87; Merrills, 90-95; and Part E.1.4 below.

⁵¹ *Konig v Germany (No 1)* (App 6232/73) (1979-80) 2 EHRR 170 at Separate Opinion of Judge Matscher. See Nicol, 170-172.

⁵² See, eg, European Commission of Human Rights, *Preparatory Work on Article 6 of the European Convention: DH (56) 11* (Council of Europe, Strasbourg 1956); European Court of Human Rights, *Preparatory Work on Article 6 of the European Convention: CDH (68) 3* (Council of Europe, Strasbourg 1968).

⁵³ European Court of Human Rights, *Preparatory Work on Article 6 of the European Convention: CDH (68) 3*, 10; European Commission of Human Rights, 6-7.

⁵⁴ European Commission of Human Rights, 6-8; European Court of Human Rights, *Preparatory Work on Article 6 of the European Convention: CDH (68) 3*, 8.

⁵⁵ See Emmerson, Ashworth and Macdonald, 78; Ovey and White, 40-41; Clayton and Tomlinson (eds), *The Law of Human Rights*, 307; cf Tobin, 22 et seq.

groups. First, some cases acknowledge that the *travaux* provide little useful guidance,⁵⁶ or expressly state that it is unnecessary to resort to the *travaux*.⁵⁷ Second, there are cases in which the European Court draws on the *travaux* to aid understanding of the meaning of ‘civil’ in Article 6.⁵⁸ Third, there are cases where passing reference is made without engaging in analysis of any depth, or passing reference is made to emphasise a point.⁵⁹

A.1.2 The European Court’s attempts at teleological interpretation are marked by incoherence

As we saw above, the Vienna Convention provides an interpretative framework that the European Court applies to the Convention. In this section, we consider the Court’s attempts to implement part of the interpretative approach expressed in Article 31(1) of the Vienna Convention: that a treaty ‘shall be interpreted’ among other things, ‘in the light of its object and purpose’. Specifically, here we consider the

⁵⁶*Pakelli v Germany* (App 8398/78) (1984) 6 EHRR 1 at [31]; *Axen v Germany* (App 8273/78) (1984) 6 EHRR 195 at [31]; *Pretto v Italy* (App 7984/77) (1984) 6 EHRR 182 at [26]; *Sutter v Switzerland* (App 8209/78) (1984) 6 EHRR 272 at [33]; *B and P v United Kingdom* (App 36337/97) (2002) 34 EHRR 19 at Concurring Opinion of Judge Sir Nicolas Bratza.

⁵⁷ *Maaouia v France* (App 39652/98) (2001) 33 EHRR 42 at Dissenting Opinion of Judge Loucaides joined by Judge Traja; *Jorgic v Germany* (App 74613/01) (2008) 47 EHRR 6 at [68]. See also *Golder v United Kingdom* at [36]; Nicol, 167-168. See also P van Dijk, ‘The interpretation of ‘civil rights and obligations by the European Court of Human Rights’ in F Matscher (ed) *Protecting Human Rights: The European Dimension* (2nd edn, Carl Heymanns Verlag KG, Koln 1990), 140.

⁵⁸ *Deumeland v Germany* at [20] of the Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing; *Feldbrugge v Netherlands* at [20] of Joint Dissenting Opinion of Judges Ryssdal, Bindschedler-Robert, Lagergren, Matscher, Sir Vincent Evans, Bernhardt and Gersing; *Ferrazzini v Italy* (App 44759/98) (2002) 34 EHRR 45 at Dissenting Opinion of Judge Lorenzen; *Neumeister v Austria* (App 1936/63) (1979-80) 1 EHRR 91 at [14]; *Pellegrin v France* (App 28541/95) (2001) 31 EHRR 26 at [5] of Joint Dissenting Opinion of Judges Tulkens, Fischbach, Casadevall and Thomassen.

⁵⁹ *Golder v United Kingdom* in Separate Opinion of Judge Zekia; *Saunders v United Kingdom* at Concurring Opinion of Judge Walsh. See *Markovic and Ors v Italy* (App 1398/03) (14 December 2006) at Dissenting Opinion Of Judge Zagrebelsky; Ost, 289-290.

Court's attempts to invoke the 'object and purpose' of Article 6 in interpreting that provision.⁶⁰ The argument is straightforward: while the European Court is enthusiastic in invoking the 'object and purpose' of Article 6, it rarely explains why the 'object and purpose' approach is used in a particular case in preference to some of the other interpretative approaches outlined in this Part, and it seldom identifies or explains what the object and purpose of the Article are. Ultimately, it is argued that the Court's interpretative approach in this regard is incoherent and undertheorised. This incoherence undermines the ability of the law to provide guidance of the sort outlined in our Introduction.⁶¹

In *Sutter v Switzerland*, for example, the Court prioritised a purposive interpretive approach:

Whilst the member States...all subscribe to this principle of publicity, their legislative systems and judicial practice reveal some diversity as to its scope and manner of implementation, as regards both the holding of hearings and the "pronouncement" of judgments. The formal aspect of the matter is, however, of secondary importance as compared with *the purpose underlying the publicity required* by [Article 6(1)]. The prominent place held in a democratic society by the right to a fair trial impels the Court, for the purposes of the review which it has to undertake in this area, to examine the realities of the procedure in question....⁶²

The *Sutter* Court does not, in this passage or elsewhere, expressly identify what is, in fact, the purpose underlying the publicity requirement or how that purpose assists interpretation of the provision. As remarkable as it may seem to fail to identify the

⁶⁰ See also Merrills, 76-78.

⁶¹ cf the early view of Ost, 292-302.

⁶² *Sutter v Switzerland* at [27], citing *Pretto v Italy* at [21] and *Axen v Germany* at [26].

‘object and purpose’ relied upon, *Sutter* is not the only case in which the Court has done just that.⁶³

Similarly, in *DeCubber v Belgium*, the Court adopted an ‘object and purpose’ approach to an impartiality question:

the Court recalls that a restrictive interpretation of Article 6(1)...would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society...⁶⁴

As with *Sutter*, the *DeCubber* Court does not explain why an object and purpose approach was appropriate in this case.⁶⁵ The European Court also fails again to identify or explain the actual ‘object and purpose’ on which it relies. As we shall see throughout this section, this failure to explain makes it harder to predict the likely outcomes of future cases, and adds to the general sense of incoherence in this area.

In *Colozza*, the European Court was willing to derive object and purpose of the Article as a whole in order to ground an implied right:

Although this is not expressly mentioned in [Article 6(1)], *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.⁶⁶

⁶³ It may also be noted here that the European Court declined to adopt an autonomous meaning of the word ‘publicity’ despite its willingness to do so when interpreting other terms in the Convention, and did so without explanation. cf, eg, *Engel v Netherlands* (App 5100/71) (1979-80) 1 EHRR 647 at [81]; *Matscher*, 70-73. Detailed consideration of the ‘autonomous meaning’ jurisprudence is not within the scope of this thesis.

⁶⁴ *DeCubber v Belgium* (App 9186/80) (1985) 7 EHRR 236 at [30]; Ost, 293-294.

⁶⁵ The only explanation is a citation of *Delcourt v Belgium* (App 2689/65) (1979-80) 1 EHRR 355 at [25].

⁶⁶ *Colozza v Italy* (App 9024/80) (1985) 7 EHRR 516 at [27] (emphasis added). See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 589; Trechsel, 252 et seq. The *Colozza* passage is referred to in a number of subsequent cases, eg, *Brozicek v Italy* (App 10964/84) (1990) 12 EHRR 371 at [45]; *Hermi v Italy* (App 18114/02) (2008) 46 EHRR 46 at [59]; *Somogyi v Italy* (App 67972/01) (2008) 46 EHRR 5 at [65]; *T v Italy* (App 14104/88) (12 October 1992) at [26]; *FCB v Italy*

We shall return to the specific issue of implied rights in Part D; for now, we note that in *Colozza* and subsequent cases, the Court invokes ‘object and purpose’ as ‘show[ing]’ that an applicant is entitled to take part in a criminal hearing. We do not cavil with the latter principle. The objection, instead, is to the Court’s cavalier, under-explained use of ‘object and purpose’: at no point does *Colozza* identify what the object and purpose of Article 6 *are*, nor does it explain why these defined factors lead to the conclusion that the Court outlined.

If cases like *Sutter*, *DeCubber* and *Colozza* purported to invoke the ‘object and purpose’ of Article 6, in *John Murray v United Kingdom*, the European Court demonstrated a willingness to interpret Article 6 in accordance with its ‘aims’ in the context of the right to silence and the privilege against self-incrimination:

By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.⁶⁷

In *Allan v United Kingdom*, the European Court repeats the *John Murray* language, stating that the purpose of the immunities is:

to provide an accused with protection against improper compulsion by the authorities and thus to avoid miscarriages of justice and secure *the aims of Article 6*.⁶⁸

Despite the Court drawing on ‘the aims of Article 6’ as a partial basis for its interpretative approach in these cases, at no stage does it specify what these aims *are*, or

(App 12151/86) (1992) 14 EHRR 909 at [33]; *Belziuk v Poland* (App 23103/93) (2000) 30 EHRR 614 at [37].

⁶⁷ *John Murray v United Kingdom* (App 18731/91) (1996) 22 EHRR 29 at [45].

⁶⁸ *Allan v United Kingdom* (App 48539/99) (2003) 36 EHRR 12 at [44], citing *John Murray v United Kingdom* at [45] (emphasis added). This passage appears almost verbatim in cases including *JB v Switzerland* (App 31827/96) [2001] Crim LR 748 at [64]; *Shannon v United Kingdom* (App 6563/03) (2006) 42 EHRR 31 at [39]; *Shabelnik v Ukraine* (App 16404/03) (19 February 2009) at [55]; *Bykov v Russia* (App 4378/02) (10 March 2009) at [92].

explain why this sort of case warranted this particular interpretative approach. Moreover, the Court gave no explanation for the proposition that Article 6 should be interpreted in a way that avoids miscarriages of justice, and did not make it clear whether avoiding miscarriages of justice is, in fact, one of the aims of Article 6. This lack of clarity is troubling in terms of the ability of the Court's case law to provide guidance.

In addition to sometimes referring to 'object', 'purpose', and 'aim,' the Court has also referred to the 'spirit of Article 6'.⁶⁹ In still other cases, such as *Medenica v Switzerland*, the Court described its task as being 'to determine whether the *result* called for by the Convention has been achieved'.⁷⁰ It is unclear whether notions of 'spirit' and 'result' are meant to be used mutually exclusively from an approach that looks at the 'object and purpose' of a provision, or when one approach should be used in preference to the other. Even if we assume there is no conflict between a 'result-oriented' or 'spirit-orientated' interpretation and other interpretative approaches, the Court crucially gives no explanation of what it actually considers to be 'the result called for by the Convention' or the 'spirit of Article 6' in these cases or more generally.

⁶⁹ See *Marziano v Italy* (App 45313/99) (28 November 2002) at [31] (*l'esprit de l'Article 6*); *Sejdovic v Italy* (App 56581/00) (10 November 2004) at [33]. See also: *Sejdovic v Italy* (Grand Chamber) (App 56581/00) (1 March 2006) at [86]; *Hermi v Italy* at [73]; *Talat Tunc v Turkey* (App 32432/96) (27 March 2007) at [59]; *Salduz v Turkey* (App 36391/02) (2009) 49 EHRR 19 at [59]; *Demebukov v Bulgaria* (App 68020/01) (28 February 2008) at [47]; *Sakhnovskiy v Russia* (App 21272/03) (5 February 2009) at [44]; *Protopapa v Turkey* (App 16084/90) (24 February 2009) at [82]; *Krestovskiy v Russia* (App 14040/03) (28 October 2010) at [28]; *Sakhnovskiy v Russia* (Grand Chamber) (App 21272/03) (2 November 2010) at [90].

⁷⁰ *Medenica v Switzerland* (App 20491/92) (14 June 2001) at [55] (emphasis added). See also *Somogyi v Italy* at [67]; *Colozza v Italy* at [30]; Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp 2002), 34; Christoffersen, 299-300.

This semantic confusion arguably reached a crescendo in *Kolu v Turkey*, in which, in the space of a single paragraph, the European Court relied on ‘the concept of fairness enshrined in Article 6(1)’; ‘the concept of fair trial’; and ‘the aims of Article 6’.⁷¹ The Court may have intended that the reader regard these three phrases as synonymous or interchangeable, but such an intention is not clear. Alternatively, the European Court may have carefully chosen three different phrases for three different purposes, but did so without indicating why each phrase is appropriate for each different purpose. In judgments such as this, the European Court hinders transparency and the predictability of its judgments by not making its interpretative reasoning process completely clear: when should we invoke the concept of fairness? When should the concept of a fair trial be invoked? And when are we able to consider the aims of Article 6? What are those aims and concepts? The Court’s work in these cases leaves much unexplained.⁷² Of course, there may well be eminently sensible reasons why the European Court might choose to adopt one interpretative approach in one class of case, and another in another class of case. What is lacking is any explanation of the interpretative choices, and any elaboration on how those choices work in a given case.

It must be acknowledged that there are some cases in which the European Court has attempted to identify the aim or object or purpose of Article 6. Thus, for example, in *Stefanelli v San Marino*, the Court attempted to identify at least one of the aims of Article 6, but with minimal interpretative utility:

⁷¹ *Kolu v Turkey* (App 35811/97) (2 August 2005) at [51] (emphasis added) (translated). In the original, ‘la notion d’équité consacrée par l’Article 6(1)’; ‘la notion de procès équitable’; and ‘les buts de l’Article 6’.

⁷² On the links between ‘object and purpose’ and dynamic interpretation, see Golsong, ‘Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention’, 149; Ost, 292-293.

By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely *a fair trial*, the guarantee of which is one of the principles of any democratic society...⁷³

In so doing, the Court has identified that one of the aims of Article 6(1)'s fair trial guarantee is, in fact, 'a fair trial'. This circumlocution contributes little to the Court's analysis. The Court has also identified the purpose of Article 6 as 'enshrining the fundamental principle of the rule of law', without elaborating on how that principle might apply.⁷⁴ Another attempt came in *Salduz v Turkey*, in which the Court addresses the 'purpose' of Article 6:

even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings.⁷⁵

In this passage, therefore, the European Court strongly implies that the 'primary' purpose of Article 6 'is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge"'. However uncontroversial this statement may appear, by identifying a 'primary' purpose, the Court implicitly relegates all other purposes to lesser 'secondary' status, and has done so without explanation and without defining what those secondary purposes might be.

⁷³ *Stefanelli v San Marino* (App 35396/97) (2001) 33 EHRR 16 at [19] (emphasis added), citing, 'as the most recent authority', *Serre v France* (App 29718/96) (29 September 1999) at [21].

⁷⁴ *Salabiaku v France* (App 10519/83) (1991) 13 EHRR 379 at [28].

⁷⁵ *Salduz v Turkey* at [50]. On *Salduz*, see R Pattenden, 'Case Comment: Right to counsel at the police station' (2011) 15(1) *International Journal of Evidence & Proof* 70; T van de Laar and R de Graaff, 'Salduz and Miranda: Is the US Supreme Court pointing the way?' [2011] *EHRLR* 304; W Wu, 'Interrogational fairness under the European Convention on Human Rights' (2011) 39 *International Journal of Law, Crime and Justice* 37; E Borge, 'Exceptionalism and internationalism in the Supreme Court: Horncastle and Cadder' [2011] *Public Law* 475; Bratza. On the application of the guarantees to the investigation stage, see, eg, Summers, 129-131.

In this section, therefore, our argument has been straightforward: the European Court does not explain why it chooses to use an ‘object and purpose’ approach in some cases, and it rarely identifies what the relevant object and purpose of Article 6 actually are.

A.1.3 The European Court uses several techniques to overcome ordinary literal meanings

As was noted above, Article 31(1) of the Vienna Convention places significance on the ‘ordinary meaning’ of a provision. It is rare, however, for the European Court to engage in detailed analysis of the ordinary meaning of Article 6, or any component part thereof. One example of such detailed analysis appeared in *Pakelli v Germany*, in which the Court examines Article 6(3)(c) and linguistic differences between the French and English texts.⁷⁶ While such examples exist, they are not common.⁷⁷ Indeed, the Court has demonstrated a willingness to overlook apparently straightforward literal analysis.⁷⁸ This section considers three examples of techniques the Court has used to overcome ordinary literal meanings in Article 6 cases. Crucially, in terms of the broader argument of this Part, the Court rarely explains when it will use any one of these techniques in preference to any other, or when it will use any one of these techniques rather than the interpretative techniques outlined elsewhere in this Part.

⁷⁶ *Pakelli v Germany* at [31]. See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 636-637.

⁷⁷ See also *Luedicke, Belkacem and Koc v Germany* at [42]-[46]; Merrills, 70-71.

⁷⁸ cf Golsong, 'Interpreting the European Convention on Human Rights Beyond the Confines of the Vienna Convention', 23.

The first technique is to dismiss an apparently ordinary meaning by reference to the Convention's drafters' intentions, even if those intentions are not ascertainable. This approach appears, for example, in *Axen v Germany*, where the Court considered the public pronouncement of judgment:

However, many member States...have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of...their courts.... The authors of the Convention cannot have overlooked that fact, even if concern to take it into account is not so easily identifiable in their working documents as in the *travaux préparatoires* of the [International Covenant on Civil and Political Rights]. The Court therefore does not feel bound to adopt a literal interpretation.⁷⁹

In this way, the Court avoids a literal interpretation by hypothesising what the drafters' intentions must have been. We may note that the Court does not explain when a drafters' intention approach is to be preferred to the Court's 'living instrument' view of the Convention, or how the two might interact.⁸⁰

The second and third techniques are, in a sense, both examples of the Court drawing on what Article 31(1) of the Vienna Convention describes as the 'context' of the provision under consideration.⁸¹ Context provides the Court with an array of interpretative options that allow it to sidestep a literal interpretation. Thus the second technique is to overcome literal obstacles by reference to aspects of the relationship between different component parts of Article 6. In *Bonisch v Austria*, the Court overcame a literal obstacle by reference to the internal structure of Article 6:

Read literally, [Article 6(3)(d)] relates to witnesses and not experts. In any event, the Court would recall that the guarantees contained in

⁷⁹ *Axen v Germany* at [31]. See Ost, 288-289.

⁸⁰ Mahoney, 69-70. cf Part A.1.1.

⁸¹ See, eg, Ost, 290.

[Article 6(3)] are constituent elements, amongst others, of the concept of a fair trial....In the circumstances of the instant case, the Court, whilst also having due regard to the [Article 6(3)] guarantees, including those enunciated in sub-paragraph (d), considers that it should examine the applicant's complaints under the general rule of [Article 6(1)].⁸²

In this way the European Court avoids having to deal with a potentially inconvenient Article 6(3)(d) issue by instead addressing the same issue under the broader auspices of Article 6(1). This approach raises questions about the internal structure of Article 6, and, in particular, about the relationship between the various component rights and the overarching fair hearing guarantee contained in Article 6(1). Often, the European Court's treatment of the internal structure of Article 6 is marked by a lack of clarity and an undeveloped sense of how the different component parts interrelate; the internal structure of Article 6 is considered in greater detail in Part C. For now, however, it is worth marking this technique as a way of circumventing a potentially inconvenient literal interpretation of one component part of Article 6.

If the second technique involved looking beyond a particular provision in favour of Article 6 as a whole, the third technique looks beyond Article 6 to the context of the Convention system as a whole. An example is *Maaouia v France*, in which the Court considered 'the applicability of Article 6(1) to procedures for the expulsion of aliens'.⁸³ In describing its interpretative approach, the Court focussed not on Article 6 in isolation, but rather on the Convention system *as a whole*:

[36] The Court points out that the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols. In that connection, the Court notes that Article 1 of Protocol No 7...contains procedural guarantees applicable to the

⁸² *Bonisch v Austria* (App 8658/79) (1987) 9 EHRR 191 at [29].

⁸³ *Maaouia v France* at [35].

expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take “further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ...”. Taken together, those provisions show that the States were aware that Article 6(1) did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere...

[37] The Court therefore considers that by adopting Article 1 of Protocol No 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6(1) of the Convention.⁸⁴

In light of our earlier discussion, this passage raises questions. For example, if Convention provisions ‘must be construed in light of the entire Convention system’, then when is it appropriate for the Court to focus specifically on the object and purpose of *Article 6*, as opposed to the object and purpose of the *entire* Convention system? In what ways do the two differ? If the object and purpose of Article 6 are not in fact different to those of the entire Convention system, it is unclear why the Court would refer to the Article in some cases and the Convention system in others.

As Ovey and White note, the difficulty with using context as an interpretative tool is that it can ‘vary considerably,’ from consisting ‘solely of paragraphs of the same article’ to ‘the whole Convention, including its Preamble and Protocols’.⁸⁵ This interpretative flexibility unaccompanied by explanation, it is submitted, leads to incoherence and inconsistency in the Court’s interpretative framework. It also makes it difficult to predict the likely outcome of future cases and thus be guided by the Court’s case law. Moreover, if it is to be a general principle that the provisions of the Convention must be construed in light of the entire system, it remains unclear what

⁸⁴ Ibid. at [36][37]. See Ovey and White, 45.

⁸⁵ Ovey and White, 45. See Ost, 290.

impact such a principle might have on the Court's jurisprudence in areas such as the admissibility of evidence obtained through breach of a Convention right.⁸⁶

This subsection considered three techniques that the Court has utilised to overcome literal interpretations, particularly through the use of context. It argued that the Court had not explained when each technique should be used in preference to the others, or in preference to techniques considered elsewhere in this Part. In the next section, we consider the Court's exhortation that rights protection should be 'practical and effective' in the Article 6 context.

A.1.4 The European Court inconsistently cites the need for 'practical and effective' interpretation

The European Court has frequently expressed the view that the Convention 'is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.⁸⁷ This view was first articulated in the Article 6 civil context by *Airey v Ireland*,⁸⁸ and in the criminal context by *Artico v Italy*.⁸⁹ Thus, for example, in

⁸⁶ See also Part B.6 below.

⁸⁷ *Artico v Italy* (App 6694/74) (1980) 3 EHRR 1 at [33]. See also cases such as *Imbrioscia v Switzerland* (App 13972/88) (1994) 17 EHRR 441 at [38]; *Bertuzzi v France* (App 36378/97) (13 February 2003) at [23][25]; *Allenet de Ribemont v France* (App 15175/89) (1995) 20 EHRR 557 at [35]; *Panteleyekno v Ukraine* (App 11901/02) (29 June 2006) at [65]; *Nerattini v Greece* (App 43529/07) (18 January 2009) at [23]; *Riepan v Austria* (App 35115/97) (14 November 2000) at [29]; *Peltier v France* (App 32872/96) (21 May 2002) at [36]; *Bakan v Turkey* (App 50939/99) (12 June 2007) at [71]; *Boldea v Romania* (App 19997/02) (15 February 2007) at [28]; *Sakhnovskiy v Russia* at [41]; *Assanidze v Georgia* (App 71503/01) (2004) 39 EHRR 32 at [181][182]; *Mostacciolo Giuseppe v Italy (No 2)* (App 65102/01) (29 March 2006) at [81]; *Vanjak v Croatia* (App 29889/04) (14 January 2010) at [39]. See, further, Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 197; Gearty, *Principles of Human Rights Adjudication*, 72-73; Christoffersen, 55-56; Ost, 294; Merrills, 98-122; Dembour, *Who Believes in Human Rights?*, 21; E Brems, 'Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights' (2005) 27 *Human Rights Quarterly* 294, 298; Tobin, 25 et seq. cf *R v Big M Drug Mart Ltd* [1985] 1 S.C.R.295 (Supreme Court of Canada) at [117].

⁸⁸ *Airey v Ireland* (App 6289/73) (1979-80) 2 EHRR 305 at [24].

Lala v Netherlands, the Court used the ‘practical and effective’ test to dismiss ‘unduly formalistic’ conditions:

Everyone charged with a criminal offence has the right to be defended by counsel. For this right to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions...⁹⁰

The ‘practical and effective’ approach has also been employed, again without much in the way of explanation, in cases concerning Article 6(2) and Article 6(3).⁹¹ Of course, it may well be defensible for the Court to adopt a ‘practical and effective’ approach. The difficulty arises in the Court’s inability to explain when it will resort to a practical and effective interpretation and when it will prefer a more restrictive text- or context-focussed interpretation. In all these cases, there is at least an argument that can be made that the ‘practical and effective’ approach provides the Court with an ex post facto justification for interpretations that might otherwise be in tension with the provision’s literal meaning or in tension with, for example, a more purposive interpretation.

Such an argument is strengthened if one considers the cases that do not utilise the ‘practical and effective’ approach as well as considering those that do. For example, in *Lamanna* the European Court adopted a purposive approach. It held that even though judgment had not been pronounced publicly in two lower court hearings, the

⁸⁹ *Artico v Italy* at [33]; Trechsel, 194-195.

⁹⁰ *Lala v Netherlands* (App 14861/89) (1994) 18 EHRR 586 at [34]. The decision in *Pelladoah*, delivered the same day as *Lala*, repeats this passage virtually verbatim, and also lacks explanation or doctrinal support: *Pelladoah v Netherlands* (App 16737/90) (1995) 19 EHRR 81 at [41].

⁹¹ See, eg, *Allenet de Ribemont v France* at [35], citing *Artico v Italy* at [33], *Soering v United Kingdom* (App 14038/88) (1989) 11 EHRR 439 at [34], and *Cruz Varas v Sweden* (App 15576/89) (1992) 14 EHRR 1 at [99]; *Protobapa v Turkey* at [80].

purpose of Article 6(1) had been served 'by the public delivery of the appellate court's judgment'.⁹² In so doing, the European Court overlooked the plain failure of the lower courts to render judgment in public, and demonstrated a willingness to focus on a purposive approach. The European Court did so without explaining its approach. One wonders what the result in this case might have been if the European Court had, instead, adopted the view that interpretation should aspire to guarantee 'rights which are practical and effective as opposed to theoretical and illusory'⁹³ at the lower court level.

In other instances, the Court appears to acknowledge the 'practical and effective' doctrine before resiling from it. In *Czekalla*, and *Bogumil*, the European Court considered alleged violations of Article 6(3)(c).⁹⁴ In *Czekalla* (and in a similar passage in *Bogumil*), the Court stated:

While it has frequently observed that the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective, assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused...The competent national authorities are required under Article 6(3)(c) to intervene only if a failure by legal-aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.⁹⁵

This passage involves the European Court acknowledging that 'practical and effective' is the overarching approach, but that there are exceptions to that approach, exceptions

⁹² *Lamanna v Austria* (App 28923/95) (10 July 2001) at [34]. See Trechsel, 132; see also Part E, below.

⁹³ *Allenet de Ribemont v France* at [35].

⁹⁴ *Czekalla v Portugal* (App 38830/97) (10 October 2002); *Bogumil v Portugal* (App 35228/03) (7 October 2008).

⁹⁵ *Czekalla v Portugal* at [60]; see also *Bogumil v Portugal* at [46]. *Czekalla* cites *Daud v Portugal* (App 22600/93) (2000) 30 EHRR 400 at [38]; see also *Artico v Italy* at [36]; *Kamasinski v Austria* (App 9783/82) (1991) 13 EHRR 36 at [65]; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 641; Trechsel, 205-206; 287-290.

defined seemingly by the inconvenience of the approach's application. But in the absence of a general and explained theory of the 'practical and effective' doctrine, in future cases involving Article 6(3)(c), or indeed involving any other Article 6 right, it is difficult to know whether the European Court will adopt its usual 'practical and effective' approach, or if it will recognise an exception.

Unless the Court is willing to explain why a particular case, or class of case, justifies a generous 'practical and effective' interpretation rather than a more restrictive interpretation, the risk is that it will appear to be selecting interpretative approaches in an arbitrary, and perhaps even opportunistic, fashion. The interests certainty and predictability demand a coherent, explained and consistent approach to interpretation.

A.1.5 The European Court's use of extrinsic materials is opaque

In addition to the interpretative catchphrases identified above, the European Court has also drawn on extrinsic material – often, documents of the Council of Europe – in interpreting Article 6. Thus in *Sander v United Kingdom*, for example, the Court considered the extent to which a juror's reportedly-racist comments might violate the applicant's Article 6(1) rights. In finding a violation, the Court considered the alleged racism:

[23]... to be a very serious matter given that...eradication of racism has become a common priority goal for all Contracting States (see, inter alia, Declarations of the Vienna and Strasbourg Summits of the Council of Europe).....

[34]Given the importance attached by all Contracting States to the need to combat racism (see [23] above), the Court considers that the judge should have reacted in a more robust manner...⁹⁶

⁹⁶ *Sander v United Kingdom* (App 34129/96) (2001) 31 EHRR 44 at [23], [34].

This thesis does not dispute the abhorrence of racism, but it is important to note that the Court provides no explanation of the criteria it uses to determine when it is appropriate to draw on this sort of extrinsic material to elucidate the meaning of Article 6.

Indeed, if the Court intended that the Vienna and Strasbourg declarations become guides to interpreting the Convention, one wonders why the Court has not elsewhere drawn on passages such as this from the Strasbourg declaration:

Sharing the concern of citizens about the new dimension of threats to their security and the dangers which these threats constitute for democracy: ...[we] decide to seek common responses to the challenges posed by the growth in corruption, organised crime and drug trafficking throughout Europe...⁹⁷

Such a passage might justify all manner of state restrictions on rights in the name of fighting corruption, organised crime and drugs. An advocate before the Court could legitimately cite this passage from the Strasbourg declaration, following the example of *Sander*. This thesis makes no comment on the normative desirability of such a possible argument. Instead, it seeks to emphasise that unexplained and unjustified use of extrinsic materials as an aid to interpretation may lead to greater incoherence and uncertainty.

The problems with extrinsic materials are not confined to these two conventions. A broadly similar approach was evident in *Ramanauskas v Lithuania*, in

⁹⁷ Second Summit of Heads of State and Government of the Council of Europe, *Final Declaration* (Strasbourg, 10-11 October 1997).

which the Court drew on the Council of Europe's Criminal Law Convention on Corruption ('the Corruption Convention'):⁹⁸

[50]....authorises the use of special investigative techniques, such as undercover agents, that may be necessary for gathering evidence in this area, provided that the rights and undertakings deriving from international multilateral conventions concerning "special matters", for example human rights, are not affected.

[51] That being so, *the use of special investigative methods* – in particular, undercover techniques – *cannot in itself infringe the right to a fair trial*. However...their use must be kept within clear limits...⁹⁹

The Court provided no further reasoning in support of the proposition that interpretation of the Convention should be constrained by the Corruption Convention. While subsequent conventions may prevail over a previous convention to the extent of any inconsistency, the Court identifies no inconsistency, and identifies no provision in the Corruption Convention justifying such a cursory treatment of the issue. The Corruption Convention, it may be noted, mentions 'human rights' only once, in its preamble.

The use of extrinsic materials is not limited to Council of Europe documents.¹⁰⁰

In *Ergin v Turkey (No 6)*, the Court used extrinsic materials to aid its interpretation in a case involving military tribunals with jurisdiction over civilians. The Court derived support for:

⁹⁸ European Criminal Law Convention on Corruption, ETS 173 (adopted 27 January 1999, entered into force 1 July 2002).

⁹⁹ *Ramanauskas v Lithuania* (App 74420/02) [2008] Crim. LR 639 at [50][51] (emphasis added).

¹⁰⁰ See also E Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the ECtHR' (1996) 56 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 240, 286-287.

its approach from developments over the last decade at international level...which confirm the existence of a trend towards excluding the criminal jurisdiction of military courts over civilians.¹⁰¹

The Court was reassured in its conclusion, in 'light of the foregoing, and particularly of the situation at international level'.¹⁰² The international developments to which the European Court referred included UN Human Rights Committee comment and observations,¹⁰³ reports to the Commission on Human Rights,¹⁰⁴ and Inter-American Court of Human Rights case law.¹⁰⁵ The Court does not explain why such use of extrinsic materials is justified. Even if we accept that material may be useful, it is important that the Court more fully explain how it chooses which material to use, and when it is appropriate to use extrinsic material. For example, should extrinsic material only be used when the object and purpose of a provision is unclear? May it be used if the European Court has not yet applied the 'practical and effective' test?

Our argument is *not* that the Court should never take into account extrinsic materials, or that such materials may sometimes be useful. It is that the Court should be clear in justifying and explaining its use of extrinsic materials. There are Council of Europe conventions on topics ranging from television¹⁰⁶ and cinema¹⁰⁷ to the

¹⁰¹ *Ergin v Turkey (No 6)* (App 47533/99) (2008) 47 EHRR 36 at [45].

¹⁰² *Ibid.* at [54].

¹⁰³ *Ibid.* at [22][23].

¹⁰⁴ *Ibid.* at [24].

¹⁰⁵ *Ibid.* at [25].

¹⁰⁶ European Convention on Transfrontier Television, ETS 132 (adopted 5 May 1989, entered into force 1 May 1993).

¹⁰⁷ European Convention on Cinematographic Co-Production, ETS 147 (adopted 2 October 1992, entered into force 1 April 1994).

environment¹⁰⁸ and 'Cybercrime'.¹⁰⁹ Unless it is clear when these conventions may be invoked, and what interpretative work they may be used for, the European Court's interpretative approach to Article 6 will remain opaque and potentially arbitrary.

A.2 Democracy and Article 6

This section focuses on one aspect of the European Court's general interpretative approach to Article 6 criminal cases: its view that Article 6 rights hold an important, prominent place in a democratic society. In some ways, this view overlaps with the European Court's 'object and purpose' analysis considered above, but it is worthy of specific examination insofar as it is one of the doctrines which the European Court relies on in its Article 6 case law.

This section examines five ways in which the European Court uses the assertion that Article 6 rights hold an important place in a democratic society, and the extent to which they are explained by the European Court.¹¹⁰ This section does not argue that fair trial rights are unimportant in a democratic society; it argues that the way in which the Court has made repeated use of this assertion has rendered its judicial reasoning opaque. Moreover, it argues that there is a lack of explanation for how the assertion

¹⁰⁸ European Convention on the Protection of Environment through Criminal Law, ETS 172 (adopted 4 November 1998).

¹⁰⁹ European Convention on Cybercrime, ETS 185 (adopted 23 November 2001, entered into force 1 July 2004).

¹¹⁰ For the European Court's consideration of 'democracy' generally, see C Gearty, 'Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal' (2000) 51 *Northern Ireland Legal Quarterly* 381; A Mowbray, 'The Role of the ECHR in the Promotion of Democracy' [1999] *Public Law* 703; S Marks, 'The European Convention on Human Rights and its "Democratic Society"' (1995) 66 *British Yearbook of International Law* 209; Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 199-200; Ost, 300-301; Merrills, 125-149; Foster, 53-54. On the links between proportionality and democracy, see Christoffersen, 195.

should be applied. Together, these criticisms undermine the extent to which the case law can be said to be consistent with the rule of law ideals outlined above.

A.2.1 The European Court uses the 'democratic society' as interpretative tool

Of the cases that refer to the role of fair trial rights in a democratic society, we may begin with *Delcourt*.¹¹¹ In considering the applicability of Article 6 to appellate proceedings, *Delcourt* included the following passage:

In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision.¹¹²

While it may be self-evident to some extent, we may note that the European Court does not explain *why* it views the right to a fair trial as holding *such* a prominent place in a democratic society. Moreover, why should the centrality of fair trial rights in a democratic society rule out a restrictive interpretation? Indeed, surely it could just as easily be said that the centrality of fair trial in a democratic society meant Article 6 should be read strictly literally,¹¹³ or should be read strictly in accordance with its framers' intentions? Furthermore, how does this sort of expansive interpretation approach fit with the interpretative approaches outlined earlier in this Part? The

¹¹¹ *Delcourt v Belgium*.

¹¹² *Ibid.* at [25], citing *Wemhoff v Germany* (App 2122/64) (1979-80) 1 EHRR 55 at 75 ([8] of 'As to the Law'). See Harris, O'Boyle and Warbrick, 201; Trechsel, 82-83; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 514, 582. While *Borgers* arguably had the effect of overruling *Delcourt* (see eg, Dembour, *Who Believes in Human Rights?* 166-168; Summers, 108-109), the passage is nonetheless of interest.

¹¹³ To some extent this was the position of the Concurring Opinion of Judge Bernhardt, joined by Judge Bindschedler-Robert and Judge Matscher in *Sutter v Switzerland* (see Trechsel, 83).

judgment in *Delcourt* does not answer these questions expressly or explain its reasoning process.¹¹⁴

Moreover, the *Delcourt* Court does not explain, or elaborate on, its assertion that fair trial rights hold a *special* place in a democratic society. Why does this matter? Predictability and consistency demand that the Court explain why Article 6 holds *particular* significance in a democratic society that justifies a different interpretative approach from that which might be used when considering, for example, the prohibition on torture¹¹⁵ or the freedom of expression.¹¹⁶ If, in the alternative, the Court is articulating a more general approach to interpretation of the Convention as a whole, then transparency demands that the Court not cloud its reasoning through reference to any attributes peculiar to Article 6.

After *Delcourt*, there were a number of cases which used the prominent place of fair trial rights in a democratic society as the basis for a specific interpretative approach: namely, an approach that emphasised substance over form in determining whether Article 6 had been infringed.¹¹⁷ Thus, for example, *DeWeer v Belgium* stated:

However, the prominent place held in a democratic society by the right to a fair trial...prompts the Court to prefer a “substantive”, rather than a “formal”, conception of the “charge” contemplated by [Article 6(1)].

¹¹⁴ While *Delcourt* refers to *Wemhoff v Germany* at 75 ([8] of ‘As to the Law’), *Wemhoff* refers to Article 5 and makes no reference to the ‘democratic society’.

¹¹⁵ Article 3 of the Convention.

¹¹⁶ Article 10 of the Convention.

¹¹⁷ See O Jacot-Guillarmod, ‘Rights Related to Good Administration of Justice’ in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993) *Salabiaku v France*, 383.

The Court is compelled to look behind the appearances and investigate the realities of the procedure in question.¹¹⁸

A similar approach was adopted in, for example, *Sutter v Switzerland*,¹¹⁹ and, more than 20 years later, in cases such as *Subinski* and *Hanzevacki*.¹²⁰ At no stage does the European Court explain *why* the place of fair trial rights in a democratic society means that it should adopt *this particular interpretative approach*.¹²¹ In the absence of such explanation, the Court risks incoherence and unpredictability.

A related use of the ‘democratic society’ catchphrase is in connection with the maxim that the Convention is intended to guarantee rights that are ‘practical and effective’.¹²² Thus in *Bertuzzi v France*,¹²³ the European Court stated:

However, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.¹²⁴

In passages like this, therefore, the Court states that the general principle that the Convention guarantees ‘practical and effective’ rights is ‘particularly’ applicable to one *specific* fair trial right (access to the courts) because fair trial rights *generally* hold such a prominent place in a democratic society. Even if we accept the ‘prominent place’

¹¹⁸ *DeWeer v Belgium* (App 6903/75) (1979-80) 2 EHRR 439 at [44], citing *Airey v Ireland* at [24].

¹¹⁹ *Sutter v Switzerland* at [27].

¹²⁰ *Subinski v Slovenia* (App 19611/04) (18 January 2007) at [62]; *Hanzevacki v Croatia* (App 17182/07) (16 April 2009) at [28].

¹²¹ Little is gained by analysing the cases cited by the Court, directly or indirectly: see *DeWeer v Belgium* at [44]; *Airey v Ireland* at [24]; *Sutter v Switzerland* at [27]; *Pretto v Italy* at [22]; *Axen v Germany* at [26]; *Adolf v Austria* (App 8269/78) (1982) 4 EHRR 313 at [30]; *Subinski v Slovenia* at [62]. See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 596-597.

¹²² See discussion accompanying note 87 et seq.

¹²³ *Bertuzzi v France*.

¹²⁴ *Ibid.* at [24], citing *Airey v Ireland* at [24], referring to *Delcourt v Belgium* at [25].

assertion, the Court provides no explanation whatsoever of why that prominent place means that the generally applicable ‘practical and effective’ approach should have ‘particularly’ strong application in ‘access to court’ cases, as opposed to cases relating to other Article 6 rights, or indeed other Convention rights.

There are three final examples of the ways in which the Court uses the ‘democratic society’ catchphrase to justify particular interpretative approaches. First, in *Somogyi v Italy*,¹²⁵ the Court made this statement about the obligation that Article 6 imposes on Contracting States:

The Court considers that, in view of the prominent place held in a democratic society by the right to a fair trial, Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the proceedings against him where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit.¹²⁶

Second, in *Zagaria v Italy*,¹²⁷ the European Court stated that:

...given the prominent place occupied by the right to good administration of justice in a democratic society, any measures restricting the rights of the defence must be absolutely necessary. Once a less restrictive measure can suffice, it must be applied.¹²⁸

We need not criticise the conclusions reached in *Somogyi* or *Zagaria*. These passages are problematic even if we accept that fair trial rights hold an important place in a democratic society: neither passage explains *why* the democratic concern leads to the particular interpretative approach adopted by the Court or why it leads to this

¹²⁵ *Somogyi v Italy*.

¹²⁶ *Ibid.* at [72], citing, inter alia, *Delcourt v Belgium*. And see, citing the *Somogyi* passage, *Seyithan Demir v Turkey* (App 25381/02) (28 July 2009) at [42].

¹²⁷ *Zagaria v Italy* (App 58295/00) (27 November 2007).

¹²⁸ *Ibid.* at [31], citing *Van Mechelen and Ors v Netherlands* (App 21363/93) (1998) 25 EHRR 647 at [58] (translation).

approach rather than others. Neither passage explains whether, and if so why, the democratic concern is restricted to Article 6 rights in justifying these two interpretative approaches (why not other Convention rights?).¹²⁹ The Court's approach is underexplained, and is lacking in clarity and transparency.

The third particular interpretative approach is that adopted by the European Court in cases arising out of Article 6(1)'s 'impartial tribunal' guarantee.¹³⁰ Thus in *Piersack v Belgium*, the European Court stated that, in an impartiality case:

What is at stake is the confidence which the courts must inspire in the public in a democratic society.¹³¹

This language later evolved through impartiality cases such as *DeCubber*,¹³² and *Hauschildt v Denmark*.¹³³ A series of cases demonstrate that the emphasis in impartiality cases is on the importance of courts inspiring confidence:

What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.¹³⁴

¹²⁹ Nor is explanation provided by the cases cited by the Court. See *Remli v France* (App 16839/90) (1996) 22 EHRR 253 at [47]-[48]; *Van Mechelen and Ors v Netherlands* at [58].

¹³⁰ See Harris, O'Boyle and Warbrick, 290-297; cf Trechsel, 56-57.

¹³¹ *Piersack v Belgium* (App 8962/79) (1983) 5 EHRR 169 at [30].

¹³² *DeCubber v Belgium* at [30], citing *Delcourt v Belgium* at [30].

¹³³ *Hauschildt v Denmark* (App 10486/83) (1990) 12 EHRR 266; Trechsel, 74-75.

¹³⁴ *Hauschildt v Denmark* at [48], citing *DeCubber v Belgium* at [26]. See also *Sander v United Kingdom* at [22]; *Sahiner v Turkey* (App 29279/95) (25 September 2001) at [37]; *Cooper v United Kingdom* (App 48843/99) (2004) 39 EHRR 8 at [104]; *Ocalan v Turkey* (App 46221/99) (2005) 41 EHRR 45 at [116]; *Kyprianou v Cyprus* (App 73797/01) (2007) 44 EHRR 27 at [118], citing *Padovani v Italy* (App 13396/87) (26 February 1993) at [27]; *Chmelir v Czech Republic* (App 64935/01) (2007) 44 EHRR 20 at [55]; *Farhi v France* (App 17070/05) (2009) 48 EHRR 34 at [23]. Related reasoning has been adopted in some Article 6(1) 'publicity' cases: *Jan-Ake Andersson v Sweden* (App 11274/84) (1993) 15 EHRR 218 at [49], cited in *Jussila v Finland* (App 73053/01) (2007) 45 EHRR 39 at [O-II5] of the dissenting judgment of Judge Loucaides (and joined by Judges Zupancic and Spielmann).

Thus the focus is not on the proposition that fair trial rights *per se* are central to democracy, but rather that *inspiring public confidence in the courts* is central to democracy. The proposition is poorly explained. This is not to say that there is not logical force in the Court's approach; instead, it is to emphasise the need for the Court to explain its reasoning process wherever possible.

A.2.2 The European Court uses the 'democratic catchphrase' as a warning against expedient utilitarianism

Having considered how the European Court uses the 'democratic catchphrase' as justifying particular interpretative approaches, this section examines two examples of cases where the Court has used the catchphrase as a justification for not engaging in expedient utilitarian reasoning.¹³⁵

Thus in *Ramanauskas v Lithuania*, the Court uses the 'democratic society' point to support a robust argument against expedience:

While the rise in organised crime requires that appropriate measures be taken, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience.¹³⁶

A similar passage appeared in the earlier case of *Teixeira de Castro v Portugal*.¹³⁷ Thus the Court uses the 'democratic society' catchphrase in order to justify the assertion that the

¹³⁵ We will return to broader questions of assessing alleged infringements of Article 6, and the relevance of the public interest to such assessments, in Part E, below.

¹³⁶ *Ramanauskas v Lithuania* at [53], citing *Delcourt v Belgium* at [25]. See also *Saunders v United Kingdom* at [74]; Harris, O'Boyle and Warbrick, 264.

¹³⁷ *Teixeira de Castro v Portugal* (App 25829/94) (1999) 28 EHRR 101 at [36]. See Trechsel, 112-113.

right to fair administration of justice cannot be sacrificed for expedience. While such an approach may be laudable, especially to those who advocate more expansive protection for criminal fair trial rights, the limits of this approach are unclear. It is unclear, for example, whether this rejection of expediency applies only to rights that hold a ‘prominent place’, and, for that matter, precisely which Convention rights do *not* hold a prominent place in a democratic society.¹³⁸ At the least, the Court’s reasoning in this area raises concerns over transparency and accountability, with flow-on problems for predictability: if it is not clear when the Court will resort to the democratic catchphrase, or why it does so, it may be difficult to predict the future direction of the Court’s case law.

A.2.3 The European Court has occasionally used the catchphrase as a factor in a proportionality analysis or as a tie-breaker

If the European Court is willing to invoke the ‘democratic catchphrase’ to refute arguments based on expediency, it has also occasionally been used the catchphrase to tip the scales in a proportionality or balancing exercise.¹³⁹ Once again, in these cases, the Court’s reasoning is opaque. Of course, some doubt whether proportionality should be used *at all* in the Article 6 context;¹⁴⁰ Part E below has detailed consideration of this issue.

¹³⁸ Part E considers in greater detail the circumstances in which the European Court has countenanced utilitarian and public interest balancing.

¹³⁹ It is not suggested that the cases discussed in this section constitute an interpretative approach deployed as frequently as that discussed in the previous section.

¹⁴⁰ See, eg, A Ashworth, ‘Security, The Terrorist Threat and the Value of Human Rights’ in B Goold and L Lazarus (eds), *Security and Human Rights* (2nd edn Hart, Oxford 2007).

In *Poitrimol v France*,¹⁴¹ the Court used the importance of the fair trial in a democratic society as a factor to be considered in analysing whether a sanction could be considered proportionate:

The Court considers that the inadmissibility of the appeal on points of law, on grounds connected with the applicant's having absconded, also amounted to a disproportionate sanction, having regard to the signal importance of the *rights of the defence* and of the principle of the rule of law in a democratic society.¹⁴²

A similar passage appeared in *Khalifaoui v France*.¹⁴³ Again, in *Ong v France*, the democratic catchphrase is again used almost as a tie-breaking factor:

In short, given all these circumstances and given the importance of the right to fair trial in a democratic society, the Court considers that the decision of removal from the complainant's appeal of the role of the Court of Cassation constituted a disproportionate measure...¹⁴⁴

It should be noted that neither *Poitrimol* nor *Ong* explain this approach to proportionality or balancing. In cases like these, the democratic catchphrase seems to be a tie-breaking consideration to be factored into the question of whether a sanction is disproportionate. If the strength of proportionality analysis in general lies in its structured approach to balancing,¹⁴⁵ the risk inherent in the Court's use of the democratic catchphrase in these cases is that it distorts the structure underlying the Court's reasoning. It is unclear how, for example, the importance of fair trial rights in a democratic society should be factored into a proportionality analysis, at what stage of the analysis it should be accounted for, and what weight should be accorded to it.

¹⁴¹ *Poitrimol v France* (App 14032/88) (1994) 18 EHRR 130.

¹⁴² *Ibid.* at [38].

¹⁴³ *Khalifaoui v France* (App 34791/97) (2001) 31 EHRR 42 at [39], citing *Poitrimol v France* at [38].

¹⁴⁴ *Ong v France* (App 348/03) (14 November 2006) at [43] (translation).

¹⁴⁵ See, eg, R Alexy, *A Theory of Constitutional Rights* (OUP, Oxford 2002); Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 203-208.

Moreover, the broader concern is that the Court does not explain why this approach is uniquely applicable to Article 6 proportionality analysis and not to proportionality analysis of infringements of other Convention articles.¹⁴⁶

A.2.4 The European Court often makes preambular or gratuitous use of the democratic catchphrase

Thus far, we have examined several interpretative or substantive ways in which the European Court has invoked or used the democratic catchphrase. In this section, we examine the tendency of the Court to use the democratic catchphrase in a preambular or gratuitous way, or as a rhetorical flourish.¹⁴⁷ For example, in *Campbell and Fell v United Kingdom*, the Court stated without explanation and really, seemingly, for strictly rhetorical effect:

However, the guarantee of a fair hearing, which is the aim of Article 6, is one of the fundamental principles of any democratic society, within the meaning of the Convention.¹⁴⁸

Similarly, in *Belziuk*, democracy is drawn upon casually as a preamble to a list of basic principles:

Bearing in mind the prominent place which the right to a fair trial holds in a democratic society, the Court recalls at the outset the fundamental principles which emerge from its jurisprudence relating to Article 6(1) in conjunction with (3)(c), relevant to the instant case.¹⁴⁹

¹⁴⁶ See Part E for more on the place of proportionality and balancing in Article 6 criminal cases.

¹⁴⁷ See Trechsel, 83.

¹⁴⁸ *Campbell and Fell v United Kingdom* (App 7819/77) (1985) 7 EHRR 165 at [69]. See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 545 et seq; Trechsel, 21-23.

¹⁴⁹ *Belziuk v Poland* at [37]. On *Belziuk*, see R Kolb, 'The Jurisprudence of the ECHR on Detention and Fair Trial in Criminal Matters from 1992-1998' (2000) 21 Human Rights Law Journal 348, 358-359.

In case after case, the European Court peppers its judgments with passing references to the place of fair trial rights in a democratic society.¹⁵⁰ In most cases, this is done without any explanation of why it is pertinent to the analysis at hand, and without explanation of how the catchphrase might affect the analytical outcome. It could be inferred that the references are merely rhetorical flourishes by a Court eager to emphasise the importance of fair trial rights.¹⁵¹ This may be so. But such a statement could be made about other Convention rights, and to focus attention on Article 6 in these passages risks leaving the impression that Article 6 is central to democracy in a way that other Convention rights are not. Moreover, the references add the veneer of rhetorical authority to passages in the Court's judgment that might otherwise be lacking. The result is reasoning that is opaque and poorly explained.

A.3 Conclusion to Part A

This Part considered the European Court's interpretative approaches to Article 6 criminal cases. This was done through two main lines of inquiry. First, the Part considered a number of general interpretative approaches and demonstrated that there was uncertainty about the rationales for these approaches, as well as uncertainty as to when one should be preferred over another. Second, Part A considered the democratic catchphrase. Analytically important in itself, and also as an example of the Court's interpretative approach, it was demonstrated that the democratic catchphrase was used

¹⁵⁰ See, for example: *Soering v United Kingdom* at [113]; *Riepan v Austria* at [27]; *Ocalan v Turkey* at [133], citing *S v Switzerland* at [48]; *Olaechea Cahuas v Spain* (App 24668/03) (2009) 48 EHRR 24 at [60] citing *Soering v United Kingdom* at [113]; *Marcello Viola v Italy* (App 45106/04) (5 October 2006) at [61]; *Walchli v France* (App 35787/03) (26 July 2007) at [37]; *Kulikowski v Poland* (App 18353/03) (19 May 2009) at [58].

¹⁵¹ See Trechsel, 83.

in an under-reasoned and poorly explained way. This Part has demonstrated, therefore, that in these areas the Court's Article 6 criminal case law is lacking when measured against the standards of predictability, clarity, coherence and consistency. In the next Part, we develop the analysis in this Part further by looking at how the Court defines its own role in Article 6 criminal fair trial cases.

PART B: THE EUROPEAN COURT'S ROLE IN ARTICLE 6 CASES

If Part A considered the tools that the European Court has used, Part B considers the tasks for which those tools are used: here we consider the Court's view of its own institutional, jurisdictional and procedural role in Article 6 cases. We explore the extent to which the European Court's stated view of its own role matches what seems to happen in reality. The cross-cutting themes in this Part are, of course, closely interrelated with the themes of interpretation discussed in Part A: the role a court carves out for itself will shape the way it interprets cases, and the interpretative approaches adopted by a court will shape its role. Both Parts should thus be read together, and also read together with subsequent Parts. By adding the analysis in this Part to that in Part A, we build a fuller picture of how the European Court operates in Article 6 criminal fair trial cases.

There are two broad arguments in this Part. The first is that the European Court's sense of its own role is poorly defined and poorly explained. The second is that there is a disconnect between the Court's stated view of its own role and the way in which the Court seems to operate in practice. This is particularly the case, as we will see, in the context of the Court's 'fourth instance doctrine'. Indeed, it will be shown that there are real questions as to the extent to which the Court's 'fourth instance doctrine' case law bears out its rhetoric.

The European Court's failure to conceptualise its role clearly, and the gap between its rhetoric and its practice, undermine the predictability and coherence of the

Court's case law, and the extent to which citizens, lawyers and national legal systems can be guided by the law.¹⁵²

B.1 The European Court adopts an ostensibly modest and deferential approach in Article 6 cases

At the outset of our investigation of the European Court's view of its own role, it must be acknowledged that, from an early stage, the European Court has tended to adopt an approach that is ostensibly deferential. Thus, for example, in the 1970 *Delcourt* case, the Court demonstrated an extremely deferential approach to Belgian domestic law.¹⁵³ Indeed, in *Delcourt* the Court deferred to established practice because of its longevity ('more than a century and a half'), to a democratically-elected national parliament ('a parliament chosen in free elections has deliberately decided to maintain the system'), and to Belgian lawyers and citizens (the system was 'never...put in question by the legal profession or public opinion in Belgium').¹⁵⁴

The European Court's more recent case law provides examples that indicate that the general deferential tone has continued. This will be expanded upon incidentally in various ways in subsequent sections, but one useful example is *Koval v Ukraine*. In *Koval*, the Court gave this view of its own role:

The Court, having regard to its subsidiary role in relation to the domestic authorities, which are better placed and equipped as fact-finding tribunals, finds that there has accordingly been no violation of

¹⁵² For general discussion of how the European Court conceives of the Strasbourg system, see, eg, Merrills, 44-67.

¹⁵³ *Delcourt v Belgium* at [36]. *Delcourt* was a 1970 independence and impartiality case concerning the role of the Belgian Procureur-Général's department in the Court of Cassation's deliberations.

¹⁵⁴ *Ibid.* at [36].

Article 6(1)...in respect of the failure of the domestic authorities to conduct a thorough and adversarial review of the applicant's submissions as to the allegedly unlawful forfeiture of his bail.¹⁵⁵

We shall return to specific aspects of *Koval* below; for now, however, we note simply that the Court has here expressly described its position as 'subsidiary'.¹⁵⁶ Ostensible deference of this sort is evident throughout the Court's descriptions of its role in Article 6 cases, perhaps partly so as 'not to alienate the respondent governments'.¹⁵⁷

The Court also emphasises the modesty of its powers. Thus, for example, in the Article 50 hearing arising out of the Article 6 issues in *LeCompte, Van Leuwen and DeMeyere*, the Court recalled:

that it is not empowered under the Convention to direct the Belgian State - even supposing that the latter could itself comply with such a direction - to annul the disciplinary sanctions imposed on the three applicants and the sentences passed...in criminal proceedings.¹⁵⁸

In so doing, the Court emphasises the narrow ambit of its powers. While this thesis is not about the jurisdiction and powers of the European Court in general, and indeed this section focuses on the European Court's *statements about* its own role, this sort of modesty must be borne in mind.

In a sense, this ostensible modesty and deference is similar to the modesty expressed by the Court through its margin of appreciation case law. This doctrine,

¹⁵⁵ *Koval v Ukraine* (App 65550/01) (2009) 48 EHRR 5 at [118], citing *McShane v United Kingdom* (App 43290/98) (28 May 2002) at [103] (an Article 2 case).

¹⁵⁶ See H Petzold, 'The Convention and the Principle of Subsidiarity' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht 1993).

¹⁵⁷ Stavros, 83.

¹⁵⁸ *LeCompte, Van Leuwen and DeMeyere v Belgium* (App 6878/75) (1983) 5 EHRR 183 at [13]. See also *Taxquet v Belgium (Grand Chamber)* (App 926/05) (16 November 2010) at [83].

described by Lester as ‘slippery and...elusive’,¹⁵⁹ is typically but not exclusively used by the European Court when considering the extent to which a government’s interference with a right is justifiable under the provisions of Articles 8(2), 9(2), 10(2) and 11(2).¹⁶⁰ Greer notes that ‘no simple formula can describe how it works’ and ‘its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature’.¹⁶¹ The margin of appreciation jurisprudence and scholarly analysis can thus be quite complex.¹⁶² Although the Court has rarely discussed the margin of appreciation in the Article 6 context,¹⁶³ there are occasional references.¹⁶⁴ Further discussion of the limited ways in which the margin of appreciation has arisen in Article 6 cases may be found in Appendix One. In this Part, our focus is on a number of much more common ways in which the European Court frequently expresses ostensible modesty and deference in the Article 6 context.

¹⁵⁹ Cited in Clayton and Tomlinson (eds), *The Law of Human Rights*, 320.

¹⁶⁰ See, eg, Harris, O’Boyle and Warbrick, 349-359.

¹⁶¹ Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 223.

¹⁶² See, eg, *Ibid.*, 222-226; Christoffersen, generally, and 227-357; Emmerson, Ashworth and Macdonald, 115-127; Foster, 60-63; Ovey and White, 52-54; N Lavender, ‘The Problem of the Margin of Appreciation’ (1997) 4 EHRLR 380, generally; Merrills, 151-175; Brems, *Human Rights: Universality and Diversity*, 341-422; Brems, ‘The Margin of Appreciation Doctrine in the Case-Law of the ECtHR’, especially 252-253; MR Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) 48 *International and Comparative Law Quarterly* 638; CS Feingold, ‘The Doctrine of Margin of Appreciation and the European Convention on Human Rights’ (1977-78) 53 *Notre Dame Lawyer* 90; Matscher, 75-78; M Delmas-Marty, ‘The Richness of Underlying Legal Reasoning’ in M Delmas-Marty and C Chodkiewicz (eds), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff, Dordrecht 1992); Mahoney, 78-85; J Schokkenbroek, ‘The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights’ (1998) 19 *Human Rights Law Journal* 30; Tobin, 42.

¹⁶³ Lavender, 383; Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 225, 251.

¹⁶⁴ See, eg, *Medenica v Switzerland* at [58]-[59]; Stavros, 354-355; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 600; Arai-Takahashi, 34 et seq; Schokkenbroek, 32.

B.2 The European Court states that its role is not to enunciate general doctrines

The European Court's view of its role as limited and modest is evident in its decision-making. In this section and the next section, we see two examples of this. This section focuses on the Court's insistence that it is not its role to situate its rulings on particular cases within broader general theories. The next section considers the Court's view that it is not its role to undertake abstract or facial analysis.

Harmsen notes that the 'established jurisprudential practice' of the European Court is to make decisions 'on a strict case-by-case basis, without the enunciation of more general doctrine.'¹⁶⁵ This view is evident in *Golder v United Kingdom*. *Golder* was an Article 6 civil case, but it contained a passage subsequently drawn upon in criminal cases:

It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule in abstracto on the compatibility of [certain provisions of the Prison Rules]...with the Convention. Seised of a case which has its origin in a petition presented by an individual, the Court is called upon to pronounce itself only on the point whether or not the application of those Rules in the present case violated the Convention to the prejudice of *Golder*.¹⁶⁶

In *Golder*, therefore, the European Court outlined two propositions. First, its job was to decide the case in front of it (something to which we shall return in the next section). Second, the first proposition meant it was not appropriate for the Court to attempt to elaborate a general theory. With respect, the second does not flow from the first.

¹⁶⁵ R Harmsen, 'The European Convention on Human Rights after Enlargement' (2001) 5 International Journal of Human Rights 18, 32. See also McHarg, 673; Matscher, 63-64.

¹⁶⁶ *Golder v United Kingdom* at [39], citing *DeBecker v Belgium* (App 214/56) (27 March 1962) at [14] of 'As To The Request...To Strike The Case Out'.

Indeed, deciding the dispute before the Court will often require explanation of how that case fits with the other case law of the European Court, and such an explanation will often necessitate a generalised sense of how the case law fits together. Without such explanation and generality, the case law risks becoming incoherent and inconsistent.

It is submitted that the Court's reluctance to pronounce on matters not before the Court has clouded its sense of the extent to which it is able to make general pronouncements. The *Golder* view is repeated in *DeWeer*, where the Court firmly stated what its role is *not*:

The "right to a court"....is subject to implied limitations, two examples of which are given [in] the Commission's report...it is not the Court's function, though, to elaborate a general theory of such limitations.¹⁶⁷

Thus in cases like *DeWeer* European Court expressly states that its role is not to place isolated implied limitations in the context of a more general theory. In these passages, the Court denies any responsibility for creating a coherent, reasoned, broadly consistent body of law. This raises two concerns.

First, this approach suggests there may be *no* general theory underpinning these limitations. This may not necessarily be a problem, but the Court's reluctance to even engage with the issue hints at a broader uncertainty over the path that the Court is treading. Second, it makes it difficult to gain a sense of the trajectory of the Court's case law. Specifically, it makes it difficult to determine when implied limitations are likely to be recognised, developed or expanded upon, something to which we return in

¹⁶⁷ *DeWeer v Belgium* at [49]. See also, eg, *Colozza v Italy* at [29]. On implied limitations, see, eg, Christoffersen, 78-81.

more detail in Part D. This difficulty reduces certainty about the state of the law, and decreases the case law's ability to provide guidance. If the European Court's concern is focussing on the case in front of it, that concern can be addressed without abdicating any responsibility for situating its decision in context.¹⁶⁸

B.3 The European Court makes incoherent claims about avoiding abstract challenges

In this section, our focus is on the European Court's insistence that, as was stated in *Minelli v Switzerland*, the Court:

has to confine itself, as far as possible, to an examination of the concrete case before it...Accordingly, it has to give a ruling not on the [domestic] legislation and practice in abstracto but solely on the manner in which they were applied to the applicant.¹⁶⁹

To adapt the American terminology, the concern in *Minelli* could be said to be a reluctance to rule on the application as though the applicant sought a facial challenge rather than an 'as applied' challenge.¹⁷⁰

In *Minelli* the Court offered no explanation for this approach, apart from referring to its previous decision in *Adolf v Austria*.¹⁷¹ Neither these decisions, nor the decisions to which they refer, explain *why* the Court purports to abstain from abstract

¹⁶⁸ cf Merrills, 38.

¹⁶⁹ *Minelli v Switzerland* (App 8660/79) (1983) 5 EHRR 554 at [35], citing *Adolf v Austria* at [36]. See also D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2004), 303-306; Trechsel, 186-191; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 625; cf S Greer, 'Constitutionalizing adjudication under the European Convention on Human Rights' [2003] *Oxford Journal of Legal Studies* 405, 406-407; Stumer, 90-91; and the European Court's pilot judgment process, discussed in, eg, *Broniowski v Poland (Friendly Settlement)* (App 31443/96) (2006) 43 EHRR 1 at [34]-[37].

¹⁷⁰ In a facial challenge, 'the challenger must establish that no set of circumstances exists under which the Act would be valid': *United States v Salerno* 481 US 739 (1987) (US Supreme Court) at 745. See Harmsen, 33.

¹⁷¹ *Adolf v Austria* at [36]. See Trechsel, 159-160; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 580.

analysis.¹⁷² Thus at no point in this group of cases does the Court offer explanation or doctrinal support for the proposition that focusing on ‘the concrete case before it’ means that the Court cannot conduct abstract analysis. Passing reference to Article 25 of the Convention does not illuminate the European Court’s reasoning.¹⁷³ Even if the Court cannot or does not wish to draw on doctrinal support for the propositions on which it relies, it is submitted that the interests of predictability, clarity and consistency call for an explanation of *why* a given approach is justified, what its limits might be, and whether there are circumstances in which the Court might be willing to conduct facial analysis.

A similar lack of explanation is evident in cases such as *Hauschildt*, *John Murray*, *Brogan*, *Sahiner*, *Fey*, *Incal*, and *Thorgerisson*.¹⁷⁴ And there are cases in which the Court purports to disclaim abstract analysis before going on to do precisely that. Thus in *Malige v France* the Court stated that it:

[30] ...considers that it is not its task to rule on the French system of deductible-point driving licences as such, but to determine whether, in the circumstances of the case, Mr Malige’s right of access to a tribunal, within the meaning of Article 6(1) of the Convention, was respected...

[31] In the first place, the Court must determine whether the sanction of deducting points from driving licences is a punishment, and accordingly whether it is “criminal” within the meaning of Article 6(1).¹⁷⁵

¹⁷² More than that, at least two of the decisions cited in fact countenance the possibility of abstract challenges: see *X v United Kingdom* (App 7215/75) (5 November 1981) at [41]-[42]; *Marckx v Belgium* at [27]. See also *Guzzardi v Italy* (App 7367/76) (1981) 3 EHRR 333 at [88].

¹⁷³ s in *Schiesser v Switzerland* (App 7710/76) (1979-80) 2 EHRR 417 at [32].

¹⁷⁴ See *Hauschildt v Denmark* at [45]; *John Murray v United Kingdom* at [44]; *Brogan and Ors v United Kingdom* (App 11209/84) (1989) 11 EHRR 117 at [53]; *Sahiner v Turkey* at [43]; *Fey v Austria* (App 14396/88) (1993) 16 EHRR 387 at [27]; *Incal v Turkey* (App 22678/93) (2000) 29 EHRR 449 at [70]; *Thorgeir Thorgeirson v Iceland* (App 13778/88) (1992) 14 EHRR 843 at [48].

¹⁷⁵ *Malige v France* (App 27812/95) (1999) 28 EHRR 578 at [30]-[31]. See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 553.

In one paragraph, the Court dismisses the idea of abstract analysis; in the following paragraph the Court commences facial *Engel*-style analysis of the sanction in the abstract.¹⁷⁶ There is no indication that the Court has a clear understanding of when, if ever, facial abstract analysis is appropriate. The articulation of a reasoned, explained theory of why and when facial or abstract review was inappropriate would enhance the extent to which future decisions could be predicted, and allow citizens, lawyers and officials to better be guided by the case law.¹⁷⁷

A final point should be made in this analysis of the Court's ostensible reluctance to engage in abstract analysis. This reluctance is difficult to reconcile with the repeated occasions on which the European Court *mandates* abstract analysis in one form or another. Two Article 6 examples will suffice for now. When the Court ruled, as it did in *Jalloh*, that evidence obtained through a breach of the Article 3 prohibition on torture is inadmissible,¹⁷⁸ it ruled in the abstract, insofar as any future case involving that issue will theoretically be governed by the rule in *Jalloh* regardless of the facts of that individual case. When the Court ruled, as it did in *Benham*, that 'where deprivation of liberty is at stake, the interests of justice in principle call for legal representation', it was ruling in the abstract.¹⁷⁹ Neither of these statements is normatively undesirable or incapable of justification. What is troubling is that the

¹⁷⁶ A similarly odd combination of passages is evident in *Bouamar*, an Article 5 case cited directly or indirectly in this context in Article 6 cases such as *Pham Hoang v France* (App 13191/87) (1993) 16 EHRR 53 at [33] and *Salabiaku v France* at [25] and [30]. The *Bouamar* Court explained that its role was not to conduct general abstract analysis but then followed this with several examples of detailed abstract analysis. See *Bouamar v Belgium* (App 9106/80) (1989) 11 EHRR 1 at [48]-[53], citing *Lithgow and Ors v United Kingdom* (App 9006/80) (1986) 8 EHRR 329.

¹⁷⁷ See, Harmsen, 33-34.

¹⁷⁸ *Jalloh v Germany* (App 54810/00) (2007) 44 EHRR 32 at [105]. See Part B.6.

¹⁷⁹ *Benham v United Kingdom* (App 19380/92) (1996) 22 EHRR 293 at [61].

Court can vehemently distance itself from abstract analysis in some cases, while enthusiastically embracing it in others, without offering any explanation for the disparity in either class of case. Unless the Court articulates a clear vision of its role with respect to facial challenges and as-applied challenges, and articulates and explains deviations from that vision where necessary, it will be difficult to rationalise past decisions and predict future decisions.

B.4 The European Court describes its role as limited by the ‘fourth instance’ doctrine

The European Court frequently describes its role in Article 6 cases in contradistinction to the role of domestic appellate courts: the Court emphasises that it is not a court of fourth instance.¹⁸⁰ It is not for the Court, according to many judgments, to review the factual or legal analysis of domestic courts in the way that domestic appellate courts perform such analysis. An example of this sentiment is evident in *Schenk v Switzerland*, in which the Court this statement about the intensity of its review powers:

According to Article 19...of the Convention, the Court’s duty is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.¹⁸¹

¹⁸⁰ See, eg, Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 202; Ovey and White, 159; Trechsel, 83-84, 257; Emmerson, Ashworth and Macdonald, 115; Petzold, 50; Christoffersen, 238-239; S Wallace, ‘The Empire strikes back: hearsay rules in common law legal systems and the jurisprudence of the ECtHR’ [2010] EHRLR 408, 409; B O’Brian, ‘Confrontation: The Defiance of the English Courts’ [2010] 2010-09 University of Warwick School of Law Legal Studies Research Paper 1, 24.

¹⁸¹ *Schenk v Switzerland* (App 10862/84) (1991) 13 EHRR 242 at [45]. See also *Khametshin v Russia* (App 18487/03) (4 March 2010) at [29]; *Gafgen v Germany (Grand Chamber)* (App 22978/05) (1 June 2010) at [163].

In so doing, the European Court emphasised that it is not a supranational appellate court with free-ranging jurisdiction. Greer states that the doctrine means the Court is not to act as ‘final court of appeal or fourth instance’.¹⁸² Stavros argued that this doctrine ‘has limited quite drastically [the European Court’s] competence to review the merits of a criminal charge.’¹⁸³ Indeed, in 2009, the President of the Court stated that:

Although we must not set ourselves up as a fourth instance rehearing what has already been heard in the domestic courts, we do have a duty to oversee the requirements of fair trial as guaranteed by Article 6 of the Convention.¹⁸⁴

In this section and the next section, we examine the tension inherent in this statement: the tension between the Court purporting not to be a fourth instance court but simultaneously attempting to ‘oversee the requirements of fair trial’. In so doing we explore the fourth instance doctrine, the extent to which it has been explained and applied by the European Court, and the extent to which it actually prevents the European Court reviewing the merits of a domestic court decision. Two broad arguments run through this section.

First, it will be shown that the fourth instance doctrine is often invoked but poorly explained and under-theorised. Second, it will be demonstrated that the fourth instance doctrine is, in fact, riddled with a series of exceptions that render the doctrine incoherent and internally inconsistent. Ultimately, it will be argued that the fourth instance doctrine is not as straightforward as is commonly assumed, and that the

¹⁸² Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 216.

¹⁸³ Stavros, 45.

¹⁸⁴ J-P Costa, ‘The authority of the jurisprudence of the ECtHR’ in Steering Committee for Human Rights (ed) *Reforming the European Convention on Human Rights: A work in progress* (Council of Europe Publishing, Strasbourg 2009), 292.

exceptions to the doctrine are of sufficient number and breadth to raise the possibility that the exceptions may, in fact, have become the rule. But we begin by sketching a basic account of the European Court's fourth instance doctrine.

A version of the fourth instance doctrine appears to have been commonly accepted in the *travaux*.¹⁸⁵ One of the earliest statements of this doctrine by the European Court may be in *Ringeisen v Austria (Merits)*, which stated, without referring to any doctrinal support:

It is not the function of the European Court to pronounce itself on the interpretation of Austrian law on which the said judgment is based or to express an opinion on the manner in which it was substantiated; on the other hand, it is the Court's duty to examine the grounds relied upon by *Ringeisen* and to determine whether or not the Regional Commission respected the rule of impartiality laid down in [Article 6(1)].¹⁸⁶

Much more recently, in *Karpenko v Russia* the Court stated that:

it is not its task to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law.¹⁸⁷

Similar sentiments were frequently expressed in the four decades between *Ringeisen* and *Karpenko*. In cases such as *Bernard v France* we see the Court's general reluctance to engage in appellate-style analysis:

¹⁸⁵ See discussion accompanying note 54.

¹⁸⁶ *Ringeisen v Austria (Merits)* (App 2614/65) (1979-80) 1 EHRR 504 at [97]. See also On *Ringeisen*, see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 293; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 613. *Ringeisen* was applied in, eg, *Winterwerp v Netherlands* (App 6301/73) (1979-80) 2 EHRR 387 at [46]; *Vaudelle v France* (App 35683/97) (2003) 37 EHRR 16 at [55]; *Jakub v Slovakia* (App 2015/02) (28 February 2006) at [48]. See also *Kemmache v France (No 3)* (App 17621/91) (1995) 19 EHRR 349 at [44], which was applied in, eg, *Perlala v Greece* (App 17721/04) (22 February 2007) at [25]; *Melich and Beck v Czech Republic* (App 35450/04) (24 July 2008) at [48]; *Parapontiaris v Greece* (App 42132/06) (25 September 2008) at [24].

¹⁸⁷ *Karpenko v Russia* (App 5605/04) (13 March 2012) at [80].

It is admittedly not the Court's task to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair...¹⁸⁸

Later, in *Miragall Escolano and Ors v Spain*, the European Court expressed the same idea in a slightly different way:

The Court reiterates...that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts of appeal and of first instance, to resolve problems of interpretation of domestic legislation. The role of the Court is limited to verifying whether the effects of such interpretation are compatible with the Convention.¹⁸⁹

At first glance, therefore, the European Court's approach is clear. It is not the role of the Court to act as an appellate court – a term effectively defined as engaging in review of the national courts' legal and factual analysis. But the reality of the case law is more complex, as is evident in the caveat expressed in *Schenk* above: 'unless and in so far as they may have infringed rights and freedoms protected by the Convention'.¹⁹⁰ The general rule, therefore, is that review of legal and factual analysis is not within the Court's purview. The caveat, in turn, creates a class of exceptions to the general rule. We do not dispute that such a caveat is logical in isolation. Difficulties arise, however, when this caveat is applied.

¹⁸⁸ *Bernard v France* (App 22885/93) (2000) 30 EHRR 808 at [37], citing *Edwards v United Kingdom* (App 13071/87) (1993) 15 EHRR 417 at [34] and *Mantovanelli v France* (App 21497/93) (1997) 24 EHRR 370 at [34]. cf van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 587; Trechsel, 176.

¹⁸⁹ *Miragall Escolano and ors v Spain* (App 28366/97) (2002) 34 EHRR 24 at [33] (emphasis added), citing *Brualla Gomez de la Torre v Spain* (App 26737/95) (2001) 33 EHRR 57 at [31] and *Edificaciones March Gallego SA v Spain* (App 28028/95) (2001) 33 EHRR 46 at [33]; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 572-573. See also *Gruais and Bosquet v France* (App 67881/01) (10 January 2006) at [27]; *Vitan v Romania* (App 42084/02) (25 March 2008) at [55].

¹⁹⁰ *Schenk v Switzerland* at [45]; Petzold, 50. See also, eg, *Bernard v France* at [37]; *Miragall Escolano and ors v Spain* at [33]; *Ringeisen v Austria (Merits)* at [97].

This thesis submits that in order for the caveat to be effective, the Court must recognise that the caveat implicitly requires that *every* Article 6 criminal fair trial case coming before it be scrutinised to determine whether there have been any errors infringing rights and freedoms protected by the Convention. That scrutiny may be strong or weak, but it is scrutiny. Moreover, it is submitted that the interests of transparency and accountability call for an explanation of how that initial scrutiny should be conducted, and the level of intensity appropriate to such a review. Put another way, the Court cannot conclude that a national court's legal and factual analysis does not 'infringe[] rights and freedoms' *unless* it engages with and assesses the national court's analysis in some preliminary way. Of course, as soon as that preliminary assessment has been conducted, the trap has been sprung, and the Court has engaged with the national courts' factual and legal analysis.

There is, however, no indication of what test the Court applies, nor of a realisation on its part that the caveat necessarily involves some level of engagement with the legal and factual analysis of every case it considers. An example of this tension is evident in *Walchli v France*, where the Court stated:

that [it is] the primary responsibility of national authorities, including courts, ...to *interpret the legislation*. The Court's role is limited to *ensuring compatibility with the Convention of the effects of such an interpretation*.¹⁹¹

In the absence of further guidance from the Court on how to distinguish between analysis of the *interpretation* of legislation and analysis of the *effects* of the interpretation

¹⁹¹ *Walchli v France* at [27] (translated)(emphasis added).

of legislation, the Court's stance is opaque. In this way the Court sets itself to walk an interpretative high-wire without acknowledging that the high-wire even exists.

The European Court thus repeatedly frames its role as different from that of the appellate courts, *except* to the extent that the proceedings have engaged Article 6's fair trial protections. But the Court does not provide the formula for approaching the question of how, and at what level of intensity, it reviews a national court's factual and legal analysis in order to determine whether that analysis has triggered Article 6 engagement. In *Goktepe v Belgium*, the Court stated:

in principle it is for national courts to assess the evidence gathered by them. The task of the Court is to determine whether the procedure as a whole, including the presentation of evidence, has been fair.¹⁹²

Versions of this formulation have been used frequently.¹⁹³ It is noteworthy that the European Court does not, in any of these cases, provide guidance as to how it determines which cases demand that the European Court itself engage with the national court's factual and legal analysis in order to determine whether a breach of the Convention has occurred.¹⁹⁴

¹⁹² *Goktepe v Belgium* (App 50372/99) (2 June 2005) at [25] (translated), citing *Van Mechelen and Ors v Netherlands* at [50].

¹⁹³ See, eg, *Garcia Ruiz v Spain* (App 30544/96) (2001) 31 EHRR 22 at [28]; *Mostacciolo Giuseppe v Italy (No 2)* at [80] (civil); *Jakumas v Lithuania* (App 6924/02) (18 July 2006) at [54]; *Mamidakis v Greece* (App 35533/04) (11 January 2007) at [29]; *Perlala v Greece* at [25]; *Gorgievski v FYROM* (App 18002/02) (16 July 2009) at [46]-[47]; *Gladyshev v Russia* (App 2807/04) (30 July 2009) 253 at [74]-[75]; *Khametshin v Russia* at [29].

¹⁹⁴ The European Court's lack of explanation for the fourth instance doctrine, and of the way in which that doctrine works, is compounded by the lack of any jurisprudential or case authority for the doctrine. See, eg, *Bernard v France* at [37]; *Gocmen v Turkey* (App 72000/01) (17 October 2006) at [70]; *Edwards v United Kingdom* at [34]; *Vidal v Belgium* (App 12351/86) (22 April 1992) at [33]; *Barbera, Messegue and Jabardo v Spain* (App 10588/83) (1989) 11 EHRR 360 at [68]. The cases are also marked by curious contradictions. In *Unterpertinger*, for example, referred to in many fourth instance doctrine cases, the European Court makes no express statement whatsoever about the European Court's role and in fact conducts analysis consisting of an assessment of the evidence before the national court, something the doctrine purports to prohibit: see *Unterpertinger v Austria* (App 9120/80) (1991) 13 EHRR 175 at [33].

As the analysis above has shown, at no stage has the Court recognised that the caveat may implicitly require that *every* Article 6 criminal fair trial case coming before it be scrutinised to determine whether there have been any errors infringing rights and freedoms protected by the Convention. Such preliminary scrutiny is a logical precursor to the more thorough scrutiny that the caveat envisages. Moreover, the European Court provided no guidance on how that initial scrutiny should be conducted, or on the level of intensity appropriate to such review. We thus have considerable evidence in support of our first broad argument, namely that the fourth instance doctrine is often invoked but poorly explained and under-theorised. This, in turn, links in to an even broader argument about predictability, consistency, and coherence. We turn next to the second of this section's broad arguments. In the 2007 decision of *Dumitru Popescu v Romania*, the European Court appeared to express regret that it could not function as an appellate court:

...however regrettable it may be, it should be noted that it is not generally for the Court to deal with errors fact or law allegedly committed by a domestic court.¹⁹⁵

In the next section, we consider the extent to which the Court does, in reality, conduct appellate-style analysis.

B.5 The fourth instance doctrine is riddled with exceptions to the point of incoherence

In this section, we move on from the question of how the caveat is *triggered*, and consider instead how the caveat is *applied*. Here, it is submitted that the range of

¹⁹⁵ *Dumitru Popescu v Romania (No 2)* (App 71525/01) (26 April 2007) at [102] (translated).

exceptions applied via the caveat is so great that it may be more accurate to frame the exceptions as the rule, and to describe the ostensible reluctance to conduct appellate-style review as the exception. In this section, as in the last, we use ‘appellate-style review’ in the way that the European Court uses that concept: conducting review of factual or legal analysis or conclusions of domestic courts.

In the first subsection (B.5.1), we consider the way in which the European Court’s jurisprudence on the right to a reasoned judgment constitutes an exception to the general rule prohibiting interference with factual and legal analysis. In the following sub-section (B.5.2), we consider other ways in which the Court has identified exceptions in a range of areas of Article 6 case law. We draw conclusions about how best to accurately summarise the fourth instance doctrine in the final sub-section (B.5.3). Overall, this section challenges the notion that the Court has ‘studiously and properly followed’ the fourth instance doctrine.¹⁹⁶

The distinction between an analysis of the fairness of ‘the proceedings as a whole’, and an appellate-style factual and legal analysis, is a slippery one. This thesis accepts that an assessment of the fairness of proceedings as a whole will often involve review of the factual and legal conclusions reached by a domestic court. Indeed, that was the conclusion reached by our analysis of ‘the caveat’ above. But the focus of our criticism is that the Court fails to acknowledge this reality; as we shall see in this section, its rhetoric about not engaging in appellate-style review is not matched by its practice. Indeed, what will be demonstrated in the following sections is that the Court

¹⁹⁶ Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 202.

has repeatedly engaged in extensive review of domestic courts' factual and legal analysis. This is not to say that the Court in these cases was not *also* involved in a review of the fairness of the proceedings as a whole, but it is to emphasise that the Court *was* involved in appellate-style review.¹⁹⁷

B.5.1 The right to reasons provides a major exception to the fourth instance doctrine

The right to a reasoned judgment is one of the component elements of Article 6.¹⁹⁸ The argument here is that, in many cases, consideration of the adequacy of a national court's reasons blurs into what reads like appellate review. Of course, the Court's ability to engage in such consideration is enlivened by the caveat: it can engage in this sort of analysis only where the fairness of the trial is in question. Here, it is submitted that right to reasons analysis has the potential to be appellate-style review in the clothing of the caveat. If all it takes to enliven the caveat is an argument alleging inadequate reasons, then virtually every case has the potential to trigger appellate-style review. Moreover, it is submitted that the Court provides little guidance to indicate how it determines the adequacy of reasons, and, in particular, the intensity of review it applies to a given set of reasons when considering their adequacy. In the absence of such guidelines, the risk is that the Court's decisions on the right to reasons may appear arbitrary, and that the fourth instance doctrine may not be as secure as the Court's rhetoric suggests.

¹⁹⁷ See Part E.2 for detailed consideration, and critique, of the European Court's references to the 'proceedings as a whole'.

¹⁹⁸ See, eg, van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 595-596; Trechsel, 102-110; Ovey and White, 179; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 268-269; *Taxquet v Belgium* (Grand Chamber); Roberts. See also *Taxquet v Belgium* (Grand Chamber) at [90]-[92]. See also Part D.1.

Of course, as *Salov v Ukraine* stated, ‘the question whether a court has failed to fulfil its obligation to state reasons can only be determined in the light of the circumstances of the particular case’.¹⁹⁹ Nevertheless, determining a case on the facts of that particular case should not disguise the need for the Court to identify a general standard against which it measures the adequacy of reasons.

In *Hadjianastassiou*, for example, we see an illustration of reasons review that appears to come close to appellate review:

[33] ...The national courts must...indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him. The [European] Court’s task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention.

[34] In this instance the judgment read out...contained no mention of the questions as they appeared in the record of the hearing....Admittedly it referred to...the Military Criminal Code...and described the information communicated as of minor importance, but it was not based on the same grounds as the decision of the Permanent Air Force Court.....²⁰⁰

In this passage, the excerpted section of paragraph [34] constitutes appellate-style review as the Court explains that term, insofar as it involves reviewing the national court’s conclusions of fact and law. The right to reasons affords the Court the opportunity to act in a thoroughly appellate-style manner. Moreover, significantly, there is no

¹⁹⁹ *Salov v Ukraine* (App 65518/01) (2007) 45 EHRR 51 at [89], citing *Ruiz Torija v Spain* (App 18390/91) (1995) 19 EHRR 553 at [29]. See also *Backes v Luxembourg* (App 24261/05) (8 July 2008) at [65] and *Taxquet v Belgium* (App 926/05) (13 January 2009) at [40]; *Taxquet v Belgium (Grand Chamber)*; and Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 268.

²⁰⁰ *Hadjianastassiou v Greece* (App 12945/87) (1993) 16 EHRR 219 at [33]-[34]. See also van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 635; Trechsel, 108-109.

indication in this judgment of what constitutes ‘sufficient clarity’ of reasons, or of how intensively to conduct the review that reaches a conclusion on the question of clarity.

The adequacy of a domestic court’s reasons was also considered in *Khudobin v Russia*, in which the Court stated bluntly:

although...the domestic court had reason to suspect that there was an entrapment, it did not analyse the relevant factual and legal elements which would have helped it to distinguish entrapment from a legitimate form of investigative activity. It follows that the proceedings which led to the applicant’s conviction were not “fair”.²⁰¹

In this way the Court directly challenges the ‘factual and legal’ analysis of the domestic court, and does so without identifying the standard or intensity of review that is appropriate in such cases.²⁰² Similarly, in *Kuznetsov*, the Court cited the importance of reasons,²⁰³ and then engaged in lengthy legal and factual analysis, including this passage:

The Court is struck by the inconsistent approach of the Russian courts, on the one hand finding it established that the Commissioner and her aides had come to the applicants’ religious meeting and that it had been terminated ahead of time, and on the other hand refusing to see a link between these two elements without furnishing an alternative explanation for the early termination of the meeting. Their findings of fact appear to suggest that the Commissioner’s arrival and the applicants’ decision to interrupt their religious service had simply happened to coincide. That approach permitted the domestic courts to avoid addressing the applicants’ main complaint, namely that neither the Commissioner nor the police officers had had any legal basis for interfering with the conduct of the applicants’ religious event. The crux of the applicants’ grievances – a violation of their right to freedom of religion – was thus left outside the scope of review by the domestic courts...²⁰⁴

²⁰¹ *Khudobin v Russia* (App 59696/00) (2009) 48 EHRR 22 at [137]

²⁰² See also Trechsel, 106-107.

²⁰³ *Kuznetsov and Ors v Russia* (App 184/02) (2009) 49 EHRR 15 at [83].

²⁰⁴ *Ibid.* at [84].

This lengthy extract demonstrates the extent to which the European Court engaged in rigorous factual and legal analysis of the national court's reasons. This thesis readily recognises that such analysis may be essential to determining whether the applicant's right to reasons was infringed. The interests of predictability and consistency demand, however, that the Court make clear the appropriate standard of review to apply in reviewing reasons cases. Moreover, and perhaps more importantly for present purposes, the Court needs to indicate why this sort of reasons analysis could not be invoked in virtually every Article 6 criminal case, thus rendering every case subject to appellate-style review and neutralising the fourth instance doctrine.

It is important to emphasise, therefore, that despite the Court's definition of its own role as not acting like an appellate court, its case law provides it with the opportunity to be precisely that.²⁰⁵ The right to reasons case law provides a gaping exception to the general rule. Moreover, it does so in an understructured way. In *Nechiporuk and Yonalko v Ukraine*, for example, the Court engaged in extensive factual and legal review of the national courts' reasons. This passage is an excerpt from that analysis:

[277] The [European Court] finds the responses of both the first-instance court and the Supreme Court to those arguments to be *strikingly scant and inadequate*. While dismissing as unfounded the first applicant's allegations about pressure on the witness and noting that "there [was] no information from which it could be discerned [otherwise]", the courts *failed to comment on* the undisputed fact of the administrative detention of Mr K. and *ignored* the existence of the

²⁰⁵ For examples of the many similar reasons cases in which the fourth instance doctrine has been invoked and then circumvented, see *Gradinar v Moldova* (App 7170/02) (8 April 2008) at [112]-[115]; *Vanjak v Croatia* at [60]-[61]; *Mamikonyan v Armenia* (App 25083/05) (16 March 2010) at [35]-[37]; *Vetrenko v Moldova* (App 36552/02) (18 May 2010) at [55]-[59]; *Bulfinsky v Romania* (App 28823/04) (1 June 2010) at [44]-[48]; *Nechiporuk and Yonalko v Ukraine* (App 42310/04) (21 April 2011) at [268]-[281], cf Trechsel, 104-106.

audiotape referred to by the applicant even though it had been included in the case-file materials.....

[279] Turning to the present case, the Court notes that: firstly, the courts decided to attach weight to the accusatory statements of Mr K. *in disregard of specific and pertinent facts* with a potential to undermine their reliability and accuracy; secondly, it was *never established in a convincing manner* that Mr K. had made those statements of his own free will – the fact that he had pursued that approach in the court might merely have resulted from continuing intimidation; and, lastly, the statements of Mr K. became consistently unfavourable for the first applicant from the time of his questioning, coinciding with his own detention.

[280] The Court has held, in the context of its examination of the fairness of civil proceedings, that by *ignoring a specific, pertinent and important point of the applicant, the domestic courts fall short of their obligations under Article 6 § 1* of the Convention. It observes a similar issue in the present case, where that requirement, although being even more stringent in the context of criminal proceedings, was not met.

[281] ...there has been a violation of [Article 6(1)] of the Convention...²⁰⁶

This sort of reasoning gives the European Court the opportunity to review the factual and legal analysis of national courts in virtually any Article 6 criminal fair trial case. An applicant who feels unsatisfied by their domestic appellate system may be well advised to allege violations of the right to reasons in order to allow the Court to trigger thorough review of the domestic system's factual and legal analysis. As a dissenting opinion in *Vetrenko v Moldova* stated, in these cases the Court has assumed 'the role of a court of appeal and seeks to substitute its own view for that of the national courts'.²⁰⁷ This thesis takes no position on whether or not such intrusive appellate-style review is desirable; the crucial point for our argument is that this situation gives rise to incongruence between the law as stated and the law as applied, and significantly undermines the coherence of the Court's case law.

²⁰⁶ *Nechiporuk and Yonalko v Ukraine* at [277]-[281] (emphasis added).

²⁰⁷ *Vetrenko v Moldova* at [2]-[5] of Joint Dissenting Opinion of Judges Bratza, Garlicki and David Thor Bjorgvinsson.

In this sub-section it was argued that the right to reasons necessarily involves thorough review of the domestic courts' factual and legal analysis, and that such review is directly contrary to the Court's ostensible reluctance to engage in appellate-style review. Further, there was no indication of the appropriate standard against which to measure the adequacy of reasons. In the next sub-section we continue the second of the two broad arguments that run through this section, and consider some of the other 'exceptions' to the general rule that the Court does not engage in review of factual or legal analysis of domestic courts.

B.5.2 The European Court's case law discloses numerous additional 'exceptions' to the fourth instance doctrine

This sub-section considers seven further classes of exception through which the Court is able to conduct appellate-style review of domestic courts' factual and legal analysis. Together with the right to reasons exception above, these loopholes combine to provide the Court with an array of ways to conduct appellate-style analysis, notwithstanding its protestations that such analysis is beyond its ambit. Additionally, these loopholes constitute further examples of incongruence between the law as stated and the law as applied.

The first exception arises in the context of presumptions of fact and law of the kind considered in *Salabiaku*.²⁰⁸ *Salabiaku* warned that Contracting States must 'confine

²⁰⁸ *Salabiaku v France*. For more on *Salabiaku*, see van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 628-629; Ovey and White, 199-200; Trechsel, 168-170; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 301-302; Stumer, 98-102.

[presumptions of fact or of law] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.²⁰⁹ In *Pham Hoang*, therefore, the Court considered several such presumptions in order to determine whether they had been confined within reasonable limits. This analysis led the Court to review directly the factual and legal analysis of the domestic courts:

Furthermore, in its judgment...the Court of Appeal did not cite in the reasons for its decision any of the impugned provisions of the Customs Code when it ruled on the accused's guilt, even if it in substance took Articles 399 and 409 as its basis for holding that he had had "an interest in customs evasion" and that he was guilty of an attempted customs offence....The court set out the circumstances of the applicant's arrest and took account of a cumulation of facts. It noted that during the afternoon of 3 January 1984 he had, in his own car, driven an important drug trafficker to several shops in order to buy hydrochloric acid; a little earlier, it added, he had been present in the flat where the head of the trafficking network had brought 5kg of caffeine and he had agreed to take Tran and Ngo to where the heroin was to be delivered. Lastly, it noted that although he had "not physically come into possession" of the heroin, this was due only to the intervention of the police and was thus for reasons beyond his control....

It therefore appears that the Court of Appeal duly weighed the evidence before it, assessed it carefully and based its finding of guilt on it. It refrained from any automatic reliance on the presumptions created in the relevant provisions of the Customs Code and did not apply them in a manner incompatible with [Articles 6(1) and 6(2)] of the Convention...²¹⁰

The lengthy quote is necessary to demonstrate the level of detail that the Court's analysis includes. Our argument is not that this detail and depth is normatively undesirable for the purposes of *Salabiaku* analysis. But it must be noted that such analysis falls squarely within the appellate-style analysis that the Court states it does not conduct as a general rule; this is concrete detailed analysis of the domestic court's reasoning.

²⁰⁹ *Salabiaku v France* at [28].

²¹⁰ *Pham Hoang v France* at [35]-[36]; Trechsel, 170.

A similar presumptions case was *Telfner v Austria*. In that case, the Court warned that:

as a general rule, it is for the national courts to assess the evidence before them, while it is for the [European] Court to ascertain that the proceedings considered as a whole were fair...²¹¹

Nevertheless, several paragraphs after this warning, the Court's analysis engaged directly with the way in which the national court had assessed the evidence:

In addition, the Court notes that both the District Court and the Regional Court speculated about the possibility of the applicant having been under the influence of alcohol which was, as they admitted themselves, not supported by any evidence. Although such speculation was not directly relevant to establishing the elements of the offence with which the applicant had been charged, it contributes to the impression that the courts had a preconceived view of the applicant's guilt.²¹²

Here, the Court found that certain speculation was 'not supported by any evidence'. This plainly involves 'assess[ing] the evidence'. While the national courts here 'admitted' their evidentiary flaw, there is nothing in the Court's logic that would prevent it from reviewing the evidence in a case where the national courts made no such admission. Once again, the Court demonstrated a willingness to engage in review of factual and legal analysis in cases involving presumptions of law or of fact.

The second of our exceptions in this section is drawn from *CG v United Kingdom*. In *CG*, the central question was 'whether the nature and frequency of the trial judge's interventions, combined with the deficiencies...in his summing up' violated

²¹¹ *Telfner v Austria* (App 33501/96) (2002) 34 EHRR 7 at [15]. See also Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 301; Ovey and White, 198-199; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 626-627.

²¹² *Telfner v Austria* at [19].

Article 6.²¹³ In the course of determining whether the judge's actions infringed

Article 6(1), the Court engaged in intensive review of the trial transcript:

The next interruptions came in the course of the applicant's own examination-in-chief by her counsel. The Court notes that these were again frequent in number, appearing on twenty-two of the thirty-one pages of the transcript, and that they commenced very early in the course of the examination. The judge effectively took over the examination for a short time (between pages 2 and 4 of the transcript), and his interruptions led the applicant's counsel to seek a short adjournment, which the judge granted (at page 6)...²¹⁴

Indeed, the Court went so far as to say:

While the Court accepts the assessment of the Court of Appeal that the applicant's counsel found himself incommoded and disconcerted by these interruptions, it also agrees with the Court of Appeal, from its own examination of the transcript of the evidence, that the applicant's counsel was never prevented from continuing with the line of defence that he was attempting to develop either in cross-examination or through his own witness.²¹⁵

These passages demonstrate that the Court engaged in close review of the domestic courts' factual and legal analysis. It may be that this is the normatively desirable course for the Court to take in resolving an Article 6(1) complaint, but it does not sit well with the Court's frequent protestations that it does not conduct appellate-style review.

The third class of exception arises out of *Walchli v France*, in which the European Court considered whether certain procedural rules infringed the applicant's Article 6 rights. The Court warned that national courts:

must, in applying the rules of procedure, avoiding both excessive formalism which would impair the fairness of the procedure, and an

²¹³ *CG v United Kingdom* (App 43373/98) (2002) 34 EHRR 31 at [35]. See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 270.

²¹⁴ *CG v United Kingdom* at [38].

²¹⁵ *Ibid.* at [41].

excessive flexibility that would remove the procedural requirements established by law.²¹⁶

The Court thus effectively stated that any Article 6 case involving procedural rules could trigger a review of the national court's application of those rules, in order to ensure that the national courts had avoided excessive formalism and excessive flexibility. Such a requirement gives the Court considerable scope for review on cases involving procedural rules, and runs against the ostensibly general approach.

The fourth exception arises out of some of the cases concerning evidence and witnesses. The applicant in *Koval v Ukraine* complained that a witness – his wife – had not been examined, contrary to Article 6(3). The Court first 'note[d]':

that the applicant's wife was not examined by the domestic courts in connection with the issue of forfeiture of bail, despite being present throughout the court proceedings. However, the applicant initially did not request to have evidence taken from her in court. Furthermore, he has failed to explain what he intended to prove with the witness evidence that would have been produced and how this evidence could have been relevant to the determination of the charge of interfering with a witness.²¹⁷

Thus the Court considered, in some detail, the course of evidence in the domestic courts and how that course may have been different if the applicant's wife had been examined. Similar analysis was conducted in *Bricmont*, *Maresti*, and *Vanjak*.²¹⁸ In so doing, the Court engages with and reviews the domestic courts' factual and legal conclusions.

²¹⁶ *Walchli v France* at [29] (translated).

²¹⁷ *Koval v Ukraine* at [116].

²¹⁸ *Bricmont v Belgium* (App 10857/84) (1990) 12 EHRR 217 at [89] (considered in *Ovey and White*, 207; *Petzold*, 50; *Trechsel*, 103; *Maresti v Croatia* (App 55759/07) (25 June 2009) at [36][41]; *Vanjak v Croatia* at [47][56].

Another case concerning witnesses was *Vladimir Romanov*. The applicant complained that he had been denied ‘adequate opportunity to put questions to witnesses against him’.²¹⁹ The Court engaged in extensive review of the national courts’ factual and legal analysis:

[101] Turning to the facts of the present case....It is also true that the applicant admitted to having been present at the crime scene with the intention of beating Mr I. up and that the courts relied on that admission, but under Russian law a conviction cannot rest solely on the admission of the accused....*The Court is not convinced that the applicant’s avowal that he had intended to beat the victim up amounted to an admission that he had wanted to rob him too...*

[102] As to the three witnesses, they had made no observations on the alleged acts and gave evidence only on the fact that they had seen some four men running from the crime scene. Furthermore, the witnesses were unable to identify those men...As regards the confessions, the Court notes that the co-defendants retracted them at the trial, alleging coercion on the part of the investigator. Leaving aside the investigation techniques and the alleged interrogation of the co-defendants in a state of drug intoxication, *the Court reiterates that a higher degree of scrutiny should be applied to assessment of statements by co-defendants, because the position in which the accomplices find themselves while testifying is different from that of ordinary witnesses....*For the guarantees of Article 6 of the Convention to be respected on account of the admissibility of a guilty plea from a co-accused, such a plea should only be admitted to establish the fact of a commission of a crime by a pleading person, and not the applicant, and a judge should make it clear to the jury that the guilty plea by itself did not prove that the applicant was involved in that crime.²²⁰

The italicised excerpts, in particular, constitute direct engagement with the national courts’ factual and legal analysis. This form of analysis undermines the Court’s frequent insistence that, in general, it is not its role to review national courts’ factual and legal conclusions.

²¹⁹ *Vladimir Romanov v Russia* (App 41461/02) (24 July 2008) at [92].

²²⁰ *Ibid.* at [101][102] (emphasis added).

Similarly, in the self-incrimination case of *Condron*, the Court engaged in detailed factual-legal review of the proceedings in the national courts:

[63] ...the Court of Appeal had no means of ascertaining whether or not the applicants' silence played a significant role in the jury's decision to convict. The Court of Appeal had regard to the weight of the evidence against the applicants. However it was in no position to assess properly whether the jury considered this to be conclusive of their guilt.

[64] The Court is not persuaded either that the fact that the co-accused, Mr Curtis, who also remained silent during police interview...was acquitted indicates that the jury attached little weight to the applicants' silence in finding them guilty. It cannot be excluded that the jury accepted Mr Curtis's explanation for his silence and did not therefore draw an adverse inference against him; it cannot be excluded either that the jury may have accepted the applicants' defence to the charges, for example their claim that the police had planted incriminating evidence in their flat...and that the evidence against them was not as overwhelming as the Court of Appeal considered. In any event, it is a speculative exercise which only reinforces the crucial nature of the defect in the trial judge's direction and its implications for review of the case on appeal.²²¹

Once again, the European Court's frequent insistence that it is not its role to review national courts' factual-legal analysis is rendered more incoherent whenever it engages in this sort of review of the national court's factual-legal analysis.

Our fifth exception, one related to those above, is evident in *Brennan v United Kingdom*, where the Court states that, 'as a general rule', it would not:

substitute its own assessment of the evidence made by a domestic court, *save in circumstances where* the domestic court's assessment was arbitrary or capricious, or the system of guarantees or safeguards which applied in the assessment of the reliability of confession evidence was manifestly inadequate.²²²

²²¹ *Condron v United Kingdom* (App 35718/97) (2001) 31 EHRR 1 at [63][64].

²²² *Brennan v United Kingdom* (App 39846/98) (2002) 34 EHRR 18 at [51] (emphasis added), citing *Edwards v United Kingdom* at [34]. Note that *Edwards* makes no reference whatsoever to 'arbitrary or capricious', nor to the 'system of guarantees or safeguards' standard.

We may note that this passage allows the Court a sizeable loophole to engage in appellate-style review of the domestic court's assessment of the evidence. Further, it is also plain that the *Brennan* judgment does not provide guidance on whether the Court should test every domestic court's factual assessments against the 'arbitrary or capricious' standard before deciding to review them, or if there is another appropriate 'gatekeeper' standard. In any event, granting the Court the power to review 'arbitrary or capricious' domestic court rulings sounds very close indeed to the appellate-style review from which the Court has distanced itself.

Our sixth exception for this section is evident in *DeWeer*. In that case, the Court considered the validity of the applicant's purported waiver of 'his right to have his case dealt with by a tribunal.'²²³ The Court stated:

in a democratic society too great an importance attaches to the "right to a court"...for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (*ordre public*) of the member States...any measure or decision alleged to be in breach of Article 6 calls for particularly careful review...²²⁴

It is unclear whether the force of this statement is that 'particularly careful review' will be conducted of any waiver case,²²⁵ or whether 'particularly careful review' is called for in any case in which a Contracting State asserts a public order interest. Regardless of whether these statements are directed at waiver or at public order, this exception imposes on the Court an obligation to conduct 'particularly careful review', which

²²³ *DeWeer v Belgium* at [49].

²²⁴ *Ibid.* [49], citing *De Wilde and Ors v Belgium* (App 2832/66) (1979-80) 1 EHRR 373 at [65]. See, analogously, van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 601.

²²⁵ See Clayton and Tomlinson (eds), *The Law of Human Rights*, 859; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 245; Gearty, *Principles of Human Rights Adjudication*, 192.

would conceivably include review of the domestic court's legal and factual conclusions with respect to a waiver or public order.

Our seventh exception involves the European Court simply stating that it is unable to endorse the factual or legal analysis of a national court and, as such, that analysis is questioned or overturned by the Court. Thus, for example, in *Hanzevacki*, the Court considered the arguments of an applicant whose lawyer had fallen ill during the hearing. The national court had 'concluded that the counsel's presence was not necessary in view of the evidence...and the features of the crime'.²²⁶ The Court, however, stated:

[25] The Court *cannot endorse the views of the appellate court* for the following reasons. The Court notes that one of the most important aspects of a concluding hearing in criminal trials is an opportunity for the defence, as well as for the prosecution, to present their closing arguments, and it is the only opportunity for both parties to orally present their view of the entire case and all the evidence presented at trial and give their assessment of the result of the trial. The Court considers that the choice made by the prosecution not to attend the concluding hearing in the case against the applicant cannot have any effect on the right of the accused to be represented by a lawyer of his own choosing.²²⁷

Virtually identical language appeared in *Maresti*.²²⁸ Similarly, in *Sebalj*, the European Court restated the fourth instance doctrine and then, three paragraphs later, openly indicated that it was unwilling to accept the analysis of the national courts:

The national courts based their conclusion that the applicant was questioned in a lawyer's presence on the fact that a statement to this effect had been given by State officials who had a duty to act in accordance with the laws well known to them. However, *the Court cannot endorse such a conclusion* in the light of the fact that the national

²²⁶ *Hanzevacki v Croatia* at [24].

²²⁷ *Ibid.* at [25] (emphasis added).

²²⁸ *Maresti v Croatia* at [41].

courts failed to examine the obvious discrepancy between the alleged time of the presence of lawyer...and the time of the applicant's actual questioning.²²⁹

In such cases, the European Court does not don even the thinnest of veils in questioning the analysis of the national courts.

B.5.3 Have the 'exceptions' become the rule?

In the two preceding subsections, therefore, eight groups of examples point to ways in which the European Court routinely engages in review of domestic courts' factual and legal analysis. If we accept this case law on its face, then the state of the law could be summarised in the following way. In the course of an Article 6 criminal application, the Court's role is not to review domestic courts' factual or legal analysis, unless the application:

- concerns the right to reasons;
- concerns *Salabiaku* presumptions;
- is an Article 6(1) application considering the role of the trial judge;
- concerns rules of procedure;
- concerns witnesses;
- arises out of an arbitrary or capricious assessment by a domestic court or out of a confession for which there were inadequate reliability-assessment safeguards;
- involves either a waiver of the right of access to a court or involves *ordre public* considerations; or
- involves domestic courts' reasoning that the European Court 'cannot endorse'.

²²⁹ *Sebalj v Croatia* (App 4429/09) (28 June 2011) at [262] (emphasis added). The fourth instance doctrine is outlined at [259].

Taken together, these exceptions provide the European Court with an array of ways in which it can review domestic courts' factual and legal analysis.²³⁰ An applicant in any Article 6 criminal application, if unsatisfied with domestic appellate processes, would be well advised to raise one or more of the categories identified above in order to provide the Court with the trigger to review domestic proceedings. The right to reasons could be invoked in many Article 6 criminal applications; rules of procedure and witnesses would similarly be able to be invoked on a regular basis.

If the European Court is willing to review factual and legal analysis in so many situations, it risks giving the appearance that the default position is, in fact, that the Court regards itself as *empowered* to engage in appellate-style analysis *unless* the application is a rare one that is incapable of being brought within one of the categories above. If that were to be the case, then the interests of transparency, congruence and predictability demand that the Court reformulate its approach to appellate-style review to reflect the reality evident in the case law.²³¹ Thus we have demonstrated how our two broad arguments with respect to the fourth instance doctrine – the first about internal coherence and the second about the incongruence between rhetoric and practice – combine to undermine the Court's approach in this area.

B.6 The European Court's approach to the law of evidence is marked by incoherence

In defining its role in Article 6 criminal cases, the European Court is frequently called upon to engage with issues related to the law of evidence. Some such issues – such as

²³⁰ cf van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 572-573.

²³¹ There may also be institutional or logistical implications, of the sort discussed by Trechsel, 84.

those relating to the calling of witnesses – have been touched on above. In this section, we consider the Court’s approach to rules of admissibility. This section is not an exhaustive survey of the Court’s approach to issues related to the law of evidence, or even of its approach to rules of admissibility. Some particular aspects of those general issues are dealt with in subsequent Parts.²³² For now, however, a brief overview of the Court’s approach is appropriate insofar as it constitutes part of the way that the Court generally defines its role in Article 6 criminal cases. This section argues that the Court’s approach is incoherent, poorly explained, and that it fails to appreciate the complexity of the framework outlined in its own case law.

The starting point is *Schenk*, where the Court outlined its inability to consider rules of admissibility:

While Article 6...guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr Schenk’s trial as a whole was fair.²³³

It may be worthwhile to disaggregate the way in which the European Court has considered several ideas in this passage. First, the Court states that because Article 6 does not lay down any rules on evidence, *therefore* it is primarily a matter for national law (one wonders whether this logic would defeat most of the Article 6 implied

²³² And for analysis of how the European Court’s jurisprudence interacts with the domestic law of, eg, the United Kingdom, see I Dennis, *The Law of Evidence* (3rd edn Sweet & Maxwell, London 2007); P Murphy, *Murphy on Evidence* (10th edn OUP, Oxford 2008); C Tapper, *Cross and Tapper on Evidence* (12th edn OUP, Oxford 2010).

²³³ *Schenk v Switzerland* at [46]. See Trechsel, 293-294; Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 202, 256; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 585-586; Petzold, 54; Arai-Takahashi, 49.

rights).²³⁴ Second, the Court states that the logical consequence of this being primarily a matter for national law is that the Court cannot rule that such evidence will never be admissible (it is unclear why the Court's inability to rule in the abstract follows from something being primarily a matter of national law). Notwithstanding these tensions, *Schenk* has proven extremely influential, and has repeatedly been referred to directly or indirectly.²³⁵

Crucially, however, *Schenk* sets up a false dichotomy: the Court's job is *not* to rule on admissibility, especially in the abstract, but its job *is* to ascertain whether the trial as a whole was fair.²³⁶ But the two are not mutually exclusive. *Schenk* failed to establish a mechanism for how to deal with cases where an admissibility issue may render the 'trial as a whole' unfair. If we accept the premise of *Schenk*, then to determine whether a 'trial as a whole' is fair, the logical course may well be to examine the evidence admitted by the national court and to consider whether or not it should have been admitted. On the other hand, if *Schenk* warns against ruling on admissibility and urges that it be the province of domestic courts, then perhaps the Court should not engage with issues of admissibility at all, even in considering the fairness of the

²³⁴ See also *Foldes and Foldesne Hajlik v Hungary* (App 41463/02) (2008) 47 EHRR 11 at [28]; cf *Jalloh v Germany* at [94]. See also Trechsel, 293-294; Part D below.

²³⁵ *Garcia Ruiz v Spain* at [28]; *Allan v United Kingdom* at [42]; *Diamantides v Greece (No 2)* (App 71563/01) (19 May 2005) at [46]; *Foldes and Foldesne Hajlik v Hungary* at [28]; *Jalloh v Germany* at [94]; *Soylemez v Turkey* (App 46661/99) (21 September 2006) at [121]; *Shabelnik v Ukraine* at [54]; *Pelissier and Sassi v France* (App 25444/94) (2000) 30 EHRR 715 at [45]; *PG and JH v United Kingdom* (App 44787/98) (2008) 46 EHRR 51 at [76]-[78]; *Solakov v FYROM* (App 47023/99) (31 October 2001) at [57]; *AM v Italy* (App 37019/97) (14 December 1999) at [24]; *Van Mechelen and Ors v Netherlands* at [50]; *Doorson v Netherlands* (App 20524/92) (20 February 1996) at [67]; *Kostovski v Netherlands* (App 11454/85) (1990) 12 EHRR 434 at [39]; *Bracci v Italy* (App 36822/02) (13 October 2005) at [51]; *Luca v Italy* (App 33354/96) (2003) 36 EHRR 46 at [38]; *Khan v United Kingdom* (App 35394/97) (2001) 31 EHRR 45 at [34]; *Teixeira de Castro v Portugal* at [34]; *Gafgen v Germany (Grand Chamber)* at [162]; see Trechsel, 294.

²³⁶ See Part E.2 for more on the 'proceedings as a whole'.

'trial as a whole'. The Court's role in such cases is left radically unclear by *Schenk*. For example, in order to determine whether the admission of certain evidence rendered any particular trial unfair, the Court may potentially need to review the admission of evidence in every Article 6 criminal fair trial case to ensure that the trial under consideration was fair at first glance. What standard should be used on such a review? Should the standard on any such preliminary review be different to that which might be used on a subsequent closer look?

There is an additional problem. *Schenk* exhibits the European Court's general reluctance to make abstract rulings, stating that it could not 'exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible'.²³⁷ But, as we will see, the European Court has repeatedly taken decisions contrary to this general statement. Often, these decisions take precisely the form of 'exclud[ing] as a matter of principle and in the abstract that' certain kinds of evidence 'may be admissible'.

A useful case study to illustrate these criticisms is provided by those cases relating to the admissibility of evidence obtained in breach of a Convention right. A forceful statement of the European Court's view of its role with respect to evidence was made in *Jalloh* (similar statements were made in cases such as *Khan*, *Allan*, *PG & JH*, and *Gafgen*²³⁸):

²³⁷ *Schenk v Switzerland* at [46].

²³⁸ *Khan v United Kingdom* at [34]; *Allan v United Kingdom* at [42]; *PG and JH v United Kingdom* at [76]; *Gafgen v Germany* (App 22978/05) (2009) 48 EHRR 13 at [97]; *Gafgen v Germany (Grand Chamber)* at [163]. See M Spurrier, 'Gafgen v Germany: fruit of the poisonous tree' [2010] EHRLR 513; S Greer, 'Should police threats to torture suspects always be severely punished? Reflections on the Gafgen case'

It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.²³⁹

Thus *Jalloh* repeats the dichotomy that determining whether certain types of evidence are admissible is *not* the role of the Court, but determining the fairness of the proceedings as a whole is the role of the Court. This dichotomy obscures the possibility that a ruling on the fairness of proceedings might, implicitly or explicitly, involve ruling on admissibility.

The difficulties with this dichotomy were evident, in fact, in *Jalloh*. In a passage worth excerpting at length, the Court ruled on the admissibility of certain evidence in the course of determining the fairness of the proceedings as a whole:

[105] ...the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings....In [the European Court's] view, incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe

[106] Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. *It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair irrespective of the seriousness of the offence allegedly committed, the*

(2011) 11(1) Human Rights Law Review 67; H Sauer and M Trilsch, 'Gafgen v Germany (Case Comment)' (2011) 105 American Journal of International Law 313; S Ast, 'The Gafgen Judgment of the ECtHR: On the Consequences of the Threat of Torture for Criminal Proceedings' (2010) 11(12) German Law Journal 1393; Ovey and White, 193-196.

²³⁹ *Jalloh v Germany* at [95], citing *Khan v United Kingdom* at [34], *PG and JH v United Kingdom* at [76], and *Allan v United Kingdom* at [42].

weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.²⁴⁰

The logical result of this passage is that if Contracting States wish to comply with the European Court's case law, certain types of evidence *must* become inadmissible regardless of the individual circumstances of a particular case. A plainer demonstration of the flaws of the *Schenk* dichotomy is difficult to imagine.

The question then becomes why the Court's role with respect to evidence changes when evidence was obtained in breach of Article 3. The Court's explanation is that:

Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible...²⁴¹

Several points should be made with respect to this series of justifications and the extent to which they justify unique treatment for Article 3. First, there is at least an argument that *every* Convention right enshrines 'fundamental values of democratic societies'. Second, there are other articles not providing for exceptions (Article 5, for example).²⁴² Third, there are other non-derogable articles (Articles 2, 4(1) and 7).²⁴³ These three factors indicate the potential for incoherence in the European Court's case law: if these factors justify interfering with admissibility rules in certain cases, why not in others?

²⁴⁰ *Jalloh v Germany* at [105]-[106], citing *Rochin v California* 342 US 165 (1952) (Supreme Court of the United States). See Trechsel, 88.

²⁴¹ *Jalloh v Germany* at [99]; cf Spurrier.

²⁴² Although cf *Austin v United Kingdom* (App 39692/09) (15 March 2012).

²⁴³ See A Ashworth, 'Security, The Terrorist Threat and the Value of Human Rights' in Goold and Lazarus (eds).

This area of the law is also rendered more complex by rulings on the inadmissibility of, for example, evidence obtained ‘as a result of incitement by state agents’.²⁴⁴ We return to *Jalloh* in later Parts.²⁴⁵ But of course neither this section, nor this thesis, is concerned directly with the admissibility of evidence obtained in breach of a Convention right. The broader concern is one of coherence and predictability, and a fear that the Court’s stated position may not always be reflected in the substance of its decisions.

B.7 Conclusion to Part B

Part B argued that the European Court’s sense of its own role is characterised by incoherence. The Part demonstrated that although the Court often describes its role in forceful and unequivocal terms, those terms are often undermined by a series of undertheorised exceptions. This was demonstrated by, first, simply arguing that the Court’s sense of its own role is poorly defined and poorly explained. Second, and particularly in the context of the fourth instance doctrine and the Court’s approach to evidence, it was argued that there was a disconnect between the Court’s stated view of its own role and the way in which the Court apparently operates in practice. The result of these arguments is that the Court’s statements in this area are marked by inconsistency, incongruity, and unpredictability.

²⁴⁴ *Khudobin v Russia* at [133].

²⁴⁵ Relevant passages of *Jalloh* have been drawn upon in a number of cases, eg, *Soylemez v Turkey* at [122]-[125]; *Haci Ozen v Turkey* (App 46286/99) (12 April 2007) at [99]-[101]; *Sacettin Yildiz v Turkey* (App 38419/02) (5 June 2007) at [46]-[48]; *Gafgen v Germany* at [98]-[99]; *Levinta v Moldova* (App 17332/03) (16 December 2008) at [99]-[100].

PART C: OUT OF ONE, MANY? THE INTERNAL STRUCTURE OF ARTICLE 6.

In Parts A and B, we considered how the European Court describes its tools of interpretation, and its role, in Article 6 criminal cases. In Part C, our focus narrows. This Part considers how the Court analyses the relationships between the various component parts of Article 6. In this thesis, we refer to these relationships as comprising the *internal* structure of Article 6.

In considering the European Court's analysis of Article 6's internal structure, this Part asks a big-picture question about how the Court views Article 6: do its component elements amount to *one* guarantee or do they constitute *multiple independent* guarantees? Put another way, does Article 6 provide protection for the right to a fair trial (a single right, the definition of which is elaborated on by the provisions of Article 6(1), Article 6(2), and Article 6(3)), or does Article 6 provide protection for a collection of related but independent rights, all of which are housed together in the omnibus provision of Article 6? Confusion between the umbrella description of Article 6 rights as the 'right to a fair trial', and the specific 'fair and public hearing' right protected by Article 6(1), may add complexity and uncertainty to attempts to conceptualise the internal structure of Article 6.²⁴⁶

²⁴⁶ For a possible example of this confusion, see Jacot-Guillarmod, 381, where Jacot-Guillarmod misquotes a key passage from *Golder v United Kingdom* at [28]. *Golder* refers to Article 6(1) but Jacot-Guillarmod's rendering of the quote has *Golder* referring to Article 6 more generally. Note, in passing, that the 'Right to a fair trial' heading to Article 6 was not added to the text of the European Convention until 1998, when Protocol 11 entered into force. Among other things, Protocol No 11 prescribed various headings to be inserted into the European Convention's Articles. See also Summers, 102-103.

Generalisations are commonly made about the internal structure of Article 6. In this Part we challenge some of these generalisations. For example, in its 2011 Grand Chamber decision in *AlKhawaja and Tahery*, the Court claimed that it had ‘always interpreted Article 6(3) in the context of an overall examination of the fairness of the proceedings’ and that the individual Article 6(3) guarantees were merely elements of the Article 6(1) fair trial guarantee.²⁴⁷ This Part demonstrates that this was an oversimplification by the Grand Chamber. Less of an oversimplification was Greer’s statement that the ‘standard of fairness for criminal trials embraces the same general Article 6(1) criteria as apply in civil proceedings, but also includes the more detailed specifications found in Article 6(2) and (3)’.²⁴⁸ Statements of this sort may well be accurate so far as they go, but, as we will see, they conceal considerable complexity in terms of the functioning of the Court’s case law.

Moreover, this Part and subsequent Parts – especially Part E – will demonstrate the consequences that arise out of oversimplifications of this sort. Indeed, by analysing how the Court describes Article 6’s internal relationships, this Part attempts to explain something even more crucial about the Court’s approach to Article 6. As we shall see, an understanding of the way that the European Court approaches the internal structure of Article 6 is crucial to understanding the way that the Court deals with the question of when Article 6 has been violated. Simply put, when determining whether there has been a violation, the Court will need to conduct that analysis within certain boundaries (if, for example, an application is considered separately under Article 6(1)

²⁴⁷ *AlKhawaja and Tahery v United Kingdom (Grand Chamber)* (App 26766/05) (15 December 2011) at [143][146].

²⁴⁸ Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 253.

alone and then under Article 6(3)(a) alone, those boundaries may be different to an application consider under Article 6(1) and Article 6(3)(a) ‘taken together’). Choosing to deal with an application by asking ‘has there been a fair trial?’ involves asking a different question indeed from, for example, ‘has the accused person been informed promptly, in a language which the person understands and in detail, of the nature and cause of the accusation against them?’. This Part, then, is about how the Court describes those boundaries, and how the internal structure of Article 6 affects them; Part E will deal with how to make the assessments within those boundaries. Part D addresses in greater depth matters relating to the internal structure of Article 6 in the context of the implied rights. As such, the discussion of Article 6’s internal structure in this Part is vitally linked to the discussion in subsequent Parts.

This Part argues that the Court has adopted a number of approaches to the internal structure of Article 6, and that these approaches are not always compatible. Crucially, the Court does not explain its use of different approaches in different cases in any meaningful way. Moreover, this Part argues that these approaches are often lacking internal consistency, and are poorly explained by the Court. In order to illuminate a discussion on these questions of internal structure, much of the discussion in this Part relates to applications that involve alleged infringements of more than one of Article 6’s provisions. How the European Court deals with an application alleging violations of Article 6(1) and Article 6(3)(a), for example, provides an insight to how the European Court views the internal relationship between those two provisions and the internal structure of Article 6 more generally.

C.1 The European Court has adopted several approaches to the internal structure of Article 6

The Court has adopted a variety of descriptions of the internal relationships of Article 6. In this Part we consider some of those descriptions. At the outset, it should be noted that while some of these descriptions may be in tension with one another, or even contradict each other, others are not mutually exclusive. After beginning with the 1961 description adopted by the European Commission in *Nielsen v Denmark*, the approaches considered by this Part include:

- that each of the different component parts constitute distinct minimum requirements;
- that the requirements of Article 6(2) and Article 6(3) represent more-specifically-defined aspects of Article 6(1) and, as such, the focus of the European Court's analysis in a given case should be on assessing complaints under the more general provision of Article 6(1) rather than the specific terms of Article 6(2) and/or Article 6(3). Under this view, Article 6(2) and Article 6(3) are most useful insofar as they provide guidance on how to define and apply the Article 6(1) guarantee;
- that the requirements of Article 6(2) and Article 6(3) represent more-specifically-defined aspects of Article 6(1) and, as such, the focus of the European Court's analysis in a given case should be on assessing complaints under the more specific provision(s) rather than the general terms of Article 6(1); and
- that the requirements of Article 6(2) and Article 6(3) represent more-specifically-defined aspects of Article 6(1) and, as such, the European Court's analysis in a given case should involve assessing complaints by 'taking together' the terms of Article 6(1) and Article 6(3) (or Article 6(1) and Article 6(2), as the case may be).

The existing literature does not always acknowledge the complexity, and potential for inconsistency, inherent in these various approaches.²⁴⁹ As this Part will demonstrate, these approaches include substantial inconsistencies and incoherence and provide various examples of the irrational flexibility that features throughout this thesis.

C.2 The Commission's decision in *Nielsen* provided a reasonably clear approach

In 1961, the European Commission handed down its decision in *Nielsen v Denmark*. It was one of the first twenty matters dealt with by the Strasbourg institutions for which there exist published decisions, and it provides an interesting model of one way to approach Article 6's internal structure. The applicant challenged his indictment on the ground that 'the text of [the] indictment was not set out in detail sufficient to give him the possibility of adequately defending himself' in violation of Article 6(3)(a).²⁵⁰ In analysing the complaint, the Commission considered the internal structure question.

The Commission noted 'that neither the Convention nor the relevant "*travaux préparatoires*" furnish any guide as to the interpretation of the words' of Article 6(3).²⁵¹ The Commission, therefore, described its task as being 'to interpret this provision in accordance with the general aim of Article 6'.²⁵² The Commission went on to state (for ease of reference, this will be 'passage A'):

²⁴⁹ See, eg, van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 631-632; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 246, 306; Brems, 'Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights'; cf Trechsel, 210.

²⁵⁰ *Nielsen v Denmark* (App 343/57) (1961) 4 YB 494, 534. The full text is not available on the European Court's 'HUDOC' database.

²⁵¹ *Ibid.*, 534.

²⁵² *Ibid.*, 534. See Part A.1.2.

Article 6 of the Convention does not define the notion of ‘fair trial’ in a criminal case. [Article 6(3)] enumerates certain specific rights which constitute essential elements of that general notion, and [Article 6(2)] may be considered to add another element. The words ‘minimum rights’, however, clearly indicate that the six rights specifically enumerated in [Article 6(3)] are not exhaustive, and that a trial may not conform to the general standard of a ‘fair trial’, even if the minimum rights guaranteed by [Article 6(3)] - and also the right set forth in [Article 6(2)] - have been respected.²⁵³

The reasoning in this passage deserves close analysis. First, the Commission stated that Article 6 does not *define* the general notion of a fair trial. Second, the Commission indicates that the rights in Article 6(2) and Article 6(3) constitute essential elements of the general notion of a fair trial. Third, the Commission stated that the wording of Article 6(3) ‘clearly’ indicated that the rights listed in Article 6(3) are *not* an exhaustive list of what constitutes a fair trial. Fourth, as a result, the Commission states that compliance with all of the Article 6(3) rights does not necessarily result in compliance with the broader Article 6 fair trial guarantee. The passage, which rests on a close reading of the text of Article 6, was only the first stage of the Commission’s analysis.

Having established this initial foundation for its understanding of the internal structure of Article 6, the Commission continued to describe that internal structure in this way (for ease of reference, this will be ‘passage B’):

The relationship between the general provision of [Article 6(1)] and the specific provisions of [Article 6(3)], seem[s] to be as follows: In a case where no violation of [Article 6(3)] is found to have taken place, the question whether the trial conforms to the standard laid down by [Article 6(1)] must be decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration of one particular aspect of the trial or one particular incident. Admittedly, one

²⁵³ Ibid., 548. Note that the ‘Right to a fair trial’ heading to Article 6 was not added to the text of the European Convention until 1998, when Protocol 11 entered into force. As such, the Commission’s references in this passage to ‘fair trial’ may be understood as referring to either the ‘fair hearing’ guarantee in Article 6(1), or to the general protection provided by Article 6. It is not immediately clear what the European Commission is referring to when it mentions the ‘six rights’ in Article 6(3).

particular incident or one particular aspect even if not falling within the provisions of [Article 6(2)] or [Article 6(3)], may have been so prominent or may have been of such importance as to be decisive for the general evaluation of the trial as a whole. Nevertheless, even in this contingency, it is on the basis of an evaluation of the trial in its entirety that the answer must be given to the question whether or not there has been a fair trial.²⁵⁴

The formula adopted by the Commission in these passages in *Nielsen*, therefore, clearly indicates that, if it is possible for an alleged violation to be considered under the specific guarantees of Article 6(3), then it should be so considered. If no violation of Article (3) 'is found to have taken place', then 'the question whether the trial conforms to the [more general] standard laid down by [Article 6(1)] must be decided on the basis of a consideration of the trial as a whole'. It should be emphasised that, under this approach, the analysis of the 'trial as a whole' or of 'the trial in its entirety' is only triggered if there is no violation of Articles 6(2) or Article 6(3).

The approach adopted by the Commission in *Nielsen* involved close analysis and explication of the text of Article 6, and provided an account of the internal structure of Article 6 that provided meaning to each of its component parts. That is, the *Nielsen* approach provided a plausible and coherent explanation for why Article 6 contained a series of individually-articulated guarantees rather than a single unelaborated guarantee. The *Nielsen* approach also made plain that, while there may be overlap between the ideas in Article 6(1) and Article 6(2) or Article 6(3), such overlap does not mean that any of Article 6's provisions deserve greater or lesser protection. For the Commission, Article 6(2) and Article 6(3) did not merely serve the purpose of helping to define the 'fair hearing' guarantee in Article 6(1): they were *guarantees in and*

²⁵⁴ Ibid., 548, 550.

of themselves and should be analysed as such. Thus *Nielsen* expressed a firm view on the crucial distinction between, on the one hand, regarding Article 6(2) and Article 6(3) as standalone guarantees and, on the other hand, regarding Article 6(2) and Article 6(3) as helpful definitional elaborations or examples of situations in which Article 6(1)'s 'fair hearing' guarantee might be triggered. As we shall see, there is significant tension in the case law of the European Court between these two approaches, to the detriment of the coherence and consistency of the European Court's case law.

Thus, despite being written early in the life of the Strasbourg institutions, *Nielsen* provided a clear and readily understood model of how to consider an application in which multiple violations of Article 6 are alleged, and more generally of the internal structure of Article 6. Notwithstanding these analytical strengths, the reasoning in *Nielsen* has been cited directly by the Strasbourg institutions only sporadically.²⁵⁵ Indeed, as we will see, other approaches to the internal structure are more prevalent.²⁵⁶ Some of these other approaches are radically different to that outlined in *Nielsen*'s passage B and are often in tension with one another. In its case law more generally, the European Court has essentially ignored the reasoning proposed and adopted in *Nielsen*, especially that in passage B. To be clear, this is *in no way* a

²⁵⁵ See, eg, *Blastland v United Kingdom* (App 12045/86) (7 May 1987)(Commission); *AB v Germany* (App 11863/85) (4 May 1987)(Commission); *F v United Kingdom (Commission)* (App 11058/84) (13 May 1986).

²⁵⁶ See, eg, *DeWeer v Belgium* at [56], citing *Nielsen v Denmark*. For background on *DeWeer*, see, eg, Trechsel, 114, 163; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 209; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 540-541. *DeWeer* referred to in, eg, *Artico v Italy* at [32]; *Quaranta v Switzerland* (App 12744/87) (24 May 1991) at [27]; *Imbrioscia v Switzerland* at [37]; *Goddi v Italy* (App 8966/80) (9 April 1984) at [28]; *Colozza v Italy* at [26]; *Bonisch v Austria* at [29]; *Unterpertinger v Austria* at [29]; *Barbera, Messegue and Jabardo v Spain* at [67]; *Kostovski v Netherlands* at [39]; *Windisch v Austria* (App 12489/86) (27 September 1990) at [23]; *Isgro v Italy* (App 11339/85) (21 January 1991) at [31]; *Asch v Austria* (App 12398/86) (26 April 1991) at [25]; *Artner v Austria* (App 13161/87) (25 June 1992) at [19]; *Pullar v United Kingdom* (App 22399/93) (10 June 1996) at [45]; *Foucher v France* (App 22209/93) (1998) 25 EHRR 234 at [30].

criticism made on *stare decisis* grounds: instead, our criticism is of the unexplained choice to ignore a reasoned, explained approach to the internal structure of Article 6 in favour of a multiplicity of incoherent and inconsistent approaches lacking any underlying theory. In this sense, *Nielsen* offers a counterfactual example of what might have been.

C.3 The European Court sometimes describes the components of Article 6 as independent minimum requirements

The first contemporary approach we consider involves the European Court describing the internal structure of Article 6 by focusing on the nature of the Article 6(3) rights. In these cases, the Court frames the Article 6(3) rights as requiring protection in their own right regardless of what protection may or may not be provided by Article 6(1). More specifically, in a number of cases, the Court has described the Article 6(3) guarantees as standalone independent rights, or as ‘minimum rights’. It is this approach that is the closest, of the more contemporary approaches, to that outlined in *Nielsen* above. Indeed, in *Luedicke, Belkacem and Koc v Germany*, in the course of finding a violation of Article 6(3)(e), the European Court went on to accept that

for the purpose of ensuring a fair trial, [Article 6(3)] enumerates certain rights (‘minimum rights’/‘*notamment*’) accorded to the accused...²⁵⁷

As simple a point as it may seem, it is rare for the Court to draw attention to the status of Article 6(3) rights as ‘minimum rights’, or even to consider that status. In *Luedicke* the German government argued for a particular interpretation of Article 6(3)(e) by

²⁵⁷ *Luedicke, Belkacem and Koc v Germany* at [42]. On *Luedicke*, see, eg, Trechsel, 331-339; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 649-650; Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 327.

referring to the wording of other Article 6(3) rights.²⁵⁸ The Court, however, rejected any such argument:

The Court is not called on in the current proceedings to interpret [Article 6(3)(c)] and [Article 6(3)(d)], which are not concerned with the same situation as [Article 6(3)(e)]...The Court restricts itself to the following remark: whatever the doubts that might be prompted by the interpretation of [Article 6(3)(c)] and [Article 6(3)(d)], such doubts cannot be relied on in opposition to the clear meaning of the adjective 'free' in [Article 6(3)(e)].²⁵⁹

In *Luedicke*, therefore, the European Court was firm in emphasising the independent and stand-alone nature of the Article 6(3)(e) guarantee. This approach stands in contrast to some of the cases that will be considered later in this Part. In a sense, this is the tension at the heart of Article 6: to what extent is Article 6 a single guarantee, and to what extent is it a series of guarantees?

More than three decades after *Luedicke*, the Court's 2009 Chamber decision in *Al-Khawaja and Tahery v United Kingdom* included an unusually lengthy statement on the internal structure of Article 6. This statement emphasises the 'minimum rights' approach noted in *Luedicke*:

As with the other elements of [Article 6(3)], [Article 6(3)(d)] is one of the *minimum rights which must be accorded to anyone who is charged with a criminal offence*. As minimum rights, the provisions of [Article 6(3)] constitute *express guarantees* and cannot be read, as it was by the [England and Wales] Court of Appeal in *Sellick*, as illustrations of matters to be taken into account when considering whether a fair trial has been held. Equally, even where those minimum rights have been respected, the general right to a fair trial guaranteed by [Article 6(1)] requires that the Court ascertain whether the proceedings as a whole were fair. Hence, in *Unterpertinger v. Austria*, the Court held that the reading out of statements of witnesses without the witness being heard in a public hearing could not be regarded as being inconsistent with

²⁵⁸ *Luedicke, Belkacem and Koc v Germany* at [43].

²⁵⁹ *Ibid.* at [44].

[Article 6(1)] and [Article 6(3)(d)] of the Convention but it went on to emphasise that the use made of this in evidence had nevertheless to comply with the rights of the defence which it was the object and purpose of Article 6 to protect.²⁶⁰

This statement is unusual in describing the internal structure of Article 6 in considerable detail, and as such is worth disaggregating. First, the *Al-Khawaja* Chamber Court notes that Article 6(3) rights are ‘minimum rights’ and ‘express guarantees’ that stand alone. Second, their status as minimum express guarantees means that the Article 6(3) rights are *not* simply criteria to be considered as part of an Article 6(1) analysis. Third, the relationship between Article 6(3) and Article 6(1) is such that an Article 6(1) analysis may take place even where there is no Article 6(3) violation. Fourth, the logical extension of this third point is that there may not be complete or partial overlap between the content and modes of analysis adopted in Article 6(1) and Article 6(3). These statements reflect some of the *Nielsen* reasoning and may appear, on their face, uncontroversial. As we shall see later in this Part, however, the European Court has frequently adopted radically different approaches to that adopted here in *Al-Khawaja*. Indeed, as we shall see, a contrary approach was adopted in the *Al-Khawaja* Grand Chamber decision.²⁶¹

In decisions like *Luedicke* and the Chamber decision in *Al-Khawaja*, as well as the decision in *Nielsen v Denmark*, the European Court has indicated clearly that the internal structure of Article 6 is such that the rights identified in Article 6(3) are independent minimum rights, worthy of protection regardless of what protection may

²⁶⁰ *Al-Khawaja and Tahery v United Kingdom* (App 26766/05) (20 January 2009) at [34] (emphasis added), referring to *R v Sellick and Sellick* [2005] EWCA Crim 651 (Court of Appeal). See also O’Brian, especially at 12.

²⁶¹ See *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [143]-[146] and at the Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajo and Karakas.

or may not be provided by Article 6(1), and at least partly autonomous from Article 6(1).²⁶² In following sections, we consider some of the European Court's other, competing, approaches to this interpretative task.

C.4 The European Court has used three approaches based on the 'specific aspects' maxim

The text of Article 6 states that the rights identified in Article 6(3) are 'minimum rights' for every person 'charged with a criminal offence'. Notwithstanding that text, the European Court has chosen, in many decisions, to emphasise the status of the Article 6(3) rights as also representing 'specific aspects' of the more general 'fair hearing' guarantee contained in Article 6(1). In this section, we consider three ways in which the Court has used the 'specific aspects' maxim to describe the internal structure of Article 6.

Three macro-arguments run throughout this section: first, that some of these three ways are in tension with the minimum rights approaches considered above. Second, these three ways are in tension with *each other*. Finally, it is argued that the European Court has failed to provide an explanation of how each of the three ways work, and why the three different ways are used at different times. It should be emphasised that this thesis accepts that, if the Court wished to adopt a finely-calibrated system in which it chose different approaches for different cases on the basis of

²⁶² This view of Article 6's internal structure is also evident in cases in which the European Court finds a violation of one sub-article of Article 6 and then goes on to find another. For example, cases like *Fatullayev*, in which the European Court found a violation of Article 6(1) on impartiality grounds and then went on to find a separate violation of Article 6(2). See *Fatullayev v Azerbaijan* (App 40984/07) (22 April 2010) at [133][163]. This approach contrasts with others we will consider below.

identifiable criteria, it could do so. As we will see, the difficulty here arises when the Court adopts approaches that are in tension with one another with very little explanation or justification at all.

C.4.1 Approach one: ‘The rights are specific aspects of Article 6(1), so the focus should be on Article 6(1)’

In a series of cases, the European Court has stated that because the guarantees contained in Article 6(3) are elements or aspects of the broader general guarantee contained in Article 6(1), the complaint should be addressed exclusively under Article 6(1). At times, the European Court’s jurisprudence under this approach seems to suggest that Article 6(2) and Article 6(3) are merely ancillary definitional advice for the purposes of construing Article 6(1). Thus, for example, in *Colozza v Italy*, the Court stated that the Article 6(3) guarantees:

are constituent elements, amongst others, of the general notion of a fair trial. In the circumstances of the case, the Court, whilst also having regard to those guarantees, considers that it should examine the complaint under [Article 6(1)]...²⁶³

Often, as in *Colozza*, the European Court will state that it had ‘regard’ to the Article 6(3) guarantees, but examined the complaint under Article 6(1). Another classic example of this approach is evident in *Bonisch v Austria*. In *Bonisch*, the Court adopted an approach that notionally gave ‘due regard’ to the Article 6(3) guarantees as part of the Article 6(1) analysis:

the guarantees contained in [Article 6(3)] are constituent elements, amongst others, of the concept of a fair trial set forth in [Article 6(1)].

²⁶³ *Colozza v Italy* at [26], citing *Goddi v Italy* at [28]. *Goddi* cites *Artico v Italy* at [32]. *Artico* cites *DeWeer v Belgium* at [56]. *DeWeer* cites *Nielsen v Denmark*. For more on *Colozza*, see, eg, van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 589; Trechsel, 252-256; Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 248.

In the circumstances of the instant case, the Court, whilst also having due regard to the [Article 6(3)] guarantees, including those enunciated in [Article 6(3)(d)], considers that it should examine the applicant's complaints under the general rule of [Article 6(1)].²⁶⁴

Notwithstanding the European Court's undertaking to have regard to the Article 6(3) guarantees, however, the Court conducted no detailed consideration of Article 6(3), and went so far as to say that there was *no need* to reach a conclusion on the Article 6(3) violation in this case.²⁶⁵ But beyond the terms of this specific case, it should be noted that it is unclear what the Court means by saying 'whilst also having due regard to the [Article 6(3)] guarantees': how much regard should be had? What analytical purpose does this regard serve? If there is a conflict between two provisions, will the European Court prioritise the provision it is 'having regard to', or the provision it is 'examining under'?

Nevertheless, in case after case, the European Court adopted this formulation.

Thus in *Barbera, Messegue and Jabardo v Spain* the Court recalled:

that the guarantees in [Article 6(2) and Article 6(3)(d)] are specific aspects of the right to a fair trial set forth in [Article 6(1)]; it will therefore have regard to them when examining the facts under [Article 6(1)].²⁶⁶

Later, in *Hennings v Germany*, the European Court reiterated:

that the guarantees contained in Article 6(3) are constituent elements, amongst others, of the general notion of a fair trial. In the circumstances of the case, whilst also having regard to those guarantees,...the complaint should be examined under [Article 6(1)]...²⁶⁷

²⁶⁴ *Bonisch v Austria* at [29]. See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 584.

²⁶⁵ See *Bonisch v Austria* at [28][37].

²⁶⁶ *Barbera, Messegue and Jabardo v Spain* at [67]. For more on *Barbera*, see, eg, Trechsel, 86, 128-129, 164-165; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 246-247, 300-301; Gearty, 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview', 104.

²⁶⁷ *Hennings v Germany* (App 12129/86) (1993) 16 EHRR 83 at [25].

Versions of the approach have also appeared more recently in cases such as *Salduz* and the Grand Chamber's *Al-Khawaja and Tahery* decision.²⁶⁸

An extreme example of this approach can be found in the European Court's decision in *IJL, GMR and AKP v United Kingdom*. In *IJL*, the European Court dismissed alleged violations of Article 6(3) on the basis that they all amounted to a violation of Article 6(1) anyway:

the guarantees of [Article 6(3)] are specific aspects of the right to a fair trial set out in [Article 6(1)]. In the circumstances of the case, it does not find it necessary to examine the applicants' allegations separately from the standpoint of [Article 6(3)(a)-(d)], since they amount to a complaint that the applicants did not receive a fair trial.²⁶⁹

This statement, breathtaking in its brevity, risks drastically simplifying the state of the law. Indeed, such a statement effectively reduces the provisions of Article 6(1), Article 6(2), and Article 6(3)(a)-(e) to a two-word 'fair trial' guarantee. Subsequently, in *Dowsett v United Kingdom*, the European Court took matters a step further and disregarded an Article 6(3) complaint in favour of a broad 'fairness' question:

As the guarantees in [Article 6(3)] are specific aspects of the right to a fair trial set out in [Article 6(1)], the Court has not examined the applicant's allegations separately from the standpoint of [Article 6(3)(b)]. It has addressed the question whether the proceedings in their entirety were fair.²⁷⁰

Such analysis not only fails to provide a plausible role for Article 6(2) and Article 6(3) that is distinct from that of Article 6(1), but is also in tension with the European

²⁶⁸ *Salduz v Turkey* at [50]; *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [145].

²⁶⁹ *IJL, GMR and AKP v United Kingdom* (App 29522/95) (2001) 33 EHRR 11 at [77], citing *Edwards v United Kingdom* at [33]. For discussion of *IJL* in a slightly different context, see A Ashworth, 'Self-Incrimination in European Human Rights Law - A Pregnant Pragmatism?' (2008) 30 *Cardozo Law Review* 751, 756.

²⁷⁰ *Dowsett v United Kingdom* (App 39482/98) (24 June 2003) at [40], citing *Edwards v United Kingdom* at [33][34].

Court's other case law on this topic. It is not clear whether the *IJL* and *Dowsett* Courts would even go so far as to 'have regard' to Article 6(2) and Article 6(3). As O'Brian argued in a different context, 'whatever the merits of a Convention that merely included Article 6(1) and not the rest of Article 6, that is not the Convention we have'.²⁷¹

Another aspect of this approach is evident in cases where the Court reaches a conclusion on an alleged violation of Article 6(1), and then states that is unnecessary to reach a further conclusion on an alleged violation of Article 6(2) or Article 6(3). Thus, for example, in *Coeme v Belgium*, the European Court found an Article 6(1) violation and then stated:

That [violation] being so, the Court considers that it is not necessary to rule on the alleged violation of [Article 6(2)] and [Article 6(3)(b)], since the arguments put forward on the latter point coincide, in substance, with those examined under [Article 6(1)].²⁷²

And in *Bonisch v Austria*, the Court stated:

...there has been a breach of [Article 6(1)]. This conclusion dispenses the Court from giving a separate ruling on the alleged violation of [Article 6(3)(d)]...²⁷³

Thus there is some ambiguity over the extent to which it is unnecessary to rule on violations of sub-articles other than Article 6(1). More specifically, especially in *Bonisch*, there is some suggestion that such a ruling is unnecessary if there has been a violation of Article 6(1). This suggestion goes unexplained (and we know, from *Nielsen's* passage B, that there is an equally compelling argument to be made for the opposite view).

²⁷¹ O'Brian, 35.

²⁷² *Coeme v Belgium* (App 32492/96) (22 June 2000) at [104]. For more on *Coeme*, see Trechsel, 110; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 624.

²⁷³ *Bonisch v Austria* at [28]-[29], [35]. See also *Peltier v France* at [41]-[43].

Moreover, the *Coeme* Court seems to indicate that such a ruling is unnecessary because of overlap of the *arguments* relating to the two provisions.²⁷⁴ And yet this does not take into account the possibility that the *arguments and factual analysis* could be the same, but the *standard and content of the legal guarantees* could be different. Thus, even if two arguments could be dismissed as ‘coinciding in substance,’ that dismissal does not account for differing legal standards.

There are many examples of this approach. In *Kyprianou v Cyprus*, the European Court upheld the applicant’s allegation of an Article 6(1) impartiality violation.²⁷⁵ The Court went on to rule that, in ‘view of the grounds on which it...found a violation of [Article 6(1)], ...no separate issue’ arose under Article 6(2) or Article 6(3)(a).²⁷⁶ Similarly, in *Caplik v Turkey*, the European Court found a violation of Article 6(1) on independence and impartiality grounds, and considered it unnecessary to assess other alleged violations of Article 6(1) and Article 6(2).²⁷⁷ In *Hatun and Ors v Turkey*, the European Court considered that a finding of a violation on impartiality-independence grounds made it unnecessary to consider more general complaints of an unfair procedure.²⁷⁸ And in *Golinelli and Freymuth v France*, the applicants alleged a violation of the rights of the defence and an impartiality violation;²⁷⁹ the European Court held that the matter should be considered only under Article 6(1), and that no separate issue

²⁷⁴ See also *Evcenos Onen v Turkey* (App 29782/02) (15 February 2007) at [29].

²⁷⁵ *Kyprianou v Cyprus* at [122]-[135].

²⁷⁶ *Ibid.* at [136]-[141].

²⁷⁷ *Caplik v Turkey* (App 57019/00) (15 July 2005) at [32]-[33].

²⁷⁸ *Hatun and Ors v Turkey* (App 57343/00) (20 October 2005) at [29]-[30].

²⁷⁹ *Golinelli and Freymuth v France* (App 65823/01) (22 November 2005) at [25].

arose under Article 6(3).²⁸⁰ In *Demicoli v Malta*, the European Court found a violation of Article 6(1) and considered that it was ‘not necessary to examine’ Article 6(2).²⁸¹

An illustration of the particular difficulties with this approach is provided by comparing a number of cases that considered domestic hearings held *in absentia*. In *Osu v Italy*, the European Court found a violation of Article 6(1), and, as such, considered it ‘not necessary to examine the matter under the provisions of’ Article 6(3).²⁸² In contrast, in *Hu v Italy*, decided less than five years later, the Court found that a trial in *absentia* amounted to a violation of Article 6(1) and Article 6(3), and it was held unnecessary to address the question of a separate Article 6(2) violation.²⁸³ There is no explanation of why it was necessary in *Hu* to address the alleged violations of Article 6(1) and Article 6(3) but *not* the alleged violation of Article 6(2). In contrast to *Osu* and *Hu*, other hearing in *absentia* cases have simply found a violation of Article 6 without specifying which provision of Article 6 had been infringed.²⁸⁴ The risk that the European Court takes is that it appears to be picking and choosing when it is ‘necessary’ to consider different provisions of Article 6, and that without an explanation or rationalisation for these choices, its decisions become very difficult to

²⁸⁰ Ibid. at [25]. (translated). In support of this proposition, the European Court cited *Reinhardt and Slimane-Kaid v France* (App 23043/93) (1999) 28 EHRR 59, *Meftah and Ors v France* (App 32911/96) (26 July 2002) and *Richen and Gaucher v France* (App 31520/96) (23 January 2003). On *Reinhardt* see Summers, 120.

²⁸¹ *Demicoli v Malta* (App 13057/87) (1992) 14 EHRR 47; see van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 552; Trechsel, 53. Part E.4 returns to the ‘never fair’ notion.

²⁸² *Osu v Italy* (App 36534/97) (11 July 2002) at [40][41]. Citing the same reason, the European Court also held it unnecessary to consider an alleged violation of Article 13: at [42][43].

²⁸³ *Hu v Italy* (App 5941/04) (28 September 2006) at [58][62], citing *RR v Italy* (App 42191/02) (9 June 2005) at [64], which, in turn, did not refer to doctrinal support.

²⁸⁴ See, eg, *Poitrimol v France* at [28][39], *Somogyi v Italy* at [61][76], and *Sejdovic v Italy* (GC) at [106].

predict or analyse. As we have seen already, and will continue to see, these discrepancies affect the scope of inquiry and the type of arguments that may be used in any given situation.

One final, and particularly unusual, example of the European Court's view that Article 6(2) and Article 6(3) are specific aspects of Article 6(1) was evident in its decision in *Anatoliy Tarasov v Russia*.²⁸⁵ In that case, the applicant alleged violations of Article 6(3)(b)-(d); the Court stated without explanation that it would 'examine the applicant's complaint under *Article 6(1) and Article 6(3)(b)-(c)*'.²⁸⁶ Having thus redefined the scope of the applicant's complaint, the Court went on to find that there had been an Article 6(1) violation and that it was 'not necessary' to examine the alleged Article 6(3) violations 'separately'.²⁸⁷ In so doing, this case and the others discussed in this section involve the European Court indicating that the provisions of Article 6(2) and Article 6(3) are specific aspects of Article 6(1), and that as such the real analysis should be done under Article 6(1), with reference to Article 6(2) or Article 6(3) only where necessary. This approach may be contrasted with the next approach.

C.4.2 Approach two: 'The rights are specific aspects of Article 6(1), so the focus should be on Article 6(2) or (3)'

In other cases, the European Court has stated that because the guarantees contained in Article 6(2) and Article 6(3) are elements or aspects of the broader general guarantee

²⁸⁵ *Anatoliy Tarasov v Russia* (App 3950/02) (18 February 2010).

²⁸⁶ *Ibid.* at [42] (emphasis added).

²⁸⁷ *Ibid.* at [48]-[49].

contained in Article 6(1), the complaint should be addressed under Article 6(2) or Article 6(3), respectively. Thus, for example, in *Pakelli v Germany*, the Court considered the relationship between Article 6(1) and Article 6(3)(c). The Court recalled:

that the provisions of Article 6(3)(c) represent specific applications of the general principle of a fair trial, stated in [Article 6(1)]. Accordingly, the question whether [Article 6(1)] was observed has no real significance in the applicant's case; it is absorbed by the question whether [Article 6(3)(c)] was complied with. The finding of a breach of the requirements of [Article 6(3)(c)] dispenses the Court from also examining the case in the light of [Article 6(1)].²⁸⁸

Intriguingly, the only explanation offered by the Court for adopting this approach was a reference to *Deweer v Belgium*, ‘*mutatis mutandis*’.²⁸⁹ The relevant passage of *Deweer* in fact expresses a view somewhat in tension with that adopted in *Pakelli*:

The finding of a breach of the requirements of [Article 6(1)] dispenses the Court from also examining the case in the light of [Article 6(2)] and [Article 6(3)], a course which might have been incumbent on it in different circumstances.²⁹⁰

This discrepancy exemplifies the difficulties with the European Court’s approach to the internal structure of Article 6. In some cases, it seems, Article 6(1) will trump Article 6(2) or Article 6(3) (as in *Deweer*), and in others Article 6(1) will be trumped by Article 6(2) or Article 6(3) (as in *Pakelli*).²⁹¹ The difficulty is knowing when the European Court is likely to analyse a case as falling under one or the other theory, and understanding what the rationale is for the differing approaches. That incoherence, of course, takes on significant implications when it is remembered that the framing of the

²⁸⁸ *Pakelli v Germany* at [42]. For additional background on *Pakelli*, see van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 636-637; Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 315, 317; Trechsel, 251, 271-272, 276-277.

²⁸⁹ *Pakelli v Germany* at [42], citing *DeWeer v Belgium* at [56].

²⁹⁰ *DeWeer v Belgium* at [56].

²⁹¹ Additional evidence of the latter approach is provided by those cases in which the European Court finds a violation of an Article 6(2) or Article 6(3) right and then considers it unnecessary to go on to consider a separate alleged violation of Article 6(1). See, eg, *Bok v Netherlands* (App 45482/06) (18 January 2011) at [48]-[50]. This contrasts with approaches outlined in sections above and below.

scope of any case inevitably affects the arguments and modes of analysis relevant to an assessment of any violation or infringement of Article 6.²⁹²

Similarly to *Pakelli*, in *Daud v Portugal*, the European Court adopted a curious description of its analytical process:

As the requirements of [Article 6(3)] are to be seen as particular aspects of the right to a fair trial guaranteed by [Article 6(1)], the Court will examine the applicant's complaints successively under [Article 6(3)(c)] and [Article 6(3)(e)] without isolating [Article 6(3)] from the common core to which it belongs.²⁹³

Under this formulation, the European Court appears to require analysis under the relevant sub-paragraph of Article 6(3), with resort to the broader context of Article 6 (including Article 6(1)) only a subsidiary concern. The European Court does not explain what the 'common core' is, its interpretative relevance, or how it is to be applied.²⁹⁴

A variation on this approach is evident in *Radio France v France*, in which the European Court 'point[ed] out':

that the complaint under [Article 6(1)] overlaps with the complaint under [Article 6(2)], so that it is not necessary to examine the facts complained of from the standpoint of [Article 6(1)] taken alone.²⁹⁵

²⁹² See especially Part E.2.

²⁹³ *Daud v Portugal* at [33], citing *Artico v Italy* at [32] and *FCB v Italy* at [29]. See Trechsel, 289.

²⁹⁴ The French equivalent of 'common core' ('*tronc commun*') appears in a small number of Article 6 cases: see the French versions of *Artico v Italy* at [32]; *Cardot v France* (App 11069/84) (19 March 1991) at Dissenting Opinion of Judge Morenilla; *Van Geyselghem v Belgium* (App 26103/95) (2001) 32 EHRR 24 at Dissenting Opinion of Judge Pellonpaa; and *Meftah and Ors v France* at [40]. See also Part C.4.3 below in the context of *Meftah*.

²⁹⁵ *Radio France and Ors v France* (App 53984/00) (30 March 2004) at [24], citing *Salabiaku v France* at [31].

The Court concluded that there had been ‘no violation’ of Article 6(2).²⁹⁶ But there was no statement whatsoever about whether there had been a breach of Article 6(1), implying that such analysis was unnecessary in light of the conclusion reached on Article 6(2).

These formulations are very different from that offered in the cases discussed in the previous sub-section. Indeed, in these cases the European Court simply ‘recalls’ and ‘points out’ its approach in a way that is in tension with the views it has expressed elsewhere, and in no way acknowledges or explains this serious inconsistency. Even if the Court only had two approaches in this area, that would cause real problems for the ability of the case law to provide any sense of guidance to citizens, lawyers, and officials. As we shall see in the next sub-section, however, the Court has yet another approach altogether.

C.4.3 Approach three: ‘The rights are specific aspects of Article 6(1), so consider the provisions “taken together”’

Thus far, we have seen that in some cases the European Court is willing to overlook Article 6(2) and Article 6(3) in favour of Article 6(1), while in other cases it is willing to overlook Article 6(1) in favour of Article 6(2) and Article 6(3). In this section, we see a third approach flowing from the ‘specific aspects’ maxim. Under this approach, the European Court *takes the different provisions together*, assesses an alleged violation under both provisions, and produces a result. This is an approach touched on by Trechsel, who criticises the Court’s:

²⁹⁶ *Radio France and Ors v France* at [24].

tendency not to examine whether a specific minimum guarantee has been respected or not, but to combine at the outset the specific guarantees with the general right to a fair trial and to deal with them together without proper distinction.....there is no justification for the Court's policy of blurring the application of [Article 6(1)] and [Article 6(3)].²⁹⁷

The approach, Trechsel argues, leaves 'Article 6 in a cloud of ambiguity'.²⁹⁸ Stumer, who focuses on Article 6(2), argues that:

To regard the presumption of innocence in Article 6(2) as a right subsumed within the right to a fair trial in Article 6(1) is contrary to the structure of the [Convention,] which places the presumption of innocence in a separate paragraph....[and] also belies the drafting history of the [Convention].²⁹⁹

In this section, we expand upon these criticisms and outline the incoherence and lack of explanation that characterises the Court's 'taken together' approach. Very rarely does the Court explain how this hybridisation should take place, or what structure its analysis should follow. Moreover, the Court offers no real explanation of when this approach should be adopted in preference to the approaches identified in previous sections of this Part. In this section, we examine how the European Court describes and explains the 'taken together' analysis, and how the Court actually implements that analysis.

As an example, in *Monnell and Morris v United Kingdom*, we see the European Court conflating Article 6(1) and Article 6(3) under the 'taken together' approach.

The guarantees contained in [Article 6(3)(c)] are constituent elements, amongst others, of the general notion of a fair trial in criminal proceedings stated in [Article 6(1)]. The Court...considers that the

²⁹⁷ Trechsel, 87-88.

²⁹⁸ Ibid., 87.

²⁹⁹ Stumer, 95-98.

nature of the applicants' complaints makes it appropriate to take [Article 6(1)] and [Article 6(3)(c)] together.³⁰⁰

Having conducted its analysis, the European Court reached a conclusion on both provisions taken together, finding that neither applicant 'was denied a fair procedure as guaranteed by [Article 6(1)] and [Article 6(3)(c)]' and that there was thus 'no breach of either of these provisions of the Convention'.³⁰¹ In *Hadjianastassiou v Greece*, the Court adopts another formulation:

As the requirements of [Article 6(3)] constitute specific aspects of the right to a fair trial, guaranteed under [Article 6(1)], the Court will examine the complaint under both provisions taken together.³⁰²

Similarly, in *Foucher v France*, the Court conflated the Article 6(3) guarantees and the Article 6(1) guarantee:

the guarantees in [Article 6(3)] are specific aspects of the right to a fair trial set forth in general in [Article 6(1)]. For this reason, it considers it appropriate to examine this complaint under the two provisions taken together.³⁰³

In lieu of an explanation for this position, the Court referred to a series of cases that ultimately lead to *Nielsen v Denmark*.³⁰⁴

³⁰⁰ *Monnell and Morris v United Kingdom* (App 9562/81) (1988) 10 EHRR 205 at [53]. For more on *Monnell and Morris*, see, eg, Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 314; Trechsel, 276, 442-443.

³⁰¹ *Monnell and Morris v United Kingdom* at [70].

³⁰² *Hadjianastassiou v Greece* at [31]. See Trechsel, 87-88.

³⁰³ *Foucher v France* at [30]. See Trechsel, 212-215.

³⁰⁴ See *Foucher v France* at [30]; *Artner v Austria* at [19]; *Asch v Austria* at [25]; *Isgrò v Italy* at [31]; *Delta v France* (App 11444/85) (1993) 16 EHRR 574 at [35]; *Windisch v Austria* at [23]; *Kostovski v Netherlands* at [39]; *Barbera, Messegue and Jabardo v Spain* at [67]; *Unterpertinger v Austria* at [29]; *Bonisch v Austria* at [29]; *Artico v Italy* at [32]; *Goddi v Italy* at [28]; *Colozza v Italy* at [26]. This group of cases included cases approaching the point in different ways: while *Foucher* appears to require the Court to combine the two provisions for the purposes of its analysis, a case like *Barbera* requires the European Court to consider them all through the lens of Article 6(1): *Barbera, Messegue and Jabardo v Spain* at [67].

On some occasions, the Court adopts a slightly different phrasing for this approach, referring to ‘both texts combined’, as in *GB v France*:

In view of the fact that the requirements of [Article 6(3)(b)] of the Convention can be broken down into separate elements of the right to a fair hearing, guaranteed under [Article 6(1)], the court studied the set of grievances in the light of both texts combined.³⁰⁵

In *Melich and Beck v Czech Republic*, the European Court takes this approach a step further, and combines the ‘three texts’ of Article 6(1), Article 6(2) and Article 6(3):

Noting that, in this case, the objections raised by the petitioners on the ground of [Article 6(1), Article 6(2) and Article 6(3)(d)] overlap, it considers appropriate to consider in terms of three texts combined.³⁰⁶

Similarly, in *Coeme v Belgium*, the European Court stated that it would take Article 6(1) together with other Articles ‘where necessary’, without specifying for what such regard would have to be necessary:

The requirements of [Article 6(2)] and [Article 6(3)(b)] are to be seen as particular aspects of the right to a fair trial guaranteed by [Article 6(1)]. The Court considers that it is appropriate to examine the complaints in the light of [Article 6(1)], taken in conjunction, where necessary, with its other paragraphs and the other provisions of the Convention [Article 13 and Article 14]...³⁰⁷

It may be noted, therefore, that for this analysis the *Coeme* Court apparently regarded it as important to take Article 6(1) together with not only Article 6(2) and Article 6(3), but also Article 13 and Article 14.

³⁰⁵ *GB v France* (App 44069/98) (2002) 35 EHRR 36 at [57].

³⁰⁶ *Melich and Beck v Czech Republic* at [47], citing *GB v France* at [57] in support of the proposition that the Article 6(3) requirements are aspects of Article 6(1), and invoking *Janosevic v Sweden* (App 34619/97) (2004) 38 EHRR 22 at [96] in support of the proposition that the Article 6(2) presumption of innocence is one of the elements required by Article 6(1). A similar taking together of Article 6(1), Article 6(2), and Article 6(3) occurred in *Vaquero Hernandez and Ors v Spain* (App 1883/03) (2 November 2010) at [123]. On the presumption of innocence in the European Court’s case law, see, eg, Stumer, 88-151.

³⁰⁷ *Coeme v Belgium* at [93].

The European Court has adopted the ‘taken together’ approach on many occasions.³⁰⁸ There are even curious cases – such as *Salduz* and *Boke and Kandemir* – in which the applicant argued their case under Article 6(3), but for which the European Court took that allegation together with Article 6(1) to find a violation of both Article 6(3) and Article 6(1).³⁰⁹ Most recently, referring to *Salduz*, the Grand Chamber in *Al-Khawaja* adopted a taken together approach and went so far as to state that it had *always* considered alleged Article 6(3) violations as part of an ‘overall examination of the fairness of the proceedings’ in which Article 6(3) guarantees were ‘one element, amongst others,’ of the Article 6(1) guarantee.³¹⁰ The Grand Chamber’s boldness is reflected in its assertion that it had ‘always’ adopted such an approach (contrary to the analysis elsewhere in this Part) and is underlined in the Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajo and Karakas.³¹¹

Some scholars have sought to explain particular instances of the ‘taken together’ approach. Thus, for example, it is said that the Article 6(3)(d) guarantees are linked to the ‘equality of arms’ guarantee, which can be grounded in Article 6(1); as

³⁰⁸ *Panasenko v Portugal* (App 10418/03) (22 July 2008) at [41] (translated); *Paraponiaris v Greece* at [23]; *Rupa v Romania* (App 58478/00) (16 December 2008) at [221], [234]; *Vladimir Romanov v Russia* at [96], [106]; *Luca v Italy* at [37]; *Medenica v Switzerland* at [53] and [60]; *Solakov v FYROM* at [56]; *Bernard v France* at [37]; *Matyjek v Poland* (App 38184/03) (24 April 2007) at [54]; *Demebukov v Bulgaria* at [43]; *Hulki Gunes v Turkey* (App 28490/95) (2006) 42 EHRR 27 at [87], [96]; *Bracci v Italy* at [49]; *Popov v Russia* (App 26853/04) (13 July 2006) at [169], [189]; *Grigoryevskikh v Russia* (App 22/03) (9 April 2009) at [75]; *Sibgatullin v Russia* (App 32165/02) (23 April 2009) at [38]; *Rasmussen v Poland* (App 38886/05) (28 April 2009) at [41]; *Seyithan Demir v Turkey* at [39]; *Prezec v Croatia* (App 48185/07) (15 October 2009) at [25]; *Caka v Albania* (App 44023/02) (8 December 2009) at [77]; *Penev v Bulgaria* (App 20494/04) (7 January 2010) at [35][36].

³⁰⁹ *Salduz v Turkey* at [45], [50], [63]; *Boke and Kandemir v Turkey* (App 71912/01) (10 March 2009) at [69], [71]. On *Salduz*, see Pattenden; van de Laar and de Graaff; Wu; Bjorge; Bratza.

³¹⁰ *Al-Khawaja and Tahery v United Kingdom* (Grand Chamber) at [143][146].

³¹¹ *Ibid.*

such, alleged violations are often taken together.³¹² Such analysis does not, however, probe beyond the superficial. Indeed, importantly, in all these cases, it is unclear exactly *what* is being ‘taken together’. The Court does not articulate whether it is taking together the factual analysis relevant to the two articles, the legal analysis, or both. It is not clear whether the two provisions retain their identity while being ‘taken together’ or if they are completely hybridised. Further, the European Court provides no guidance on which of the provisions should take priority, within the ‘taken together’ analysis, in the event of tension or contradiction. As an example, in *Barbera, Messegue and Jabardo v Spain*, we can see what ‘taking together’ may mean in practice. In considering whether certain witnesses’ evidence was heard in circumstances that complied with Article 6, the European Court stated:

[80]...The evidence of the various witnesses was heard in circumstances that complied with the requirements of Article 6(1) taken in conjunction with [Article 6(3)(d)], because the witnesses were examined at a public hearing under an adversarial procedure.³¹³

Statements of this sort risk confusing the content of the guarantees provided by Article 6(1) and Article 6(3)(d) respectively, and also leave some ambiguity over the extent to which the result reached would have been the same had the analysis been done solely under Article 6(1) or solely under Article 6(3)(d).

It is very rare, moreover, for the European Court to provide an explanation of *why* it combines texts, or takes them together. In *Meftah v France*, the European Court

³¹² van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 644. See also Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 306.

³¹³ *Barbera, Messegue and Jabardo v Spain* at [80].

provided a longer-than-usual analysis of the relationship between Article 6(1) and Article 6(3) in the course of explaining its ‘taken together’ analysis:

The various rights of which a non-exhaustive list appears in [Article 6(3)] reflect certain of the aspects of the notion of a fair trial in criminal proceedings. When compliance with [Article 6(3)] is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots. The Court therefore considers complaints under [Article 6(3)] under those two provisions taken together.³¹⁴

This passage, therefore, suggests that the reason the provisions should be ‘taken together’ is that the European Court should not forget the ‘basic purpose’ of Article 6(3) and that it should not be ‘severed from its [Article 6(1)] roots’. One author has gone so far as to identify the ‘risk of isolating the specific guarantees...from the [Article 6(1)] “root”’.³¹⁵ This seems to reflect a remarkable lack of confidence in the European Court’s interpretative skills. The *Meftah* Court does not identify or explain the ‘basic purpose’ of Article 6(3), nor does it explain its theory of ‘roots’. Indeed, one could just as easily say that the basic purpose and roots of *Article 6(3)* demand that any alleged violation be assessed solely within the parameters of Article 6(3) itself without reference to any other provision.³¹⁶ The *Meftah* Court’s explanation is lacking.

An alternative explanation for the taken together approach is offered in *Melich and Beck*:

Noting that, in this case, the objections raised by the petitioners on the ground of [Article 6(1), Article 6(2) and Article 6(3)(d)] overlap, it considers appropriate to consider in terms of three texts combined.³¹⁷

³¹⁴ *Meftah and Ors v France* at [40]. See also Jacot-Guillarmod, 383-384; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 638.

³¹⁵ Jacot-Guillarmod, 384.

³¹⁶ On the ‘roots’ terminology, see also the discussion of *Daud v Portugal* in Part C.4.2 above.

³¹⁷ *Melich and Beck v Czech Republic* at [47].

This approach risks confusing the nature of the guarantees provided by Article 6(1), Article 6(2) and Article 6(3) respectively: it involves assuming that overlapping arguments warrant merging several distinct legal standards. If the European Court is happy for them to be merged where the facts are convenient to do so, then the content of Article 6 risks being boiled down to a single, simple ‘fair trial’ guarantee. Such a simplification does not sit well with the detailed provisions of Article 6(1), Article 6(2) and Article 6(3).

Furthermore, while much of this section has focused primarily on the European Court’s descriptions of the ‘taken together’ doctrine itself, it must be emphasised that the way in which the European Court *applies* this doctrine is also marked by uncertainty and a lack of explanation. There are two uncertainties worth highlighting. The first is that the European Court does not spell out what legal test it is actually applying. That is, the European Court does not specify whether ‘taking together’ two provisions involves simply applying both of them at once, or first one and then another, or whether it involves some element of combination or hybridisation. The second is that, when conducting analysis of the facts of a particular case, the Court does not explain which facts are relevant to which provision, which facts are relevant to both provisions, or why.

Instead, the practice of the European Court seems to be this: at the outset of any Article 6 ‘taken together’ analysis it indicates that it is taking together two or more

provisions.³¹⁸ It does not provide further definition or articulation of how these different legal tests combine. It then proceeds to recount and analyse the facts of the case, usually without specifying expressly or implicitly which facts are relevant to which provisions or subset of provisions.³¹⁹ More rarely, sometimes the European Court will identify facts that are relevant for a particular legal test, but on these occasions it often does so without indicating how the test interrelates with the rest of its legal analysis, or without indicating how a series of unstructured legal tests feed in to an ultimate conclusion in any structured sense.³²⁰ It then proceeds to reach a conclusion, almost always finding either a violation of *all* of the provisions that had been taken together or no violation of *any* of the provisions that had been taken together.³²¹ In other cases, such as *Coeme*, the focus of the ‘taken together’ analysis appears to be almost exclusively on one particular provision (in *Coeme*, Article 6(1)), such that it is difficult to distinguish a ‘taken together’ analysis from an analysis focusing exclusively on one provision alone.³²²

³¹⁸ See, eg, *Monnell and Morris v United Kingdom* at [53]; *Hadjianastassiou v Greece* at [31]; *Foucher v France* at [26], [30]; *GB v France* at [57]; *Rupa v Romania* at [221]; *Luca v Italy* at [37]; *Medenica v Switzerland* at [53]; *Bernard v France* at [37]; *Matyjek v Poland* at [54]; *Dembukov v Bulgaria* at [43].

³¹⁹ Sometimes there may be reference to a particular implied right, but without explanation of the basis of the implied right, and without explanation of whether the implied right relates to one or all of the ‘taken together’ provisions. See, generally as examples, *Hadjianastassiou v Greece* at [31]-[37]; *Foucher v France* at [31]-[38]; *GB v France* at [57]-[70]; *Paraponiaris v Greece* at [23]-[27]; *Luca v Italy* at [37]-[45]; *Medenica v Switzerland* at [53]-[60]; *Bernard v France* at [37]-[40]; *Matyjek v Poland* at [55]-[65]; *Hulki Gunes v Turkey* at [87]-[96].

³²⁰ See, eg, *Monnell and Morris v United Kingdom* at [55]-[70]; *Rupa v Romania* at [218]-[234]; *Dembukov v Bulgaria* at [44]-[59].

³²¹ See, eg, *Hadjianastassiou v Greece* at [37]; *Monnell and Morris v United Kingdom* at [70]; *Foucher v France* at [38]; *GB v France* at [70]; *Paraponiaris v Greece* at [27]; *Bernard v France* at [41]; *Dembukov v Bulgaria* at [59]; *Hulki Gunes v Turkey* at [96].

³²² See *Coeme v Belgium* at [91]-[141]. See also *Solakov v FYROM* with reference to Article 6(3)(d) at [66]-[67].

This method of reasoning is problematic. When the European Court reaches its conclusions in a way that obscures the legal test it is applying, it makes it difficult for citizens, lawyers and officials to be guided by its decisions. When the European Court reaches its conclusions in a way that obscures which facts are relevant to which provisions, or in a way that makes it difficult to assess how different facts interrelate, the Court again undermines the extent to which its decisions can provide guidance. In a more limited sense, this sort of reasoning also makes it difficult for the Court – and those who write about and work with its judgments – to predict the likely outcomes of future cases.

A closely related theme to the ‘taken together’ approach appears in those European Court decisions that state that a violation of one provision of Article 6 will be sufficient to trigger finding a violation of another provision. For example, in *Heaney and McGuinness v Ireland*, the European Court identifies a ‘close link’ between the ‘rights guaranteed by’ Article 6(1) and the ‘presumption of innocence guaranteed by’ Article 6(2), and very matter-of-factly finds a violation of Article 6(2) on the basis of the Article 6(1) violation:

...there has been a violation of the applicants' right to silence and their right not to incriminate themselves guaranteed by [Article 6(1)]...Moreover, given the close link, in this context, between those rights guaranteed by [Article 6(1)] and the presumption of innocence guaranteed by [Article 6(2)], the Court also concludes that there has been a violation of the latter provision.³²³

³²³ *Heaney and McGuinness v Ireland* (App 34720/97) (2001) 33 EHRR 12 at [59]. See also Trechsel, 359; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 262.

In *Quinn v Ireland*, too, the Court used similar language to find an Article 6(2) violation on the basis of an Article 6(1) violation.³²⁴ The corollary was evident in *Averill v United Kingdom*, when the Court used a conclusion as to an Article 6(1) violation to justify its decision not to conduct Article 6(2) analysis:

Having found that [Article 6(1) has not been breached, the Court considers that for the same reasons there has been no violation of Article 6(2).³²⁵

This approach renders the relationship between Article 6(1) and Article 6(2) more opaque, and does not assist in understanding the content of Article 6(2), nor how that content may be distinguished from Article 6(1) or, indeed, Article 6 as a whole.³²⁶

A similar variation is evident in cases in which the European Court has indicated that it will attempt to interpret parts of Article 6 ‘in light of’ other parts of the Article. In *Pelissier and Sassi v France*, for example, there are several statements about the structure and importance of Article 6. These statements indicate that Article 6(3)(a) must be interpreted in light of Article 6(1), and that Article 6(3)(a) must be interpreted in light of Article 6(3)(b):

The scope of [Article 6(3)(a)] must in particular be assessed in the light of the more general right to a fair hearing guaranteed by [Article 6(1)]....

Lastly, as regards the complaint under [Article 6(3)(b)] of the Convention, the Court considers that [Article 6(3)(a) and Article 6(3)(b)] are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused’s right to prepare his defence.³²⁷

³²⁴ *Quinn v Ireland* (App 36887/97) (21 December 2000) at [59][60].

³²⁵ *Averill v United Kingdom* (App 36408/97) (2001) 31 EHRR 36 at [52].

³²⁶ Further discussion of the Court’s implied rights jurisprudence follows in Part D.

³²⁷ *Pelissier and Sassi v France* at [52][54]. In support of the first sentence in [52], the European Court cites *DeWeer v Belgium* at [56], *Artico v Italy* at [32], *Goddi v Italy* at [28], and *Colozza v Italy* at [26]. See also van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 632-633; Trechsel, 203-204.

The Court used a similar form of analysis in *Sadak* and *Gouget*.³²⁸ In cases of this type, therefore, the European Court indicates a willingness to emphasise the links between the different Article 6 guarantees when examining or explaining the definition or content of those guarantees. This analysis does not necessarily amount to the European Court conflating the Article 6 guarantees into one single guarantee. Importantly, however, the European Court does not make clear what it means when it assesses one provision in light of another, or what impact that may have on the interpretative task.

C.5 Conclusion to Part C

This Part has considered the European Court's approach to the internal structure of Article 6. It was demonstrated that the European Court has adopted a series of different approaches to Article 6, and that these approaches involve considerable incoherence and inconsistency. It is difficult to identify any reasoned, rational, predictable explanation of why certain classes of case fall within one of the three limbs, while other classes are treated differently. The European Court certainly articulates no such explanation. If the European Court wishes to deploy different approaches in similar situations – or different approaches in different situations – the interests of predictability and consistency demand that it explain *why*. As it stands, the European Court's incoherent treatment of this area risks undermining the rule of law values of predictability and certainty. Perhaps more importantly, it risks the European Court creating the appearance that it classifies cases on a random or convenient basis. Thus, these approaches offer irreconcilable alternatives to whether Article 6(1) is the focus of

³²⁸ *Sadak and Ors v Turkey* (App 29900/96) (2003) 36 EHRR 26 at [49]-[50]; *Gouget and Ors v France* (App 61059/00) (24 January 2006) at [28].

Article 6, to whether it is appropriate to begin analysis of an Article 6(3) violation with a focus on Article 6(3), to whether alleged violations of multiple provisions should be taken separately or together. Moreover, it is not at all clear that the European Court has a clear sense of what it means to ‘take together’ multiple violations. The incoherence of the European Court’s approach risks creating the appearance of a mix-and-match approach to violations, where the European Court assesses one complaint under Article 6(1), another under Article 6(3), and yet another under Article 6(1) and Article 6(3) ‘taken together’. In no available decision does the European Court explain why one of these choices would be legitimate in one type of case, but another preferable in another type of case.

As was established at the beginning of this Part, all of this matters, because the European Court’s approach to Article 6’s internal structure shapes the boundaries for any inquiry as to whether there has been a violation of Article 6. As we will see in subsequent Parts, choosing which inquiry to make, and what standard to apply, is intertwined with choosing which approach to adopt to the internal structure of Article 6. In the next Part we consider a specific Article 6 issue linked closely to those we have considered thus far: the implied rights.

PART D: THE IMPLIED RIGHTS

This Part considers the origins of the implied rights, their scope and limits, and identifies indications in the European Court's case law that may suggest the basis for 'new' implied rights in the future. When we refer to 'implied rights' we are referring to those rights that the European Court has recognised as falling within the terms of Article 6, but which are not expressly provided for in the text of that provision.³²⁹ In this context, identifying and analysing the implied rights is, to some extent, an exercise in considering how best to approach the definition and interpretation of Article 6.

In more recent years, however, the European Court's Article 6 implied rights jurisprudence has taken on an energetic life of its own, and has been central to many high-profile Article 6 cases.³³⁰ Given the role of the implied rights in fleshing out the context of the Article 6 guarantees, an understanding of how the Court identifies, explains, and applies the implied rights is crucial to assessing the Court's Article 6 case law. The implied rights jurisprudence is thus worthy of specific consideration. It must be acknowledged that the discussion of the implied rights is intimately linked to the consideration elsewhere in the thesis of approaches to interpretation, to the internal structure of Article 6, and to how the European Court assesses infringements of Article 6.

³²⁹ See, eg, Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 198; Emmerson, Ashworth and Macdonald, 88-91, 93-96.

³³⁰ See, eg, *Salduz v Turkey*; *Gafgen v Germany (Grand Chamber)*; *Jalloh v Germany*; and the cases considered below.

This Part begins by briefly identifying the implied rights that have been recognised by the European Court and in the literature (D.1). It then moves on to consider the European Court's 1993 decision in *Funke*, which may be regarded as the starting point for our consideration of the implied rights (D.2). The Part then considers the various foundations on which the European Court has based its recognition of implied rights since *Funke*, and foundations on which the European Court has been unwilling to base implied rights (D.3). This Part then turns to consider some of the difficulties that the European Court has faced in defining the scope and limits of the implied rights (D.4).

Overall, this Part's argument is that the European Court's implied rights jurisprudence is marked by significant uncertainty and incoherence. This is evident in the way that the European Court recognises implied rights, the way it attempts to define their scope, and the way it applies these principles to new and developing areas of the law. This level of incoherence is troubling, and raises real doubts over the extent to which the European Court's jurisprudence can provide guidance to courts, lawyers and citizens.

D.1 What are the implied rights?

There is extensive literature providing description and analysis of the content of the implied rights in great depth. This thesis does not attempt to replicate that depth of analysis, but instead adopts a cross-cutting analytical approach. In that sense, therefore, the *list* of implied rights is less important than how our analysis of those rights reveals

the European Court's *approach* to implied rights generally. Nevertheless, it may be helpful to outline briefly the recognised implied rights at the beginning of this Part.

It should be emphasised that the implicit nature of these rights means that different authors – and different judgments of the European Court – will characterise the rights in different ways. In some cases, the implied rights may be recognised as independent rights; in others they will be characterised as forming part of another implied right or of an express right.³³¹ For present purposes, we need a brief working account of the implied rights. Thus the scholarly work on the criminal aspects of Article 6 has identified implied rights including:

- The right to an adversarial hearing;³³²
- The right to be present at, and participate in, the hearing;³³³
- The equality of arms;³³⁴
- The right to silence and privilege against self-incrimination;³³⁵

³³¹ See, further, Emmerson, Ashworth and Macdonald, 88-91; *Golder v United Kingdom*, Separate Opinion of Judge Fitzmaurice.

³³² See, eg, van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 584; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 254; Trechsel, 89; Summers, 112-123; Clayton and Tomlinson (eds), *The Law of Human Rights*, 860; *Brandstetter v Austria* (App 11170/84) (1993) 15 EHRR 378; *Pirali Orujov v Azerbaijan* (App 8460/07) (3 February 2011).

³³³ See, eg, Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 247, 250; Clayton and Tomlinson (eds), *The Law of Human Rights*, 860; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 586, 589-591; Trechsel, 252-261; Emmerson, Ashworth and Macdonald, 577, referring to *Stanford v United Kingdom* (App 16757/90) (23 February 1994) and *T and V v United Kingdom*; *SC v United Kingdom* (App 60958/00) (2005) 40 EHRR 10 at [28][37]; Summers, 116-123; *Jelcovas v Lithuania* (App 16913/04) (19 July 2011) at [106].

³³⁴ See, eg, Clayton and Tomlinson (eds), *The Law of Human Rights*, 860; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 251, excerpting a passage from *Kress v France* (App 39594/98) (7 June 2001) at [72]; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 581-587, excerpting a passage from *Edwards v United Kingdom* at [36]; Jacot-Guillarmod, 392-393; Trechsel, 96; *Plotnicova v Moldova* (App 38623/05) (15 May 2012) at [47].

³³⁵ See, eg, Clayton and Tomlinson (eds), *The Law of Human Rights*, 860; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 592; Harris, O'Boyle and Warbrick, *Law of the*

- The right to legal assistance during the pre-trial phase;³³⁶
- The right in some or all circumstances not to have evidence used where that evidence is obtained by torture or inhuman or degrading treatment, incitement, or entrapment;³³⁷ and
- The right to reasons.³³⁸

As we shall see, the European Court itself has founded these implied rights on a variety of justifications. The European Court has not provided an overarching account of the implied rights, how they relate to the express rights, how they are to be applied and developed, and how to assess when they have been infringed. Instead, the European Court's jurisprudence has been marked by an incremental, piecemeal approach that lacks any underlying theory or explanation.

The lists of implied rights identified above, and in the literature, provide a framework with which to analyse the European Court's case law on the implied rights. It is important to bear in mind, however, that the European Court does not always draw crisp distinctions between different implied rights, or between the express rights

European Convention on Human Rights, 259; Trechsel, 340-359; T Ward and P Gardner, 'The privilege against self incrimination: in search of legal certainty' [2003] EHRLR 388; Ashworth; J Jackson, 'Re-conceptualizing the right of silence as an effective fair trial standard' (2009) 58 *International and Comparative Law Quarterly* 835; Summers, 130-131; *Bykov v Russia* at [92]; *Gafgen v Germany (Grand Chamber)* at [168].

³³⁶ See, eg, Trechsel, 278-285. See also *Salduz v Turkey*; van de Laar and de Graaff; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 59.

³³⁷ See, eg, Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 264; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 586; Trechsel, 111-113; Clayton and Tomlinson (eds), *The Law of Human Rights*, 866-868; *Jalloh v Germany*; *Khan v United Kingdom*; *Gafgen v Germany*; *Bykov v Russia*; *Gafgen v Germany (Grand Chamber)*.

³³⁸ See, eg, Clayton and Tomlinson (eds), *The Law of Human Rights*, 860; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 595-596; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 268-269; Trechsel, 102-110; Ovey and White, 179; *Taxquet v Belgium (Grand Chamber)*; Roberts. See also Part B.5.1.

and the implied rights. This nebulous ambiguity should be considered when analysing the implied rights. To some extent, perhaps, ambiguity of this kind is a product of dealing with implied rights rather than express rights. It is, however, indicative of an incoherence and inconsistency in the way that the European Court approaches implied rights generally and their relationship with the broader Article 6 structure.

A brief example of this ambiguity is evident in those cases in which the European Court has considered criminal proceedings based, in whole or in part, on evidence obtained through entrapment-style investigations or through surveillance. In these cases, there is some uncertainty over whether there are standalone entrapment and surveillance guarantees, or whether other guarantees simply apply to the particular factual scenario of entrapment and surveillance. In this way, Part D explores a specific variation of the macro-arguments made in Part C's analysis of the ambiguities over the internal structure of Article 6. An example of the European Court recognising a specific stand-alone right is evident in *Ramanauskas*. In that case, the Court emphasised that there was a specific and standalone guarantee relating to police incitement:

[69] Article 6 of the Convention will be complied with *only if* the applicant was effectively able to raise the issue of incitement during his trial, whether by means of an objection or otherwise. It is therefore *not sufficient* for these purposes, contrary to what the Government maintained, that *general safeguards* should have been observed, such as equality of arms or the rights of the defence.³³⁹

In this passage, the European Court appears to recognise a guarantee that exists independently of the other Article 6 guarantees. Elsewhere, however, the European Court's approach appears to reduce the entrapment and surveillance guarantees to a simple fairness guarantee or to a subcategory of other guarantees. In *Khan*, for example,

³³⁹ *Ramanauskas v Lithuania* at [69] (emphasis added).

the European Court emphasised that with respect to unlawfully-obtained recordings, the 'central question...is whether the proceedings as a whole were fair'.³⁴⁰ In *Edwards and Lewis*, in turn, the European Court analysed an entrapment issue with reference to the adversarial proceedings guarantee and the equality of arms guarantee.³⁴¹ This ambiguity in the European Court's case law should be considered throughout our discussion of the implied rights.³⁴²

D.2 The first implied rights case was poorly explained

Funke v France may be regarded as the first of the silence and self-incrimination guarantees cases, and an early example of the implied rights cases.³⁴³ As an influential case, it is worthy of close analysis, notwithstanding criticisms subsequently made of it.³⁴⁴ In *Funke*, the applicant argued for the recognition of the implied privilege against self-incrimination on the basis that it was:

a general principle enshrined both in the legal orders of the Contracting States and in the European Convention and the International Covenant on Civil and Political Rights.³⁴⁵

³⁴⁰ *Khan v United Kingdom* at [38].

³⁴¹ *Edwards and Lewis v United Kingdom* (App 39647/98) (2005) 40 EHRR 24 at [59].

³⁴² Further discussion of the proceedings as a whole test is in Part E.2.

³⁴³ *Funke v France* (App 10828/84) (1993) 16 EHRR 297. See A Choo, 'Compelling the Provision of Information: The Privilege Against Self-Incrimination as a Human Right' 2010 University of Warwick Legal Studies Research Paper Series 2010-20 <http://ssrn.com/abstract=1676137>; Ashworth, 752-753. It may be noted that two earlier Commission decisions hinted at an implied silence and self-incrimination guarantee. In *I v Switzerland (Commission)* (App 13972/88) (14 May 1992), the dissent of Mr Loucaides referred to the need for safeguards to protect against self-incrimination and protect the right to silence; in *K v Austria (Commission)* (App 16002/90) (13 October 1992) the Commission appeared to recognise the privilege against self-incrimination in Article 10. On the latter, see also Trechsel, 342-343. On *Funke*, see also Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 260; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 592-593.

³⁴⁴ See, eg, Ward and Gardner, 390-391; Jackson; Ashworth, 752-753; Trechsel, 353-354.

³⁴⁵ *Funke v France* at [41]. We might note that reference to the internal legal orders of Contracting States had been made in various cases not related to the privilege against self-incrimination. See, for example, cases about voting rights and elections such as *Mathieu-Mohin and Clerfayt v Belgium* (App 9267/81) (2

The French Government did not resist these arguments on principle, but instead argued that, on the facts, there had been no violation.³⁴⁶ The European Commission of Human Rights agreed, holding that there had been no violation of Article 6; the Commission did not consider the privilege against self-incrimination on any theoretical level.³⁴⁷ The European Court's analysis in *Funke* is curious. The European Court recounted the arguments of the applicant and the Government, and the decision of the Commission, before reaching its conclusion:

The special features of customs law...cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself. There has accordingly been a breach of [Article 6(1)].³⁴⁸

The European Court accepts, without explanation or reasoning of any kind, that the right to silence and the privilege against self-incrimination are rights of anyone charged with a criminal offence. At no point does the European Court provide an indication of the grounds on which it reaches this conclusion, nor does it draw on doctrine or previous decisions in so doing: 'nothing was said about the scope of the privilege, or about its origins and rationale.'³⁴⁹

For our purposes, this is interesting because the European Court's jurisprudence about the implied privilege against self-incrimination emerged in a way that lacked theoretical underpinnings and also lacked any indication of the parameters

March 1987); since then, see *Kudla v Poland* (App 30210/96) (2002) 35 EHRR 11; *SH and Ors v Austria* (App 57813/00) (1 April 2010).

³⁴⁶ *Funke v France* at [42].

³⁴⁷ *Funke v France (Commission)* (App 10828/84) (8 October 1991) at [47]-[70] (translated).

³⁴⁸ *Funke v France* at [44].

³⁴⁹ Ashworth, 753. See also, on *Golder v United Kingdom* and related cases, Merrills, 84-90.

within which such implications could be drawn. Moreover, if it is assumed that the Court reached its conclusion on the basis of the applicant's arguments, then the implication was drawn on the basis that the privilege against self-incrimination was:

a general principle enshrined both in the legal orders of the Contracting States and in the European Convention and the International Covenant on Civil and Political Rights.³⁵⁰

Such an argument would open up a plethora of possible rights to be implied into the European Convention; as we shall see below, the Court has only ever adopted this argument in a modified form. For now, we note the considerable uncertainty underlying the European Court's reasoning in *Funke*, and emphasise that this poorly-explained and poorly-justified jurisprudence cannot provide citizens, lawyers or courts with guidance as to the nature of the law. This lack of guidance is in respect of both the silence and self-incrimination guarantees but also the implied rights and Article 6 more generally. We now turn to the ways in which the European Court has subsequently recognised implied rights.

D.3 At least eight justifications for implied rights can be identified in the European Court's case law

In recognising rights implicit in Article 6, the European Court's reasoning is generally an opaque mixture of mostly-unexplained justifications. The opacity of this reasoning, it is submitted, creates uncertainty over not only the content of Article 6, but also over the likelihood that a 'new' implied right might be recognised.

³⁵⁰ *Funke v France* at [41]. See note 345, above.

The European Court has adopted at least eight different bases on which rights could be implied into Article 6. Identifying and analysing these justifications is important, both for what it tells us about the way the European Court approaches Article 6, but also for providing some indication of potential future expansions of the scope of the Article 6 implied rights. More broadly, given the extent to which the Article 6 case law is shaped by implied rights cases, this analysis also aids understanding of the Article 6 case law generally. The range of justifications also indicates something of the fluidity with which the European Court approaches its interpretative task.

We must emphasise that the European Court has not catalogued these justifications itself. Nor has the European Court attempted to explain how the justifications interact and combine, or whether or not there is any sort of hierarchy of justifications. The European Court's apparent reluctance to articulate any sort of overarching view of how it approaches the recognition and interpretation of implied rights only adds to the incoherence and inconsistency that marks its approach to interpretation more generally.

D.3.1 'Generally recognised international standards at the heart of a fair procedure'

While subsequent European Court decisions have not adopted the arguments made by the applicant in *Funke*, the European Court has adopted a modified version of that reasoning. Indeed, in *John Murray v United Kingdom*, the European Court referred to *Funke* and stated:

Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination *are generally*

*recognised international standards which lie at the heart of the notion of a fair procedure under Article 6...*³⁵¹

Here, then, the European Court indicates that it is willing to recognise an implied right where, among other things, the right constitutes a generally recognised international standard at the heart of the notion of a fair procedure. This passage, or passages like it, appear in many subsequent cases.³⁵²

It is worth disaggregating the component parts of this reasoning. First, it places importance on ‘generally recognised international standards’. While the parties in *John Murray* referred to certain international instruments,³⁵³ the judgment does not specify which principles or customs or documents the Court relies on for the purposes of establishing these international standards.³⁵⁴ Nor does the judgment indicate, for example, what level of international conformity or practice would be required before a

³⁵¹ *John Murray v United Kingdom* at [45] (emphasis added). For more on *John Murray*, see also Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 261-262; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 594; Trechsel, 345-346, 356-358; Ashworth, 753-755.

³⁵² See, for example: *Saunders v United Kingdom* at [68]; *Serves v France* (App 20225/92) (1999) 28 EHRR 265 at [46]; *Heaney and McGuinness v Ireland* at [40]; *Quinn v Ireland* at [40]; *Luca v Italy* at [33]; *JB v Switzerland* at [64]; *Allan v United Kingdom* at [44]; *Weh v Austria* (App 38544/97) (8 April 2004) at [39]; *Shannon v United Kingdom* at [32]; *Jalloh v Germany* at [100]; *Macko and Kozubal v Slovakia* (App 64054/00) (19 June 2007) at [48]; *O’Halloran and Francis v United Kingdom* (App 15809/02) (2008) 46 EHRR 21 at [46]; *Yaremenko v Ukraine* (App 32092/02) (12 June 2008) at [77]; *Gafgen v Germany* at [94]; *Getiren v Turkey* (App 10301/03) (22 July 2008) at [123]; *Panovits v Cyprus* (App 4268/04) (11 December 2008) at [65]; *Shabelnik v Ukraine* at [55]; *Bykov v Russia* at [92]; *Marttinen v Finland* (App 19235/03) (21 April 2009) at [60]; *Ozcan Colak v Turkey* (App 30235/03) (6 October 2009) at [44]; *Oleg Kolesnik v Ukraine* (App 17551/02) (19 November 2009) at [36]; *Aleksandr Zaichenko v Russia* (App 39660/02) (18 February 2010) at [38]; *Krumpholz v Austria* (App 13201/05) (18 March 2010) at [31]; *Hakan Duman v Turkey* (App 28439/03) (23 March 2010) at [47]; *Pavlenko v Russia* (App 42371/02) (1 April 2010) at [100]; *Baran and Hun v Turkey* (App 30685/05) (20 May 2010) at [68]; *Gafgen v Germany (Grand Chamber)* at [168]; *Desde v Turkey* (App 23909/03) (1 February 2011) at [127]; *Nechiporuk and Yonalko v Ukraine* at [258]; *Balitskiy v Ukraine* (App 12793/03) (3 November 2011) at [38].

³⁵³ See, eg, *John Murray v United Kingdom* at [42].

³⁵⁴ On the European Court’s general tendency to assert the state of the law in this area without providing details, see M Ambrus, ‘Comparative Law Method in the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law’ (2009) 2(3) *Erasmus Law Review* 354, 369.

standard becomes truly ‘international’.³⁵⁵ These gaps matter because they shape our understanding of when an international standard may become a guaranteed right under Article 6, and because the Court has not provided any mechanism to determine which of the numerous generally recognised international standards warrant the full protection of Article 6.³⁵⁶

Second, perhaps it could be said that illumination is added by the requirement that these standards be ‘at the heart of the notion of a fair procedure under Article 6’. It is unclear, however, whether ‘a generally accepted international standard’ would be protected if it was *not* ‘at the heart of the notion’: are the criteria each sufficient to ground an implied right, or are both necessary? It is also unclear what the European Court means by ‘the heart of the notion’, and whether, by implication, there are Article 6 standards and rights that are *not* at the heart of the notion of a fair procedure under Article 6. If the ‘heart of the notion’ is merely a rhetorical flourish, it renders the ‘international standard’ test unnecessarily opaque. If, on the other hand, it is a meaningful standard, then the interests of predictability and coherence demand that the European Court explain precisely which standards and rights are at the heart of the notion of a fair procedure, and which are not.³⁵⁷

Third, there is the sentence that follows the excerpted passage above:

³⁵⁵ For example, the test could be analogous to that for customary international law (see, eg, *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)* [1969] ICJR (International Court of Justice)), or to the US Supreme Court’s test for assessing international trends (consider, eg, *Roper v Simmons* 543 US 551 (2005) (Supreme Court of the United States)). cf Brems, *Human Rights: Universality and Diversity*, 416-420.

³⁵⁶ See also Part A.1.6.

³⁵⁷ For discussion of ‘the very essence’, see Part E.6.

By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.³⁵⁸

It is unclear to what extent this sentence provides an additional criterion that will be decisive to whether or not a right is implied. Further, as has been considered at length in Part A, the Court never provides meaningful guidance on what the aims of Article 6 *are*, whether those aims include avoiding miscarriages of justice, or how the undefined aims are best secured.³⁵⁹

In sum, recognising a right as implicit in Article 6 because of its position as an internationally-recognised right means that the implied right rests on shaky foundations.³⁶⁰ Without coherent and logical explanation of the foundations of the guarantees, the Court does not meet the onus of justification. First, it obscures the nature of the silence and self-incrimination guarantees and the circumstances in which they will be infringed. This makes it difficult for citizens, lawyers and officials to understand or predict how the silence and self-incrimination guarantees would apply to a particular case. Second, it obscures the grounds on which *other* implied rights could be recognised, developed and deployed (or rebutted). This makes it difficult to understand the scope of Article 6's non-express guarantees. In the remainder of this section we consider other justifications for implied rights.

³⁵⁸ *John Murray v United Kingdom* at [45] (emphasis added).

³⁵⁹ Trechsel has different objections to this passage: Trechsel, 347.

³⁶⁰ For more on the ways in which the European Court's use of comparative legal materials is problematic from a rule of law perspective, see Ambrus.

D.3.2 'Domestic state practice'

The state practice of the Contracting States – and of other jurisdictions – has been used by the European Court to help explain the recognition of the silence and self-incrimination guarantees. Ever since *Saunders*,³⁶¹ the European Court has stated that the silence and self-incrimination guarantees are ‘primarily concerned’ with ‘respecting the will of an accused person’.³⁶² The Court has indicated that its focus on ‘the will of an accused person’ was grounded in ‘the legal systems of the Contracting Parties to the Convention and elsewhere’.³⁶³ It is unclear why, for this interpretative task, the European Court should use the domestic state practice of Contracting Parties as a tool to interpret implied guarantees that, it said, ‘lie at the heart of the notion of a fair procedure under Article 6’.³⁶⁴ If domestic law is to be an interpretative tool in such situations, the interests of clarity and consistency require the European Court to explain the circumstances in which it can be so used: must domestic state practice be the same in *all* Contracting States? In a *majority*? In an *increasing* number?³⁶⁵

³⁶¹ See, by way of example, *Heaney and McGuinness v Ireland* at [40]; *Quinn v Ireland* at [40]; *Weh v Austria* at [40]; *Macko and Kozubal v Slovakia* at [48]; *Bykov v Russia* at [92]. On *Saunders* see Trechsel, 342 et seq; Lord Hoffman, [27]-[29].

³⁶² *Saunders v United Kingdom* at [68]-[69].

³⁶³ *Ibid.* at [68]-[69]. See also Trechsel, 347; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 593-594.

³⁶⁴ *Saunders v United Kingdom* at [68]-[69].

³⁶⁵ See Merrills, 81-84; Christoffersen, 57-66; Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the ECtHR', 276-288; L Helfer, 'Consensus, Coherence and the ECHR' (1993) 26 *Cornell Int'l LJ* 133. cf *Atkins v Virginia* 536 US 304 (2002) (Supreme Court of the United States).

Moreover, the *Saunders* Court did not identify any particular domestic legal provisions or statutes, nor does it identify the jurisdictions to which it refers.³⁶⁶ If the Court is to rely on domestic law to interpret the Convention in this way, the interests of clarity demand it explain how it uses domestic law, when domestic law may be so used, and which law it relies upon in so doing.

D.3.3 'Article 6 read as a whole'

The European Court has also stated that a right could be implied on the basis of 'Article 6, read as a whole'. Thus in *Stanford v United Kingdom*, where the applicant complained of a violation of Article 6(1) because 'he was unable to hear the proceedings', the Court held that 'Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial.'³⁶⁷ Virtually identical language appears in cases such as *Evrenos Onen v Turkey* and *Uzunget and Ors v Turkey*.³⁶⁸ Thus the European Court is willing to imply the relevant right on the basis of reading Article 6 as a whole. Crucially, the Court does not identify any characteristics or qualities or attributes of 'Article 6 as a whole' on which it relies. Even if we accept that this is a sensible and logical approach to interpretation, it remains unclear how such an amorphous justification might contribute to defining the *limits* or *content* of an implied right.

There is an additional uncertainty here. It is sometimes unclear in these cases if it is the European Court's view that Article 6 may be read as a whole and interpreted in

³⁶⁶ For more on the ways in which the European Court's use of comparative legal materials is problematic from a rule of law perspective, see Ambrus, especially at 369.

³⁶⁷ *Stanford v United Kingdom* at [26]. On *Stanford*, see Kolb, 357; Trechsel, 335.

³⁶⁸ *Evrenos Onen v Turkey* at [27]; *Uzunget and Ors v Turkey* (App 21831/03) (13 October 2009) at [34], citing *T and V v United Kingdom* at [83].

such a way that it provides an implied standalone guarantee to participate in the hearing, or whether it is the European Court's view that in assessing whether a proceeding was fair as a whole, one of the relevant factors will be the extent to which the applicant was able to participate in the hearing. Much like the points made in Part C about the relevance of internal structure to framing the scope of the Court's inquiry, this point also allows the Court a considerable degree of what we describe as irrational flexibility.³⁶⁹

D.3.4 'The object and purpose of Article 6 read as a whole'

In a slight variation to the reasoning identified above, there are other cases in which the European Court recognises an implied right on the basis that it is guaranteed by the *object and purpose* of Article 6 read as a whole. Thus in *Colozza*, the Court stated that, although not expressly mentioned in Article 6(1), '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'.³⁷⁰ Similar passages using the same justification, and often drawing on *Colozza*, appear in a significant number of cases.³⁷¹ As we have seen above in Part A.1.2, the Court never identifies what the object and purpose of Article 6 actually *are*, nor does it articulate the links between that object and purpose (whatever they may be) and the right being implied.

³⁶⁹ See Part E.2 for more on 'proceedings as a whole'.

³⁷⁰ *Colozza v Italy* at [27]. For more on *Colozza*, see, eg, van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 589; Trechsel, 252-256; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 248.

³⁷¹ See, eg, *Somogyi v Italy* at [65]; *Sejdovic v Italy* at [29]; *Sejdovic v Italy* (GC) at [81]; *Hermi v Italy* (App 18114/02) (28 June 2005) at [33]; *Hermi v Italy* at [59]; *Marcello Viola v Italy* at [52]; *Demebukov v Bulgaria* at [44]; *Sibgatullin v Russia* at [33]; *Seyithan Demir v Turkey* at [37]; *Makarenko v Russia* (App 5962/03) (22 December 2009) at [132]; *Zhuk v Ukraine* (App 45783/05) (21 October 2010) at [26]; *Jelcovas v Lithuania* at [106].

Moreover, when this approach is contrasted with the approach immediately above, a further concern arises: the Court risks fostering the appearance that it will imply rights on the basis of *Article 6* read as a whole when it is able to do so, but when that fails it will imply rights on the basis of the *object and purpose* of *Article 6* read as a whole.

D.3.5 'Implications based on other Convention provisions'

In *Doorson v Netherlands*, the European Court considered the rights of witnesses and victims. In so doing, the Court stated:

It is true that 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, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, *principles of fair trial also require* that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.³⁷²

This passage has been cited in subsequent cases such as *Van Mechelen* and *Marcello Viola*.³⁷³ This thesis does not seek to make arguments about Article 8. Instead, our argument here is focussed on three aspects of relevance to Article 6. First, the

³⁷² *Doorson v Netherlands* (App 20524/92) (1996) 22 EHRR 330 at [70] (emphasis added). For more on *Doorson*, see, eg, Trechsel, 314-315, 317, 318-319; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 324-325; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 646; Greer, 'Constitutionalizing adjudication under the European Convention on Human Rights', 424; Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 254; Brems, 'Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights', 317.

³⁷³ *Van Mechelen and Ors v Netherlands* at [53]; *Marcello Viola v Italy* at [51].

European Court does not indicate precisely which ‘principles of *fair trial*’, as opposed to principles of the Convention generally, justify drawing this implication. Second, the passage indicates that the rights of witnesses under *other Articles of the Convention* may be sufficient to trigger coextensive or complimentary rights *under Article 6* that are distinct from the original ‘source’ rights. Third, the European Court’s explanation for this reasoning is limited to the following: ‘Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled.’ As logically compelling as this analysis may be, it imposes on the Contracting States a burden to organise their criminal proceedings in such a way that is, at best, in tension with the Court’s ostensible reluctance to so impose on Contracting States in other situations (for example, the Court’s reluctance to require the Contracting States to organise their rules of admissibility in any particular way).³⁷⁴ It may well be the case that rights other than Article 6 rights will play a role in criminal proceedings; what the Court has *not* done is indicate why that warrants the recognition of implied Article 6 rights buttressing the Article 8 rights.

This third aspect is also reflected in those explanations of the silence and self-incrimination guarantees that focus on respecting ‘the will of an accused’.³⁷⁵ This rationale was touched upon in D.3.2 above, in the context of relying on domestic state practice. For present purposes, we simply note that the silence and self-incrimination guarantees have also been justified on the basis of other Convention guarantees –

³⁷⁴ cf Part B.6.

³⁷⁵ *Saunders v United Kingdom* at [68]-[69].

notably Article 3 and also Article 8.³⁷⁶ Such reasoning rests on the notion that conduct contrary to the silence and self-incrimination guarantees may often, or always, involve elements that are invasive of privacy or degrading.³⁷⁷ As sound as this logic may appear on its face, the Court has not provided any explanation of the circumstances in which it will be willing to imply a right in one Article on the basis of the content of another Article, nor how such a network of implications might affect the functioning of the Convention as a whole. Thus the Court is willing to recognise rights as implicit in Article 6 on the basis of the content of other Articles, and does so in a poorly-explained and under-theorised way.

D.3.6 'The notion of an adversarial procedure'

In Part D.3.3 we considered the case of *Stanford* in the context of 'Article 6, read as a whole'. Here we consider it from another angle. In considering *Stanford*'s complaint, the European Court held that:

Nor is it in dispute that Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings. Such *rights are implicit in the very notion of an adversarial procedure* and can also be derived from the guarantees contained in [Article 6(3)(c), Article 6(3)(d) and Article 6(3)(e)]...³⁷⁸

The Court concluded that, on the facts of this case, there had been no breach of Article 6(1).³⁷⁹ Nevertheless, *Stanford* provided a statement of the law that recognised

³⁷⁶ See, eg, Trechsel, 348-349.

³⁷⁷ See, eg, *Ibid.*, 348-349.

³⁷⁸ *Stanford v United Kingdom* at [26]. See, generally, Trechsel, 252-253, Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 250-251.

³⁷⁹ *Stanford v United Kingdom* at [32].

implied rights to participate, to be present, to hear proceedings and to follow proceedings, and did so partly based on the notion of adversarial procedure.

Interestingly, this means that one of the bases on which the rights were implied did not rely on the right being implicit in *Article 6*. Instead, the European Court stated that these rights were implicit *in the very notion of an adversarial procedure*. The Court does not indicate here, or anywhere else in *Stanford*, its view of the relationship between *Article 6* and ‘the very notion of an adversarial procedure’. It is also unclear how broad the concept of ‘the very notion of an adversarial procedure’ is, whether that concept is coextensive with *Article 6*’s fair trial guarantees, and whether it provides any guarantees not explicitly protected by the provisions with which it is cited in *Stanford*. Since *Stanford*, the Court has frequently used ‘the very notion of an adversarial procedure’ as the basis for implied rights. Indeed, the *Stanford* formulation has been adopted in a great many decisions.³⁸⁰ In addition to those rights dealt with in *Stanford*, cases such as *Popov* and *Evrenos Onen* also state that ‘the right to receive legal assistance’ could be implied by the ‘very notion of an adversarial procedure’.³⁸¹

³⁸⁰ See, eg, *Lagerblom v Sweden* (App 26891/95) (14 January 2003) at [49]; *Ziliberg v Moldova* (App 61821/00) (1 February 2005) at [40]; *IH and Ors v Austria* (App 42780/98) (20 April 2006) at [33]; *Taner v Turkey* (App 38414/02) (15 February 2007) at [24]; *Mevlut Kaya v Turkey* (App 1383/02) (12 April 2007) at [18]; *Vozhigov v Russia* (App 5953/02) (26 April 2007) at [40]; *Mitreuski v FYROM* (App 33046/02) (21 June 2007) at [35]; *Barisik and Alp v Turkey* (App 29765/02) (27 November 2007) at [36]; *Dagli v Turkey* (App 28888/02) (27 November 2007) at [29]; *Nurhan Yilmaz v Turkey* (App 21164/03) (11 December 2007) at [18]; *Abbasov v Azerbaijan* (App 24271/05) (17 January 2008) at [31]; *Erseven and Ors v Turkey* (App 27225/02) (24 January 2008) at [22]; *Piroglu and Karakaya v Turkey* (App 36370/02) (18 March 2008) at [36]; *Nurhan Yilmaz v Turkey (no 2)* (App 16741/04) (8 April 2008) at [20]; *Timergaliyev v Russia* (App 40631/02) (14 October 2008) at [51]; *Russu v Moldova* (App 7413/05) (13 November 2008) at [26]; *Guwec v Turkey* (App 70337/01) (20 January 2009) at [123]; *Grigoryevskikh v Russia* at [78]; *Lazoroski v FYROM* (App 4922/04) (8 October 2009) at [71]; *Maksimov v Azerbaijan* (App 38228/05) (8 October 2009) at [39]; *Sergey Timofeyev v Russia* (App 12111/04) (2 September 2010) at [77]; *Zhuk v Ukraine* at [26]; *Pirali Orujov v Azerbaijan* at [43]; *Mammad Mammadov v Azerbaijan* (App 38073/06) (11 October 2011) at [31]. See also the similar formulation of ‘the very notion of a fair trial’ in, for example, *Sabayev v Russia* (App 11994/03) (8 April 2010) at [32].

³⁸¹ *Popov v Russia* at [170]; *Evrenos Onen v Turkey* at [27].

D.3.7 'The rule of law'

In *Golder*, the European Court relied on 'the rule of law' as the basis for recognising the implied right to a court in Article 6.³⁸² *Golder*, although a civil case, is of interest here insofar as it relates to the implied rights. The *Golder* Court considered the text of the European Convention, including its Preamble, and stated:

It may also be accepted...that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith...to bear in mind this widely proclaimed consideration when interpreting the terms of [Article 6(1)] according to their context and in the light of the object and purpose of the Convention. This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member...refers in two places to the rule of law....And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.³⁸³

The *Golder* Court went on to protest that:

This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of [Article 6(1)] read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty...and to general principles of law.³⁸⁴

³⁸² *Golder v United Kingdom*. See also Merrills, 128-129; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 557-559; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 235-236.

³⁸³ *Golder v United Kingdom* at [34].

³⁸⁴ *Ibid.* at [36].

The *Golder* decision has been described as one ‘of the most creative steps taken by the European Court in its interpretation of any article of the Convention’.³⁸⁵ However, in this decision the European Court implied a right into Article 6 on the basis of ‘the principle of the rule of law’ without ever expressly defining or describing what that principle means or what its limits may be. This failure to define the rule of law in this context meant that the Court left vague the extent to which it might serve as the basis for other implied rights. Moreover, and perhaps more interestingly, it is implicit in the language of *Golder* that the Court would have reservations about an interpretation that could be described as ‘an extensive interpretation forcing new obligations on the Contracting States’. It is unclear whether such an ‘extensive interpretation’ would be grounds for refusing to recognise an implied right, and equally unclear how onerous obligations would need to be in order to refuse to recognise such a right. In any event, despite the European Court’s protests, it seems plain that this was an interpretation that ‘forc[ed] new obligations on Contracting States’.

D.3.8 ‘Drawing implications from specific provisions of Article 6’

In other instances, the European Court has drawn implied rights from specific provisions of Article 6. Thus, for example, in *Colozza*, the Court added the following reasoning in support of an implied right to be present at criminal proceedings:

Moreover, [Article 6(3)(c), Article 6(3)(d) and Article 6(3)(e)] 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

³⁸⁵ Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 235; cf Merrills, 85-86.

language used in court', and it is difficult to see how he could exercise these rights without being present.³⁸⁶

As we have seen above, *Stanford* included a similar passage.³⁸⁷ Similarly, in the context of the right to silence and the privilege against self-incrimination, the European Court in *Saunders* stated that the privilege in particular 'is closely linked to the presumption of innocence contained in [Article 6(2)] of the Convention'.³⁸⁸ *Saunders* also went on to refer to the right not to incriminate oneself as one of 'the basic principles of a fair procedure inherent in' Article 6(1).³⁸⁹

This means of reasoning, it might be thought, has some advantages over the others adopted by the European Court. In terms of transparency and predictability, this method at least offers a broad indication of how the implied right is anchored in the text of Article 6. Nevertheless, if an 'implied right' is 'closely linked' to a particular express provision of Article 6, it is somewhat unclear whether it is accurate to speak of the implied right as separate to, or distinct from, the express right. For example, does the right to participate and be present at a hearing have a life of its own beyond the precise terms of Article 6(3) on which the *Colozza* Court relies in the extract above? As was the case with our Part C analysis of the internal structure of Article 6, this matters because it affects the scope of the inquiry that the European Court makes when considering a particular case or assessing an alleged violation: for example, is the relevant inquiry 'have Articles 6(3)(c)-(e) been violated?' or is it 'has the right to be

³⁸⁶ *Colozza v Italy* at [27] (emphasis added)

³⁸⁷ *Stanford v United Kingdom* at [26].

³⁸⁸ *Saunders v United Kingdom* at [68] (emphasis added). This has been cited in, eg, *Heaney and McGuinness v Ireland* at [40].

³⁸⁹ *Saunders v United Kingdom* at [69].

present been violated?'. The former question affords the opportunity for a broader range of considerations to be taken into account when assessing an alleged violation, especially in light of some of the analytical methods we will consider in Parts D.4 and E. Thus the interests of clarity demand that the Court more fully articulate the relationship between the implied rights and the express provisions on which it is grounding these implied rights.

D.3.9 Examples of 'dogs that did not bark' emphasise these criticisms

As well as considering the circumstances in which the European Court is willing to recognise implied rights, it may be worthwhile to consider examples of situations in which the Court was unwilling to recognise implied rights: the dogs that did not bark.³⁹⁰ For our purposes, the *substance* of what was not recognised is less important than *the reasons* for so doing. Three examples will be considered.

First, a number of European Court cases consider the right to reimbursement of legal expenses for a person charged with a criminal offence, but against whom proceedings are discontinued. In *Lutz*, the Court stated:

The Court points out, first of all,... that *neither [Article 6(2)] nor any other provision of the Convention gives a person "charged with a criminal offence" a right to reimbursement of his costs where proceedings taken against him are discontinued.*³⁹¹

In *Lutz*, therefore, the Court stated that no right to reimbursement existed *because* no express provision of Article 6 provided for such a right. We make no normative claims

³⁹⁰ See A Conan Doyle, 'Silver Blaze' in A Conan Doyle, *The Memoirs of Sherlock Holmes* (Penguin, Harmondsworth 1950).

³⁹¹ *Lutz v Germany* (App 9912/82) (1988) 10 EHRR 182 at [59] (emphasis added). See also *Leutscher v Netherlands* (App 17314/90) (1997) 24 EHRR 181 at [29], citing *Lutz v Germany* at [59]. *Lutz* cites *Minelli v Switzerland* at [34]-[35].

that such a right should or should not exist. Instead, our focus is on the reasoning adopted, and the tension created by the fact that these statements appear to amount to a rejection of rights that are not expressly stated in Article 6.

The second example of a ‘dog that did not bark’ is drawn from *Peers v Greece*. In *Peers*, the Court undertook a cursory examination of an Article 6(2) argument, and bluntly rejected the notion of an implied right. The applicant, a remand prisoner, argued that the failure ‘to provide for a special regime for remand prisoners’ amounted to a violation of Article 6(2)’s presumption of innocence.³⁹² The Court ‘recalled’:

that the Convention contains no Article providing for separate treatment for convicted and accused persons in prisons. It cannot be said that [Article 6(2)] has been violated on the grounds adduced by the applicant. There has accordingly been no violation of [Article 6(2)] of the Convention.³⁹³

In this passage, the Court’s view appears to be that unless the Convention contains an Article providing for a right, that right will simply not be protected. It is extremely difficult to reconcile the approach taken in this 2001 decision with, for example, the entirety of the Court’s jurisprudence relating to the privilege against self-incrimination. In the absence of reasoning providing explanation of why the Court adopted this sort of approach in this case, and a different sort of approach in, for example, the privilege against self-incrimination cases, there risks being great inconsistency and incoherence in the case law of the Court. For potential applicants and their lawyers, particularly those eager to argue for new implied rights or for redefinition of existing implied rights, reasoning like that in *Peers* can provide only bafflement in the place of guidance.

³⁹² *Peers v Greece* (App 28524/95) (19 April 2001) at [76].

³⁹³ *Ibid.* at [78].

The third example is one that was discussed earlier in Part B in the context of that Part's discussion of evidence. In *Schenk v Switzerland*, the Court made its now-familiar statement about admissibility of evidence:

While Article 6 of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.³⁹⁴

In this passage, the Court appears to state that because the express terms of Article 6 do not lay down rules on evidence, that area of law is *therefore* not within the scope of the Court's power. Indeed, *therefore* it is primarily a matter for national law. The *Schenk* Court's reluctance to engage with an area of law for which Article 6 does not make express provision stands in stark contrast to all of its implied rights case law. Of course, *Schenk* was decided more than four years before *Funke*. But the logic in *Schenk* continues to be of considerable influence today, and the parallel streams of reasoning in *Schenk* and *Funke* do not sit well together.³⁹⁵

In considering these three examples, we do not make any argument that the European Court reached the normatively 'wrong' decision in any of these cases. Instead, we aim to underline the incoherence and inconsistency in the way that the Court approaches its interpretative task in cases concerning implied rights or would-be implied rights. These three examples demonstrate a significantly incoherent approach, and demonstrate that the Court risks looking opportunistic or casual in its performance of this interpretative work. If the Court wishes to treat these areas of law

³⁹⁴ *Schenk v Switzerland* at [46].

³⁹⁵ See J Merrills, *The development of international law by the European Court of Human Rights* (2nd edn Manchester University Press, Manchester 1993), 85.

differently to those areas in which it is willing to recognise implied rights, then it is incumbent on the Court to explain why, and identify the characteristics of the various areas of law that warrant different and inconsistent treatment.

D.3.10 A conclusion to our analysis of the foundations of the implied rights

Thus we have considered a variety of justifications for the implied rights, as well as several examples of situations in which the European Court either elected not to recognise an implied right or reasoned in a way that was inconsistent with its implied rights jurisprudence. In some cases the Court drew on several of these justifications; in others it relied on one alone.³⁹⁶ The above analysis demonstrates, however, that the overriding characteristic of the justifications – whether used together or disaggregated – is a lack of clear explanation and coherence. This manifests itself as both incoherence in the way that the Court explains each justification, and as incoherence in the way the Court views these justifications as complementing or competing with one another.

At this point, it is worth drawing a connection between our analysis here and the analysis preceding it in Part C. Importantly, the European Court’s jurisprudence on the implied rights shares some of the ‘internal structure’ problems that were identified more generally in Part C. Thus it is not always clear if a particular implied right is grounded in Article 6 as a whole, one aspect of Article 6 specifically, or whether it forms part of the Article 6 protections without being tied to any aspect of the text specifically. Equally, as we shall see in the next section, the implied rights often shade into one another, rendering their precise boundaries opaque. The lack of clarity on the

³⁹⁶ cf the analysis in Summers, 116-117.

relationship between the implied rights and the internal structures of Article 6, and the lack of clarity within and between the implied rights, raises real problems in terms of certainty and predictability.

D.4 The case law indicates uncertainty over the boundaries of the implied rights

In the last section, we considered the foundations on which the European Court based the implied rights. In this section, we consider the European Court's efforts to define the scope of the various implied rights. In a sense, defining the scope of the rights is a jurisprudential challenge that affects both express and implied rights, and we will return to this in greater detail when we consider violation and infringement in Part E. Here, however, we examine a number of ways in which the European Court has grappled with defining the scope and limits of the implied rights specifically.

As has been foreshadowed above, the European Court's jurisprudence does not always make it easy to draw lines between different implied rights, or to make it clear how one implied right relates to another, or to the express rights.³⁹⁷ In a sense, this is a very specific application of the problems relating to internal structure that were dealt with in Part C above.

Among the authors, for example, there is a diversity of viewpoints. Thus, some authors suggest that the implied rights could be described as merely component elements of the Article 6(1) 'fair hearing' guarantee. Indeed, Clayton and Tomlinson describe the implied rights as 'principles [that] have been developed by the

³⁹⁷ And see, eg, Wu, 44-45.

Commission and the Court’ that are elements of ‘the content of the right to a fair hearing’.³⁹⁸ These ‘principles’ are part of the analysis of the proceedings *as a whole* under the ‘fair hearing’ guarantee, rather than as standalone rights as such.³⁹⁹ For Emmerson, Ashworth, and Macdonald, the implied rights are closely linked to the way that the European Court approaches the internal structure of Article 6. Thus, the fact that Article 6(2) and Article 6(3) constitute a non-exhaustive list of the components of a fair trial is seen as logically requiring that other rights may be implied from the Article 6(1) guarantee.⁴⁰⁰ These rights, however, are portrayed as standalone rights capable of being protected – and violated – independently of any other component of Article 6.⁴⁰¹ Similarly, Harris, O’Boyle and Warbrick note that Article 6’s ‘fair hearing’ guarantee has ‘an open-ended, residual quality’ that allows ‘for adding other particular rights not listed in Article 6 that are considered essential to a “fair hearing”’.⁴⁰² Here, therefore, we see the first fault-line in seeking to understand the internal structure of Article 6 as it applies to the implied rights. Indeed, the question is whether or not the implied rights are *based on* Article 6(1) or *form part of* Article 6(1). The significance of this lies in the way that the answer to the question frames the scope of the inquiry within which the European Court analyses violations of the implied rights, in ways we analyse in Part E. Analysing the breach of an independent implied right may require a

³⁹⁸ Clayton and Tomlinson (eds), *The Law of Human Rights*, 860.

³⁹⁹ *Ibid.*, 860; Summers, 105. We return to the proceedings as a whole in Part E.2.

⁴⁰⁰ Emmerson, Ashworth and Macdonald, 89.

⁴⁰¹ See *Ibid.*, 88-91.

⁴⁰² Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 246. See also Trechsel, 84-86.

very different interpretative exercise to analysing the breach of the ‘fair hearing’ guarantee, of which the implied guarantee forms part.

There are two other, related, classes of uncertainty when it comes to the internal structure of Article 6 and the implied rights. The first relates primarily to the relationship between the implied rights and the express rights. The second relates primarily to the relationship between the different implied rights.

As to the first class of uncertainty, it was noted above that the implied rights are sometimes justified on the basis of a particular sub-provision of Article 6. The uncertainty arises because sometimes the same implied right is treated as being linked to different express provisions within Article 6. If we take the silence and self-incrimination guarantees as our example, it is evident that the Court has treated these guarantees as being linked to, and being capable of violating, Article 6 simpliciter, Article 6(1), and Article 6(2). Thus, for example, *Funke* simply described the silence and self-incrimination guarantees as relating to ‘Article 6’.⁴⁰³ By contrast, many cases refer to Article 6(1) specifically when identifying which provision of Article 6 had been violated in cases concerning the silence and self-incrimination guarantees. Thus, for example, in *Condron*, the European Court found a violation of Article 6(1): ‘the applicants did not receive a fair hearing within the meaning of [Article 6(1)] of the Convention.’⁴⁰⁴

⁴⁰³ *Funke v France* at [41][44].

⁴⁰⁴ *Condron v United Kingdom* at [66]. See also, eg, *Saunders v United Kingdom* at [76-81]; *Averill v United Kingdom* at [52]; *JB v Switzerland* at [71].

There are also instances, such as in *Saunders*, where the European Court focuses its analysis on Article 6(1) for the purposes of determining whether there has been a violation, but acknowledges that the silence and self-incrimination guarantees are ‘closely linked to the presumption of innocence contained in Article 6(2) of the Convention’.⁴⁰⁵ In turn, in a case such as *Heaney and McGuinness*, the Court identifies the violation as being of both Article 6(1) and Article 6(2):

there has been a violation of the applicants' right to silence and their right not to incriminate themselves guaranteed by [Article 6(1)] of the Convention. Moreover, given the close link, in this context, between those rights guaranteed by [Article 6(1)] of the Convention and the presumption of innocence guaranteed by [Article 6(2)]..., the Court also concludes that there has been a violation of the latter provision.⁴⁰⁶

Importantly, the Court’s justification for this approach is less due to the facts of the case and more due to the nature of the silence and self-incrimination guarantees.

Inconsistently, the European Court has elsewhere indicated that these matters are to be considered exclusively under Article 6(1). Indeed, in *Rieg v Austria*, the ‘applicant complained about a violation of her right to remain silent and the privilege against self incrimination and the presumption of innocence’, relying on Article 6(1) and Article 6(2).⁴⁰⁷ The Court sourced the privilege against self-incrimination in Article 6(1) ‘alone’ and not in Article 6(2).⁴⁰⁸ Thus in *Rieg*, the European Court refused to recognise an Article 6(2) basis for the silence and self-incrimination guarantees. It is hard to reconcile this interpretative choice with the fact that in *Weh*, ruling on *exactly*

⁴⁰⁵ *Saunders v United Kingdom* at [68]. See Trechsel, 342 et seq; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 593; Lord Hoffman, ([27]-[29]); Stumer, 88-151; cf Ward and Gardner, 391-394.

⁴⁰⁶ *Heaney and McGuinness v Ireland* at [59].

⁴⁰⁷ *Rieg v Austria* (App 63207/00) (24 March 2005) at [23].

⁴⁰⁸ *Ibid.* at [29]-[32].

the same Austrian law less than one year earlier, the Court had expressly acknowledged that the guarantees are ‘closely linked to the presumption of innocence contained in Article 6(2) of the Convention’.⁴⁰⁹ The applicant in *Weh* did not argue for an Article 6(2) violation, but the European Court nonetheless recognised the role of Article 6(2) in providing the basis for the silence and self-incrimination guarantees.⁴¹⁰ Perversely, the applicant in *Rieg* did argue for an Article 6(2) violation, but the European Court refused to recognise the relevance of Article 6(2) in any way.

This analysis only deals with the silence and self-incrimination guarantees. But even from a brief consideration of this particular implied right, it is apparent that the Court is inconsistent and incoherent in explaining how the silence and self-incrimination guarantees relate to the express terms of Article 6. This incoherence makes it difficult for citizens, lawyers and officials to predict how the Court will act (how could the applicant in *Rieg*, for example, possibly imagine that the Article 6(2) argument would be rejected out of hand when the *Weh* Court had expressly acknowledged the link between the silence and self-incrimination guarantees and Article 6(2)?). Moreover, this incoherence has significant consequences for our consideration of how the European Court approaches questions of violation and infringement, and it echoes the criticisms made in Part C above.

⁴⁰⁹ *Weh v Austria* at [39]. Both cases concerned the Austrian Motor Vehicles Act (Kraftfahrzeuggesetz). The *Rieg* Court expressly acknowledged that the *Rieg* application ‘raises the same issue as *Weh v Austria*’: *Rieg v Austria* at [29]. On *Weh*, see Choo.

⁴¹⁰ The applicant in *Weh* framed the argument with reference only to Article 6(1): *Weh v Austria* at [32].

As to the second class of uncertainty, this relates to the relationship between the different implied rights. Here, we point to instances where the dividing lines between different implied rights are somewhat murky. It is acknowledged here that, by their very nature, implied rights may often be less clearly defined than express provisions. Our argument is not to the contrary. Our argument, instead, is simply to identify a number of ways in which the European Court's explanation of the implied rights is vague and incoherent, such that it gives rise to rule of law concerns.

There is murkiness, for example, in the boundary between the right to equality of arms and the right to an adversarial procedure.⁴¹¹ On multiple occasions, the Court has emphasised its view that these rights are distinct, separate, elements of Article 6.⁴¹² It is clear, however, that the European Court is willing to conflate aspects of the two rights in its analysis.⁴¹³ Similarly, there is also some murkiness over the boundaries between 'the very notion of an adversarial procedure,'⁴¹⁴ the right to be present and participate in a hearing,⁴¹⁵ the implied aspects of the right to receive legal assistance,⁴¹⁶ and the 'fundamental' implied right that criminal proceedings should be adversarial.⁴¹⁷ For present purposes, it is simply worth noting that the Court's reasoning in this area creates potential ambiguity over the relationship between the various implied rights. If

⁴¹¹ Compare *Summers*, 110-112.

⁴¹² See, eg, *Brandstetter v Austria* at [66]; *Ruiz-Mateos v Spain* (App 12952/87) (23 June 1993) at [62]; *Salov v Ukraine* at [87]; *Belziuk v Poland* at [37]. Compare *Summers*, 104-105.

⁴¹³ See, eg, *Edwards and Lewis v United Kingdom* at [59], see also [54].

⁴¹⁴ See Part D.3.6.

⁴¹⁵ See, eg, *Stanford v United Kingdom* at [26], and the authorities in Part D.3.6 above.

⁴¹⁶ See *Popov v Russia* at [170]; *Evrenos Onen v Turkey* at [27].

⁴¹⁷ *Brandstetter v Austria* at [66].

one of the rights is merely a sub-category of the other, then the Court should clearly outline that relationship; if the rights warrant conceptual independence then the Court should clarify the basis for its reasoning, especially with regard to the foundations for the right to be present and participate.

Thus we have outlined several ways in which there is ambiguity over the boundaries of the implied rights, both when compared with the express rights and when compared with one another. These ambiguities raise the possibility of real uncertainty as to how the Court views Article 6 generally, and the implied rights specifically. When considered together with our analysis in Part C, we begin to build an overall picture in which the boundaries of Article 6 rights are poorly defined and fluid. In Part E, we turn to what forms of analysis are used by the Court within those poorly defined and fluid boundaries.

D.5 Conclusion to Part D

In concluding our analysis of the implied rights in this Part, we may note that there are hints in the European Court's case law of rights that might, in future, be recognised as rights implicit in Article 6. Indeed, there have been indications in the case law of the possibility of implied rights such as

- An implied right to be prosecuted under procedural rules established in advance;⁴¹⁸
- An implied right to call expert witnesses where another expert witness completely changes their mind in the course of a hearing;⁴¹⁹

⁴¹⁸ See, eg, *Coeme v Belgium* at [102]-[104].

⁴¹⁹ *GB v France* at [69]-[70].

- A qualified implied right for civilians to be tried in civilian courts;⁴²⁰
- An implied right to civilian clothing in the courtroom;⁴²¹
- An implied guarantee to have a fair procedure applied to the determination of public interest immunity;⁴²² or
- An implied guarantee against the use of evidence obtained in breach of a Convention right.⁴²³

The difficulties with the Court’s approach to the implied rights, outlined in this Part, mean that it is difficult to determine whether, and if so when and how, these embryonic implied rights may crystallise into generally accepted implied rights. It is also worth acknowledging that many of these potential implied rights could also be categorised as simply being definitions of the broad ‘fair trial’ or ‘fair hearing’ guarantees, or as factors relevant to a proceedings as a whole analysis. We will turn to the latter form of analysis shortly in Part E.2 For present purposes, our point is more modest: notwithstanding hints in the case law like those listed above, the Court’s failure to rationalise and explain its implied rights jurisprudence in any coherent or consistent way makes it extremely difficult for lawyers, citizens, and officials to predict the likely future direction of the Court’s case law.

Generally, then, this Part considered the European Court’s implied rights jurisprudence. By examining the incoherent approach of the Court to the origins of

⁴²⁰ *Ergin v Turkey (No 6)* at [36]–[47].

⁴²¹ *Samoila and Cionca v Romania* (App 33065/03) (4 March 2008) at [82], [100].

⁴²² See, eg, *Jasper v United Kingdom* (App 27052/95) (2000) 30 EHRR 441 at [53], *Rowe and Davis v United Kingdom* (App 28901/95) (2000) 30 EHRR 1 at [62], and *Fitt v United Kingdom* (App 29777/96) (2000) 30 EHRR 480 at [50]. See also Part E.2.3 below.

⁴²³ *Jalloh v Germany* at [105]–[107].

implied rights, this Part demonstrated significant uncertainty inherent in the Court's jurisprudence, which in turn raised broader rule of law concerns. The Part concluded by considering some potential new implied rights, noting both the duality of their definition and the uncertainty over the means by which the Court might confirm their status as implied rights.

PART E: ASSESSING INFRINGEMENTS AND VIOLATIONS: THE PUZZLE OF ARTICLE 6

In this Part, we look at how the European Court assesses alleged violations of Article 6 rights. We begin by identifying and explaining the origins of two characteristics of Article 6 that complicate the assessment of these alleged violations: its unqualified nature and its structure. We identify what will be described as the puzzle of Article 6: given that Article 6 lacks an express guiding principle for assessing alleged violations of Article 6, how should the European Court assess such allegations? In the absence of such a meta-principle, how does Article 6 infringement analysis work in the Court's case law? Having explored the origins of this puzzle in the *travaux*, the main portion of this Part then looks at a variety of different tools and devices that the European Court has used to assess alleged violations of Article 6. During the course of this Part, a variety of arguments and criticisms will be made. But there are two macro-arguments that run through the Part, echoing the two broad classes of argument outlined in the Introduction and elsewhere in this thesis.

First, for each of the array of tools and mechanisms used by the European Court to assess violations of Article 6, it will be shown that the European Court's case law reflects internal inconsistency as to how each specific tool and mechanism is identified, explained and applied. The individual arguments advanced with respect to each of these tools and mechanisms will be specifically related to the relevant method of assessment, but the overall picture will be one of incoherence.

Second, it will be argued that these tools and mechanisms are inconsistently and incoherently deployed by the European Court, with little explanation of why particular tools are used in particular situations and not in others. Our argument is not that the European Court must adopt exactly the same analytical framework for all Article 6 rights in all circumstances. The argument is more focused. It is that, if the European Court is to adopt different analytical approaches for different cases, the interests of coherence and predictability demand that it offer explanations of some sort for why a particular analytical framework is applicable to one case but not to another. As it stands, this Part argues, the European Court's case law is characterised by uncertainty and inconsistency and the sort of irrational flexibility we have already seen elsewhere in the thesis.

Together, it will be shown that in assessing violations of Article 6, the European Court uses a set of analytical tools that are inconsistent with each other, and incoherent in themselves. Moreover, when we add the arguments made in previous Parts, especially Parts C and D, to those made in Part E, we also see that this level of incoherence generates considerable uncertainty in terms of the ways in which the European Court frames, explains, and assesses alleged Article 6 violations.

E.1 Article 6 is different

Article 6 is different. In beginning our consideration of how the European Court analyses and deals with alleged violations of Article 6, it is important to emphasise those characteristics of Article 6 that make it different from many of the other Convention provisions. Our argument is not that Article 6 is unique, and it is not that

other Convention provisions lack unique features. The argument is narrower: simply put, there are several features of Article 6 that complicate the task of assessing potential violations. These features are critical to understanding the parameters within which the Court works when analysing Article 6, and to understanding why that work may be flawed. We will begin by outlining two key characteristics inherent in Article 6.

E.1.2 Article 6 does not have a restrictions clause

For those who draft human rights documents, and for those who use and think about human rights documents, a key question is this: under what circumstances, and for which rights, may a prima facie infringement of a right be justified?⁴²⁴ Different human rights documents answer this question in different ways.⁴²⁵ One option is a generally-applicable limitations clause specifying the circumstances in which it may be possible to justify an infringement of any of the protected rights. This course was adopted in, for example, section 1 of the Canadian Charter.⁴²⁶

A second option is to specify that particular justifications, or sets of justifications, are applicable to particular rights. Thus in the case of the European Convention, for example, Article 8's protection of private and family life is qualified in this way:

⁴²⁴ As is evident in Alexy's work, there is considerable philosophical debate over the nature of limitations on rights. Here, and consistently throughout this thesis, our focus is less theoretical. See, eg, Alexy, ch 6.

⁴²⁵ See, eg, the discussion in J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174, 174-177.

⁴²⁶ *Constitution Act 1982* (Canada), Canadian Charter of Rights and Freedoms, s 1: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

Article 8(2). There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

And in the case of each of Articles 9-11, the European Convention provides a set of available justifications that overlap in part with each other and with Article 8, but also differ in part.⁴²⁷

A third option is to provide no express mechanism for resolving whether, if at all, an infringement might be justified. Thus, for example, the Sixth Amendment to the Constitution of the United States simply provides a series of guarantees and gives no express indication of any mechanism whereby restrictions on the rights contained therein might be justified. For now, our argument is not about how alleged infringements of these various provisions are justified *in practice* before the various relevant courts. Our concern is simply with the structure of the guarantees; we will come to the reality of applying these guarantees later in this Part.

In the European Convention, we see a combination of options two and three. Our focus here turns to *derogable unqualified* rights. The unqualified rights include, for example, those rights contained in Articles 2-7.⁴²⁸ Under Article 15 of the European

⁴²⁷ For an analysis of how this 'somewhat disorderly' situation came about, see Simpson, 715.

⁴²⁸ There is one qualification: for one of the Article 6 component rights, there is an express restrictions clause. Article 6(1) states that judgments 'shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.' On this, see R Clayton and H Tomlinson (eds), *Fair Trial Rights* (2nd edn OUP, Oxford 2010), 62-66, 174-176; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 271-278; Trechsel, 117-133; van Dijk and van Hoof, *Theory and*

Convention, the guarantees in Article 2,⁴²⁹ Article 3, Article 4(1), and Article 7 cannot be derogated from. These guarantees, therefore, form a class of *unqualified and non-derogable* rights. In contrast, guarantees such as those in Article 5 and Article 6 are members of a class of *derogable and unqualified* rights. It is possible to argue, as Ashworth does, that these classes of rights, together with the *qualified* rights, form a hierarchy of sorts.⁴³⁰ For present purposes, we do not need to make an argument about a hierarchy, but we can adopt Ashworth's classification of the rights into these various groups.⁴³¹

Our focus is on the unqualified and derogable rights, and, particularly, those contained in Article 6. The status of Article 6 as an unqualified and derogable right raises a number of normative questions: should the Article 6 guarantees be interpreted as absolute, with no infringement thereof being capable of justification? Should some infringements of Article 6 be justifiable? If so, what standard applies, and should it be similar to the standards used for the qualified rights? As we will see, this Part is about the European Court's attempts to solve these questions; its attempts to solve what we describe as the puzzle of Article 6. In a broader sense, this Part is also about the deep

practice of the European Convention on Human Rights, 596-602. References to Article 6 elsewhere in this Part may refer to all of Article 6 apart from this guarantee with its standalone limitations provision.

⁴²⁹ In the case of Article 2, derogation is accepted 'in respect of deaths resulting from lawful acts of war'.

⁴³⁰ See A Ashworth, 'Security, Terrorism and the Value of Human Rights' in B Goold and L Lazarus (eds), *Security and Human Rights* (2nd edn, Hart, Oxford 2007). cf Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the ECtHR', 264-269.

⁴³¹ The European Court itself has referred to a 'hierarchy of human rights,' but usually in the context of the right to life and only in passing. Typically the Court refers to the right to life being at the apex of this hierarchy: see *KH W v Germany* (App 37201/97) (22 March 2001); *Tysiac v Poland* (App 5410/03) (20 March 2007); *Kononov v Latvia* (App 36376/04) (17 May 2010). Compare the suggestion that the right to liberty is at the apex, at [1.15] of the Partly Dissenting Opinion of Judge Bushev in *Oao Neftyanaya Kompaniya Yukos v Russia* (App 14902/04) (20 September 2011). On assessing qualifications to ostensibly unqualified rights in the German domestic context, see Alexy, 72-76.

incoherencies and inconsistencies running through the European Court's Article 6 case law.⁴³²

E.1.3 Article 6's structure creates further complexity

The second key characteristic that we can identify at this point relates to the complexity of Article 6's structure. Analytical difficulties arising from the structure of Article 6 have been discussed above in Part C. At this point we note two aspects of Article 6's structure.

First, Article 6 appears to protect *two different* fair trials. In one sense, *all* of Article 6 is designed to protect what might be described as 'the right to a fair trial'. In this way, referring to 'fair trial rights' or 'the right to a fair trial' is shorthand for all of the various rights and guarantees, express and implied, that may be found in Article 6(1), Article 6(2) and the provisions of Article 6(3).⁴³³ This is one of the 'fair trials'.

If we look at Article 6(1), however, the potential for *another* 'fair trial' is evident.

The first sentence of Article 6(1) states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a *fair and public*

⁴³² For some analogous analysis regarding other Articles, see J Gerards and H Senden, 'The structure of fundamental rights and the European Court of Human Rights' (2009) 7 *International Journal of Constitutional Law* 619; H Battjes, 'In search of a fair balance: The absolute character of the prohibition of refoulement under Article 3 ECHR reassessed' (2009) 22 *Leiden Journal of International Law* 583; Delmas-Marty.

⁴³³ The heading to Article 6 was added to the text in 1998, when Protocol No 11 (ETS 155) entered into force. Among other things, Protocol No 11 prescribed various headings to be inserted into the European Convention's Articles.

hearing within a reasonable time by an independent and impartial tribunal established by law.⁴³⁴

Thus Article 6(1) specifically guarantees ‘a fair and public hearing’. This particular guarantee is one of several component parts of Article 6(1), which in turn is one of several component parts of Article 6.

Thus it is possible to read Article 6 as containing two identifiable ‘fair trial’ rights. These rights may be similar, and may overlap, but it is important to note the potential for confusion and ambiguity.⁴³⁵ This ambiguity is, perhaps, increased when we fold in an additional complication: Article 6 is one of the longer and more detailed provisions of the European Convention. It is thirteen times longer than Article 3, and is second only to Article 5 in both its length and the number of sub-provisions contained within it. In light of this, there may be a temptation to regard parts of Article 6 – such as Article 6(2) and Article 6(3) – as merely providing definitional assistance and elaboration on the meaning of Article 6(1).⁴³⁶

Of course, it is possible to imagine a scenario in which the European Court treated Article 6(2) and Article 6(3)(a)-(e) as merely definitional. As we saw in Part C, however, this is not what the European Court has done. Or, more precisely, this is not what the Court has done in any consistent way: the Court has demonstrated a willingness to find violations of Article 6(2) and Article 6(3), whether in conjunction

⁴³⁴ (Emphasis added).

⁴³⁵ For a possible example of this confusion, see Jacot-Guillarmod, 381, where Jacot-Guillarmod misquotes a key passage from *Golder v United Kingdom* at [28]. *Golder* refers to Article 6(1) but Jacot-Guillarmod’s rendering of the quote has *Golder* referring to Article 6 more generally. For more on different approaches to ‘fairness’, see, eg, Summers, 97-128.

⁴³⁶ A temptation manifestations of which have been seen above. See, eg, Part C.4.1.

with Article 6(1) or independently. The rights in these articles thus appear to have some independent existence and force. In other instances, as we saw in Part C, Article 6(2) and Article 6(3) have been treated as being close to mere definitional provisions, a usage that does not sit well with the cases in which a violation is found of those provisions.

The second aspect of structural complexity relevant to our present discussion relates to the implied rights. Part D considered the implied rights in detail; here we identify some complexities particularly relevant to our current analysis. The nature of implied rights means, as we have seen in Part D, that their origins and definition can be especially vague. In terms of assessing infringements and violations, we may note that the case law reflects uncertainty over whether implied rights are absolute.⁴³⁷ With respect to justifiable infringements of implied rights, the case law on the right to a court, for example, suggests that that right is subject to implied limitations.⁴³⁸ The Court, however, has refused to rationally explain such limitations: it declined to ‘elaborate a general theory of such limitations,’⁴³⁹ other than to suggest that they should be the subject of a proportionality analysis.⁴⁴⁰

⁴³⁷ *John Murray v United Kingdom* at [46]-[47]; *Saunders v United Kingdom* at [68]-[69], [74] See also Kolb, 356.

⁴³⁸ *DeWeer v Belgium* at [49]; *Peltier v France* at [35]; *Gruais and Bosquet v France* at [26]. See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 557-578; Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 235-246; R Clayton and H Tomlinson (eds), *Fair Trial Rights* (2nd edn OUP, Oxford 2010), 15-43, 140-155; Christoffersen, 78-81.

⁴³⁹ *DeWeer v Belgium* at [49]; see also Part B.2.

⁴⁴⁰ *Peltier v France* at [35]; *Gruais and Bosquet v France* at [26]. For more on proportionality in this context, see below, and van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 573-575; Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 235-246.

Thus far, we have noted two characteristics of Article 6: it is unqualified, and it is structurally complex in a number of ways. Shortly we will move on to examine how these characteristics play out in the context of alleged violations of Article 6 generally, and how these factors interact with other characteristics of Article 6. Before doing so, however, we will examine whether the *travaux préparatoires* to the European Convention provide any guidance on how these intertwined strands may be untangled.

E.1.4 The *travaux préparatoires* do not solve the(se) puzzle(s)

As we have seen in Part A, under the Vienna Convention and the Court's case law, the *travaux* are a supplementary means of interpreting the European Convention.⁴⁴¹ At this point, we turn to the *travaux* to try to understand how the structure of the Convention - with its mixture of qualified and unqualified rights, and its drafting of Article 6 - came about.

The drafters of the European Convention did give some consideration to limitations clauses. At the outset, there was disagreement over the level of definitional detail that the European Convention would provide for each of the protected rights (should the rights be 'listed' or 'defined?').⁴⁴² Alongside this dispute, however, there was an initial sense that there should be a generally-applicable 'limitations clause designed to limit not so much the rights themselves as the powers of government'.⁴⁴³ This debate was also intertwined with debate about the institutions to be created by any

⁴⁴¹ See Part A.1.1: Article 32 of the Vienna Convention allows for *travaux préparatoires* to be consulted as a supplementary means of interpretation.

⁴⁴² Simpson, 658-659. See also Christoffersen, 7-14.

⁴⁴³ Simpson, 658-659; Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol I* (Martinus Nijhoff, The Hague 1975), 168-170.

convention: there was, for example, extensive discussion of whether there should be a court.⁴⁴⁴

In a sitting on 5 September 1949, the Consultative Assembly considered a proposal that the Convention include a generally-applicable limitations clause (then identified as ‘Article 6’).⁴⁴⁵ As Simpson notes, the clause ‘was a modified version of Article 29(2)’ of the Universal Declaration of Human Rights.⁴⁴⁶ The Rapporteur, Teitgen, described a clause of this sort as being designed to provide States with the power to restrict rights for good cause, but not the power to restrict rights for selfish reasons or reasons against the ‘public interest’.⁴⁴⁷ Benvenuti of Italy later expressed the concern that, if ‘Article 6’ were enacted, ‘every State which violates human rights...will always have an excuse’.⁴⁴⁸ These concerns were shared by the United Kingdom; Simpson summarises the British argument that such a clause ‘would be “a mockery and a fraud on the public”, since it would allow governments to justify any form of oppression’.⁴⁴⁹

Concerns of this sort are indicative, perhaps, of the uncertainty over how the European Convention would be likely to work in practice. And yet, as Simpson argues, the purpose of a draft clause like ‘Article 6’ was:

⁴⁴⁴ See, eg, Simpson, 712.

⁴⁴⁵ Council of Europe, 208. Another version of this clause appears at 230.

⁴⁴⁶ Simpson, 677.

⁴⁴⁷ Council of Europe, 278. See also 272 and Simpson, 677.

⁴⁴⁸ Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol II* (Martinus Nijhoff, The Hague 1975), 138.

⁴⁴⁹ Simpson, 688.

the exact reverse of what the [United Kingdom] Foreign Office thought; it was there to prevent governments from justifying any form of oppression...⁴⁵⁰

Despite the British concerns, a generally-applicable limitations clause became a feature of the early drafts.⁴⁵¹ As time went on, there were proposals to amend the list of public goals that might justify an infringement, and proposals to add specific limitations clauses to particular provisions.⁴⁵²

Then, in March 1950, the debate shifted. The debate now considered two alternative proposals. Alternative One included language based, to varying degrees, on a draft originally proposed by the United Kingdom,⁴⁵³ and was described as *defining* rather than *enumerating* or *listing* the rights.⁴⁵⁴ It included specific limitations clauses for particular rights – and no generally-applicable limitations clause.⁴⁵⁵ No specific limitations clause was inserted to cover fair trial rights.⁴⁵⁶ It appears that Alternative One reflected British views that any Convention should ‘make it quite clear what was

⁴⁵⁰ Ibid., 688.

⁴⁵¹ For subsequent versions of such a clause, see Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol III* (Martinus Nijhoff, The Hague 1976), 224; 238. See also Simpson, 658-660.

⁴⁵² Turkey proposed that ‘Article 6’ be amended such that limitations of rights would be allowed if they were for ‘national unity and solidarity’: Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol III*, 182-184. See also 194; Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV* (Martinus Nijhoff, The Hague 1977), 24-26; Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol III*, 206, 266; Simpson, 694.

⁴⁵³ See Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol III*, 312-320. In the following passage, the terms ‘Alternative One’ and ‘Alternative Two’ are used as shorthand for the two models. It may be noted that the *travaux* are not entirely consistent in referring to the two models; sometimes the *travaux* refer to one model as Alternative A and at other times refer to it as Alternative B. Contrast the above reference with, eg, Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 16-18.

⁴⁵⁴ See, eg, Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 18.

⁴⁵⁵ Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol III*, 280-288.

⁴⁵⁶ See, eg, Ibid., 284.

the nature and extent of the obligations to be assumed by the States party'.⁴⁵⁷ The fear was that agreeing to a mere list of rights, designed to be developed and elaborated upon by a court, would amount to signing 'a blank cheque'.⁴⁵⁸ More generally, the British view was that arguments in favour of a list were 'profoundly alien to their legal culture'.⁴⁵⁹

Alternative Two, however, retained a generally-applicable limitations clause as 'Article 6'.⁴⁶⁰ It was said that this alternative *enumerated* or *listed* the rights rather than defining them.⁴⁶¹ Supporters of Alternative Two argued that debate about the precise wording of definitions may 'take a long time' and might delay the establishment of European institutions.⁴⁶² Rather than spending time debating precise definitions and specific limitation clauses, Alternative Two advocates argued that:

the rights and freedoms listed [in Alternative Two], including the general rules concerning their limitation, had for Western Europe a sufficiently precise meaning to allow the signatory States to be left the responsibility to lay down the conditions for the exercise of these rights and their protection in their own national laws.⁴⁶³

Views of this sort were expressed by, for example, representatives of Belgium, France, Ireland, and Italy; a French representative warned that the British definitions might be

⁴⁵⁷ Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 10.

⁴⁵⁸ Simpson, 663; Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 82.

⁴⁵⁹ Simpson, 688. See also Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 106; cf Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 108;110-112.

⁴⁶⁰ See Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol III*, 320-324.

⁴⁶¹ See, eg, Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 18. The differences between the two alternatives were summed up well by the United Kingdom representative in June 1950: see Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 170.

⁴⁶² Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV*, 12.

⁴⁶³ *Ibid.*, 12-14.

‘very dangerous’ and ‘extremely difficult’ to formulate.⁴⁶⁴ Throughout mid-1950, various compromise proposals were discussed, and support slowly moved behind Alternative One.⁴⁶⁵ This move was linked to compromises on other areas of contention, including concerns over institutional structure and the proposed convention’s applicability to Contracting States’ colonies.⁴⁶⁶ With the benefit of hindsight, it may seem somewhat surprising that the final text of the European Convention was thought to have been extremely detailed.

Thus the Convention was left without a generally-applicable limitations clause, and with specific limitations clauses attaching to selected rights.⁴⁶⁷ Several rights – including those contained in what became Article 6 – lacked limitations clauses.⁴⁶⁸ The *travaux* give no indication of whether the Convention’s drafters viewed Article 6 as absolute, whether they had in mind some other limitations mechanism, or whether the matter was simply not addressed. The *travaux* reflect that, as time went on, less attention was paid to the question of limitations. The British delegation may have originally proposed a scheme under which ‘there would be specific limitations to each of the substantive rights, but no general limitations clause,’⁴⁶⁹ but the result of the

⁴⁶⁴ Ibid., 12-14; 108; 110; Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol V* (Martinus Nijhoff, The Hague 1979), 284-286.

⁴⁶⁵ For examples of some of the relevant votes and the compromise proposals, see Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol IV* 112; 178; 210; 286.

⁴⁶⁶ Simpson, 712-713.

⁴⁶⁷ Greer and Simpson note that there is no obvious coherence to the ‘disorderly’ limitations: Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 197; Simpson, 715.

⁴⁶⁸ But see note 428, above.

⁴⁶⁹ Simpson, 704.

negotiations was that the Convention was left without a general limitations clause, and with specific limitations only to *some of* the substantive rights.

While the *travaux* do not help solve our first puzzle, they do help contextualise the situation in which the puzzle came about: there was a series of political compromises, and an agenda on which there were multiple controversies to be dealt with by the drafters. The limitations issue was left to one side.

The *travaux* provide even less assistance on our second puzzle, namely, how the drafters of the European Convention regarded the relationship between the possible multiple fair trials in Article 6. As the European Court said in its 1978 decision in *Konig v Germany (No 1)*, ‘no very specific and exact ideas on the scope of [Article 6] emerge from the *travaux*’.⁴⁷⁰

That being said, Article 6’s multiple, lengthy provisions are indicative of the approach to drafting adopted and advocated by the United Kingdom in the *travaux*. Indeed, the more detailed nature of Article 6 suggests the influence of the British approach: ‘define the rights...and the limitations with the greatest possible precision’.⁴⁷¹ In this regard, Article 6 may be contrasted with, for example, earlier less detailed proposals for a fair trial guarantee;⁴⁷² the drafters elected to adopt a more detailed fair trial guarantee, with each of the component parts identified and articulated. Much as

⁴⁷⁰ *Konig v Germany (No 1)* at Separate Opinion of Judge Matscher.

⁴⁷¹ Simpson, 705, citing British ministerial brief.

⁴⁷² Council of Europe, *Collected Edition of the Travaux Préparatoires: Vol III*, 222.

was the case with out previous puzzle, this insight does not help us resolve the puzzle of ‘multiple fair trials,’ but it does contextualise the language of the European Convention.

The puzzles created by Article 6, therefore, cannot be solved by reference to the *travaux*.

E.1.5 The European Court uses a variety of analytical tools to assess alleged infringements of Article 6

In the remainder of this Part, therefore, we consider the European Court’s own attempts to solve the puzzle of Article 6. We consider a number of analytical tools used by the European Court, how these tools work, and how well they sit with one another.

In turn, we consider:

- the ‘proceedings as a whole’ test (Part E.2);
- ‘counterbalancing’ and ‘defect-curing’ (Part E.3);
- the notion that some infringements render a trial irretrievably unfair (the ‘never fair’ jurisprudence) (Part E.4);
- the semi-structured balancing used in cases considering whether certain evidence was the ‘sole or decisive’ evidence against a defendant (Part E.5); and
- the extent to which the public interest can justify restrictions on Article 6 rights through balancing or proportionality analysis (Part E.6).

These analytical tools all represent attempts to solve the puzzle of Article 6. Throughout our analysis of these forms of analysis run the two macro-arguments outlined above: first, that the European Court has not explained well how the different

tools interrelate and when one should be used in preference to another. And second, that the tools themselves are often poorly explained and inconsistently applied.

E.2 The ‘proceedings as a whole’ test is used inconsistently and incoherently

In this section, we consider the European Court’s use of what we will describe as the ‘proceedings as a whole’ test. Frequently in Article 6 cases, the Court will insist that this test is the appropriate lens through which to analyse an alleged violation.⁴⁷³ As will be demonstrated, its definition and boundaries have not been explained or made clear by the Court. We can, nonetheless, infer from the cases that the *theory* of the test is this: the existence of a violation of Article 6 will sometimes be contingent on the fairness of the proceedings as a whole. As such, the theory goes, examination of some alleged violations of Article 6 should not involve simply assessing the facts and legal standards most relevant for the precise violation alleged, or the precise sub-section of Article 6 that is said to have been violated. Instead, where the proceedings as a whole test is engaged, the appropriate course is to examine *all* of the factual circumstances constituting the ‘proceedings as a whole’ and to do so against a general test of *fairness*.⁴⁷⁴ It must be emphasised that this is an inferred definition of the theory of the proceedings as a whole test; as we will see, in reality the test works quite differently.

At this stage, a point of clarification should be made. The ‘fairness of the proceedings as a whole’ test is *not* necessarily the same as the European Court’s

⁴⁷³ Among recent cases, see, eg, *Hanzevacki v Croatia* at [20]. See also the cases considered throughout this section.

⁴⁷⁴ Summers argues that the European Court’s focus on the fairness of the proceedings as a whole has ‘overshadowed’ ‘concrete examples of the use of specific fairness’: Summers, 103.

tendency, discussed in Part C, to ‘take together’ two or more component parts of Article 6. Two component parts of Article 6 are sometimes taken together without assessing the alleged violations under the proceedings as a whole test;⁴⁷⁵ the proceedings as a whole test is sometimes used in situations where multiple component parts are not ‘taken together’.⁴⁷⁶ Of course, the European Court can – and often does – use these two analytical tools together,⁴⁷⁷ and later in this section we will consider the particular consequences that flow from this combination.⁴⁷⁸

We make several arguments with respect to the proceedings as a whole test. First, in some cases the Court outlines the test, ostensibly applies it, but then *in substance does not perform* a proceedings as a whole analysis. Second, in other cases the Court outlines the test, but then does not even *purport* to perform the proceedings as a whole analysis. Third, the Court sometimes purports to apply the proceedings as a whole test while also conducting inconsistent ‘trial within a trial’ analysis. Fourth, it will be argued that the flaws in the proceedings as a whole test are exacerbated when combined with the European Court’s ‘taken together’ approach. In making these specific arguments, we will also form a broader picture as to how the ‘fairness of the proceedings as a whole’ test works in the Article 6 case law. That picture is one of incoherence and inconsistency, supporting the two macro-arguments made in throughout this Part.

⁴⁷⁵ See, eg, *Prezec v Croatia* at [20]-[32]; *Penev v Bulgaria* at [29]-[45].

⁴⁷⁶ See, eg, *Jan Zawadzki v Poland* (App 648/02) (6 July 2010) at [18]-[20]; *Bykov v Russia* at [89]-[90].

⁴⁷⁷ See, eg, *Caka v Albania* at [77]; *Rasmussen v Poland* at [56].

⁴⁷⁸ See especially Part E.2.4

E.2.1 The European Court frequently does not consider the proceedings as a whole when it purports to apply the proceedings as a whole test

There is often a considerable distance between the rhetoric of the ‘proceedings as a whole’ and how the European Court actually conducts its analysis. Indeed, frequently the Court purports to be applying the proceedings as a whole test but plainly considers something less than, or different to, the proceedings as a whole. In this section we explore examples of this tendency, and argue that in applying what it describes as the proceedings as a whole test, the Court in practice frequently fails to live up to its rhetoric.

This tendency is evident in *Barbera, Messegue and Jabardo v Spain*, in which the applicants alleged ‘a clear violation’ of Article 6(1) ‘in conjunction with’ Article 6(2) and Article 6(3)(d).⁴⁷⁹ In analysing these arguments, the European Court made the following statement:

[68] As a general rule, it is for the national courts, and in particular the court of first instance, to assess the evidence before them as well as the relevance of the evidence...*The Court must, however, determine...whether the proceedings considered as a whole, including the way in which prosecution and defence evidence was taken, were fair* as required by [Article 6(1)].⁴⁸⁰

The Court then considered various arguments, and concluded at [89] that ‘the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing’: there was an Article 6(1) violation.⁴⁸¹ Having reached this conclusion,

⁴⁷⁹ *Barbera, Messegue and Jabardo v Spain* at [67].

⁴⁸⁰ *Ibid.* at [68]. This passage has been cited, directly or indirectly, in cases such as *Kostovski v Netherlands* at [39]; *Windisch v Austria* at [25]; and *Delta v France* at [35]. See also Petzold, 54.

⁴⁸¹ *Barbera, Messegue and Jabardo v Spain* at [89].

which the Court claimed was based on the proceedings as a whole, the judgment then turned to an alleged Article 6(2) violation. The applicants:

[90] ...also claimed to be victims of a failure to apply the presumption of innocence....

[91] ...In this case, it does not appear from the evidence that during the proceedings, and in particular the trial, the Audiencia Nacional or the presiding judge had taken decisions or attitudes reflecting such an opinion. The Court therefore does not find a violation of [Article 6(2)]...⁴⁸²

It is worth emphasising the analytical steps taken by the European Court in this case: the Court had, on its own logic, reached a conclusion at [89] based on ‘the proceedings as a whole’ without considering the allegation of bias referred to in paragraph [90]. Even if it was concluded that the allegation of bias was without merit, it is difficult to understand how the European Court could assess the fairness of ‘the proceedings as a whole’ without reference to an allegation of bias. Plainly, in the passage leading up to paragraph [89], the Court did *not* consider the ‘proceedings as a whole’. As we will see, this tendency – to notionally consider the proceedings as a whole while openly failing to do so – is repeated throughout the Court’s proceedings as a whole jurisprudence.

In *Pelissier and Sassi v France*, the applicants alleged two violations of Article 6: first, ‘the use against the first applicant of a document whose admissibility was contested’ and second, ‘that they had been convicted of an offence different from the one charged’.⁴⁸³ The applicants thus alleged violations of Article 6(1), Article 6(3)(a),

⁴⁸² Ibid. at [90][91]; cf Trechsel, 86-87.

⁴⁸³ *Pelissier and Sassi v France* at [42].

and Article 6(3)(b).⁴⁸⁴ The Court dealt first with the evidence argument. It described the relevant test thus:

[45] ...*whether the proceedings considered as a whole*, including the way in which the evidence was taken, were fair as required by [Article 6(1)]...

[46] The fairness of proceedings is assessed with regard to *the proceedings as a whole*...⁴⁸⁵

Thus the European Court emphasised, twice in two paragraphs, that the analytical key was ‘the proceedings as a whole’. It then conducted one paragraph of analysis on this point, reaching its conclusion in the course of that paragraph: ‘the use...of the document in issue did not entail a violation of Article 6(1).⁴⁸⁶ Thus, the Court states that the proceedings as a whole had been analysed, and that this analysis concluded that the proceedings as a whole were fair. Remarkably, however, it then moves on to assess the argument that the applicants ‘had been convicted of an offence different from the one charged’. At first glance, one might assume these matters had been addressed during the Court’s analysis of all aspects of the *proceedings as a whole*. They had not. The European Court went on to provide fifteen paragraphs of analysis on this point, concluding there had been ‘a violation of [Article 6(3)(a)] and [Article 6(3)(b)] of the Convention, taken together with [Article 6(1)], which provides for a fair trial’.⁴⁸⁷ Bafflingly, then, the Court has plainly failed to assess *the proceedings as a whole* with respect to the first argument: a significant issue was ignored for the duration of that analysis.⁴⁸⁸ Moreover, the Court has managed to state, within the space of sixteen

⁴⁸⁴ Ibid. at [42].

⁴⁸⁵ Ibid. at [45]-[46] (emphasis added).

⁴⁸⁶ Ibid. at [47].

⁴⁸⁷ Ibid. at [63].

⁴⁸⁸ See Ibid. at [44]-[47].

paragraphs, that the proceedings as a whole were fair, *but* that there were violations of three separate provisions of Article 6. It seems the Court described the first test incorrectly, and/or reached the second conclusion erroneously.

This trend continued in *Visser v Netherlands*, where the applicant complained about the use of anonymous witness evidence and alleged a violation of Article 6(1) and Article 6(3)(d).⁴⁸⁹ The European Court emphasised that its role was ‘to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair’.⁴⁹⁰ The Court then conducted its analysis, notionally of the proceedings as a whole, and reached this penultimate conclusion:

[48] In these circumstances the Court is not satisfied that the interest of the witness in remaining anonymous could justify limiting the rights of the defence to the extent that they were limited.⁴⁹¹

The Court then explained that it did not consider it necessary, in the course of its analysis of ‘the proceedings as a whole,’ to consider the possibility that counterbalancing measures might have had an impact on this penultimate conclusion:

[51] In the light of the above conclusion the Court does not find it necessary to examine further whether the procedures put in place by the judicial authorities could have sufficiently counterbalanced the difficulties faced by the defence as a result of the anonymity of the witness.⁴⁹²

The Court then concluded ‘that the proceedings as a whole were not fair’ and that there had thus been violations of Article 6(1) and Article 6(3)(d).⁴⁹³ It seems odd that

⁴⁸⁹ *Visser v Netherlands* (App 26668/95) (14 February 2002) at [34].

⁴⁹⁰ *Ibid.* at [43], citing *Van Mechelen and Ors v Netherlands* at [50].

⁴⁹¹ *Visser v Netherlands* at [48].

⁴⁹² *Ibid.* at [51].

⁴⁹³ *Ibid.* at [52].

the Court could purport to assess the fairness of the proceedings as a whole without at least *considering* ‘whether the procedures put in place by the judicial authorities could have sufficiently counterbalanced the difficulties faced by the defence’. A similar passage appeared in *Krasniki*.⁴⁹⁴ In these cases, the Court purports to be considering the proceedings as a whole, and yet appears to voluntarily and expressly decline to consider certain aspects of the proceedings. This also raises the broader question of counterbalancing, which is dealt with in greater detail in Part E.3 below.

In *Ocalan v Turkey*, the European Court found an independence and impartiality violation.⁴⁹⁵ The Court then went on to consider a series of additional arguments alleging violations of Article 6(1), Article 6(2), and Article 6(3).⁴⁹⁶ In assessing this series of alleged violations, the Grand Chamber referred to and adopted the reasons of the Chamber, including tests such as:

[131]... The question, in each case, is whether the restriction, in the light of the *entirety of the proceedings*, has deprived the accused of a fair hearing....

[133]... restrictions may be imposed on an accused's access to his lawyer if good cause exists. The relevant issue is whether, in the light of the *proceedings taken as a whole*, the restriction has deprived the accused of a fair hearing....

[135]... in order to determine whether the aim of Article 6 – a fair trial – has been achieved, *regard must be had to the entirety of the domestic proceedings* conducted in the case.⁴⁹⁷

Throughout its analysis of these arguments, therefore, the *Ocalan* Court purports to be assessing the ‘entirety’ or ‘whole’ of the proceedings. Yet, throughout, it does so

⁴⁹⁴ *Krasniki v Czech Republic* (App 51277/99) (28 February 2006) at [85]–[86].

⁴⁹⁵ *Ocalan v Turkey* at [118].

⁴⁹⁶ *Ibid.* at [119].

⁴⁹⁷ *Ibid.* at [131]–[135] (emphasis added).

without referring to its own finding that the *tribunal was not independent and impartial*. How can any assessment of the fairness of the proceedings as a whole occur without reference to a lack of independence and impartiality? The European Court is, quite simply, not doing what it says it is doing when it applies a ‘proceedings as a whole’ analysis. The inconsistency and incoherence of this decision is exacerbated when one takes into account the long line of doctrine and jurisprudence in which the Court itself has indicated that a hearing cannot be fair if the tribunal is not independent and impartial, something to which we will return in Part E.4 below.

In its decision in *Guvec v Turkey*, the Court adopted a truly peculiar approach to analysing a series of alleged Article 6 violations. The applicant alleged numerous breaches of Article 6(1), several breaches of Article 6(2), and several breaches of Article 6(3).⁴⁹⁸ These allegations included an argument that the presence of a military judge on the bench of the domestic court constituted a violation of the independence and impartiality guarantees. In its analysis of the Article 6(1) arguments, the Court offered this breathtakingly poorly-explained paragraph:

[122] The Court observes that in a number of applications against Turkey involving a complaint of an alleged lack of independence and impartiality on the part of State Security Courts, the Court has limited its examination to that aspect alone, not deeming it necessary to address any other complaints relating to the fairness of the impugned proceedings. *However, the Court deems it necessary to put this well rehearsed question aside in the instant case* because the particularly grave circumstances of the application present *more compelling* issues involving the effective participation of a minor in his trial and the right to legal assistance.⁴⁹⁹

⁴⁹⁸ *Guvec v Turkey* at [114].

⁴⁹⁹ *Ibid.* at [122].

To be clear here: the Court elected to ignore the independence and impartiality arguments not because it was unnecessary to consider them, but because there were more compelling issues to be considered. The Court did not even offer a finding on the independence and impartiality arguments. One may have sympathy for the European Court judges and the monotonous flow of Turkish independence-impartiality cases, but it is a very curious situation indeed if a court's usual approach to an important question of law can be cast aside with no explanation other than that there was a *more compelling* issue to consider instead. This might be troubling enough from the perspective of the rule of law, but then the Court concluded its analysis thus:

[132] The Court *has had regard to the entirety of the criminal proceedings against the applicant*. It considers that the shortcomings highlighted above, including in particular the de facto lack of legal assistance for most of the proceedings, exacerbated the consequences of the applicant's inability to participate effectively in his trial and infringed his right to due process.

[133] There has, therefore, been a violation of [Article 6(1)] of the Convention in conjunction with [Article 6(3)(c)].⁵⁰⁰

First, it is extremely plain from paragraph [122] that the Court has *not* had regard to the entirety of the proceedings: it expressly disregarded a factor that it has elsewhere indicated to be crucial. But second, and more generally, what guidance does this decision offer to citizens, lawyers, and officials? Is the moral of the story that any applicant's lawyers should attempt to avoid alleging boring familiar violations in favour of alleging compelling violations? This is not a decision that contributes to any coherent or consistent body of law, and it is certainly not judicial reasoning of a high calibre.

⁵⁰⁰ Ibid. at [132][133] (emphasis added).

The examples of this inexplicably incoherent method of reasoning are legion.⁵⁰¹

E.2.2 The opaque nature of the European Court's reasoning makes it difficult to determine whether the proceedings as a whole test is actually being used

In the section above, we considered a number of cases in which the European Court outlined the proceedings as a whole test, purported to apply it, but then its analysis elsewhere in the judgement indicated that the test may not actually have been applied. In this section, we examine a slight variation on that theme: cases in which the Court outlined the proceedings as a whole test, but then did not even purport to apply the test. In these cases, as we shall see, the proceedings as a whole test seems like a meaningless intermediary between the violation alleged and the conclusion reached on that violation.

Thus in *AM v Italy*, the applicant alleged a violation of Article 6(1) and Article 6(3)(d) on the basis 'that the criminal proceedings against him had been unfair and that he had not been given an opportunity to examine or have examined' certain witnesses.⁵⁰² The European Court 'reiterated' that:

[24] ...The Court's task...is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain

⁵⁰¹ See, eg, *Brennan v United Kingdom* at [41], [45], [48], [58], [63]; *Georgios Papageorgiou v Greece* (App 59506/00) (2004) 38 EHRR 30 at [28]-[29], [35]; *Jalloh v Germany* at [108], [109], [110]-[122]; *Popov v Russia* at [166]-[168], [169]-[174], [175], [178], [189]; *Kollcaku v Italy* (App 25701/02) (8 February 2007) at [54]-[56], [57], [66], [72]; *Ferrantelli and Santangelo v Italy* (App 19874/92) (1997) 23 EHRR 288 at [42]-[43], [44], [48], [53], [60] (see Trechsel, 65); *Caka v Albania* at [95], [100], [116]; *Aleksandr Zaichenko v Russia* at [46]-[60]; *Krivoshapkin v Russia* (App 42224/02) (27 January 2011) at [32]-[65]; *Jan Zawadzki v Poland* at [12]-[20].

⁵⁰² *AM v Italy* at [20].

whether the proceedings as a whole, including the way in which evidence was taken, were fair.⁵⁰³

But having made this broad proclamation of its role, and having outlined the crucial test as being the fairness of the proceedings as a whole, the European Court's conclusion did not actually answer the question it had set for itself. In fact, the Court did not mention the fairness of the proceedings as a whole anywhere else in its judgment. Its conclusion was as follows:

[28] Under these circumstances, the applicant cannot be regarded as having had a proper and adequate opportunity to challenge the witness statements that formed the basis of his conviction. He therefore did not have a fair trial and there has been a violation of [Article 6(1)] taken together with [Article 6(3)(d)].⁵⁰⁴

If the wording of the conclusion was read in the absence of paragraph [24], one could reasonably assume that the crucial factor to considering whether or not there had been a violation in this case was whether 'the applicant...had a proper and adequate opportunity to challenge the witness statements that formed the basis of his conviction'. It may readily be acknowledged that assessing the fairness of the proceedings as a whole could well *include* consideration of the extent to which an accused person could challenge a witness; that is not in dispute. The key point is this: if the Court identifies 'the fairness of the proceedings as a whole' as a determinative test of whether or not there has been a violation, the interests of clarity and consistency demand that it reach a conclusion as to whether *that test has been satisfied*. Instead, in *AM v Italy* and in the cases below, the Court fails to reach a conclusion on the test it has identified as crucial. Instead of reaching a conclusion on the fairness of the proceedings as a whole, it focuses on the precise violation alleged. The reader is left in

⁵⁰³ Ibid. at [24].

⁵⁰⁴ Ibid. at [28].

some uncertainty: is the fairness of the proceedings as a whole actually the decisive factor, or is the Court's much more narrow focus indicative of the truly important analysis for determining whether there has been a violation?

In *Luca v Italy*, the applicant relied on Article 6(1) and Article 6(3)(d) and argued 'that the criminal proceedings against him had been unfair and alleged that he had been convicted on the basis of statements made to the public prosecutor, without being given an opportunity to examine the maker of the statements, ...or to have him examined'.⁵⁰⁵ In examining this argument, the European Court recalled that its role was 'to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair'.⁵⁰⁶ As in *AM*, the *Luca* Court did not refer to the proceedings as a whole anywhere else in the judgment. Instead, its analysis and its conclusions were much more narrowly focused. Its conclusion stated:

[43] In the instant case, the Court notes that the domestic courts convicted the applicant solely on the basis of statements made by N. before the trial and that neither the applicant nor his lawyer was given an opportunity at any stage of the proceedings to question him.

[44] In those circumstances, the Court is not satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based.

[45] The applicant was, therefore, denied a fair trial. Accordingly, there has been a violation of [Article 6(1)] and [Article 6(3)(d)].⁵⁰⁷

A very similar pattern of reasoning played out in *Solakov v FYROM*.⁵⁰⁸ This thesis does not argue that the Court was in any way wrong to focus on the Article 6(3)(d) issue. But

⁵⁰⁵ *Luca v Italy* at [31]. See also Brems, 'Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights', 310-311.

⁵⁰⁶ *Luca v Italy* at [38].

⁵⁰⁷ *Ibid.* at [43]-[45]. See also Trechsel, 301-302.

⁵⁰⁸ See *Solakov v FYROM* at [57]-[67].

it does argue that if the Court promises to ascertain whether the proceedings as a whole were fair, then it should do that. If the European Court regards determining the Article 6(3)(d) issue as somehow wholly decisive of the broader ‘proceedings as a whole’ issue, then it should articulate that justification. If it is simply assessing the proceedings against the text of Article 6(3)(d), then that may well be desirable, but it should not be done while pretending to consider the proceedings as a whole. The interests of clarity and predictability would be better served by the Court discarding the intermediary ‘proceedings as a whole’ step. Instead, the Court could simply and clearly identify the key test as whether or not the applicant had an adequate and proper opportunity to contest the statements on which his conviction was based.

In *Allan v United Kingdom*, the applicant ‘complained of the use at his trial of evidence gathered by the covert recording devices and of the admission of evidence from the prisoner H concerning conversations which they had together in their cell’ and alleged a violation of Article 6.⁵⁰⁹ The Court offered some ‘general principles,’ including this statement:

The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair...⁵¹⁰

And yet, despite identifying the ‘question which must be answered’ as the fairness of the proceedings as a whole, what seemed to be decisive for the Court’s analysis was its detailed discussion of the silence and self-incrimination guarantees. That discussion concluded in this way:

⁵⁰⁹ *Allan v United Kingdom* at [37]. See Trechsel, 350 et seq.

⁵¹⁰ *Allan v United Kingdom* at [42].

In those circumstances, the information gained by the use of H. in this way may be regarded as having been obtained in defiance of the will of the applicant and its use at trial impinged on the applicant's right to silence and privilege against self-incrimination. Accordingly, in this respect there has been a violation of [Article 6(1)]...⁵¹¹

It is entirely fitting that a silence and self-incrimination case of this kind focuses on the silence and self-incrimination guarantees. But if the assessment of those guarantees is the decisive factor for the Court, then it should refrain from stating that the decisive factor will be some nebulous consideration of the proceedings as a whole. Claiming to assess the proceedings as a whole and then not even reaching a conclusion on that point renders the Court's reasoning opaque.

In these various types of case, therefore, the European Court has consistently identified the determinative test as being the fairness of the proceedings as a whole, before ignoring the proceedings as a whole to focus on the specific Article 6 guarantee alleged to have been violated in the case at hand. This is understandable. It is also not necessarily inconsistent with the proceedings as a whole test – the specific provision identified may have a crucial or decisive impact on the proceedings as a whole – but this is rarely explained by the Court and in any event does not foster clear and coherent reasoning. If the proceedings as a whole is what matters, then the interest of predictability and coherence demand the Court reach a conclusion as to whether the proceedings as a whole have been fair; if a more specific inquiry is what matters, then the rule of law interests demand that the Court clearly identify that inquiry and then apply it. The ability of the Court's case law to provide guidance in this area is questionable.

⁵¹¹ Ibid. at [52]-[53].

E.2.3 The European Court's 'trial within a trial' analysis is inconsistent with its 'proceedings as a whole' analysis and is also internally incoherent

The flaws inherent in the European Court's proceedings as a whole jurisprudence are particularly evident in a series of cases in which the European Court considers the issues of public interest immunity and the disclosure of evidence guarantees under Article 6. In this section, we first sketch out what will be called the European Court's 'trial within a trial' jurisprudence, and then go on to argue that not only does that jurisprudence sit uncomfortably with the Court's proceedings as a whole jurisprudence, but that it is also incoherent on its own terms.

In February 2000, the Court decided a set of cases relating to public interest immunity.⁵¹² These cases – *Jasper v United Kingdom*, *Rowe and Davis v United Kingdom*, and *Fitt v United Kingdom*⁵¹³ – all included a curious method of assessing whether there had been a violation of Article 6 in public interest immunity cases. As we shall see, these decisions, and the subsequent jurisprudence of the European Court, established an analytical test that sought *not* to guarantee a fair hearing, but to guarantee a fair hearing within a hearing. Our analysis here focuses on extracts from *Jasper*, but virtually identical language and reasoning was used in *Rowe and Davis* and *Fitt* and in

⁵¹² See, generally on public interest immunity, van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 588; Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 253; Emmerson, Ashworth and Macdonald, 534 et seq.

⁵¹³ *Jasper v United Kingdom*; *Fitt v United Kingdom*; *Rowe and Davis v United Kingdom*. See Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 253; Greer, 'Constitutionalizing adjudication under the European Convention on Human Rights', 424.

subsequent cases such as *PG and JH*.⁵¹⁴ Reference is made to those decisions in the footnotes as appropriate.

In *Jasper*, the applicant had been convicted of an offence related to cannabis importation. At the European Court, he alleged violations of Article 6(1), Article 6(3)(b) and Article 6(3)(d). The Court indicated that it would ‘confine its examination to the question whether the proceedings in their entirety were fair’.⁵¹⁵ The reasoning that followed is worthy of close analysis. The Court first emphasised that Article 6 protected the right to an adversarial trial. This right included, among other things, a guarantee that ‘prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused’.⁵¹⁶ Next, the European Court explained the circumstances in which the disclosure guarantee might be capable of restriction:

the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, *only such measures restricting the rights of the defence which are strictly necessary are permissible* under Article 6(1)⁵¹⁷

⁵¹⁴ *PG and JH v United Kingdom*. cf *McKeown v United Kingdom* (App 6684/05) (11 January 2011) at [43]-[55].

⁵¹⁵ *Jasper v United Kingdom* at [50]. See, for equivalent passages, *Rowe and Davis v United Kingdom* at [59]; *Fitt v United Kingdom* at [43]; *Dowsett v United Kingdom* at [40]. It is not clear why the Court regards considering the proceedings as a whole as in some way ‘confining’ its ‘examination’.

⁵¹⁶ *Jasper v United Kingdom* at [51]. See *Rowe and Davis v United Kingdom* at [60]; *Fitt v United Kingdom* at [44]; *PG and JH v United Kingdom* at [67].

⁵¹⁷ *Jasper v United Kingdom* at [52] (emphasis added). See *Rowe and Davis v United Kingdom* at [61]; *Fitt v United Kingdom* at [45]; *PG and JH v United Kingdom* at [68].

Moreover, the domestic authorities would need to ensure that ‘any difficulties caused to the defence’ by the restriction were ‘counterbalanced’.⁵¹⁸ It should be noted that Article 6 does not set forth the test that any restrictions of this sort should be ‘strictly necessary’, and certainly makes no provision for a counterbalancing process: the Court here is grappling with the broader problems associated with Article 6’s lack of an express meta-principle for analysing infringements.⁵¹⁹

Having clearly stated that the permissibility of restrictions on defence rights would depend on whether those restrictions were strictly necessary, the European Court went on to state:

In cases where evidence has been withheld from the defence on public interest grounds, *it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary* since, as a general rule, it is for the national courts to assess the evidence before them. In any event, in many cases, such as the present, where the evidence in question has never been revealed, it would not be possible for the Court to attempt to weigh the public interest in non-disclosure against that of the accused in having sight of the material.⁵²⁰

Remarkably, therefore, the Court expressly abdicated any responsibility for assessing whether a restriction on Article 6 rights was permissible. Importantly, the standard that was applied – ‘strictly necessary’ – was articulated by the Court rather than by the Convention, and the very same Court then refused to apply the standard it had articulated. This reasoning, it should be remembered, is repeated in case after case. Having gone through the exercise of articulating and then refusing to apply the

⁵¹⁸ *Jasper v United Kingdom* at [52]. See *Rowe and Davis v United Kingdom* at [61]; *Fitt v United Kingdom* at [45]; *PG and JH v United Kingdom* at [68]. For more on counterbalancing generally, see Part E.3 below.

⁵¹⁹ We return to counterbalancing and defect-curing in Part E.3.

⁵²⁰ *Jasper v United Kingdom* at [53] (emphasis added). See *Rowe and Davis v United Kingdom* at [62]; *Fitt v United Kingdom* at [46]; *PG and JH v United Kingdom* at [69]. For more on the role of the Court, see Part B.

relevant standard, the European Court then sought a way out of this endogenous predicament.

The Court's solution was to change the question. Instead of asking whether Article 6's guarantees had been violated by a restriction that was not strictly necessary, the Court shifted its focus:

It must therefore scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.⁵²¹

Thus it is not the *hearing* or the *trial* that should comply with the requirements of Article 6. Instead, the decision-making procedure *within* the hearing or trial should comply with the requirements of Article 6. The result of this analysis, it becomes clear, is what will determine whether or not Article 6 has been complied with. The Court concludes:

that, as far as possible, the *decision-making procedure* complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. *It follows* that there has been no violation of [Article 6(1)] in the present case.⁵²²

Extraordinarily, therefore, the Court abdicated its responsibility to determine whether or not the hearing that the applicant received was fair, in favour of determining

⁵²¹ *Jasper v United Kingdom* at [53] (emphasis added). See *Rowe and Davis v United Kingdom* at [62]; *Fitt v United Kingdom* at [46]; *PG and JH v United Kingdom* at [68]; *Natunen v Finland* (App 21022/04) (31 March 2009) at [41].

⁵²² *Jasper v United Kingdom* at [58] (emphasis added). See *Rowe and Davis v United Kingdom* at [66]-[67] (finding a violation); *Fitt v United Kingdom* at [50] (finding no violation); and *PG and JH v United Kingdom* at [73] (no violation).

whether or not *one procedural aspect* of that hearing could be regarded as meeting standards that were designed for testing the fairness of overall hearings.⁵²³

In the *Jasper* line of cases, therefore, the European Court has effectively created a class of case to which Article 6's provisions *do not apply* – instead, the provisions only apply to a portion of the case.⁵²⁴ It has done so with very little explanation or justification for any or all of the steps in its reasoning, making it difficult to predict whether there are other areas of Article 6 jurisprudence that might be susceptible to this sort of analysis. Moreover, perhaps most remarkably, the Court adopted this analytical course after claiming that it would focus on ‘whether the proceedings in their entirety were fair’.⁵²⁵ Yet, of course, it did no such thing. As its conclusion makes clear, its focus was on whether ‘the decision-making procedure complied with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused’.⁵²⁶ If one was charitable to the Court, perhaps it could be said that in cases like this the decision-making procedure was *the decisive factor* for the proceedings as a whole – but in that case, why bother with the intermediary and inaccurate analytical step? In *Jasper*, and in a series of cases after it, the Court conducted analysis that was inconsistent with the proceedings as a whole test it purported to apply, and that was radically internally incoherent.

⁵²³ A vigorous dissent from Judges Palm, Fischbach, Vajic, Thomassen, Tsatsa-Nikolovska and Traja followed, but even that dissent accepted ‘the majority's statement of the law as set out at paragraphs 51-53’. Note that Judge Hedigan’s dissent was perhaps more critical of the majority’s legal reasoning.

⁵²⁴ cf Greer’s analysis of the ‘trial within’ approach: Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 253.

⁵²⁵ *Jasper v United Kingdom* at [50].

⁵²⁶ *Ibid.* at [58] (emphasis added). See *Rowe and Davis v United Kingdom* at [66]-[67] (finding a violation) and *Fitt v United Kingdom* at [50] (finding no violation).

E.2.4 The ambiguity in the proceedings as a whole test is only exacerbated when combined with the European Court's 'taken together' approach

We have seen, throughout the sections above, that there is considerable ambiguity and incoherence in the way that the European Court uses the proceedings as a whole test. This ambiguity risks creating a perception that the Court could choose which way it applies the proceedings as a whole test in order to reach a particular result in a particular case. That ambiguity is exacerbated when the proceedings as a whole test is combined with the 'taken together' approach outlined in Part C.4.3.

When it applies the 'taken together' approach, the European Court is conflating two or more legal tests, and is doing so without specifying clearly how that conflation may shape or affect its analysis of the alleged violations. When it joins that 'taken together' approach with the 'fairness of the proceedings as a whole,' suddenly the Court has notionally provided itself with a legal test that might be applicable to the provisions that are taken together – namely, were the proceedings as a whole fair? – but it has also notionally conflated all the possibly relevant facts. The assessment of a precise violation based on particular facts is impossible if one remains loyal to these two tests, and the result is reasoning that is opaque, unfocused, and poorly explained. It is a clear example of the sort of irrational flexibility that we highlight at various points in this thesis. The 'taken together' cog and the 'proceedings as a whole' cog turn each other so as to generate considerable uncertainty and unpredictability in terms of the scope of the infringement inquiry and the content of the test applied within that

inquiry. Moreover, all of the problems identified in Part C.4.3 combine with the problems identified earlier in this section.

An example of this may be seen in *Bernard v France*, where the applicant argued that ‘comments made by the two psychiatric experts at his trial...had infringed his right to a fair trial and the principle of the presumption of innocence’.⁵²⁷ The European Court outlined the test in this way:

The Court reiterates in the first place that “the presumption of innocence enshrined in [Article 6(2)] is one of the elements of the fair criminal trial that is required by [Article 6(1)]”. It will accordingly consider the applicant’s complaints from the standpoint of these two provisions taken together. *In so doing, it must consider the criminal proceedings as a whole....The Court’s task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair.*⁵²⁸

In this passage, therefore, we see how quickly the ‘taken together’ and ‘proceedings as a whole’ tests combine to turn an Article 6(2) argument into an argument about the fairness of the proceedings as a whole. Despite the ostensibly seductive logic deployed by the Court in this passage, it remains somewhat unclear why an applicant who wishes to establish a violation of the presumption of innocence must establish that the proceedings as a whole were ‘unfair’. It also leads one to wonder whether applicants with Article 6(2) complaints might be well advised to avoid also alleging Article 6(1) complaints, lest the European Court conflate away the applicant’s arguments.

⁵²⁷ *Bernard v France* at [31].

⁵²⁸ *Ibid.* at [37]. Compare similar examples in recent cases such as *Caka v Albania* at [77]; *Rasmussen v Poland* at [56].

A more recent, but equally compelling, example is provided by the Grand Chamber's decision in *Al-Khawaja and Tahery*. In concluding its analysis of the 'sole or decisive rule' in that case,⁵²⁹ the Court stated that it 'has always interpreted Article 6(3) in the context of an overall examination of the fairness of the proceedings' and that Article 6(3)(c) 'was one element, amongst others, of the concept of a fair trial in criminal proceedings contained in Article 6(1)'.⁵³⁰ Having invoked the 'taken together' approach in this way, the *Al-Khawaja and Tahery* Court went on to describe:

the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.⁵³¹

The European Court thus links together the 'taken together' approach and the 'proceedings as a whole' approach in a way that allows it to conduct the sort of open-ended balancing and counterbalancing that will be considered below. Moreover, it does so on the basis of a conflated misrepresentation about its previous case law: to say that it 'has always interpreted Article 6(3) in the context of an overall examination of the fairness of the proceedings' is demonstrably false. Indeed, as we saw in Part C above, and as is pointed out by the Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajo and Karakas in *Al-Khawaja and Tahery*:

But in applying the holistic approach (now presented as "an overall examination") in order to determine the fairness of the trial, this Court has never stated that fairness can still be achieved if one of the fundamental rights is deprived of its essence. With regard to the right to cross-examine witnesses and the related but broader equality-of-arms principle, the Court has systematically and consistently drawn a bright line, which it has never abandoned, in the form of the sole or decisive

⁵²⁹ We will return to this test in more detail in Part E.5.

⁵³⁰ *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [143], [145].

⁵³¹ *Ibid.* at [146].

rule. Today this last line of protection of the right to defence is being abandoned in the name of an overall examination of fairness.⁵³²

Thus the majority judgment in *Al-Khawaja and Tahery* provides an unwittingly articulate demonstration of the flaws in the European Court's proceedings as a whole jurisprudence.

E.2.5 The proceedings as a whole test risks radically undermining the text of Article 6

In the sections above, we have identified a variety of flaws in the way the European Court applies the proceedings as a whole test. In this section, we make one brief argument: even if the above flaws could be ignored, the proceedings as a whole test is fundamentally ambiguous and vague.

As is evident in the many cases discussed above, the European Court never defines the 'fairness of the proceedings as a whole'. In some cases the Court hints that the test may be linked specifically to Article 6(1)'s guarantee of a 'fair and public hearing',⁵³³ but in many others the test seems much more nebulous and capable of being applied in the context of various other Article 6 guarantees. In so many of the cases discussed above, the Court simply asserts that the proceedings as a whole were fair or unfair without any structured or replicable reasoning process.⁵³⁴

There is also a broader concern. It is difficult to conceive of how the European Court could combine the 'fairness of the proceedings as a whole' test with any view of

⁵³² Ibid. at the Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajo and Karakas.

⁵³³ See, eg, *Barbera, Messegue and Jabardo v Spain* at [89].

⁵³⁴ See, Ibid. at [70]-[90] and O'Brian, 23-24.

Article 6 as containing a series of separate, discreet guarantees: why not disregard the specific guarantees of Article 6(1)-(3) and instead just ask whether the proceedings as a whole were fair? If the ‘proceedings as a whole’ test is a useful tool capable of being applied to any Article 6 case, then Article 6 collapses into a simple two-word ‘fair trial’ guarantee and the actual text of Article 6(1), Article 6(2) and Article 6(3) becomes redundant. In this way, we see echoes of, and links to, Part C. If, however, the test is only appropriate for certain types of Article 6 case, then the interests of predictability and transparency demand that the European Court explain why and how the test should apply to different types of case. And if the problems with the proceedings as a whole test mean that normatively it should be put to one side, then it is incumbent on the European Court to adopt another, clearer, tool of analysis.

The proceedings as a whole test is also linked to other analytical tools that the European Court uses when assessing alleged violations of Article 6. Elsewhere in this Part, we consider the related ideas of counterbalancing and defect-curing, both of which are closely linked to the European Court’s use of the proceedings as a whole test. Indeed, as touched upon with respect to *Al-Khawaja and Tahery* above, this thesis demonstrates the extent to which the proceedings as a whole test and the European Court’s analysis of the internal structure of Article 6, provide the basis for free-wheeling balancing and counterbalancing analysis in the Article 6 context.

If the European Court wishes to convert Article 6 into a simple, two-word ‘fair trial’ guarantee, in which every alleged violation boils down to whether the proceedings as a whole were fair, then it should say so. If it were to do so, it would need to stop

finding separate violations of Article 6(2) and Article 6(3): under a two-word-guarantee theory of interpretation those sub-articles are there only for definitional assistance and not to provide guarantees. As matters stand, the proceedings as a whole test risks undermining the text and structure of Article 6 in a way that diminishes the capacity of the Court's case law to provide any form of guidance.

E.3 Counterbalancing and defect-curing are attempts to provide a modest amount of structure to the European Court's balancing

In the previous section we considered the unstructured analysis of the proceedings as a whole test. In this section we consider two tools that the European Court uses to assess alleged violations of Article 6. In contrast to the unstructured analysis considered in the previous section, these two tools constitute attempts to conduct a semi-structured form of analysis. The first is the notion of 'counterbalancing,' by which a potential violation is described as having been offset by other factors in the same proceedings. The second is the notion of 'curing defects in proceedings,' by which a would-be violation is identified but is said to have been 'cured' by subsequent events (often, by an appeal). The two tools are similar: both involve a vaguely-structured balancing process in which one factor (the alleged violation) is balanced against another identified factor (respectively, the counterbalancing element or the curing element). The Court seems to view them as distinct, albeit sometimes overlapping, tools and so the analysis that follows in this section will be shaped by that view.

In this section, it will be argued that the two methods may be regarded as an attempt to provide a modest amount of structure to the European Court's Article 6

balancing process, but that the methods are flawed. It will be argued that whatever vague sense of structure results from the Court's approach, that sense is, in fact, deceptive. As we will see, the methods are internally incoherent, but there are also broader external inconsistencies between the ways that the Court uses these methods and the ways it is willing to use other methods of assessing alleged violations of Article 6. Counterbalancing will be examined first; curing defects will follow.

E.3.1 The European Court provides only limited guidance on how it intends counterbalancing to work

In discussing counterbalancing, it is important to note at the outset that the European Court does not set out a clear explanation of how it sees counterbalancing working, the circumstances in which counterbalancing may be conducted as part of Article 6 analysis, or the details of how such counterbalancing should be structured. It should also be noted that while the Court often refers to counterbalancing using that name, sometimes it refers to the same concept using different language. In this section, we consider the extent to which the Court provides any guidance on how its idea of counterbalancing is intended to work. While there are cases such as *Luca v Italy*, *A v United Kingdom*, and *Al-Khawaja and Tahery* in which the European Court attempts to provide a more structured analysis of counterbalancing than usual,⁵³⁵ it is argued that overall the Court provides very little guidance indeed, and that in some cases references to counterbalancing may simply be a circumlocution.

⁵³⁵ See *Luca v Italy* at [39]-[40]; *A v United Kingdom* (App 3455/05) (19 February 2009) at [217]-[220]; *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [152]-[165].

The earliest use of ‘counterbalancing’ in the context of Article 6 appears to have been in the Court’s 1989 decision in *Kostovski v Netherlands*. In that case, the applicant alleged a violation of Article 6 because of the ‘use as evidence...of reports of statements by two anonymous persons’ who were not then heard at trial.⁵³⁶ The reference to counterbalancing came towards the end of the Court’s Article 6 analysis:

In these circumstances it cannot be said that the handicaps under which the defence laboured were counterbalanced by the procedures followed by the judicial authorities.⁵³⁷

The Court did not explain what it meant by counterbalancing, nor did it explain the requisite standard or level that would need to be reached in order for ‘handicaps’ to be satisfactorily counterbalanced. It merely referred to counterbalancing measures in this offhand way during the course of its analysis. Nevertheless, this passage formed the basis for much subsequent consideration by the Court.

By the time of its 1996 decision in *Doorson*, which directly cited *Kostovski*, the passing reference to counterbalancing had become a firmer test:

no violation of [Article 6(1)] taken together with [Article 6(3)(d)]...can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities.⁵³⁸

Thus for the *Doorson* Court, identifying potential counterbalancing factors was a crucial part of its assessment of whether or not the use of anonymous witnesses constituted a

⁵³⁶ *Kostovski v Netherlands* at [38].

⁵³⁷ *Ibid.* at [43]; Trechsel, 319.

⁵³⁸ *Doorson v Netherlands* at [72], citing *Kostovski v Netherlands* at [43]. On *Doorson*, see Brems, ‘Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights’ 317; Trechsel, 314-319; Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 324-325; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 646; Greer, ‘Constitutionalizing adjudication under the European Convention on Human Rights’, 424; Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 254.

violation of Article 6. The process of counterbalancing was part of *Doorson*'s attempt to protect 'the interests of witnesses...and...victims'.⁵³⁹ Significantly, however, the *Doorson* Court did not explain how the counterbalancing test would work, other than to say that counterbalancing measures:

must be considered sufficient to have enabled the defence to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements.⁵⁴⁰

This passage appears to suggest that counterbalancing measures will be sufficient if they give the applicant a set of rights that are similar to those that have been 'taken away', even if they do not offer the full protection provided by the guarantees that have been violated. This form of reasoning suggests, therefore, that a violation of a particular Article 6 guarantee may be offset by providing a diluted but similar version of the same Article 6 guarantee. This is, perhaps, implicit in any notion of counterbalancing. But the *Doorson* Court performed this analysis without providing a mechanism that explained how to weigh the significance of the complainants' and witnesses' interest in specific or general cases against the Article 6 guarantee, and without explaining why the complainants' and witnesses' interest in *this sort of case specifically* could justify restrictions on Article 6 rights. In the absence of such guiding principles, it becomes difficult for citizens, lawyers, and officials to determine when to 'open the door' to counterbalancing measures.

In *Dowsett v United Kingdom*, the applicant argued that there had been a violation of Article 6(1) and Article 6(3)(b) on the basis that there had been 'non-

⁵³⁹ *Doorson v Netherlands* at [70].

⁵⁴⁰ *Ibid.* at [75]. See also, eg, *SN v Sweden* (App 34209/96) (2004) 39 EHRR 13 at [52]-[53]; *A v United Kingdom* at [205].

disclosure of evidence which was acknowledged to be relevant and material'.⁵⁴¹ The Court stated that disclosure was 'not an absolute right':

In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigating crime, which must be weighed against the rights of the accused.⁵⁴²

The Court added:

in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.⁵⁴³

It was not clear whether the *Dowsett* Court actually identified any possible counterbalancing measures in this case. Its conclusion on this point merely stated that:

An application to the Court of Appeal in those circumstances could not be regarded as an adequate safeguard for the defence.⁵⁴⁴

Although it did identify weaknesses in the appellate procedure, the Court did not identify a test against which the 'adequacy' of the counterbalancing safeguard could reliably be measured. Merely describing the procedure available in a given case and then stating whether or not that procedure was 'adequate' does not provide a predictable or replicable test. As it stands in decisions like *Dowsett*, the Court provided only the most opaque guidance.

Similarly, in *Edwards and Lewis*, the Court considered counterbalancing in the context of an alleged entrapment scenario. Citing the public interest immunity cases, the Court stated:

⁵⁴¹ *Dowsett v United Kingdom* at [35].

⁵⁴² *Ibid.* at [41][42], citing *Doorson v Netherlands* at [70].

⁵⁴³ *Dowsett v United Kingdom* at [42], citing *Doorson v Netherlands* at [72]; *Van Mechelen and Ors v Netherlands* at [54].

⁵⁴⁴ *Dowsett v United Kingdom* at [49].

The entitlement to disclosure of relevant evidence is not, however, an absolute right....in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights *must be sufficiently counterbalanced by the procedures followed by the judicial authorities.*⁵⁴⁵

The Court did not expressly conduct any analysis of the counterbalancing safeguards in this case, but did conclude:

the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of [Article 6(1)]...⁵⁴⁶

Instead of providing an analytical test, the Court simply identified how the procedure worked, identified some shortcomings with respect to the relevant Article 6 tests, and then declared that those shortcomings meant that the counterbalancing measures were inadequate. But in any case in which counterbalancing has come into play, *by definition there will be shortcomings with respect to the Article 6 guarantee*: if there were not, there would be nothing to be counterbalanced. What any doctrine of counterbalancing would need in order to provide adequate guidance, and what the Court's jurisprudence lacks, is a sense of how to determine whether a counterbalancing measure has adequately eliminated *enough* of the shortcoming such that there has not been a violation, and how to determine what weight should be accorded to any public interest in reaching that decision.

Another example in support of this argument may be found in *Van Mechelen v Netherlands*. In that case, the Court countenanced the possibility of counterbalancing

⁵⁴⁵ *Edwards and Lewis v United Kingdom* at [53] (Fourth Section judgment)(emphasis added); Trechsel, 113.

⁵⁴⁶ *Edwards and Lewis v United Kingdom* at [59] (Fourth Section judgment).

measures as helping to ameliorate the problems caused by anonymous prosecution witnesses:

[54] However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases [Article 6(1)] taken together with [Article 6(3)(d)]...requires that the handicaps under which the defence labours *be sufficiently counterbalanced* by the procedures followed by the judicial authorities.⁵⁴⁷

In *Van Mechelen*, the Court did not consider the potentially-counterbalancing factors as sufficient:

[62] It is true...that the anonymous police officers were interrogated before an investigating judge, who had himself ascertained their identity and had, in a very detailed official report of his findings, stated his opinion on their reliability and credibility as well as their reasons for remaining anonymous.

However these measures cannot be considered a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment as to their demeanour and reliability. It thus cannot be said that the handicaps under which the defence laboured were counterbalanced by the above procedures.⁵⁴⁸

This analysis is somewhat curious. In identifying the quality it seeks in a counterbalancing measure – that it be ‘a proper substitute for the possibility of the defence to question the witnesses in their presence and make their own judgment...’ – the European Court appears to be stating that only compliance with the Article 6 guarantees is capable of ‘neutralising’ a violation. And yet, if there has been compliance with the Article 6 guarantee, there is nothing to neutralise.

⁵⁴⁷ *Van Mechelen and Ors v Netherlands* at [54] (emphasis added). This passage was drawn upon in, for example, *Rasmussen v Poland* at [42]. See Brems, 'Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights' 318.

⁵⁴⁸ *Van Mechelen and Ors v Netherlands* at [62].

Indeed, the European Court's counterbalancing jurisprudence in these cases amounts to reasoning along the following pattern:

- the applicant alleges a violation of guarantee *x* and substantiates that allegation;
- the relevant government identifies measures possibly capable of being regarded as counterbalancing measures; and
- the European Court identifies ways in which the counterbalancing measures do not completely remove the violation of guarantee *x*, or ways in which implementing the counterbalancing measures is not the same as complying with guarantee *x*.

The appearance in the cases in this sub-section, therefore, is that the notion of counterbalancing measures is simply a circumlocution that adds a gloss to the plain question of whether or not a particular guarantee has been violated. In reality, it seems, weighing up counterbalancing factors is simply a slightly more complicated version of a broadbrush proceedings as a whole test. And while there may be reason to applaud attempts at providing structure to the Article 6 balancing exercise, the risk with the Court's counterbalancing cases is that it provides the appearance of structure without adding anything to the analytical tools available to the Court.

E.3.2 In some instances, counterbalancing can involve 'giving' applicants rights which the applicants already held

This sub-section deals with a possible corollary of the argument made in the previous section. In cases where the European Court recognises that a potential violation has been neutralised, or counterbalanced away, the substance of the judgments often involves simply highlighting other rights to which the applicant was *already entitled* under Article 6. At the risk of oversimplifying, in these cases, the Court's

counterbalancing logic seems to be that while an applicant may have lost her right to x under Article 6, she has not lost her right to y, and therefore the violation of x may be forgiven. It will be argued that this form of reasoning raises questions about the extent to which the Court's references to counterbalancing mask an incoherent case law.

In *Jasper* and the public interest immunity cases, the Court outlined a theory of counterbalancing that would be triggered in cases where it was considered necessary to withhold certain evidence from the defence:

[52]...In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under [Article 6(1)]. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights *must be sufficiently counterbalanced* by the procedures followed by the judicial authorities.⁵⁴⁹

The Court's counterbalancing analysis in *Jasper* is complicated in two significant ways. The first is this: as is dealt with earlier in this Part, the *Jasper* Court makes considerable play of the fact that in a public interest immunity case, the role of the Court is to assess the fairness not of the trial as such, but of the 'decision-making procedure' used to decide the public interest immunity issue.⁵⁵⁰ What the *Jasper* Court does not make clear is whether the 'counterbalancing' should be done within this decision-making procedure, or within the hearing more generally. The second complication is that the *Jasper* Court does not expressly identify which measures it regarded as the

⁵⁴⁹ *Jasper v United Kingdom* at [52] (emphasis added). See, for a similar passage, *Rowe and Davis v United Kingdom* at [61]; *Fitt v United Kingdom* at [45]. See also A Ashworth, *Human rights, serious crime and criminal procedure* (Hamlyn Lectures, Sweet & Maxwell, London 2002), 129-130.

⁵⁵⁰ See, eg, *Jasper v United Kingdom* at [53]. There is more discussion of this point in Part E.2.3.

counterbalancing measures. It seems likely that this is the passage considering counterbalances:

[55] The Court is satisfied that the defence were kept informed *and permitted to make submissions and participate* in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds. Whilst it is true that in a number of different contexts the United Kingdom has introduced, or is introducing, a “special counsel”, the Court does not accept that such a procedure was necessary in the present case....

[56] The fact that the need for disclosure was at all times *under assessment by the trial judge* provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld. *It has not been suggested that the judge was not independent and impartial* within the meaning of [Article 6(1)]. He was fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial.... The jurisprudence of the English Court of Appeal shows that the assessment which the trial judge must make fulfils the conditions which, according to the Court's case-law, are essential for ensuring a fair trial in instances of non-disclosure of prosecution material. *The domestic trial court in the present case thus applied standards which were in conformity with the relevant principles* of a fair trial embodied in [Article 6(1)]. Furthermore, during the *appeal proceedings* the Court of Appeal also considered whether or not the evidence should have been disclosed, providing an additional level of protection for the applicant's rights.⁵⁵¹

Thus it seems that the European Court relied on counterbalancing factors such as that ‘the defence were kept informed and permitted to make submissions and participate in the above decision-making process as far as was possible’ and that it had not been ‘suggested that the judge was not independent and impartial’. But these factors are *already the subject of Article 6 guarantees*. That is, an accused person is *already entitled* to these things, and the European Court appears to be justifying one restriction on Article 6 by reassuring the accused person that Article 6 would not be restricted in other ways as well. Admittedly, the Court does identify a number of overlapping

⁵⁵¹ Ibid. at [55]-[56] (emphasis added). See also *Fitt v United Kingdom* at [48]-[50].

guarantees that have been complied with, and it may have seen significance in the combination of these overlapping guarantees. But the notion that a restriction on Article 6 can be ‘counterbalanced’ by the absence of *other* restrictions on Article 6 is quite perverse.

In *Grayson and Barnham*, two applicants each argued ‘that, in confiscation proceedings following his conviction for drugs offences, the fact that the legal burden of proof was on him to show that he did not have realisable assets equivalent to the benefit figure offended the basic principles of a fair procedure, in breach of Article 6’.⁵⁵² The applicant’s focus was on Article 6(1) rather than Article 6(2), but there was nonetheless much discussion of the presumption of innocence. In the course of its analysis, the Court cited *Salabiaku* in stating that presumptions of fact or law

are not prohibited in principle, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence.⁵⁵³

In assessing the extent to which the presumption in this case violated the applicant’s Article 6 right to a fair trial, the Court refers several times to the counterbalancing ‘safeguards’ present in the confiscation procedure:

[45] Throughout these proceedings, the rights of the defence were protected by the safeguards built into the system. Thus, in each case the assessment was carried out by a court with a *judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence*. Each applicant was represented by *counsel* of his choice. The *burden was on the prosecution* to establish that the applicant had held the assets in question during the relevant period. Although the court was required by law to assume that

⁵⁵² *Grayson and Barnham v United Kingdom* (App 19955/05) (2009) 48 EHRR 30 at [3].

⁵⁵³ *Ibid.* at [40], citing *Salabiaku v France* at [28].

the assets derived from drug trafficking, this assumption could have been rebutted if the applicant had shown that he had acquired the property through legitimate means. Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice....

[48] Each of the present applicants chose to give oral evidence relating to his realisable assets. Again, they had the advantage of the safeguards referred to in paragraph 45 above. They were *legally represented* and had been informed, through the judges' detailed rulings, exactly how the benefit figure had been calculated. Each applicant was given the opportunity to explain his financial situation and describe what had happened to the assets which the judge had taken into account in setting the benefit figure.⁵⁵⁴

The European Court found no violation of Article 6(1) for either applicant.⁵⁵⁵ Virtually all of these counterbalancing safeguards are *required* by Article 6. The Court is thus reasoning that, because a particular procedure did not violate Article 6 in certain respects, that makes a violation in another respect less likely or less serious. Our argument is not that the Court reached an incorrect decision on the substance of the right. The argument is, instead, to highlight the extent to which the Court appears to accept that compliance with some parts of Article 6 may be relevant to whether or not another part of Article 6 has been violated. In a sense, as was foreshadowed at the outset of this section, this reflects the fact that the Court's analysis of counterbalancing and safeguards often amounts to a slightly more structured version of its proceedings as a whole jurisprudence.

This sense was reinforced by the Grand Chamber's decision in *AlKhawaja and Tahery*. In that case, the Court effectively defined 'sufficiently counterbalanced' as being synonymous with the fairness of the proceedings as a whole. In one paragraph,

⁵⁵⁴ *Grayson and Barnham v United Kingdom* at [45], [48].

⁵⁵⁵ *Ibid.* at [50].

the Grand Chamber sets up the relevant test as being one in which counterbalancing plays a part:

...in cases concerning the withholding of evidence from the defence in order to protect police sources, the Court has left it to the domestic courts to decide whether the rights of the defence should cede to the public interest and has confined itself to verifying whether the procedures followed by the judicial authorities *sufficiently counterbalance the limitations on the defence with appropriate safeguards*...Similarly, in the case of *Salduz*...the Court reiterated that the right to legal assistance...was one element, amongst others, of the concept of a fair trial in criminal proceedings contained in Article 6(1).

The Court is of the view that the sole or decisive rule should also be applied in a similar manner. It would not be correct, when reviewing questions of fairness, to apply this rule in an inflexible manner.⁵⁵⁶

It then goes on to explain how the flexible counterbalancing test would work, making express reference to the proceedings as a whole test:

the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.⁵⁵⁷

Thus the counterbalancing reasoning infrastructure seems simply to amount to a circumlocution delaying the inevitable arrival of the proceedings as a whole test.

Similarly flawed analysis is evident in *AL v Finland*, in which the applicant had been accused and convicted of sexually abusing a child relative. At the European Court, the applicant alleged a violation of Article 6(3)(d) 'in that he was denied the opportunity to put questions to [the complainant], although her account, recorded on videotape, had been treated as decisive evidence against him'.⁵⁵⁸ In considering this argument, the Court noted:

⁵⁵⁶ *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [145][146] (emphasis added).

⁵⁵⁷ *Ibid.* at [146].

⁵⁵⁸ *AL v Finland (App 23220/04)* (27 January 2009) at [23].

Criminal proceedings concerning sexual offences are often perceived as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor... Therefore, the Court accepts that in criminal proceedings concerning sexual abuse, certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence. *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.*⁵⁵⁹

The Court did not expressly outline what measures might constitute counterbalances in this case. The closest it came was this passage, noting opportunities the applicant had not had:

the applicant was not afforded an opportunity to put questions to R. at any stage of the proceedings. His request to hear [the complainant] before the Court of Appeal was refused. His further request to hear [the complainant] before a court, or by some other means, was to no avail, as the Supreme Court refused leave to appeal.⁵⁶⁰

All these safeguards are guaranteed by Article 6. Ultimately, in this case, the Court found a violation of Article 6.⁵⁶¹ But in reaching that conclusion, the European Court gave no indication of what counter-balancing safeguards – other than those *already embodied in Article 6* – might have ameliorated the effect of what would otherwise constitute a violation of Article 6.⁵⁶² In this way, the ‘counterbalancing’ analysis amounted to asking simply whether or not Article 6 had been complied with.

These cases, it is submitted, further fill out the picture of how the European Court uses counterbalancing in its analysis of alleged infringements. In this section and the last section, we have seen two different ways in which it seems that

⁵⁵⁹ Ibid. at [39] (emphasis added).

⁵⁶⁰ Ibid. at [42].

⁵⁶¹ Ibid. at [45].

⁵⁶² See also Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 254.

‘counterbalancing’ simply collapsed into an analysis of whether or not the proceedings as a whole had been fair, or simply whether there had been a fair trial. In these cases, there is reason to think that the nomenclature of counterbalancing is simply a circumlocution masking a basic ‘proceedings as a whole’ analysis. In the next section, we examine some examples of cases in which the Court has provided greater detail about what it requires in order for an alleged violation to be ‘counterbalanced’.

E.3.3 In other instances, counterbalancing appears to involve the European Court requiring the provision of specific extra rights in an arbitrary way

As we have seen above, there are many cases in which the European Court does not specify counterbalancing measures beyond the guarantees secured by the text of Article 6. In a number of cases, however, the Court does more explicitly identify the counterbalancing measures that it requires.

In *Riepan v Austria*, the applicant was a prisoner charged with having threatened a prison official; the relevant Austrian court decided to hold the hearing within a closed area of the prison.⁵⁶³ The applicant argued that he was thus ‘deprived of a public hearing’.⁵⁶⁴ The Court stated:

the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, *the State is under an obligation to take compensatory measures* in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.⁵⁶⁵

⁵⁶³ *Riepan v Austria* at [9][18].

⁵⁶⁴ *Ibid.* at [23].

⁵⁶⁵ *Ibid.* at [29] (emphasis added).

The European Court then examined possible counterbalancing ‘compensatory measures’:

[30] The Court will therefore examine whether such measures were taken in the present case. As to the question whether the public could obtain information about the date and place of the hearing, the Court notes that the hearing was included in a weekly hearing list held by the Steyr Regional Court, which apparently contained an indication that the hearing would be held at Garsten Prison....However, apart from this routine announcement, no particular measures were taken, such as a separate announcement on the Regional Court's notice-board accompanied, if need be, by information about how to reach Garsten Prison, with a clear indication of the access conditions. Moreover, the other circumstances in which the hearing was held were hardly designed to encourage public attendance: it was held early in the morning [08.30am] in a room which, although not too small to accommodate an audience, does not appear to have been equipped as a regular courtroom.

[31] In sum, the Court finds that the Steyr Regional Court failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Garsten Prison had on its public character. Consequently, the hearing...did not comply with the requirement of publicity laid down in [Article 6(1)]....⁵⁶⁶

In this case, then, the Court’s description of possible counterbalancing measures focuses on providing guarantees *above and beyond* what it views Article 6 requiring in a normal case. In this way *Riepan* differs from the many cases identified above. Here, the Court required special instructions on how to get to the venue, that the hearing be held in a courtroom ‘equipped as a regular courtroom,’ and that it not be held too early in the morning. These counterbalancing measures may be perfectly sensible, but in the absence of explanation of how the Court arrived at them, it is extremely difficult to predict how future cases are likely to be resolved, and for officials in Contracting States to have their behaviour guided by this sort of decision. The Court does not explain, for example, the way in which Article 6 requires that a courtroom should be

⁵⁶⁶ Ibid. at [30]-[31] (the reference to the time of the hearing is drawn from [14]). See Trechsel, 127.

‘equipped,’ or why 08.30am is too early in the morning for the purposes of Article 6’s guarantees.

In *T and V v United Kingdom*, the European Court considered particular safeguards that had been put in place for two children on trial for murder and abduction. These counterbalancing safeguards included the applicants having had the trial procedure explained to them, visiting the courtroom before the proceedings, and shortening the hearings.⁵⁶⁷ Nevertheless, the Court considered that the proceedings would have been ‘incomprehensible and intimidating’ for the applicants at times, and that the applicants’ ‘skilled and experienced lawyers’ were not sufficient to safeguard their Article 6 rights.⁵⁶⁸ Indeed,

although the applicant's legal representatives were seated, as the Government put it, “within whispering distance”, it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence.⁵⁶⁹

It may be worth noting that the European Court did not specify any counterbalancing measures that *could* have been taken in order to protect the applicants’ right to participate effectively in the trial under Article 6, or a test with which to identify such measures. The absence of such an indication may be contrasted with the case of *SC v United Kingdom*, decided four and a half years after *T and V*.

⁵⁶⁷ *T and V v United Kingdom* at [86].

⁵⁶⁸ *Ibid.* at [86][88].

⁵⁶⁹ *Ibid.* at [88].

In SC, the applicant was also a child who had been charged with various criminal offences. Having been convicted in the Crown Court of one such offence, and having been unsuccessful on appeal, the applicant argued before the European Court that he ‘was so intellectually backward’ that he:

should not have been tried by a judge and jury, in a court open to the public to which the press was given free access. Instead, the applicant [argued that he] should have been tried in the privacy of a specialist Youth Court with proper sentencing powers.⁵⁷⁰

The European Court acknowledged that some steps had been taken in the Crown Court to accommodate the applicant’s position and to ‘ensure that the procedure was as informal as possible’: the lawyers ‘did not wear wigs and gowns and the applicant was allowed to sit next to his social worker’.⁵⁷¹ Nevertheless, the European Court concluded that these measures were not enough. More counterbalancing measures were required in a case of this sort:

it is essential that [the applicant] be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours, and adapt its procedure accordingly.⁵⁷²

In this case, therefore, the Court required that the only way to try someone in the position of the applicant would be to do so in a specialist tribunal. This conclusion is, perhaps, a more explicit version of what the Court said in *T and V v United Kingdom*, insofar as it expressly identifies what steps could be taken to allow the applicant’s trial to comply with Article 6. The *T and V* Court saw it as sufficient to identify the flaws in the process; the SC Court took matters a step further and also identified the way in which those flaws would be capable of being counterbalanced.

⁵⁷⁰ SC *v United Kingdom* at [26].

⁵⁷¹ Ibid. at [30].

⁵⁷² Ibid. at [35].

It must be noted that there are rare examples of the European Court spelling out its approach to counterbalancing more clearly and precisely. Indeed, the Grand Chamber in *Taxquet* held that, in proceedings involving a jury,

Article 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction. Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced, and precise, unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers. Lastly, regard must be had to any avenues of appeal open to the accused.⁵⁷³

Similarly, the analysis in *Luca v Italy* of ways in which an Article 6(3)(d) infringement could be counterbalanced, and the analysis in the Grand Chamber's *Al-Khawaja and Tahery* decision of ways in which a trial judge's directions to a jury might be capable of acting as a counterbalance, all demonstrate ways in which the European Court can be somewhat more precise in its counterbalancing analysis.⁵⁷⁴ Unfortunately, as our analysis has demonstrated, judgments of this sort are unusual in the Court's jurisprudence.

In cases like *Riepan* and *SC*, therefore, we see examples demonstrating that the Court is occasionally willing to identify explicitly what counterbalancing factors are required by its counterbalancing analysis. This may have merit in terms of providing lawyers, citizens and officials with guidance. But the way in which this guidance is provided by the European Court gives very little indication of how the precise

⁵⁷³ *Taxquet v Belgium (Grand Chamber)* at [92]. See Roberts; Bratza.

⁵⁷⁴ See *Luca v Italy*, [39]-[40]; *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)*, [152]-[165]. See also the Grand Chamber's Article 5 analysis in *A v United Kingdom* at [217]-[220].

combination of counterbalancing factors had been arrived at (why, in *Riepan*'s case, was 8.30am too early in the morning?). The counterbalancing jurisprudence of the Court has a series of weaknesses, discussed above in cases where the Court failed to identify any additional counterbalancing guarantees; in those cases where it does identify additional counterbalancing measures those measures tend to be poorly explained and risk appearing arbitrary. In the next section we consider the related analytical approach of 'curing defects'.

E.3.4 The 'defect-curing' technique is another form of semi-structured balancing

In this section, we examine the European Court's jurisprudence about curing defects in proceedings. In general terms, the curing defects jurisprudence holds that 'defects' at the trial stage of criminal proceedings may be 'cured' by appellate proceedings in some or all circumstances, and that potential infringements may thereby be saved from becoming violations in the eyes of the Court. In this section, we argue that the Court does not properly explain why this analytical technique is appropriate in some cases and not in others, and that the Court's explanations of how the technique is to work when it is applicable are characterised by incoherence.

We will briefly address the apparent origins of the curing defects jurisprudence. To some extent, it could be said that the notion of curing defects is simply a somewhat more structured version of the unstructured violation analysis that characterise much of the Article 6 case law, and much of the European Court's proceedings as a whole jurisprudence. Indeed, it involves balancing one potentially-violating identified factor

against other identified complying factors and weighing up the extent to which the latter has ameliorated the former.

It may be that the origins of the defect-curing jurisprudence are in some way thematically linked to the European Convention's 'exhaustion of domestic remedies' admissibility requirement.⁵⁷⁵ Importantly, however, defect-curing as it is analysed here primarily takes place not in the context of decisions about the *admissibility* of the complaint, but rather takes place in the context of assessing whether there has been a *violation* of Article 6.

In any event, whatever the origins of the curing defects technique, and whatever nomenclature is used in a particular case, the Court has often made statements along the lines of that made in *Kyprianou v Cyprus*:

The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings...⁵⁷⁶

As will be seen in following sub-sections, however, the apparent simplicity of statements of this sort belies a hidden complexity. That complexity takes two forms: first, uncertainty over what the Court will require in order for an appellate process to successfully cure a defect. Second, uncertainty over when it is appropriate to utilise the tool of defect curing *at all*.

⁵⁷⁵ See, eg, *Guzzardi v Italy* at [72]; *De Wilde and Ors v Belgium* at [50]; *DeCubber v Belgium* at [33]. See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 617-618; Trechsel, 69; Summers, 118-120; Clayton and Tomlinson (eds), *The Law of Human Rights*, 2072-2075.

⁵⁷⁶ *Kyprianou v Cyprus* at [134]. See Trechsel, 66.

E.3.5 There is uncertainty over what is required in order for an ameliorating act to 'cure' a defect

In this section, we examine what characteristics the European Court requires of an appellate court in order for it to be capable of curing defects. There are two threads that run through this case law: the powers of review possessed by the 'curing' court and the extent to which a curing court's appellate processes provide protection for certain Article 6 guarantees. It is worth recalling here that the Court does not always require that appellate proceedings comply with every one of the Article 6 guarantees.⁵⁷⁷ But, as we shall see, in cases where an appellate court is said to have 'cured' a defect in earlier proceedings, the Court will sometimes require that particular Article 6 guarantees be respected in the appellate proceedings.

In *Weber v Switzerland*, the applicant argued that there had been a breach of Article 6(1) insofar as the initial judgment in his case (given by the President of the Cassation Division), and the subsequent judgment in the first of two appeals, had been given without any public hearing.⁵⁷⁸ The second appeal's proceedings, in the Federal Court, *had* involved a public hearing. After dealing with preliminary issues, the European Court's analysis was brief:

The applicant was consequently entitled in principle to a public hearing in the determination of the "criminal charge" against him. The President of the Criminal Cassation Division, however, did not hold a hearing at all but gave his decision after a summary investigation entirely in written form, as provided for in...the Vaud Code of Criminal

⁵⁷⁷ See, for example, discussion of the right to be present at an appeal: Clayton and Tomlinson (eds), *Fair Trial Rights*, 157-158; Trechsel, 257-261; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 250; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 589-591.

⁵⁷⁸ *Weber v Switzerland* (App 11034/84) (1990) 12 EHRR 355 at [28].

Procedure. The Criminal Cassation Division too dismissed the applicant's appeal without hearing argument, as it was empowered to do by...the same Code. The fact that the proceedings in the Federal Court were public *did not suffice to cure the two defects just noted*. Having before it a public-law appeal, the Federal Court could only satisfy itself that there had been no arbitrariness and not determine all the disputed questions of fact and law....There has therefore been a breach of [Article 6(1)].⁵⁷⁹

In this passage, therefore, the European Court regards the public hearing at the final stage as not 'curing' the earlier defects. Crucially, however, it appears that this was because the Federal Court was unable to determine 'all the disputed questions of fact and law'. The constraints on the Federal Court's powers made it unable to cure a defect for the purposes of the European Court's analysis. Similarly, in *Condron*, the inability of the appellate court to review the jury's reasons meant that it lacked sufficient powers of review and hence could not cure defects.⁵⁸⁰

Another of the characteristics that must be possessed by an appellate court in order for it to have 'curing powers' was evident in *T v Austria*. In that case the applicant argued that:

his rights under [Article 6(3)(a)] and [Article 6(3)(b)] were violated in that the District Court, before imposing a fine for abuse of process on him, did not inform him of the suspicion that he had made false or incomplete statements in his legal aid request.⁵⁸¹

The European Court considered whether subsequent appellate proceedings might have cured these problems, but stated:

the appeal was not capable of remedying the shortcomings of the first instance proceedings, because the Regional Court confirmed the District Court's decision...without a hearing and rejected the

⁵⁷⁹ Ibid. at [39][40] (emphasis added). On *Weber*, see Trechsel, 20-21; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 552.

⁵⁸⁰ *Condron v United Kingdom* at [63].

⁵⁸¹ *T v Austria* (App 27783/95) (14 November 2000) at [68].

submissions made by the applicant in his defence as constituting new facts which were inadmissible on appeal.⁵⁸²

In *T*, therefore, the European Court was clear in demanding that any appellate process must itself comply with certain Article 6 guarantees – such as having a hearing – if it is to properly cure defects in an earlier stage of the proceedings. We should recall that there is not necessarily an automatic right to a hearing in appellate proceedings.⁵⁸³ But in this case, the European Court suggests that an appellate process lacking certain Article 6 rights cannot cure a flawed trial process for the purposes of the Court's jurisprudence.⁵⁸⁴

This way of approaching curing defects was also considered in *Riepan*, decided on the same day as *T*. In that case, the European Court stated:

In a number of cases [the Court] has found that the fact that proceedings before an appellate court are held in public cannot remedy the lack of a public hearing at the lower instances where the scope of the appeal proceedings is limited, in particular where the appellate court cannot review the merits of the case, including a review of the facts and an assessment of the proportionality between the fault and the sanction.⁵⁸⁵

In cases like *Riepan*, the Court also clarifies another aspect of its curing jurisprudence.

In assessing whether the appellate court had cured defects earlier in the criminal process, the Court stated that:

...an examination of the facts of the present case reveals that the review carried out by the Linz Court of Appeal did not have the requisite

⁵⁸² *Ibid.* at [71].

⁵⁸³ See, eg, *Jan-Ake Andersson v Sweden* at [27]; *Helmert v Sweden* (App 11826/85) (29 October 1991) at [36]; *Muttillainen v Finland* (App 18358/02 (22 May 2007) at [23]; *RH v Finland* (App 34165/05) (2 June 2009) at [29]. See also Clayton and Tomlinson (eds), *Fair Trial Rights*, 175; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 598-599.

⁵⁸⁴ See also *Sakhnovskiy v Russia* at [23]-[53]; *Sakhnovskiy v Russia (Grand Chamber)* at [99]-[109].

⁵⁸⁵ *Riepan v Austria* at [37].

scope. It is true that the appellate court could review the case as regards questions of law and fact and could reassess the sentence. However, apart from questioning the applicant, the court did not take any evidence, and in particular did not rehear the witnesses. It is of little importance that the applicant did not request a rehearing of the witnesses....Accordingly, the Court finds that the lack of a public hearing before the Steyr Regional Court was not remedied by the public hearing before the Linz Court of Appeal.⁵⁸⁶

Here, then, the European Court requires not only that the appellate court have the *ability* to 'review the case as regards questions of law and fact' and to 'reassess the sentence,' but also that the appellate court *actually conduct* a rigorous review, even if the applicant does not make such a request. This approach is also evident in cases including *Kyprianou v Cyprus*.⁵⁸⁷

In *Condron v United Kingdom*, however, the Court appeared to adopt a different view of what an appellate court would need to do in order to cure defects. In that case, the Court placed significance on the fact that the appellate court's analytical task was different to the analytical task of the European Court itself:

The Court must also have regard to the fact that the Court of Appeal was concerned with the safety of the applicants' conviction, not whether they had in the circumstances received a fair trial. In the Court's opinion, the question whether or not the rights of the defence guaranteed to an accused under Article 6 of the Convention were secured in any given case cannot be assimilated to a finding that his conviction was safe in the absence of any enquiry into the issue of fairness...⁵⁸⁸

In this passage, therefore, the Court indicates that, in order to cure a defect, an appellate court must not only have broad review powers, but that those review powers must be at least partly directed towards establishing whether or not there was a fair trial

⁵⁸⁶ Ibid. at [41].

⁵⁸⁷ *Kyprianou v Cyprus* at [134]-[135].

⁵⁸⁸ *Condron v United Kingdom* at [65]. On the relationship between fairness of trials and safeness of convictions, see I Dennis, 'Fair Trials and Safe Convictions' (2003) 56 *Current Legal Problems* 211.

at the initial hearing. Thus the *Condron* Court appears to require that, in order for a defect to be cured, the appellate court must conduct an analysis similar to that conducted by the European Court. Unlike some of the cases above, in which it appeared that the Court would find a defect to be cured if the appellate court's process had the *effect* of ameliorating a potential violation of Article 6 in the trial process, this case requires that the appellate court identify the defect *in Article 6 terms* in order for the defect to be cured. That is, under *Condron*, it is not enough that the European Court can look at a particular appellate procedure and recognise that that procedure, in substance, ameliorated a flaw in the earlier stage of proceedings. The European Court must be able to identify how the appellate court conducted a fair trial analysis under Article 6.

If we take these cases together, then, the European Court's position appears to be this: it may be enough for the 'curing' court simply to be able to determine all the disputed questions of fact and law. Or, the Court may also require that the curing court operated with certain of the Article 6 rights in its own proceedings (the right to a hearing, for example). Or, the Court may require that the curing court not only had the ability to do these things in these circumstances, but that it did so.⁵⁸⁹ Finally, the Court may require not only that the curing court had all of these characteristics, but also that it turned its mind to the question of an Article 6 analysis rather than simply to analysis of the safeness of a conviction. These positions are by no means irreconcilable, but the Court has not reconciled them, and there is evident uncertainty

⁵⁸⁹ It seems that the case law indicates that the result of that review need not be favourable to the applicant; the important thing is that the review be conducted, eg, *Dallos v Hungary* (App 29082/95) (2003) 37 EHRR 22 at [50][53].

as to what is required of an appellate court before it may cure a particular type of defect. For any applicant, Government, or domestic appellate court, the Court's judgments lack any sense of systematic guidance as to why certain Article 6 guarantees are crucial to the appellate court's ability to cure defects and how intense any review should be.

E.3.6 There is uncertainty over when the defect-curing technique may be utilised

Within the European Court's defect-curing case law, and even within individual cases dealing with defect-curing, there is significant uncertainty over when it is appropriate for the European Court to engage in defect-curing analysis. In this section we point to several examples of this uncertainty, and argue that it feeds into a broader sense of incoherence in the way the Court approaches violations of Article 6.

A useful example of inconsistency within a case is provided by *DeCubber v Belgium*. In that judgment, the Court offered a forceful statement explaining why it would be rare that subsequent appellate proceedings could cure flawed trial proceedings. The Court began by noting that the existence in a particular Contracting State of appellate courts that complied with Article 6's guarantees did not mean 'that the lower courts do not [also] have to provide the required guarantees'.⁵⁹⁰ The Government had argued, on the basis of *LeCompte, Albert and LeCompte* and *Sutter*, that guarantees in trial proceedings could be reduced if full-guarantee appellate proceedings

⁵⁹⁰ *DeCubber v Belgium* at [32].

were available.⁵⁹¹ The European Court rejected this argument, noting that those cases had not involved criminal proceedings, and stated:

The reasoning adopted in the three above-mentioned judgments, to which should be added the *Campbell and Fell* judgment...cannot justify reducing the requirements of [Article 6(1)] in its traditional and natural sphere of application. A restrictive interpretation of this kind would not be consonant with the object and purpose of [Article 6(1)].⁵⁹²

Thus the European Court made a forceful statement that the Article 6 guarantees could not be watered down at the trial stage of criminal proceedings, even if there was an appellate court available; this statement has been drawn on by subsequent cases.⁵⁹³

But in the next paragraph of *DeCubber*, the European Court appeared to contradict these sentiments. Indeed, in paragraph [33], the European Court offered a tentative explanation of how flaws in proceedings might be ‘cured’ by appellate processes:

The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention’s provisions: this is precisely the reason for the existence of the rule of exhaustion of domestic remedies....The particular defect in question [in this case] did not bear solely upon the conduct of the first-instance proceedings: its source being the very composition of the Oudenaarde criminal court, the defect involved matters of internal organisation and the Court of Appeal did not cure that defect since it did not quash on that ground the judgment...in its entirety.⁵⁹⁴

It is difficult to reconcile these passages. In the first passage, the European Court stood firmly against reducing the protection afforded by Article 6 to criminal trial proceedings. In the next passage, the Court expressly countenanced the reduction of

⁵⁹¹ *Ibid.* at [31][32]. See *Albert and Le Compte v Belgium* (App 7299/75) (1983) 5 EHRR 533; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 567 et seq.

⁵⁹² *DeCubber v Belgium* at [32]. This passage has been cited by the European Court as an explanation for its approach in decisions such as *Findlay*: see *Findlay v United Kingdom* (App 22107/93) (1997) 24 EHRR 221 at [79].

⁵⁹³ *Findlay v United Kingdom* at [79].

⁵⁹⁴ *DeCubber v Belgium* at [33].

rights protection in criminal trial proceedings provided that an appellate court subsequently quashes the trial judgment. The *De Cubber* Court seems unable to decide whether or not appellate processes can ‘justify reducing the requirements of [Article 6(1)] in its traditional and natural sphere of application’.⁵⁹⁵ Judgments marked by this sort of uncertainty provide little guidance.

A further example of inconsistency within an individual case is provided by *Riepan v Austria*. In the course of its analysis, the *Riepan* Court attempted to draw an analogy between its view of the independence and impartiality guarantees and its view of the publicity guarantee:

the Court has, in the context of the requirement of a tribunal's independence and impartiality, rejected the possibility that a defect at first instance could be remedied at a later stage, finding that the accused was entitled to a first-instance tribunal that fully met the requirements of [Article 6(1)]. The Court considers that a normal criminal trial requires *the same kind* of fundamental guarantee in the form of publicity....Given the possible detrimental effects that the lack of a public hearing before the trial court could have on the fairness of the proceedings, the absence of publicity *could not in any event be remedied by anything other than a complete re-hearing before the appellate court*.⁵⁹⁶

But it is somewhat unclear what, precisely, the Court's analogy is. The European Court appears to state that independence and impartiality violations can never be cured, and that publicity violations should be treated the same way. The European Court then goes on to outline a way in which publicity violations *could* be cured. This is confusing, and suggests a broader uncertainty about how and when defect-curing is an appropriate approach to violations of Article 6 guarantees.

⁵⁹⁵ Ibid. at [32]. This passage has been cited by the European Court as an explanation for its approach in decisions such as *Findlay*: see *Findlay v United Kingdom* at [79].

⁵⁹⁶ *Riepan v Austria* at [40] (emphasis added). This passage is drawn upon and cited in *Krestovskiy v Russia* at [34].

If the two cases above involved examples of internal incoherence, we now turn to two cases that demonstrate inconsistency between cases. The cases were decided less than a month apart, but adopt different approaches to the question of defect-curing. In *Macin v Turkey (No 2)*, the applicant was tried before a tribunal that, during the early stages, included a military judge. The military judge was replaced by a civilian judge during the course of proceedings. The question was whether the replacement of the military judge during the proceedings vitiated the otherwise potentially-infringing nature of that judge's presence for independence and impartiality purposes. In its analysis, the European Court noted that there had been five hearings before the replacement and seventeen afterward. The European Court concluded that 'replacing the military judge has dispelled the doubts of the [applicant] about the independence and impartiality of the court which sentenced him'.⁵⁹⁷ That is, measures taken subsequent to the potentially-violating incident were sufficient to 'cure' that defect such that there was no violation.

Curiously, almost the opposite result was reached in similar circumstances in *Kavak v Turkey*, decided less than three weeks after *Macin v Turkey (No 2)*. After conducting analysis of the applicant's argument that there had been a violation of Article 6 because a military judge had participated in an early stage of the proceeding, the European Court stated:

[48] However, the Court recalls that in *Ocalan*, the Grand Chamber found that "when a military judge is involved in one or more procedural steps that remain valid in subsequent criminal proceedings

⁵⁹⁷ *Macin v Turkey (No 2)* (App 38282/02) (24 October 2006) at [30] (translated).

concerned, the accused could reasonably have doubts as to the legality of the whole procedure.” Thus, the fact that a military judge has participated in a trial against a civilian in a pleading inherent part of the proceedings, deprives the whole procedure of the appearance of having been led by a independent and impartial tribunal.

[49] Accordingly, there has been a violation of Article 6(1)...⁵⁹⁸

In these two decisions we have two fundamentally different approaches to not only the independence and impartiality guarantees but also to the extent to which a violation of Article 6 may be ‘cured’ of its defects by subsequent action. It might be noted that *Ocalan* was not referred to in the *Macin* decision. The European Court does not acknowledge the discrepancy between *Kavak* and *Macin (No 2)*, let alone attempt to explain or rationalise it.⁵⁹⁹

The European Court’s approach to defect-curing is thus marked by uncertainty and incoherence. This uncertainty and incoherence is indicative of a broader lack of guidance as to how violations of Article 6 are to be assessed, and what framework should be used to decide how that assessment is made.

E.3.7 Concluding this section

Both counterbalancing and defect-curing ostensibly involve the European Court using some structure in its assessment of alleged violations. By identifying and characterising the factors to be balanced as ‘counterbalancing measures,’ or ‘defects,’ or ‘curing procedures,’ the European Court appears to provide more clearly structured reasoning than that in its proceedings as a whole jurisprudence. This clarity, however, is undermined significantly by the incoherencies and inconsistencies that have been

⁵⁹⁸ *Kavak v Turkey* (App 69790/01) (9 November 2006) at [48][49] (translated).

⁵⁹⁹ Judge Türmen of Turkey participated in both decisions.

identified in this section. As has been seen, the methods are internally incoherent, and there are broader external inconsistencies between the ways that the Court uses these methods and the ways it is willing to use other methods of assessing alleged violations of Article 6. Moreover, ultimately, as we have seen, both counterbalancing and defect-curing seem to amount to versions of the Court's proceedings as a whole doctrine. If the Court adopted an approach in which it focused on individual violations assessed with respect to the facts relevant to the alleged violation, then it might be difficult to argue that it was relevant that there were counterbalancing factors, or that there were appellate proceedings of one sort or another. With the proceedings as a whole doctrine, however, the European Court may choose to take into account those things in the course of assessing a specific alleged violation.

E.4 The European Court's 'never fair' case law is inconsistent with its other case law, and internally incoherent

In the sections above, we have examined ways in which the European Court has attempted to incorporate semi-structured balancing techniques into its analysis of potential violations of Article 6. In this section, we consider situations in which the Court has elected not to conduct that sort of semi-structured balancing. The argument being constructed here is that the Court demonstrates great incoherence in the way that it uses its analytical tools. With very little explanation, it will disregard its counterbalancing and defect-curing jurisprudence and instead choose to analyse a potential violation through what will be described as the 'never fair' method. But even then, *that* method will not be applied regularly and methodically. The picture being painted here is one of inconsistencies on inconsistencies. Of course, it is possible to

imagine an analytical meta-framework in which the Court carefully chose different analytical tools for different sorts of violations, and explained why each tool was applicable or inapplicable to a given situation. It will be shown that this is not what the Court does. On one level, it simply fails to explain the rationale for its pick-and-choose approach to analysing violations. On another, the methods that it purports to use are, themselves, used incoherently and inconsistently.

There are several arguments made in this section. First, it is established that the Court uses the ‘never fair’ formulation, and does so in a way that does not square with its attempts at counterbalancing and defect-curing. Second, it is established that the Court’s use of the ‘never fair’ formulation is inconsistent on its own terms. Third, it will be argued that one possible explanation for some inconsistencies in the use of the ‘never fair’ formulation lies in the way the Court orders remedies for Article 6 violations.

E.4.1 The European Court uses the ‘never fair’ formulation in a way that is inconsistent with its attempts at semi-structured balancing

In this sub-section, we give a descriptive account of the European Court’s ‘never fair’ analysis, and identify tensions between that analysis and the analytical tools critiqued above. A typical statement of what we will describe as the ‘never fair’ analysis is seen in *Ciraklar v Turkey*. In that case, the Court found a violation of Article 6(1) on independence and impartiality grounds.⁶⁰⁰ It then considered an argument arising out of Article 6(3)(d), but concluded as follows:

⁶⁰⁰ *Ciraklar v Turkey* (App 19601/92) (28 October 1998) at [40]-[41].

The Commission was of the view that “a court whose lack of independence and impartiality has been established cannot, in any circumstances, guarantee a fair trial to the persons subject to its jurisdiction”. Having regard to its finding that Mr Ciraklar’s right to a fair hearing by an independent and impartial tribunal has been infringed, the Court considers that it is unnecessary to examine this complaint.⁶⁰¹

In a long line of cases, the European Court has stated that a violation of the independence and impartiality guarantees will mean that the trial as a whole can never be fair. A frequently-expressed and important corollary of this position is expressed in the Court’s statements that, once an independence or impartiality violation has been found, it will regard it as unnecessary to consider any other Article 6 arguments.⁶⁰² Thus in *Ergin v Turkey (No 6)*, the Court found a violation on independence and impartiality grounds.⁶⁰³ The Court then went on to state, with reference to an additional Article 6 argument made by the applicant:

The Court observes that it has already held in similar cases that a court whose lack of independence and impartiality has been established cannot, in any event, guarantee a fair trial to the persons subject to its jurisdiction. Having regard to its finding that the applicant’s right to a hearing by an independent and impartial tribunal has been infringed, the Court considers that there is no cause to examine the other complaint relating to Article 6 of the Convention.⁶⁰⁴

Versions of the ‘never fair’ approach appear extremely frequently in independence and impartiality cases.⁶⁰⁵ While these cases concern the independence and impartiality

⁶⁰¹ Ibid. at [44]-[45]. Curiously, the passage cited from the Commission does not appear in the Commission’s decision: *Ciraklar v Turkey (Commission)* (App 19601/92) (19 January 1995).

⁶⁰² Indeed, this statement standing alone would also amount to an implicit statement that a hearing in which there had been an independence or impartiality violation could never be fair.

⁶⁰³ *Ergin v Turkey (No 6)* at [54].

⁶⁰⁴ Ibid. at [55]-[56] (emphasis added), citing *Ciraklar v Turkey* at [44]-[45].

⁶⁰⁵ See, eg, *Caplik v Turkey* at [33]; *Demicoli v Malta* at [40]-[43]; *Findlay v United Kingdom* at [80]; *Incal v Turkey* at [73]-[74]; *Buyukdag v Turkey* (App 28340/95) (21 December 2000) at [73]-[76]; *Geger v Turkey* (App 24919/94) (8 July 1999) at [62]-[65]; *Morris v United Kingdom* (App 38784/97) (2002) 34 EHRR 52 at [77]-[79]; *YB and Ors v Turkey* (App 48173/99) (28 October 2004) at [38]; *Orhan Aslan v Turkey* (App 48063/99) (20 October 2005) at [57]-[61]; *Celik v Turkey* (App 61650/00) (15 July 2005) at [28]-[33];

guarantees, analogies may be drawn with, for example, those cases in which the Court has stated that the use of evidence obtained by torture or incitement may mean that a trial can never be fair.⁶⁰⁶

In the cases identified above, the Court does not explain why independence and impartiality violations are subject to this analytical regime, whereas infringements of other Article 6 guarantees are often capable of being ‘cured’ or ‘counterbalanced’. Why, for example, would an infringement of the right to disclosure of documents not mean that the trial could never be fair?⁶⁰⁷ Why, indeed, does an insufficiently public trial not render that trial automatically unfair?⁶⁰⁸ And why do violations of Article 6(3)(a) and Article 6(3)(b) not render a trial unfair, but instead trigger a defect-curing analysis?⁶⁰⁹ Instead, in those cases (and many others discussed in previous sections), the Court employs a counterbalancing analysis or a defect-curing analysis. To put the rhetorical questions another way, if the Court is committed to semi-structured balancing of the sort identified above, why could independence or impartiality violations not be subject to a counterbalancing or defect-curing analysis? Importantly,

Duran Sekin v Turkey (App 41968/98) (2 February 2006) at [34]-[39]; *Tokay and Ulus v Turkey* (App 48060/99) (23 March 2006) at [34]-[39]; *Akkas v Turkey* (App 52665/99) (23 October 2003) at [22]-[23]; *Ozertikoglu v Turkey* (App 48438/99) (22 January 2004) at [24]-[25]; *Serdar Ozcan v Turkey* (App 55427/00) (8 April 2004) at [24]-[25]; *Isik v Turkey* (App 50102/99) (5 June 2003) at [37]-[39]; *Unal v Turkey* (App 48616/99) (10 November 2004) at [27]-[28]; *Vera Fernandez-Huidobro v Spain* (App 74181/01) (6 January 2010) at [12] of Dissent of Judge Casadevall; *Nechiporuk and Yonalko v Ukraine* at [259]-[261]. It may be noted that some of these passages appear to attempt to confine this approach to cases involving Turkey.

⁶⁰⁶ See *Jalloh v Germany*; *Gafgen v Germany* (Grand Chamber); *Gorgieuski v FYROM* at [49]. See also *Hakan Duman v Turkey* at [52]-[53]. cf *Gladyshev v Russia* at [75].

⁶⁰⁷ cf *Dowsett v United Kingdom* at [42], *Doorson v Netherlands* at [72]; *Van Mechelen and Ors v Netherlands* at [54].

⁶⁰⁸ Cf *Riepan v Austria* at [30]-[31].

⁶⁰⁹ *T v Austria* at [71].

this is *not* an argument that the Court could not elect to treat violations of some guarantees differently to violations of other guarantees. It is an argument about clarity and coherence. If the Court wishes to establish a hierarchy of Article 6 rights, in which violations of some guarantees are more serious than others, or are treated differently from others, then the interests of clarity and coherence demand that it explain and justify that hierarchy or differentiation. It has not done so.

E.4.2 The ‘never fair’ formulation does not sit well with the European Court’s analysis of the proceedings as a whole

In this section we link our consideration of ‘never fair’ with our analysis above related to the proceedings as a whole test. In our analysis above, we noted several cases in which the European Court purported to be reaching a conclusion based on the fairness of the proceedings as a whole, but then went on to consider other Article 6 factors separately and discretely. That form of analysis, it was argued, suggested that the Court was not *actually* considering the fairness of the proceedings as a whole. Here we note two ways in which this point plays out in the context of the Court’s ‘never fair’ analysis.

First, there are cases in which the Court purports to be assessing the fairness of the proceedings as a whole, but that analysis is cut short by the use of a ‘never fair’ analysis. Thus, for example, in *Gafgen* the Grand Chamber stated that:

The question which must be answered is *whether the proceedings as a whole, including the way in which the evidence was obtained, were fair*. This involves an examination of the unlawfulness in question and, where the

violation of another Convention right is concerned, the nature of the violation found.⁶¹⁰

But while the Court placed emphasis on the fairness of the proceedings as a whole, the application of that test came down to one factor:

[166] ... the Court has found in respect of confessions, as such, that the admission of statements obtained as a result of torture as evidence to establish the relevant facts in criminal proceedings rendered the proceedings as a whole unfair. This finding applied irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction.⁶¹¹

In this passage, the European Court presents the discussion of evidence obtained by torture within the context of the proceedings as a whole analysis. Yet it seems that the effect of the European Court's analysis is that, regardless of what happened in the rest of the proceedings as a whole – regardless of any potentially exacerbating or ameliorating features of the proceedings as a whole – the proceedings *will not be capable of being fair*. In such circumstances, the key test seems to be whether evidence obtained in breach of Article 3 has been used rather than whether the proceedings as a whole were unfair. To be clear, this is emphatically *not* an argument that evidence obtained by torture renders a trial anything other than unfair; it is an argument about the clarity and coherence with which the European Court explains its reasons.

Second, there are a number of cases in which the Court reaches a conclusion that proceedings could never be fair but then, in the context of a separately alleged Article 6 violation, goes on notionally to consider the fairness of the proceedings as a whole. In *Haci Ozen v Turkey*, for example, the Court first considered an independence

⁶¹⁰ *Gafgen v Germany (Grand Chamber)* at [163] (emphasis added). See Spurrier; Greer, 'Should police threats to torture suspects always be severely punished? Reflections on the Gafgen case'; Sauer and Trilsch; Ast.

⁶¹¹ *Gafgen v Germany (Grand Chamber)* at [166].

and impartiality argument, and found a violation on that basis.⁶¹² Having found that violation, the Court then turned to consider a more general fairness argument.⁶¹³ The consideration of this additional argument began by noting that, usually, an independence or impartiality violation would mean the trial could never be fair:

The Court...has already held in previous cases that a court whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial to the persons under its jurisdiction and that, accordingly, it is not necessary to examine complaints regarding the fairness of the proceedings before that court.⁶¹⁴

On the facts of this case, the Court stated, it was nonetheless necessary to consider the additional arguments.⁶¹⁵ In the course of assessing those additional arguments, the Court described the relevant analytical framework in familiar terms:

The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.⁶¹⁶

In the course of this subsequent analysis, in which it purported to consider 'the proceedings as a whole', the Court did not mention the independence or impartiality issue once. Thus the Court was purporting to analyse the proceedings as a whole while completely leaving out a factor that, on its own analysis, was sufficient *in itself* to render the trial irretrievably unfair.⁶¹⁷ There are, in fact, a string of cases in which the Court reaches a conclusion on alleged independence and impartial violations and then, separately, purports to consider the fairness of the proceedings as a whole without

⁶¹² *Haci Ozen v Turkey* at [93]-[94].

⁶¹³ *Ibid.* at [95]-[105].

⁶¹⁴ *Ibid.* at [97].

⁶¹⁵ *Ibid.* at [98].

⁶¹⁶ *Ibid.* at [100] (emphasis added).

⁶¹⁷ The European Court concluded that the use of the statements had 'rendered [the applicant's] trial as a whole unfair' and that there had thus been a violation of Article 6(1) and Article 6(3)(c): *Ibid.* at [104]-[105].

making any reference to its earlier conclusion on independence and impartiality.⁶¹⁸ For this reason, looking at the ‘never fair’ case law helps to illustrate and emphasise the flawed nature of the way the Court conducts its proceedings as a whole analysis.

E.4.3 The European Court is inconsistent in its use of the ‘never fair’ formulation

The sub-sections above have identified, described, and criticised the way the European Court uses the ‘never fair’ formulation, principally for independence and impartiality violations. The sub-sections above focussed on the ‘external’ inconsistencies and incoherencies between how the European Court uses ‘never fair’ on the one hand and how it uses defect-curing, counterbalancing, and the proceedings as a whole test on the other hand. In this sub-section we turn briefly to the ‘internal’ inconsistencies and incoherencies between how the Court uses ‘never fair’ in some cases but not in others. We focus on three case examples in which the Court acknowledged the possibility that independence or impartiality violations might be capable of being counterbalanced or cured and, in so doing, acknowledged the possibility that an independence or impartiality violation might not always render a trial irretrievably unfair.⁶¹⁹

In *Belilos v Switzerland*, the Court held that ‘the applicant could legitimately have doubts as to the independence and organisational impartiality of the Police Board, which accordingly did not satisfy the requirements of [Article 6(1)] in this respect.’⁶²⁰ In many of the cases discussed above, this would have been sufficient for the

⁶¹⁸ See, eg, *Sadak and Ors v Turkey* at, [31]-[43], [59]-[69]; *Hulki Gunes v Turkey* at [80]-[96]; *Ocalan v Turkey* at [118]-[148].

⁶¹⁹ cf Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 252.

⁶²⁰ *Belilos v Switzerland* (App 10328/83) (1988) 10 EHRR 466 at [67].

Court to conclude that the trial could never be fair. Here, however, the Court went on to state that it ‘must satisfy itself that the available forms of appeal made it possible to remedy the deficiencies noted in the proceedings at first instance’.⁶²¹ The *Belilos* Court ultimately found a violation of Article 6(1), but *only* because the cantonal and federal appellate proceedings in Switzerland did not provide sufficient safeguards to ameliorate the independence and impartiality violations.⁶²² For example, in the case of the cantonal court, the Court stated:

[The Criminal Cassation Division of the Vaud Cantonal Court] also acknowledged that the proceedings before it included neither oral argument nor the taking of evidence by, for example, hearing witnesses....These various factors lead to the conclusion that the jurisdiction of the Criminal Cassation Division of the Vaud Cantonal Court was not in the instant case sufficient for the purposes of [Article 6(1)].⁶²³

Thus while the *Belilos* Court found a violation, it was plain that there would have been no violation had the Swiss appellate proceedings had additional counterbalancing or defect-curing safeguards.

The second case is *De Haan v Netherlands*, in which the Court considered an independence and impartiality complaint. The Court found that the applicant’s ‘fears’ as to independence and impartiality ‘were objectively justified’.⁶²⁴ Once again, this would have been sufficient to render the trial unfair in many of the cases discussed above. In *De Haan*, however, the Court moved to a further stage of analysis:

⁶²¹ Ibid. at [68] citing *Ozturk v Germany* (App 8544/79) (21 February 1984) at [56]. The relevant passage of *Ozturk* related to curing potential violations of Article 6(3)(e) rather than potential violations of the independence and impartiality guarantees.

⁶²² *Belilos v Switzerland* at [69][73].

⁶²³ Ibid. at [70]. See also Trechsel, 47-48, 56-57.

⁶²⁴ *De Haan v Netherlands* (App 22839/93) (26 August 1997) at [51].

Nonetheless no violation of [Article 6(1)] could be found if the decision of the Appeals Tribunal was subject to subsequent control by a judicial body that had full jurisdiction and did provide the guarantees of Article 6....

However, the possibility exists that a higher or the highest tribunal may, in some circumstances, make reparation for an initial violation of one of the Convention's provisions. The Central Appeals Tribunal had the power to quash the decision appealed against on the ground that the composition of the Appeals Tribunal had not been such as to guarantee its impartiality and to refer the case back to the Appeals Tribunal for rehearing if necessary. However, it declined to do so and, as a consequence, *did not cure the failing* in question.

In conclusion, there has been a violation of [Article 6(1)]...⁶²⁵

De Haan thus explicitly acknowledges that a hearing may be cured of an independence or impartiality violation. The violation here was not cured on these facts, but the possibility was there. This stands in stark contrast to *Ciraklar, Ergin (No 6)* and the long list of cases outlined above, in which an independence or impartiality violation meant the proceedings could *never* be fair.

In *Kyprianou*, the Grand Chamber considered an argument that there had been 'a breach of the principle of impartiality' in the domestic trial court, and that the breach had not been rectified by the domestic appellate court. The Court concluded its analysis of this argument in this way:

the Court shares the Chamber's view that the Supreme Court *did not remedy the defect* in question. The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings. In the present case, although the parties disagree as to the precise scope of the powers of the Supreme Court, it is clear that it had the power to quash the decision on the ground that the Limassol Assize Court had not been impartial. However, it declined to do so and upheld the conviction and sentence. As a consequence, it did not cure the failing in question.

In the light of the foregoing and having examined the facts of the case under both the objective and subjective tests enshrined in its case-law,

⁶²⁵ *Ibid.* at [52]-[54] (emphasis added). See also Trechsel, 75-76.

the Court finds that the Limassol Assize Court was not impartial within the meaning of [Article 6(1)].⁶²⁶

Very similar suggestions were made in cases such as *Chmelir*, *Ozerov*, and *Krivoshapkin*.⁶²⁷

It is in no way clear that the Court would be able to reconcile these suggestions – that an impartiality violation might be able to be cured by the appellate process – with its often-expressed view that a non-impartial trial can never be fair.

In these examples, therefore, the European Court countenances the possibility that an independence or impartiality violation might be cured or counterbalanced. In each of these cases, the Court reaches a tentative conclusion that the independence or impartiality violation had been established, before going on to assess potential counterbalancing or curing factors. It is conceivable that the Court could design an interpretative framework within which some, but not all, independence and impartiality violations could be cured or balanced away. It is equally conceivable that the Court could design a framework within which it could not be said that there had been an independence or impartiality violation unless the Court had also checked that violation against potential counterbalancing or curing factors. What is important for our analysis is that the European Court has given no sign of implementing such a system. Instead, we are left with a distinct impression that the Court adopts an inconsistent and incoherent approach to independence and impartiality violations, and to the circumstances in which it is appropriate to cure defects or counterbalance

⁶²⁶ *Kyprianou v Cyprus* at [134]-[135] (emphasis added), citing *DeCubber v Belgium* at [33]; *Findlay v United Kingdom* at [78]-[79]; *De Haan v Netherlands* at [52]-[55]; *Guzzardi v Italy* at [72]; *Van Oosterwijck v Belgium* (App 7654/76) (6 November 1980) at [34]; *Adolf v Austria* at [38]-[41]; *Airey v Ireland* at [18]; *De Wilde and Ors v Belgium* at [50].

⁶²⁷ *Chmelir v Czech Republic* at [68]; *Ozerov v Russia* (App 64962/01) (18 May 2010) at [35], [55]-[58]; *Krivoshapkin v Russia* at [37]-[40], especially at [40].

shortcomings. As we will see in the next sub-section, there are further examples of such inconsistency.

E.4.4 Some inconsistency may be explained by the availability of remedies for Article 6 violations

In this section, we argue that one explanation for the European Court's inconsistent and incoherent approach to its 'never fair' analysis may lie in the way that the European Court has approached remedies available for violations of Article 6.

It is necessary to provide some initial context for this argument. When it comes to remedial measures for violations of the independence and impartiality guarantees, the general trend in the Court's case law has been to embrace the view that 'in principle *the most appropriate remedy would be to retry the applicant* in due course by an independent and impartial tribunal'.⁶²⁸ In other cases, such as *Ciraklar*, the mere finding of a violation has been found to be a sufficient remedy.⁶²⁹ It is readily acknowledged that the Court has made statements indicating that it will be flexible in terms of appropriate remedial measures.⁶³⁰ Our point, however, is that there is a clear

⁶²⁸ *Gencel v Turkey* (App 53431/99) (23 October 2003) at [27] (translated) (emphasis added). See also, eg, *Tahir Duran v Turkey* (App 40997/98) (29 January 2004) at [23], citing *Gencel v Turkey* at [27]; *Halis v Turkey* (App 30007/96) (11 January 2005) at [49]; *YB and Ors v Turkey* at [57]; *Baran v Turkey* (App 48988/99) (10 November 2004) at [48]; *Salduz v Turkey* at [72]; *Gocmen v Turkey* at [87]; *Paraskeva Todorova v Bulgaria* (App 37193/07) (25 March 2010) at [52]; *Satik v Turkey (No 2)* (App 60999/00) (8 July 2008) at [74]; *Haci Ozen v Turkey* at [111]; *Sejdovic v Italy* (GC) at [125]-[128]; *Sannino v Italy* (App 30961/03) (27 April 2006) at [69]-[71]. For more on remedies generally, see I Nifosi-Sutton, 'The power of the ECHR to order specific non-monetary relief: A critical appraisal from a right to health perspective' (2010) 23 *Harvard HR Journal* 51.

⁶²⁹ *Ciraklar v Turkey* at [49].

⁶³⁰ See, eg, *Scoppola v Italy (No 2)* (App 10249/03) (17 September 2009) at [150]-[151]; *Assanidze v Georgia* at [202]; *Ocalan v Turkey* at [210]-[212]; *Henryk Urban & Ryszard Urban v Poland* (App 23614/08) (30 November 2010) at [64].

body of law in favour of retrials and reopening of hearings being the appropriate remedy for independence and impartiality violations. This has the crucial result that, in many cases, there is no compensation awarded on account of the independence and impartiality violation specifically.⁶³¹

In this sub-section, we consider how this approach to remedies interacts with the Court's inconsistent and incoherent approach to 'never fair' analysis. As we have seen above, in many of the 'never fair' cases, a conclusion that there has been an independence or impartiality violation is sufficient to cut off any further consideration of Article 6 arguments, even where those arguments relate to possible additional violations.⁶³² When combined with the Court's approach to remedies for independence and impartiality violations, this can mean that applicants who are successful on an independence or impartiality argument may receive a retrial, but not compensation, as a remedy for their Article 6 violation. On the other hand, if the Court conducts its analysis of the independence or impartiality violation in such a way that further Article 6 arguments *may* be considered, then the applicant may have an increased chance of obtaining damages or compensation. The way in which the Court frames its independence or impartiality analysis, therefore, may be crucial to the question of what damages – if any – the applicant will receive. We can see how this plays out by considering two examples.

⁶³¹ Which is not to say that an award is not possible for legal costs and expenses at the domestic level: see, eg, *Grievs v United Kingdom* (App 57067/00) (2004) 39 EHRR 2 at [94][98].

⁶³² See, eg, *Ergin v Turkey (No 6)* at [55][56]; *Funke v France* at [38][46]; *Kadubec v Slovakia* (App 27061/95) (2 September 1998) at [54][64]; *Genger v Turkey* at [53][65].

In *Sahiner*, the European Court first found a reasonable time violation.⁶³³ It then went on to find an independence and impartiality violation.⁶³⁴ On the point of remedies, the Court stated:

[51] The Court considers that the finding of a violation in respect of the trial by a tribunal which lacked independence and impartiality constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant. It reiterates that it can award reparation only in respect of its finding that there has been a violation of the Convention as regards the unreasonable length of the criminal proceedings and make its calculation accordingly.

[52] The Court considers that the applicant must have suffered a certain amount of distress, having regard to the total length of the proceedings against him. Deciding on an equitable basis, it awards him the sum of FRF 100,000.⁶³⁵

If the Court had analysed the independence and impartiality violation differently – if, for example, it had analysed that violation before analysing the reasonable time violation – then arguably under a ‘never fair’ approach there would have been no need even to *consider* the reasonable time violation.⁶³⁶ In such a circumstance there may also have been no award of damages.

In *Sadak*, the Court first found an independence and impartiality violation.⁶³⁷ It then went on to acknowledge that:

it has already held in previous cases that a court whose lack of independence and impartiality has been established cannot, in any circumstances, guarantee a fair trial to the persons subject to its jurisdiction and that, accordingly, it is unnecessary to examine the

⁶³³ *Sahiner v Turkey* at [30].

⁶³⁴ *Ibid.* at [47].

⁶³⁵ *Ibid.* at [51]–[52].

⁶³⁶ As in *Funke v France* at [38]–[46].

⁶³⁷ *Sadak and Ors v Turkey* at [40].

complaints regarding the fairness of the proceedings before that court.⁶³⁸

Nevertheless, in light of ‘the particular circumstances of the case,’ the Court continued to address the applicants’ other Article 6 arguments.⁶³⁹ The Court went on to find additional violations: a violation of Article 6(3)(a) and Article 6(3)(b) together with Article 6(1), and a violation of Article 6(3)(d) together with Article 6(1).⁶⁴⁰ Bafflingly, after making those findings the Court decided that it did not need to go any further and consider *other* Article 6 arguments.⁶⁴¹ Why it was necessary to go beyond the independence and impartiality guarantee was unclear to start with; why it was necessary to go only so far and no farther is entirely puzzling. In any event, the important thing is that the Court chose to frame its analysis in a way that allowed it to consider aspects of Article 6 other than simply the independence and impartiality guarantees. This, in turn, opened remedial doors that may not have been open if the Court had framed its analysis in the usual ‘never fair’ way. And, in turn, the Court said the following with respect to remedies:

Whilst it cannot speculate as to the outcome of the trial had the position been otherwise, it does not find it unreasonable to regard the applicants as having suffered a loss of real opportunities....To that must be added non-pecuniary damage, which the findings of violations in this judgment do not sufficiently remedy. Making its assessment on an equitable basis as required by Article 41, the Court awards USD 25,000

⁶³⁸ Ibid. at [41], cf Trechsel, 217.

⁶³⁹ The European Court indicated that such consideration was necessary because whether or not there had been a fair trial would affect the Court’s findings on Article 10, Article 11 and Article 14. This logic is questionable: by the Court’s own admission, the finding of an impartiality and independence violation should have answered the fair trial question decisively: cf *Sadak and Ors v Turkey* at [42].

⁶⁴⁰ Ibid. at [59], [68]. Perhaps unsurprisingly, the second of these violations was notionally based on the fairness of the proceedings as a whole, despite making no reference to the fact that the European Court had already found two violations of the right to a fair trial in these same proceedings: see, eg, [63].

⁶⁴¹ Ibid. at [69].

to each of the four applicants in respect of all heads of damage taken together.⁶⁴²

Thus as one of the ‘heads of damage,’ the independence and impartiality violation contributed towards the non-pecuniary damages awarded to the applicants. Had the analysis been framed in the usual way and had the Court adopted its usual approach to independence and impartiality violations, the applicants would not have received damages.

In these case studies, and in similar cases like *Salov* and *Nestak*,⁶⁴³ we see how the incoherence and inconsistency in the Court’s analysis plays out. The inconsistency has measurable impact in terms of the remedies awarded and capable of being awarded to applicants, and it risks creating the appearance that the European Court will craft its analytical framework on the basis of pragmatic awarding of damages rather than on the basis of principle.

E.4.5 The never fair jurisprudence sits awkwardly with the European Court’s other approaches to assessing violations and is internally inconsistent

In this section, therefore, we have shown how the European Court’s use of the ‘never fair’ analytical tool is flawed: it is inconsistent with other analytical tools used by the Court, and no explanation is ever offered for this incoherence. Moreover, it is internally inconsistent and applied in a way that lacks detailed or thoughtful explanation of how this analytical method is thought to work.

⁶⁴² Ibid. at [77].

⁶⁴³ *Salov v Ukraine* at [78]-[98], [122]; *Nestak v Slovakia* (App 65559/01) (27 February 2007) at [83], [91], [101], [102], [106].

There is no question that the Court *could* design and adopt a highly calibrated and nuanced analytical framework, in which it treated some violations as warranting a ‘never fair’ treatment and other violations as warranting a defect-curing or counterbalancing analysis, and offered reasoned explanation for the different approaches. Such a framework has not, however, been identified or articulated by the Court.

E.5 Assessing whether certain evidence was the ‘sole or decisive’ evidence against a defendant involves a particularly opaque form of semi-structured balancing

In this section, we consider a form of semi-structured balancing that the European Court frequently employs in cases concerning the admission and use of evidence. Substantive analysis of how the Court’s case law interacts with the domestic law of evidence is beyond the scope of this thesis.⁶⁴⁴ This section’s aim is more modest: it aims to chart a semi-structured balancing process used by the Court in assessing alleged violations of this sort. Principally, this section is concerned with how the Court approaches the situations where it is said that the fairness of a trial was compromised in some way by:

- evidence that was obtained in an unlawful way or a way that may not be consistent with the European Convention; and/or
- evidence that was admitted into evidence in an unlawful way or in circumstances that may not be consistent with the European Convention.

⁶⁴⁴ See, eg, in the UK context, Dennis, *The Law of Evidence*; Murphy; Tapper. See also Wallace; Bjorge; O’Brian; *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373 (UK Supreme Court); *Al-Khawaja and Tahery v United Kingdom* (Grand Chamber).

For the purposes of this section, we refer to these categories of evidence as ‘the two categories’. This section argues that the Court’s approaches to the two categories have varied considerably and that the result is an opaque semi-structured balancing process that raises a number of concerns in terms of coherence and predictability. Moreover, it argues that the decision in *Al-Khawaja and Tahery* has not resolved this incoherence or unpredictability.⁶⁴⁵

In many Article 6 criminal cases, an applicant alleges that he or she has been denied a fair trial because of the use of evidence from one of the two categories. For a long time, the European Court’s response involved an assessment of whether the applicant’s conviction was based *solely or to a decisive extent* on the evidence from the two categories. If it was, the Court reasoned in a string of cases, there would be a violation of the Article 6(1) fair hearing guarantee, or of one of the relevant specific Article 6 guarantees. Among the earliest cases to use this form of reasoning were the Court’s 1986 decision in *Unterpertinger* and its 1988 decision in *Schenk*.⁶⁴⁶ In *Schenk*, for example, the Court stated that it:

attaches weight to the fact that the recording of the telephone conversation was *not the only evidence on which the conviction was based*. The Rolle Criminal Court....carefully stated in several passages of its judgment that it relied on evidence other than the recording but which corroborated the reasons based on the recording for concluding that Mr. Schenk was guilty.⁶⁴⁷

⁶⁴⁵ In keeping with the scope of this thesis, no argument is made about possible political motivations for the European Court’s reasoning in *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)*. For a discussion of such arguments, see C Gearty, ‘Al-Khawaja and Tahery v United Kingdom’ *UK Constitutional Law Group Blog* (9 January 2012) <<http://ukconstitutionallaw.org/2012/01/09/conor-gearty-al-khawaja-and-tahery-v-united-kingdom/>>.

⁶⁴⁶ See *Unterpertinger v Austria* at [33]; *Schenk v Switzerland* at [48]. Searches did not reveal any earlier examples. See also O’Brian.

⁶⁴⁷ *Schenk v Switzerland* at [48] (emphasis added).

The European Court went on to conclude that, assessing the fairness of the proceedings as a whole, the use of the ‘two categories’ evidence in this case ‘did not deprive the applicant of a fair trial and therefore did not contravene’ Article 6(1).⁶⁴⁸ Perhaps the most often-quoted articulation of this approach came in *Van Mechelen*: ‘a conviction should not be based either solely or to a decisive extent on anonymous statements’.⁶⁴⁹ Versions of this approach were quoted and applied in a long string of cases.⁶⁵⁰ In effect, it appears to hold that fair trial concerns are raised when a conviction is based solely or to a decisive extent on evidence from the two categories. Until recently, the Court had provided little articulation of what it means by ‘solely or to a decisive extent,’ or of the rationale for such a rule.⁶⁵¹ While the decision in *Al-Khawaja and Tahery* recently provided some exploration of the rule,⁶⁵² we shall see that that decision did not resolve certain key ambiguities.

But the approach of the European Court in cases like *Schenk* and *Van Mechelen* is only part of the story. Indeed, in two significant ways, the Court has complicated the position.

⁶⁴⁸ *Ibid.* at [49]. See also [46].

⁶⁴⁹ *Van Mechelen and Ors v Netherlands* at [55]; see also [63]-[66]. *Van Mechelen* cited *Doorson v Netherlands* at [76].

⁶⁵⁰ For example, *Saidi v France* (App 14647/89) (1994) 17 EHRR 251 at [44]; *Bernard v France* at [40]-[41]; *AM v Italy* at [25]-[28]; *Luca v Italy* at [40]-[45]; *Solakov v FYROM* at [57]; *Visser v Netherlands* at [43]-[46]; *Hulki Gunes v Turkey* at [86], [96]; *Kollcaku v Italy* at [70]; *Panasenko v Portugal* at [57]-[58]; *Shabelnik v Ukraine* at [59].

⁶⁵¹ cf Summers, 139 et seq.

⁶⁵² *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [126]-[147].

First, the European Court has given a number of indications that a conviction *may*, in fact, be based solely or to a decisive extent on evidence from the two categories, provided that the evidence in question is particularly strong and reliable. Thus in *Khan* the Court stated:

The Court next notes that the contested material in the present case *was in effect the only evidence against the applicant* and that the applicant's plea of guilty was tendered only on the basis of the judge's ruling that the evidence should be admitted. However, the relevance of the existence of evidence other than the contested matter depends on the circumstances of the case. In the present circumstances, *where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker*. It is true that, in the case of *Schenk*, weight was attached by the Court to the fact that the tape recording at issue in that case was not the only evidence against the applicant. However, the Court notes in this regard that the recording in the *Schenk* case, although not the only evidence, was described by the Criminal Cassation Division of the Vaud Cantonal Court as having "a perhaps decisive influence, or at the least a not inconsiderable one, on the outcome of the criminal proceedings". Moreover, this element was not the determining factor in the Court's conclusion.⁶⁵³

The European Court went on to find that 'the secretly taped material did not conflict with the requirements of fairness guaranteed by' Article 6(1).⁶⁵⁴ Even leaving aside the Court's torturous attempt to dismiss *Schenk*,⁶⁵⁵ we can note that the reasoning used in

⁶⁵³ *Khan v United Kingdom* at [37]; Trechsel at [113].

⁶⁵⁴ *Khan v United Kingdom* at [40]; compare the Partly Concurring, Partly Dissenting Opinion of Judge Loucaides: 'This is the first case which comes before the Court where the only evidence against an accused in a criminal case which also led to his conviction was evidence secured in a manner contrary to the provisions of Article 8 of the Convention.'

⁶⁵⁵ There are two prongs to the *Khan* Court's attempt to dismiss *Schenk*. First, *Khan* argues that, regardless of what the *Schenk* judgment actually said, the case involved the use of a questionable piece of evidence where that evidence was the decisive basis for the conviction. *Khan*'s proof of this lies in the judgment of the Swiss domestic court ('perhaps decisive') in the *Schenk* case rather than the judgment of the European Court itself. In so doing, *Khan* ignores the text of the *Schenk* European Court judgment, which plainly states: 'It emerges clearly...that the criminal court took account of a combination of evidential elements before reaching its opinion': *Schenk v Switzerland* at [48]. This reasoning in *Khan* is clumsy at best. Second, *Khan* argues that the relevant discussion in *Schenk* 'was not the determining factor in the [*Schenk*] Court's conclusion'. Even if we accept that this is a legitimate interpretative tool for the *Khan* Court to deploy, it is not clear the *Schenk* judgment reflects *Khan*'s analysis on this point either: the relevant passage constituted fully *half* of the *Schenk* application of law to the facts, and was the last

Khan fundamentally undermines the rule articulated by *Van Mechelen* and outlined above. This undermining continued in cases citing *Khan*, such as *Allan*. By the time of *Allan*, decided two and a half years after *Khan*, the rule had become radically different to that outlined in *Van Mechelen*:

While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.⁶⁵⁶

This approach has created a group of cases that runs parallel to those identified above as citing the *Schenk-Van Mechelen* rule: the *Khan-Allan* rule is quoted and applied in *Jalloh*, *Galstyan*, *Yaremento*, *Satik (No 2)*, *Panovits*, *Bykov*, *Gafgen*, and *AS v Finland*.⁶⁵⁷ Over the last decade, therefore, the Court has been issuing decisions offering two very different versions of how best to analyse the fairness of a trial in which use has been made of evidence from the two categories. Of course, if the Court wants to have different rules for different types of evidence, or for different Article 6 rights, it may do so. But given that the two lines of cases sprang from the same roots, use extremely similar language, and attempt to solve similar problems, the interests of predictability and clarity demand that the Court explain why one rule is applicable to one class of case and the other rule is applicable to another class, and the logical reason why one of the two lines of case could not cover all situations. The current two-track approach risks the appearance that applicants, Governments, or the Court itself, might pick whichever line of cases best suits its view and reason backward from that.

thing discussed before the Court reached its conclusion: *Schenk v Switzerland* at [48]. The reasoning in this passage of *Khan* is disingenuous.

⁶⁵⁶ *Allan v United Kingdom* at [43], citing *Khan v United Kingdom* at [37].

⁶⁵⁷ *Jalloh v Germany* at [96]; *Galstyan v Armenia* (App 26986/03) (15 November 2007) at [77]; *Yaremenko v Ukraine* at [76]; *Satik v Turkey (No 2)* at [55]; *Panovits v Cyprus* at [82]; *Bykov v Russia* at [90]; *Gafgen v Germany (Grand Chamber)* at [164]; *A.S. v Finland* (App 40156/07) (28 September 2010) at [52].

Regrettably, whatever else it may have resolved, the decision in *Al-Khawaja and Tahery* did little to resolve this uncertainty. The key conclusion of *Al-Khawaja and Tahery* relevant to this point was:

that, where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6(1). At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny.....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.⁶⁵⁸

In short, this approach seems like a watered-down version of the *Schenk-Van Mechelen* rule, albeit a version in tension with the oft-cited passage from *Van Mechelen* excerpted above. Frustratingly, the *Al-Khawaja and Tahery* Court does not refer to, or acknowledge the existence of, the *Khan-Allan* rule. Even if the *Al-Khawaja and Tahery* approach could be seen as the adoption of a compromise path between the *Schenk-Van Mechelen* rule and the *Khan-Allan* rule, the *Al-Khawaja and Tahery* Court risks generating uncertainty by neglecting to acknowledge or discuss these cases in any depth. We are thus left with uncertainty as to whether *Al-Khawaja and Tahery* was an attempt to reconcile the rules, or acts as a third class of rule to operate alongside the earlier rules.

Second, in a thematically related line of argument, the European Court has complicated the position with respect to the silence and self-incrimination guarantees. This issue arises on the basis that the Court regards the silence and self-incrimination

⁶⁵⁸ *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [147].

guarantees as non-absolute. The formulation reached in *John Murray*, and adopted in subsequent decisions, is two-fold. First, it states that:

On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself.⁶⁵⁹

Having outlined a circumstance in which silence may *not* be used against an accused, the Court then went on to outline a situation in which silence *could* be used:

...On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.⁶⁶⁰

Two points should be made here. First, this dichotomy of 'two extremes'⁶⁶¹ is a false dichotomy. The Court's framework does not contemplate the possibility that the accused might wish to remain silent in a situation which 'clearly call[s] for an explanation' *and* where taking that silence into account in assessing the prosecution evidence might be crucial to a the conviction of the accused. What should domestic courts do in a situation where the accused's conduct 'clearly call[s] for an explanation', but where there is little or no other evidence against the accused? Outlining the framework in this way does not provide the boundaries of the guarantees; it merely renders those guarantees more opaque. Second, it should not go unnoticed that the Court's reasoning in this passage is based on what is 'obvious'. No further explanation is offered. The interests of predictability require more than this sort of simple assertion:

⁶⁵⁹ *John Murray v United Kingdom* at [47]. See also Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 261-262; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 594; Trechsel, 345-346, 356-368; Ashworth, 'Self-Incrimination in European Human Rights Law - A Pregnant Pragmatism?', 753-755.

⁶⁶⁰ *John Murray v United Kingdom* at [47]. Ashworth discusses this passage, for different purposes: Ashworth, 'Self-Incrimination in European Human Rights Law - A Pregnant Pragmatism?', 755.

⁶⁶¹ *John Murray v United Kingdom* at [47].

as Alexy put it in a different context, relying on what is ‘obvious’ risks degenerating into ‘rationally uncontrollable’ answers and ‘intuitionism’.⁶⁶² Moreover, there must be considerable doubt as to whether it is in any way ‘obvious’ that the right to silence or the privilege against self-incrimination mean that accused persons should sometimes be required to speak. Apart from anything else, this doubt is reflected in the uncertainty in the Court’s own case law as to whether or not the silence and self-incrimination guarantees are absolute.⁶⁶³

Notwithstanding these flaws, the *John Murray* passage has been ‘recalled’ in cases such as *O’Halloran and Francis*, *Condrón*, and *Al-Khawaja and Tahery*.⁶⁶⁴ Importantly, the ‘on the other hand’ principle outlined in this passage opens the door to a balancing exercise in which the nature of the evidence is weighed against the strength of the case against the applicant. The structure of that balancing exercise goes undefined, other than to say that it should be ‘determined in light of all the circumstances of the case’.⁶⁶⁵ To the extent that *Al-Khawaja and Tahery* elaborated upon such a balancing exercise, it was simply to state that it would ‘weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice’.⁶⁶⁶

⁶⁶² Alexy, 73.

⁶⁶³ cf *Saunders v United Kingdom* at [68]-[69], [74] and *John Murray v United Kingdom* at [46]-[47].

⁶⁶⁴ *O’Halloran and Francis v United Kingdom* at [46]; *Condrón v United Kingdom* at [56]; *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [138].

⁶⁶⁵ A formulation perilously close to the ‘proceedings as a whole’ formulation that is addressed in Part E.2.

⁶⁶⁶ *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [146].

The European Court's use of balancing in the context of the silence and self-incrimination guarantees is also evident in its statements that the guarantees did not prevent people from being asked a question where the answer to that question was 'a simple fact...which is not in itself incriminating.' This suggestion, outlined in cases including *Weh*, *Rieg*, *O'Halloran*, has been criticised by Ashworth as 'unsatisfactory'.⁶⁶⁷ Moreover, simply put, such an approach is inconsistent with the Court's rhetoric on the silence and self-incrimination guarantees. It is difficult to reconcile the notion that simple questions can be asked in order to assist the prosecution with the rhetoric used by the Court:

[39]...The right not to incriminate oneself in particular presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right in question is closely linked to the presumption of innocence contained in [Article 6(2)]...

[40] The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent..⁶⁶⁸

In allowing the use of 'simple facts', the Court plainly and unashamedly assists the 'prosecution in a criminal case' to 'prove their case against the accused' with 'resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused'. It involves *not* respecting the accused's will to remain silent. This is strikingly incoherent and inconsistent. A broadly similar narrowing of the guarantees' protection was evident in *Grayson and Barnham*:

[49] ...it was not unreasonable to expect the applicants to explain what had happened to all the money shown by the prosecution to have been in their possession....Such matters fell within the applicants' particular

⁶⁶⁷ Ashworth, 'Self-Incrimination in European Human Rights Law - A Pregnant Pragmatism?', 771. See *Weh v Austria* at [54]; *Weh v Austria* at [54]; *Rieg v Austria* at [31].

⁶⁶⁸ *Weh v Austria* at [39]-[40].

knowledge and the burden on each of them would not have been difficult to meet if their accounts of their financial affairs had been true.

[50] There has, therefore, been no violation of [Article 6(1)]...⁶⁶⁹

By ‘expect[ing] the applicants to explain’ and effectively compelling them to provide ‘matters...within the applicants’ particular knowledge’, the Court facilitates precisely that which it purports to prevent: the prosecution being able to compel or require an accused person to aid their own prosecution. This inconsistency and incoherence is troubling. The Court should either adopt less dramatic rhetoric about the importance of the silence and self-incrimination guarantees, and explain how a more limited guarantee is in keeping with Article 6; or it should adopt an approach to Article 6 that practices what it preaches. As it stands, an unexplained and unprincipled balancing process undermines the coherence of the Court’s case law.

This section has, therefore, identified two ways in which the European Court has complicated its case law in this area. Even if we disregard concerns over consistency and coherence, we cannot disregard the unstructured and largely unexplained balancing processes on which the two approaches rest. The *Khan-Allan* case law, with its unelaborated and unquantifiable references to evidence being ‘stronger’ and the need for other evidence being ‘weaker’, provides very little guidance to those who seek to be guided by the Court’s case law.

⁶⁶⁹ *Grayson and Barnham v United Kingdom* at [49]-[50] (emphasis added).

E.6 The European Court is inconsistent in approaching the extent to which the public interest may justify a restriction on Article 6

So far in this Part, we have looked at unstructured and semi-structured methods with which the European Court has sought to analyse alleged violations of Article 6. We have demonstrated inconsistency between those methods and within those methods. In this section we look at the extent to which the Court has regarded the public interest as capable of justifying restrictions on Article 6 rights. The role of the public interest in these cases is used to explore the Court's attempts to conduct structured balancing or proportionality analysis in Article 6 cases. Of course, balancing and proportionality can be deployed in other contexts too – and this section touches on one such context – but it is analysis of public interest balancing that provides particularly useful insights into the Court's case law.⁶⁷⁰ As Stumer put it in another context, we are concerned here with 'attempts to limit Article 6 rights by reference to the community interest.'⁶⁷¹

Thus in this section we examine the instances in which the European Court has directly or indirectly utilised proportionality as an analytical tool in Article 6 cases. It is worth explaining what we mean here by 'proportionality'. There are various competing definitions for proportionality as an analytical tool, and considerable scholarly discussion in the literature about when proportionality should be used and how any proportionality inquiry should be structured.⁶⁷² Thinking about

⁶⁷⁰ See Part E.6.2 for the other context.

⁶⁷¹ Stumer, 110.

⁶⁷² See, eg, Rivers; Alexy; Greer, *The European Convention on Human Rights: achievements, problems and prospects*; T Hickman, 'Proportionality: Comparative Law Lessons' [2007] *Judicial Review* 31; A Mowbray, 'A study of the principle of fair balance in the jurisprudence of the ECtHR' (2010) 10 *Human Rights Law Review* 289; J McBride, 'Proportionality and the European Convention on Human Rights' in E Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford 1999); L Lazarus, B Goold and G

proportionality generally, the literature identifies differences between, for example, ‘rigorously applied’ heavily-structured proportionality analysis on the one hand, and more opaque ‘broad brush’ balancing.⁶⁷³ In the Article 6 context, however, the boundaries between these different forms are more slippery.⁶⁷⁴ Indeed, as we have seen, the central puzzle of Article 6 is how to resolve alleged violations of Article 6 and, as part of that puzzle, there is uncertainty about the appropriateness of using proportionality or balancing *at all* in the Article 6 context. As such, when we refer to proportionality or balancing in this section we are using those terms as shorthand for the idea expressed by Stumer above, rather than to any particular technical meaning.

Thus, the goal of this section is to identify elements of reasoning in Article 6 cases that involve attempts to limit Article 6 rights by reference to the community interest: cases that explicitly or implicitly reflect reasoning found in proportionality analysis. When we refer to ‘explicitly’ reflecting proportionality reasoning, we mean cases in which the parties or the Court have directly assessed an application at least partially by using proportionality. When we refer to implicitly reflecting proportionality, we refer to cases in which the Court uses forms of argument and analysis commonly used in proportionality analysis: for example, this section reviews many cases in which the Court assesses to what extent pressing societal needs and

Swiney, *Public Protection, Proportionality, and the Search for Balance* (Ministry of Justice Research Series 10/07, London 2007); ET Sullivan and RS Frase, *Proportionality Principles in American Law* (OUP, Oxford 2008); Christoffersen, 33-35, 69-76; J Waldron, ‘Security and Liberty: The Image of Balance’ (2003) [11] 2 *Journal of Political Philosophy* 191.

⁶⁷³ Lazarus, Goold and Swiney, *Public Protection, Proportionality, and the Search for Balance*, 1-2.

⁶⁷⁴ *Ibid.*, 29-34.

problems are relevant when it assesses whether a particular restriction on Article 6 rights is justifiable.

Some authors appear to unquestioningly apply proportionality in the Article 6 context,⁶⁷⁵ but, as we will see in this section, the picture is much more complex. Indeed, this Part demonstrates that, in many cases, the European Court is firmly against the use of public interest arguments in any sort of proportionality or balancing analysis. It then contrasts those cases with a series of cases in which the Court has been willing to ‘balance away’ Article 6 rights as part of a proportionality-style analysis. This Part then turns to a series of cases in which the Court performs public interest balancing but places constraints and limits on its applicability, before turning to a series of cases in which those limits are undermined or disregarded. In this section, as in previous sections in this Part, we argue that the use of these techniques to assess potential violations of Article 6 has been inconsistent, but also internally incoherent. Our argument is that these cases reflect an uncertain and poorly explained approach to the question of whether public interest concerns, filtered through a proportionality or balancing framework, are relevant in assessing Article 6 violations. More broadly, in making these arguments, this section also advances our two macro-arguments of internal incoherence and inconsistency with other analytical tools.

⁶⁷⁵ van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 573.

E.6.1 In many cases the European Court is firmly against the use of public interest arguments

There are many cases in which the European Court has rejected the use of public interest balancing arguments in assessing Article 6 violations. In these cases, the Court has resisted Government arguments that restrictions on Article 6 could be justified in the name of some broader societal policy interest through the use of some sort of proportionality-style analysis.⁶⁷⁶

In *Kostovski v Netherlands*, for example, the Dutch Government argued ‘that case-law and practice in the Netherlands in the matter of anonymous evidence stemmed from an increase in the intimidation of witnesses and were based on a balancing of the interests of society, the accused and the witnesses’.⁶⁷⁷ The Court stated that it did not

underestimate the importance of the struggle against organised crime. Yet the Government’s line of argument, whilst not without force, is not decisive. Although the growth in organised crime doubtless demands the introduction of appropriate measures, the Government’s submissions appear to the Court to lay insufficient weight on what the applicant’s counsel described as “the interest of everybody in a civilised society in a controllable and fair judicial procedure”. The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency.⁶⁷⁸

As such, the European Court rejected Dutch attempts to diminish the applicant’s rights in the name of the public interest, and found a violation of Article 6(3)(d) taken

⁶⁷⁶ See Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 248; Ashworth, *Human rights, serious crime and criminal procedure*, 69.

⁶⁷⁷ *Kostovski v Netherlands* at [44]. See Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 252.

⁶⁷⁸ *Kostovski v Netherlands* at [44], citing *Ciulla v Italy* (App 16839/90) (1991) 13 EHRR 346 at [41]. In *Ciulla*, the European Court rejected the use of public interest arguments on the basis of its past rulings that ‘the exhaustive list of permissible exceptions in [Article 5(1)] must be interpreted strictly’.

together with Article 6(1). It may be noted, however, that the *Kostovski* Court characterised the Government's argument as being 'not without force.'

Then, in *Funke v France*, the European Court rejected the notion that the 'special features of customs law' could justify a measure placing restrictions on Article 6 guarantees.⁶⁷⁹ Thus the *Funke* Court indicated that infringement of the silence and self-incrimination guarantees could not be justified by the public interest in maintaining a customs law regime. It is worth noting, however, the reasoning of the Commission in the same case. The Commission, by a majority of seven to five, had concluded there was *no* violation of Article 6: the Commission could not 'choose to ignore the special character of inquiries of an economic and financial nature,' especially given the authorities' 'aim of protecting the country's vital economic interests'.⁶⁸⁰ The Commission described the Convention system as characterised by 'an inherent balance between the legitimate interests of the community, on the one hand, and the individual rights it protects on the other'.⁶⁸¹ Its reasoning, ultimately rejected by the European Court, thus represented rather a different vision of Article 6.

Similar issues were raised in *Saidi v France*. The applicant argued that he had been denied a fair trial because he had been unable to confront witnesses who had given evidence against him. Their evidence had been the sole evidence against the

⁶⁷⁹ *Funke v France* at [44].

⁶⁸⁰ *Ibid.* at [35] of the European Court's judgment, quoting [63][64] of the Commission's decision (emphasis added).

⁶⁸¹ *Ibid.* at [35] of the European Court's judgment, quoting [63][64] of the Commission's decision (emphasis added).

applicant. In finding a violation of Article 6(1) and Article 6(3)(d), the Court stated that it was:

fully aware of the undeniable difficulties of the fight against drug trafficking – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by the drug problem, but such considerations cannot justify restricting to this extent the rights of the defence of “everyone charged with a criminal offence”.⁶⁸²

Notably, while the *Saidi* Court rejects reasoning on the basis of broader societal interests, its language– ‘cannot justify restricting to this extent’ – suggests that there is at least a possibility that considerations of the difficulties of the fight against drug trafficking may justify restricting the rights of the defence to a lesser extent. A firm statement rejecting Government arguments along these lines came in *Saunders v United Kingdom*, where the Court stated that it did not:

accept the Government's argument that the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure...from one of the basic principles of a fair procedure....the general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex.⁶⁸³

This passage is a clear statement that the assessment of the public interest, and the nature of the particular crime, will have no impact on the extent of Article 6 guarantees.

A similar rejection of these sorts of public interest arguments came in *Teixeira de Castro v Portugal*, where the European Court rejected an argument that evidence obtained as a result of police incitement could be justified by the public interest:

⁶⁸² *Saidi v France* at [44].

⁶⁸³ *Saunders v United Kingdom* at [74]. See Lord Hoffman, (at [27][29]; Trechsel, 342 et seq; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 593.

The use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement.⁶⁸⁴

The Court has referred to this passage in subsequent cases, such as in *Edwards and Lewis v United Kingdom*.⁶⁸⁵

Further, the European Court has repeatedly indicated that concerns over national security or terrorism are incapable of justifying restrictions of Article 6. In *Hulki Gunes v Turkey*, for example, the Court stated that it was:

fully aware of the undeniable difficulties of combating terrorism – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by this problem, but considers that *such factors cannot justify* restricting to this extent the rights of the defence of any person charged with a criminal offence.⁶⁸⁶

The *Hulki Gunes* Court found a violation of Article 6(1) and Article 6(3)(d). Similarly, in *Heaney and McGuinness v Ireland* and *Shannon v United Kingdom*, the European Court was unwilling to accept the notion that the security context justified a restriction on the Article 6 silence and self-incrimination guarantees. It stated in *Shannon* that

The Court recalls that in *Heaney and McGuinness* it found that the security context of the relevant provision in that case could not justify a provision which “extinguishes the very essence of the ... right to silence and ... right not to incriminate [oneself]”....The security context – the special problems of investigating crime in Northern Ireland – cannot

⁶⁸⁴ *Teixeira de Castro v Portugal* at [36].

⁶⁸⁵ *Edwards and Lewis v United Kingdom* at [49].

⁶⁸⁶ *Hulki Gunes v Turkey* at [96]. Compare *Saidi v France* at [44].

justify the application of the 1996 Order in the present case any more than could that in *Heaney and McGuinness*.⁶⁸⁷

The *Shannon* Court found a violation of Article 6(1). It should be noted that in these cases, the Court indicated that national security efforts could not justify restrictions ‘to this extent’⁶⁸⁸ and that national security efforts could not justify restrictions extinguishing ‘the very essence’ of the right.⁶⁸⁹ We will return to the effect of these qualifications later in this section.

This general approach extends to the most serious crimes. In *Papon v France*, the applicant had been convicted of ‘offences that constituted crimes against humanity’; he argued that the French Code of Criminal Procedure had the effect of interfering with his right of access to a court under Article 6.⁶⁹⁰ The Court stated once again that any limitation of the right to a court must not impair ‘the very essence of the right’ and that there must be ‘a reasonable relationship of proportionality’ between the measure and a legitimate aim (to which we shall return below).⁶⁹¹ And yet the Court rejected an argument based on the proportionality of the measure relative to the seriousness of the offence:

As to the Government's argument based on the extreme seriousness of the offences of which the applicant stood accused, the Court does not overlook the fact. However, the fact that the applicant was prosecuted for and convicted of aiding and abetting crimes against humanity does

⁶⁸⁷ *Shannon v United Kingdom* at [38]. See also *Heaney and McGuinness v Ireland* at [56]-[58].

⁶⁸⁸ *Hulki Gunes v Turkey* at [96].

⁶⁸⁹ *Shannon v United Kingdom* at [38].

⁶⁹⁰ *Papon v France* (App 54210/00) (2004) 39 EHRR 10 at [71], [84].

⁶⁹¹ *Ibid.* at [90].

not deprive him of the guarantee of his rights and freedoms under the Convention.⁶⁹²

If the seriousness of the offence was not relevant to assessing the proportionality of a restriction when the offences were *crimes against humanity*, then the *Papon* Court is making a firm statement about its reluctance to take into account public interest considerations. Such a statement is, perhaps, of particular significance in an age when many governments might find such public interest arguments attractive.⁶⁹³

In its decision in *Ramanauskas*, regarded as ‘the leading authority on entrapment,’⁶⁹⁴ the Court included this emphatic passage:

While the rise in organised crime requires that appropriate measures be taken, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. *The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience.* Furthermore, while the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, *the public interest cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset.*⁶⁹⁵

Thus the Court again adopted a robust view of the extent to which public interest considerations are relevant to determining the level of protection afforded by Article 6.

In this section, therefore, we have seen a significant number of cases in which the European Court refuses to allow the public interest to be used as a justification for

⁶⁹² Ibid. at [98] citing *Koch v Germany (Commission)* (App 1270/61) (8 March 1962).

⁶⁹³ See, for analysis of such trends, eg, Waldron; Gearty, *Civil Liberties*, 30-58.

⁶⁹⁴ Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, 264-265.

⁶⁹⁵ *Ramanauskas v Lithuania* at [53]-[54] (emphasis added).

restrictions on Article 6 rights.⁶⁹⁶ In attempting to solve the puzzle created by Article 6's lack of an express meta-principle for analysing infringements, these cases provide a clear and emphatic statement: the public interest cannot justify Article 6 restrictions. If applied consistently, such a statement would have significant ramifications for any sort of structured balancing or proportionality analysis in the Article 6 context. But, as we will see in subsequent sections of this Part, the statement has not been applied consistently.

E.6.2 The European Court's case law allowing balancing of rights in cases involving vulnerable witnesses is poorly explained

In general, this Part's analysis of proportionality and balancing focuses on what we may call public interest balancing. Public interest balancing provides useful insights into how the European Court views Article 6, and examples of various trends with respect to public interest balancing are common in the case law. In this sub-section, however, we consider several examples of balancing in which the 'other factor' being balanced is something other than the public interest. Examples of this sort have also been considered elsewhere in the thesis.⁶⁹⁷

Here, we consider cases involving vulnerable witnesses, victims, or complainants. In those situations, the European Court has been willing to accept that the witnesses' interest in being protected may justify restrictions on applicants'

⁶⁹⁶ Further recent examples include: *Hanzevacki v Croatia* at [23]; *Aleksandr Zaichenko v Russia* at [39]; *Bannikova v Russia* (App 18757/06) (4 November 2010) at [33][35].

⁶⁹⁷ Part B.6, eg, considered the poorly explained relationship between Article 6 and Article 3.

Article 6 rights. In some cases, such as *Doorson*, this balancing is explained as being a balancing of the witnesses' Article 8 rights against the applicant's Article 6 rights:

It is true that 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, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention....Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.⁶⁹⁸

The *Doorson* Court did not provide further explanation for this approach to Article 6, nor did it explain whether Article 8 factors were the only ones against which the applicant's rights could be balanced (for example, could the public interest in protecting Article 10 rights be balanced against Article 6 rights?). More broadly, the *Doorson* judgment reflects a view that specific Article 6 rights should be interpreted in accordance with other Convention rights.

A number of cases have drawn on the logic in *Doorson* as a way of justifying restrictions on Article 6 in the name of particular individuals' interests. In *SN v Sweden*, for example, the applicant had been convicted of sexual abuse of a child. The European Court considered the extent to which the interest in protecting the complainant might affect the applicant's defence rights:

The Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence...⁶⁹⁹

⁶⁹⁸ *Doorson v Netherlands* at [70].

⁶⁹⁹ *SN v Sweden* at [47], citing *Baegen v Netherlands (Commission)* (App 16696/90) (20 October 1994) at [77]. See also Brems, 'Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights' 319.

Unlike in *Doorson*, in *SN* the Court gives no indication that its balancing approach is linked to the need to protect other Convention rights. Its emphasis is simply on ‘protecting the victim’ rather than, for example, Article 8 rights. This thesis makes no argument that complainants in sexual offences cases are not in need of special consideration; the argument is simply that there is a lack of clarity in the European Court’s approach to balancing the applicant’s Article 6 rights with the complainant’s. More specifically, in the absence of fuller explanation, these cases risk creating inconsistency with those cases in the previous section: the special features of sexual offences cases justified restrictions on an Article 6 guarantee in *SN*, even though the special features of terrorism, customs, and fraud cases did not. It may be noted that the *SN v Sweden* formulation has been subsequently cited or repeated in cases such as *Bocos-Cuesta v Netherlands*, *WS v Poland*, *Kovac v Croatia*, and *Demski v Poland*.⁷⁰⁰

A similar approach was taken in *Krasniki v Czech Republic*, where the applicant ‘complained that his conviction had been based exclusively on anonymous witness testimony’ and that he had been ‘denied the opportunity either to see the anonymous witnesses during their testimonies or to learn their identities’.⁷⁰¹ In this case the witnesses, who were involved in the drug world, were said to be fearful of reprisals. The *Krasniki* Court framed the relevant test as being, at least in part, whether ‘the interest of the witnesses in remaining anonymous could justify limiting the rights of the

⁷⁰⁰ *Bocos-Cuesta v Netherlands* (App 54789/00) (10 November 2005) at [64][74] (no violation found); *WS v Poland* (App 21508/02) (19 June 2007) at [53][64] (violation found); *Kovac v Croatia* (App 503/05) (12 July 2007) at [27][33] (violation found); *Demski v Poland* (App 22695/03) (4 November 2008) at [34][47] (violation found).

⁷⁰¹ *Krasniki v Czech Republic* at [51].

applicant to such an extent'.⁷⁰² On the established facts in this case, however, the Court was not satisfied that the witness' interests justified limiting the rights of the applicant in this way.⁷⁰³ Nevertheless, the *Krasniki* Court demonstrated a willingness to countenance balancing arguments.

The cases we have considered up to this point involved vulnerable witnesses or complainants in sexual offence cases. The balancing approaches considered in these cases are arguably in tension with the cases considered in the previous section, in which the European Court stressed the prominent place that Article 6 rights held in a democratic society, and in which the Court warned against balancing away Article 6 rights.⁷⁰⁴ One could, however, accept that cases involving the interests of particular individuals – such as witnesses or complainants – should normatively be considered differently to cases involving a broader public interest. One could argue that sexual offences, in particular, warrant special treatment. Clarity, however, demands that the European Court more fully articulate the rationale for this form of balancing and state it more clearly with respect to its more general balancing case law. The applicability of this form of balancing to cases other than vulnerable witness cases remains unclear. This is especially so in light of poorly explained statements like this one from *Al-Khawaja and Tahery*, in which the Grand Chamber explains that its 'traditional' method of consider the proceedings as a whole is:

⁷⁰² Ibid. at [83].

⁷⁰³ Ibid. at [83].

⁷⁰⁴ For example, *Ramanauskas v Lithuania* at [53][54].

to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.⁷⁰⁵

In the remainder of this section, we return our focus to how the Court deploys balancing and proportionate analysis in the context of public interest balancing.

E.6.3 In other cases the European Court allows the use of public interest arguments

In a number of Article 6 cases, the European Court has been explicitly willing to consider public interest arguments. When contrasted with the cases in previous sections, the cases in this section create the appearance of inconsistency and incoherence in the European Court's case law. Even leaving aside the vulnerable witness and sexual offence cases, there are other classes of case in which the European Court has demonstrated a willingness to balance a public interest with the rights of an applicant. From the first decade of this century, we can point to five cases as examples of this willingness: *Janosevic v Sweden*, *Jussila v Finland*, *Marcello Viola v Italy*, *Jalloh v Germany* and *Heglas v Czech Republic*.⁷⁰⁶

The first example is provided by *Janosevic v Sweden*. *Janosevic* sought to interpret the Court's oft-cited statement in *Salabiaku* that Article 6(2) requires presumptions of fact or law to be confined 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.⁷⁰⁷ The *Salabiaku* Court had not made it expressly plain what it meant by 'the importance of what is at

⁷⁰⁵ *Al-Khawaja and Tahery v United Kingdom (Grand Chamber)* at [146].

⁷⁰⁶ Stumer has argued that it is only in the context of Article 6(2) rights that the European Court has allowed 'attempts to limit Article 6 rights by reference to the community interest': Stumer, 110. In this and the following sections it is argued that there are also examples from elsewhere in Article 6.

⁷⁰⁷ *Salabiaku v France* at [28]. On *Salabiaku* presumptions, see, eg, Stumer, 98-102.

stake,' but a string of subsequent cases indicate that the Court generally regarded the phrase as meaning what is at stake *for the applicant*.⁷⁰⁸ In cases such as *Janosevic*, however, the Court uses 'what is at stake' as a way to introduce public interest considerations when assessing a potential infringement of Article 6 rights.⁷⁰⁹ The *Janosevic* Court purported to apply *Salabiaku*, and summarised its effect in this way:

Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim sought to be achieved.⁷¹⁰

For the *Janosevic* Court, therefore, the logical implication is that the 'what is at stake' element does not assess what was at stake *for the applicant* but what is at stake *for broader society*. Indeed, the Court was clearly willing to countenance a balancing exercise, outlining the interest of the state in organising an effective system of taxation:

The Court also has regard to the financial interests of the State in tax matters, taxes being the State's main source of income. A system of taxation principally based on information supplied by the taxpayer would not function properly without some form of sanction against the provision of incorrect or incomplete information, and the large number of tax returns that are processed annually coupled with the interest in ensuring a foreseeable and uniform application of such sanctions undoubtedly require that they be imposed according to standardised rules.

In view of what has been stated above, in particular the fact that the relevant rules on tax surcharges provide certain means of defence based on subjective elements and that an efficient system of taxation is

⁷⁰⁸ While the European Court does not always identify what is in fact at stake when it cites the *Salabiaku* test, we can refer, eg, to *Pham Hoang v France* at [32]-[33] (seriousness of potential sentence); *Phillips v United Kingdom* (App 41087/98) 11 BHRC 280 at [42]-[47] (seriousness of a fine compared to a conviction); *Helmers v Sweden* at [38] (professional reputation and career at stake); *Matyjek v Poland* at [59] (applicant's 'good name' and political career at stake); *Portington v Greece* (App 28523/95) (23 September 1998) at [21], [34], [125] (death sentence); *Rasmussen v Poland* at [39] (applicant's 'good name' and 'her special status as a retired judge'); *Shilbergs v Russia* (App 20075/03) (17 December 2009) at [122] (lengthy sentence). See van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 608-609.

⁷⁰⁹ On this point, see Stumer, 108.

⁷¹⁰ *Janosevic v Sweden* at [101].

important to the State's financial interests, the Court considers that the presumptions applied in Swedish law with regard to surcharges are confined within reasonable limits...⁷¹¹

Having considered these public interest arguments, the Court ultimately found that there had been no violation in this case. Similar public interest reasoning via the 'what is at stake' route was deployed in *Vastberga Taxi AB* and *Radio France*.⁷¹² In this way, 'what is at stake' provided the Trojan horse for community interest balancing. This reasoning creates a degree of confusion and incoherence when contrasted with the general trend of the Court's 'what is at stake' jurisprudence. But most importantly for present purposes, this sort of reasoning sits inconsistently with the cases considered in Part E.6.1.

In *Jussila*, the Court outlined an approach that allowed it to afford greater Article 6 protection to more serious criminal offences and lesser protection to less serious offences. In summarising a number of civil cases in which the Court had held that the obligation to hold a hearing 'is not absolute', the *Jussila* Court then focused its argument on the notion that oral hearings could be dispensed with in the name of 'efficiency and economy' in civil hearings.⁷¹³ There was no rule, it held, that an oral hearing could be dispensed with 'only in rare cases'.⁷¹⁴ Having framed its approach based on civil cases, the *Jussila* Court then turned its attention to criminal cases:

While it may be noted that...the requirements of a fair hearing are the most strict in the sphere of criminal law, the Court would not exclude

⁷¹¹ *Ibid.* at [103][104].

⁷¹² *Vastberga Taxi AB and Vulic v Sweden* (App 36985/97) (23 July 2002) at [113][122] (see Stumer, 108); *Radio France and Ors v France* at [24].

⁷¹³ *Jussila v Finland* at [41][42].

⁷¹⁴ *Ibid.* at [42].

that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, *it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly “criminal charges” of differing weight.* What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a “criminal charge” by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law....Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency...⁷¹⁵

In this extraordinary passage, the Court notes that its own ‘autonomous interpretation’ case law has led to ‘criminal charge’ being construed broadly. It then determinedly undermines the long line of *Engel* case law by indicating that a reduced level of protection will be afforded to some less weighty criminal proceedings. In linking a reduced level of protection in criminal proceedings to broader considerations of seriousness, efficiency, and economy, the Court adopted a form of reasoning radically different from that in Part E.6.1. Judge Loucaides noted this departure in a strident dissent:

This is the first time the Court has found that an oral hearing may not be required in a criminal case. The Court previously found that the obligation to hold such a hearing was not absolute in respect of certain civil proceedings. Without entering into the question whether the approach regarding civil proceedings was justified or not by the terms of Article 6, I must, from the outset, stress the point that there is a great difference between civil proceedings and criminal proceedings in many respects affecting the requirement of an oral hearing.⁷¹⁶

⁷¹⁵ Ibid. at [43] e!, citing, inter alia, *Bendenoun v France* (App 12547/86) (1994) 18 EHRR 54 and *Janosevic v Sweden*.

⁷¹⁶ *Jussila v Finland* at [O-II 2].

The *Jussila* majority's willingness to adjust levels of Article 6 protection in response to public interest considerations is evident in a number of other cases.⁷¹⁷

Indeed, in our third example, *Marcello Viola v Italy*, the Court concluded that the public interest in fighting the organised crime 'scourge' might justify restrictions on Article 6 rights:

At the same time it should be pointed out that the applicant was accused of serious crimes related to the Mafia's activities. The fight against that scourge may, in certain cases, require the adoption of measures intended to protect, in particular, public safety and order and to prevent other criminal offences....

In the light of the foregoing, the Court considers that the applicant's participation in the appeal hearings by videoconference pursued legitimate aims under the Convention, namely, prevention of disorder, prevention of crime, protection of witnesses and victims of offences in respect of their rights to life, freedom and security, and compliance with the "reasonable time" requirement in judicial proceedings. It remains to be considered whether the arrangements for the conduct of the proceedings respected the rights of the defence....

That being so, the Court finds that the applicant's participation by videoconference in the appeal hearings during the second set of criminal proceedings did not put the defence at a substantial disadvantage as compared with the other parties to the proceedings, and that the applicant had an opportunity to exercise the rights and entitlements inherent in the concept of a fair trial, as enshrined in Article 6.

It follows that there has been no violation of Article 6 of the Convention.⁷¹⁸

Thus in this passage the European Court has indicated that the special characteristics of the mafia may justify measures restricting the rights of a defendant where those

⁷¹⁷ See, for further expansion of this approach in the criminal context, *Kammerer v Austria* (App 32435/06) (12 May 2010) at [26][31].

⁷¹⁸ *Marcello Viola v Italy* at [71][77]. In the course of its analysis the European Court relied on two Article 5 decisions in which concessions had been made in light of a mafia context: *Pantano v Italy* (App 60851/00) (6 November 2003) at [69] and *Contrada v Italy* (App 27143/95) (24 August 1998) at [67]; the *Marcello Viola* Court did not note that these were Article 5 decisions. 'Pentiti' refers to informant witnesses: *Marcello Viola v Italy* at [11].

measures pursue ‘legitimate aims’ and where the arrangements ‘respected the rights of the defence’. This latter qualification adds some uncertainty to the Court’s reasoning: if ‘the rights of the defence’ is simply synonymous with Article 6 rights, is the Court effectively simply saying that a measure will violate Article 6 rights if it violates Article 6? If so, perhaps it is similar to those counterbalancing cases in which the Court provides a circumlocution masking a simpler question. But more generally, this is an instance of the Court plainly accepting restrictions on Article 6 rights in the name of the public interest, and doing so with a formulation – ‘legitimate aims’ – that reflects a proportionality analysis.

In *Jalloh*, the European Court made several statements about the role that ‘public interest’ considerations can play in assessing Article 6 infringements. At this point, we simply note one such statement:

In order to determine whether the applicant’s right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; *the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.*⁷¹⁹

But *Jalloh* and other related cases also made statements about the relationship between public interest arguments and the ‘very essence’ of Article 6 rights, and we will turn to those statements in a moment.

Our penultimate example is *Heglas*, in which the European Court considered the extent to which public interest considerations might define the extent of Article 6 guarantees. Invoking *Heaney and McGuinness*, the Court stated:

⁷¹⁹ *Jalloh v Germany* at [117] (emphasis added).

The general requirements of fairness provided in [Article 6] apply to all criminal proceedings, regardless of the type of offence. Nevertheless, in order to determine whether the proceedings as a whole have been fair, *the weight of the public interest in the prosecution of a particular offence and the sanction of its author may be taken into consideration and put in the balance with the interest of the individual that evidence against him be gathered lawfully.* However, the considerations of public interest cannot justify measures emptying an applicant's rights of defence of their very substance, including the privilege against self-incrimination guaranteed by Article 6.⁷²⁰

In applying this statement of the law, the Court considered various factors as part of its 'weighing up,' including the seriousness of the offence, the injuries caused to a third party, and the length of the prison sentence ultimately imposed on the applicant.⁷²¹ As a result of this and other factors, the Court held that 'the use of the recording complained of as well as of the list of telephone conversations by the national courts did not infringe the applicant's right to a fair trial' and there had been no violation of Article 6.⁷²² Plainly, this sort of reasoning contradicts those cases considered in Part E.6.1. But from *Heglas* we also gain a complicated sense of the workings of the Court's tests. It seems the Court intended there to be an analytical safeguard provided by sternly indicating that the public interest cannot justify a measure destroying the very substance of the right. Yet at no point does the *Heglas* Court *even ask whether the very essence of the right has been extinguished.* We will return to the essence of the right later in this Part.

⁷²⁰ *Heglas v Czech Republic* (App 5935/02) (2009) 48 EHRR 44 at [87] (translated) (emphasis added).

⁷²¹ *Ibid.* at [91]. For broadly similar analysis, see *Sandor Lajos Kiss v Hungary* (App 26958/05) (29 September 2009) at [22]-[24]; *Talaber v Hungary* (App 37376/05) (29 September 2009) at [25]-[26]. Cf *Leonid Lazarenko v Ukraine* (App 22313/04) (28 October 2010) at [50].

⁷²² *Heglas v Czech Republic* at [92]-[93].

Finally, we reiterate the willingness of the Grand Chamber in *Al-Khawaja and Tahery* to countenance public interest arguments as part of its assessment of the proceedings as a whole:

the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the *public interest* in the effective administration of justice.

The *Al-Khawaja and Tahery* judgment leaves open the question of precisely what infringements the public interest in the effective administration of justice is capable of justifying. It also provides further evidence of the irrational flexibility that the proceedings as a whole test, especially when combined with a 'taken together' approach, allows the Court in conducting broad-brush balancing exercises.

We conclude this section by noting that in a long series of recent cases, touching on a variety of Article 6 rights and a variety of public interests, the European Court has demonstrated a willingness to consider public interest arguments as justifying restrictions on Article 6.⁷²³ It has done so notwithstanding, and without acknowledging, the extensive case law to the contrary. Perhaps most importantly, the cases in this section and those in Part E.6.1 show little recognition of the inconsistency and incoherence created by the other class of case. We are thus left with two separate streams of jurisprudence, neither acknowledging the other's existence.

⁷²³ For further examples, see the discussion of *Jussila v Finland* and *Hermi v Italy* in A Mowbray, 'No violations but interesting: A study of the Strasbourg Court's jurisprudence in cases where no breach of the Convention has been found' (2008) 14 *European Public Law* 237, 243-245.

E.6.4 In other cases the European Court allows the use of public interest arguments subject to some form of safeguard

In the previous sections we considered cases in which the European Court was willing to countenance public interest arguments. In this section, we add further to that analysis. Specifically, we consider those cases in which the European Court purports to allow the use of public interest arguments, but only within certain limits. We begin by considering the Court's poorly explained references to the 'very essence' of Article 6 rights. We move on to analyse how, in a number of cases, the Court has used the 'very essence' tool as a way to limit the applicability of public interest arguments. We consider cases in which the Court appears to state that the public interest may be used to justify some restrictions on Article 6, but *not* to justify restrictions that go so far as to extinguish the very essence of the relevant Article 6 right.

We begin with an example of the 'very essence' test. While the test has been used in a number of Article 6 civil cases since the mid-1980s,⁷²⁴ one of its first in an Article 6 criminal case appears to have been in *John Murray*. In that case the European Court referred to 'a degree of compulsion' that 'destroyed the very essence of the privilege against self-incrimination'.⁷²⁵ The *John Murray* Court did not define what

⁷²⁴ See, eg, *Ashingdane v United Kingdom* (App 8225/78) (28 May 1985) at [57]. See also: *Lithgow and Ors v United Kingdom* at [194]; *Fayed v United Kingdom* (App 17101/90) (21 September 1990) at [65]; *Philis v Greece* (App 12750/87) (27 August 1991) at [69]; *De Geouffre De La Pradelle v France* (App 12964/87) (16 December 1992) EHRR at [28]; *Holy Monasteries v Greece* (App 13092/87) (9 December 1994) at [83]; *Tolstoy Miloslavsky v United Kingdom* (App 18139/91) (13 July 1995) at [59]; *Bellet v France* (App 23805/94) (20 November 1995) at [31]; *A v United Kingdom* (App 35373/97) (2003) 36 EHRR 51 at [74]; *Bakan v Turkey* at [66].

⁷²⁵ *John Murray v United Kingdom* at [49]. See, for later examples, *Heaney and McGuinness v Ireland* at [48]; *Quinn v Ireland* at [48]; *Allan v United Kingdom* at [44]; *Jalloh v Germany* at [97], [101]; *O'Halloran and Francis v United Kingdom* at [49]; *Salduz v Turkey* at [54]; *Bykov v Russia* at [92]; *Marttinen v Finland* at [75]; *Pishchalnikov v Russia* (App 7025/04) (24 September 2009) at [69]; *Ozcan Colak v Turkey* at [44]; *Aleksandr*

constituted ‘the very essence’ or identify the non-essential parts of the privilege. The closest that the Court came to identifying the ‘very essence’ of the privilege was to identify two essential elements outlined by the applicant in that case: ‘the right to remain silent in the face of police questioning and not to have to testify against oneself at trial’; and ‘that the exercise of the right by an accused would not be used as evidence against him in his trial’.⁷²⁶ It is hard to imagine that these descriptions allow much room for non-essential content of the right to silence or the privilege against self-incrimination.

Although it is beyond the scope of this thesis to chart the history of the use of ‘the very essence’ as a judicial tool more generally,⁷²⁷ we may note that the ‘very essence’ test has its supporters. Indeed, the ‘very essence’ test has been said to have ‘spawned...dynamic and insightful methods of analysis’ on a satisfactorily ‘*ad hoc* basis’.⁷²⁸ Others, however, including Alexy and Rivers, have argued that in most cases

Zaichenko v Russia at [38]; *Hakan Duman v Turkey* at [47]; *Pavlenko v Russia* at [100][101]; *Baran and Hun v Turkey* at [68].

⁷²⁶ *John Murray v United Kingdom* at [41]. cf Brems’ assertion that notions such as ‘essence’ ‘regularly appear in the case law of the [European Court], albeit not so often in the context of the right to a fair trial’: Brems, ‘Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights’, 304.

⁷²⁷ For more general discussion of the ‘very essence’ tool, see D Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 U Toronto Law Journal 383, 384-387; D Currie, *The Constitution of the Federal Republic of Germany* (U Chicago Press, Chicago 1994), 178; Brems, ‘Conflicting Human Rights An Exploration in the Context of the Right to a Fair Trial in the European Convention on Human Rights’, 303-304; Stumer, 114-118; Emmerson, Ashworth and Macdonald, 77; Rivers, 186-187; Lazarus, Goold and Swiney, *Public Protection, Proportionality, and the Search for Balance*, 11-12; Brems, *Human Rights: Universality and Diversity*, 368-371; *State v Makwanyane & Anor* [1995] ZACC 3 (South African Constitutional Court), [132][134].

⁷²⁸ Arai-Takahashi, 36; Brems, *Human Rights: Universality and Diversity*, 369.

the ‘very essence’ test boils down to a circumlocutive restatement of a proportionality analysis.⁷²⁹ The ‘very essence’ test, Rivers argues, is thus ‘practically useless’.⁷³⁰

To what extent do these theoretical criticisms reflect the European Court’s use of the very essence test in the Article 6 context? In this section we explore some of the ways in which the ‘very essence’ has been used to analyse alleged violations of Article 6. If the Court is to continue to use ‘the very essence of the privilege’ as a useful or meaningful test, the interests of the rule of law demand that it define what is involved in the essence of the guarantees, and what is part of the guarantee but nonetheless may be regarded peripheral or non-essential.⁷³¹ Unless *non-essential* content can be identified and defined, then referring to the ‘very essence’ of the guarantee is mere obfuscation.⁷³² Having established the vagueness of the very essence as an analytical tool, we turn to the ways in which the Court has used that tool as a safeguard in the context of public interest balancing. We turn first to the Court’s application of the ‘very essence’ tool in *Heaney and McGuinness v Ireland*.

In *Heaney and McGuinness*, the applicants were convicted of ‘failing to provide an account of their movements during a specified period,’ contrary to Irish legislation.⁷³³ In arguing that the legislation did not violate the silence and self-

⁷²⁹ Alexy, 192-196; Rivers, 186-187.

⁷³⁰ Rivers, 187.

⁷³¹ See Stumer, ch 4; Rivers, 186-187.

⁷³² The vagueness of this approach is exacerbated when the Court refers to ‘the very essence of an applicant’s defence rights’ instead of ‘the very essence’ of a *particular* right: see, eg, *Bykov v Russia* at [93]; *Othman (Abu Qatada) v United Kingdom* (App 8139/09) (17 January 2012) at [260].

⁷³³ *Heaney and McGuinness v Ireland* at [12].

incrimination guarantees, Ireland described the measure as ‘a proportionate response to the subsisting terrorist and security threat given the need to ensure the proper administration of justice and the maintenance of public order and peace’.⁷³⁴ The Court took notice of the Irish security situation, but did not accede to the government’s argument:

the security and public order concerns relied on by the Government cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and against self-incrimination guaranteed by [Article 6(1)]...⁷³⁵

Importantly, therefore, the Court indicates that ‘security and public order concerns’ could not justify measures that extinguish ‘the very essence’ of the silence and self-incrimination guarantees. *Quinn v Ireland*, decided the same day as *Heaney and McGuinness*, included a virtually identical passage, as did *Shannon v United Kingdom*.⁷³⁶ One implication of this passage is that security concerns *may* justify a measure that infringes the silence and self-incrimination guarantees, provided that such a measure does not go so far as to extinguish the essence of the guarantees. The paragraph [58] implication, as we will see, was taken up by the *Jalloh* Court.

Jalloh included a number of passages worthy of close scrutiny in this context.

The first *Jalloh* statement drew on *Heaney and McGuinness*:

[97] The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and be weighed against the individual interest that the

⁷³⁴ *Ibid.* at [56].

⁷³⁵ *Ibid.* at [58]. See, eg, Ward and Gardner, 395-396.

⁷³⁶ *Quinn v Ireland* at [57]-[60]; *Shannon v United Kingdom* at [38].

evidence against him be gathered lawfully. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination....⁷³⁷

With one paragraph, the Court thus reframed the *Heaney and McGuinness* formula, under which public interest concerns could not 'justify a provision which extinguishes the very essence' of a right, such that public interest concerns may be 'weighed against' individual rights *except* if the relevant measure extinguishes the very essence. The public interest cannot justify the very worst infringements, the *Jalloh* Court seemed to reason, but that means it can justify other infringements. The Court then offered this formulation of the circumstances in which the very essence of the privilege would be extinguished:

[101]...the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put.⁷³⁸

We may note that the public interest was *not* listed as a relevant factor to the assessment of whether the very essence of the privilege had been extinguished; this fits with the Court's insistence that the public interest cannot justify measures extinguishing the very essence of a right. We will return to this point below.

The *Jalloh* Court made a further contribution to the use of the public interest in assessing violations. It stated:

[117] In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; *the weight of the public interest in the investigation*

⁷³⁷ *Jalloh v Germany* at [97] (emphasis added), citing *Heaney and McGuinness v Ireland* at [57]-[58] '*mutatis mutandis*'.

⁷³⁸ *Jalloh v Germany* at [101].

*and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.*⁷³⁹

Crucially, therefore, ‘the public interest’ is relevant in the second test and not in the first. *Jalloh* offers no explanation for these ‘factors,’ or for the introduction of a public interest balancing test into the assessment of an Article 6 violation. In any event, in this case the ‘public interest’ conclusion was that ‘the public interest in securing the applicant’s conviction could not justify recourse to such a grave interference with his physical and mental integrity’.⁷⁴⁰ And so the public interest could not justify the restrictions on Article 6 in *Jalloh*.

One possible summary of the *Jalloh* framework is this: the Court first requires that there be an assessment of whether or not the privilege has been infringed. For this assessment, a variety of factors – including the public interest – may be taken into account (‘the [117] factors’). If the conclusion at the end of this balancing exercise is that the right has been violated, then that will be the end of the matter. If the conclusion at the end of this balancing exercise is that the right has *not* been violated, then a secondary question comes into play: has the very essence of the right been extinguished? On this account, for the secondary question, the Court may have regard to all the same factors to which it had regard for the primary question *apart from the public interest* (‘the [101] factors’). It is important to emphasise that this sort of

⁷³⁹ *Ibid.* at [117] (emphasis added). See A Ashworth and M Redmayne, *The criminal process* (4th edn OUP, Oxford 2010), ch 5.6.

⁷⁴⁰ *Jalloh v Germany* at [119]. Compare the Concurring and Dissenting Opinions: see the Concurring Opinion of Judge Bratza; Joint Dissenting Opinion of Judges Ress, Pellonpaa, Baka and Sikuta.

rationalisation for the Court's approach is entirely reverse-engineered: the Court itself does not provide any explanation through which its analysis may be understood.⁷⁴¹

And yet if we turn from *Jalloh* to *O'Halloran and Francis*, we see that any clarity capable of being discerned from *Jalloh* is perhaps illusory. In *O'Halloran and Francis* the Court stated:

[53]...While the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. This was confirmed in the specific context of the right to remain silent in the case of *Heaney and McGuinness* and, more recently, in the Court's *Jalloh* judgment, in which the Court identified the factors to which it would have regard in determining whether the applicant's privilege against self-incrimination had been violated...

[55] In the light of the principles contained in its *Jalloh* judgment, and in order to determine whether the essence of the applicants' right to remain silent and privilege against self-incrimination was infringed, the Court will focus on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put.⁷⁴²

There are two things to note here. First, the Court appears to go back and forth between referring to a violation of the privilege and referring to a violation of *the essence of the privilege*. There is no sense here that there may be a distinction between the two. The focus of the *O'Halloran* analysis is very much on the essence of the privilege rather

⁷⁴¹ Indeed, it could be approached another way: one could also argue that the effect of the passages is that if a Government - or, indeed, the European Court - wishes to take into account public interest factors in assessing an alleged violation, it need only state that the measure does not extinguish the very essence, thereby allowing public interest considerations to come into play. This fluid process is, of course, made both more complex and more opaque by the fact that the European Court has never provided a working definition of what falls inside and outside the very essence of the guarantees. See also Jackson; in terms of the clarity of the judgment, cf Lester, 'The European Court of Human Rights after 50 years', 474.

⁷⁴² *O'Halloran and Francis v United Kingdom* at [53]-[55]. cf Lord Hoffman, [29]; see also Ashworth, 'Self-Incrimination in European Human Rights Law - A Pregnant Pragmatism?'; Choo.

than the right itself. The significance of this analytical choice, however, is never explained.

Second, the factors listed in *O'Halloran* as relevant to the essence of the right reflect those in *Jalloh*.⁷⁴³ However, in *O'Halloran*, the Court additionally considered several public interest factors in the course of assessing whether the essence of the privilege had been violated. Principally, the *O'Halloran and Francis* Court identified the public interest in a 'regulatory regime' affecting drivers, and the 'limited nature of the inquiry which the police were authorised to undertake'.⁷⁴⁴ These public interest factors were used as the basis for a conclusion that 'the essence of the applicants' right to remain silent and their privilege against self-incrimination has not been destroyed' and that as a result there had 'been no violation'.⁷⁴⁵ Leaving to one side the question of whether the Court should be having regard to public interest considerations in determining whether or not there has been a violation of Article 6, it certainly seems that even under the formulation adopted in *Jalloh*, this sort of public interest considerations should not have been considered in answering the question of whether or not *the essence of the right* had been destroyed. The *Jalloh* Court did not regard the public interest as relevant to assessing a violation of the *essence* of the right. *O'Halloran and Francis* did. In *Jalloh*, at least, it appeared that the inquiry about the essence of the right may have been designed as a safeguard against excessive consideration of public interest factors. If we accept that reading of *Jalloh*, the *O'Halloran and Francis* Court has

⁷⁴³ See *Jalloh v Germany* at [101]; cf *O'Halloran and Francis v United Kingdom* at [55].

⁷⁴⁴ *O'Halloran and Francis v United Kingdom* at [57]-[58]. The points made were similar to those originally raised by Lord Bingham in the Privy Council in *Brown v Stott*. See *Brown v Stott* [2000] UKPC D 3, [2003] 1 AC 681 (Privy Council) at 705-706.

⁷⁴⁵ *O'Halloran and Francis v United Kingdom* at [62]-[63].

undermined that analytical safeguard. The potentially farcical result is that the Court's case law allows public interest factors to be taken into account so long as the essence of the right is not violated, but it allows public interest factors to affect its conclusion on whether or not the essence of the right has been violated. It should also be noted that the decision in *Grayson and Barnham v United Kingdom* echoes the reasoning adopted in *O'Halloran and Francis*.⁷⁴⁶

The flimsiness of the European Court's use of 'the very essence' as a possible limitation on public interest arguments is also seen in *Bykov*. In that case, the Court made an enigmatically brief statement about the role for public interest concerns:

[93] The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue. Public-interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination...⁷⁴⁷

This ostensibly-straightforward statement is, however, problematic. If the logic of the first sentence holds, then the second sentence's scope should not be limited to measures that extinguish *the very essence* of defence rights but rather should apply to measures that extinguish *defence rights*, regardless of whether or not the very essence of the right is extinguished. If the logic of the first sentence is to be extended, the second sentence of paragraph [93] should perhaps have read something like:

Public-interest concerns cannot justify measures *which extinguish an applicant's defence rights*, including the privilege against self-incrimination...

Stating the law in the way it has done in *Bykov* adds nothing to the clarity or predictability of the European Court's jurisprudence. Moreover, after having

⁷⁴⁶ See *Grayson and Barnham v United Kingdom* at [49].

⁷⁴⁷ *Bykov v Russia* at [93].

established the relevant test as being whether ‘the very essence of...defence rights’ had been extinguished, the *Bykov* Court made no further reference whatsoever to ‘the very essence’ of the right. Even in reaching its conclusion the *Bykov* Court omitted any reference to the very essence of the right and simply concluded that the alleged violating actions ‘were not contrary to the requirements of a fair trial’.⁷⁴⁸ It is acknowledged that this distinction may not be of significance in many cases. But if the Court’s ‘very essence’ test is to mean anything more than simply ‘was there a violation?’, and if the ‘very essence’ test is to act as a check on the creeping influence of public interest considerations, then the onus of justifications means it is incumbent on the Court to be clear and consistent in explaining, applying and reaching decisions about the ‘very essence’ test. On the other hand, if the Court regards the public interest as relevant to both the infringement of the right *and* to the infringement of the very essence of the right, the interests of clarity demand the Court say so plainly. In either situation, the interests of coherence and consistency also demand that the Court reconcile its approach to these cases with its approach to the cases considered in Part E.6.1 above.

There is one final example of a case in which the European Court appears to open the door for public interest arguments, albeit with a limitation, and a limitation different to the ‘very essence’ approach. In *Salduz v Turkey*, the Court offers a baffling explanation of the approach to be taken when considering whether confidential access to a lawyer can ever be restricted:

⁷⁴⁸ *Ibid.* at [104].

the Court finds that in order for the right to a fair trial to remain sufficiently practical and effective [Article 6(1)] requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are *compelling reasons to restrict this right*. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.⁷⁴⁹

This passage, which has been repeatedly cited by the European Court, is worth disaggregating.⁷⁵⁰ The Court appears to acknowledge that, in exceptional circumstances, compelling reasons may justify denial of access to a lawyer. It does not identify any such compelling reasons. The Court then goes on to say that such a denial must not 'unduly prejudice' the rights of the accused. This statement seems self-defeating, insofar as the *rights* of the accused under Article 6(3)(c) will, by definition, be prejudiced by a denial of access to a lawyer. The trial, or the result of the trial, may not *necessarily* be prejudiced, but the accused's *rights* will be. But leaving those objections to one side, the Court complicates the matter further by indicating that, 'in principle,' the rights of the defence will be 'irretrievably prejudiced' when incriminating statements made during interrogation without access to a lawyer are used for a conviction. The cumulative effect of these three statements, therefore, would appear to indicate that even 'compelling reasons' in 'exceptional circumstances' cannot justify the use in evidence of incriminating statements made during police interrogation without access to lawyer. This cumulative effect makes one wonder whether there was any significant

⁷⁴⁹ *Salduz v Turkey* at [55] (emphasis added). For more on *Salduz*, see Jackson; Pattenden; van de Laar and de Graaff; Wu; Bjorge; Bratza.

⁷⁵⁰ This passage has been cited in, for example, *Plonka v Poland* (App 20310/02) (31 March 2009) at [35]; *Pishchalnikov v Russia* at [70]; *Pavlenko v Russia* at [97]; *Sharkunov and Mezentsev v Russia* (App 75330/01) (10 June 2010) at [97]; *Lopata v Russia* (App 72250/01) (13 July 2010) at [130]. On *Pishchalnikov*, see Wu, 52.

content at all to the Court's apparent concession with respect to 'exceptional' circumstances.

E.6.5 In another class of cases, the European Court appears to regard measures infringing 'the very essence' of a right as synonymous with disproportionality

There is, however, yet another class of case: cases in which the European Court appears to define 'a restriction infringing the very essence of the right' as effectively meaning 'a disproportionate restriction'.⁷⁵¹ In these cases, the Court implicitly identifies the proportionality or 'fair balance' of a restriction as being decisive to the question of whether the restriction has infringed the very essence of a right. In taking this step, the Court implicitly acknowledges that public interest factors – capable of being made part of any proportionality or fair balance exercise – may be taken into account when determining whether a restriction has infringed the very essence of a right. The logical implication of this move is that public interest factors may be capable of justifying a measure that *might otherwise have infringed the very essence of a right*. In other cases, of course, the European Court has strenuously indicated that the public interest is not relevant to assessments of Article 6 violations,⁷⁵² or that if it is relevant, the public interest cannot justify measures infringing the very essence of a right.⁷⁵³ And yet those stringent indications are robbed of much of their force if public interest considerations can be relevant to the assessment of whether a restriction has infringed the very essence of a right. As we shall see, however, in a number of cases the Court has clearly

⁷⁵¹ On this point, see Rivers, 186-187; Alexy, 193-196; Arai-Takahashi, 36-37.

⁷⁵² See Part E.6.1.

⁷⁵³ See Part E.6.3.

indicated a view that a restriction will infringe the very essence of a right if it is disproportionate.

We turn first to the judgments in *Omar* and *Guerin*, both decided on the same day. These applications concerned a French procedure that the applicants argued ‘had infringed their right of access to a court’.⁷⁵⁴ The Court drew on a number of civil cases as it ‘reiterated’ its approach to the right to a court:

[34] The Court reiterates that the right to a court, of which the right of access is one aspect, is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal. However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved.⁷⁵⁵

The Court thus uses ‘the very essence’ as a way of confining the scope of limitations on rights. Notably, the Court’s statement here also openly articulated a proportionality analysis as the method through which to assess Article 6 violations. But in this passage the Court does not make it entirely clear how the ‘very essence’ rule interacts with the proportionality rule outlined in the following sentence, or whether one takes

⁷⁵⁴ *Omar v France* (App 24767/94) (29 July 1998) at [31]. See also *Guerin v France* (App 25201/94) (29 July 1998) at [34].

⁷⁵⁵ *Omar v France* at [34], citing *Levages Prestations Services v France* (App 21920/93) (23 October 1996) at [40]; *Bellet v France* at [31]; *Tolstoy Miloslavsky v United Kingdom* at [59]; *Fayed v United Kingdom* at [65]. See also *Guerin v France* at [37]. It should be noted that the cases referred to by the European Court in this passage (and the cases referred to by those cases) do not offer an explanation as to why this sort of proportionality analysis should be deployed in the specific context of Article 6. Indeed, ultimately the cases appear to rest on cases making general statements about balance being ‘inherent in the whole of the Convention’ or statements about rights other than Article 6. See, for example: *Levages Prestations Services v France* at [40]; *Bellet v France* at [31]; *Tolstoy Miloslavsky v United Kingdom* at [59]; *Fayed v United Kingdom* at [65]; *Sporrong and Lonnroth v Sweden* (App 7151/75) (23 September 1982) at [69]; *Belgian Linguistic Case (No 2)* (App 1474/62) (1968) 1 EHRR 252 at [5] of ‘Interpretation adopted by the Court’; *Lithgow and Ors v United Kingdom* at [194]; *Ashingdane v United Kingdom* at [57].

precedence over the other. The Court's conclusion provided some indication of how the two statements might interact:

[The restriction] impairs the very essence of the right of appeal, by imposing a disproportionate burden on the appellant, thus upsetting the fair balance that must be struck between the legitimate concern to ensure that judicial decisions are enforced, on the one hand, and the right of access to the Court of Cassation and exercise of the rights of the defence on the other.⁷⁵⁶

In this passage, therefore, the European Court indicates that a restriction will impair the very essence of a right if that restriction is disproportionate. It goes on to note that such a disproportionate restriction would upset the balance between societal and individual interests. If 'impairing the very essence of the right' simply means 'disproportionate', then it is unclear why the Court complicates its analysis by apparently adding 'the very essence' as an additional criterion in paragraph [34]. If 'impairing the very essence of the right' means something different to this, then the Court has obscured that meaning by framing its analysis in this way. Approaches similar to that of *Omar* and *Guerin* have been utilised in a number of Article 6 criminal cases.⁷⁵⁷

Less than four years after *Omar* and *Guerin* came *Eliazer v Netherlands*, a case in which the applicant argued he had been denied access to the Court of Cassation due to

⁷⁵⁶ *Omar v France* at [40]. See also *Guerin v France* at [43]. In both *Omar* and *Guerin* the European Court went on to find a violation of Article 6(1): *Omar v France* at [44]. See also *Guerin v France* at [47].

⁷⁵⁷ *Khalifaoui v France* at [27], [36], [40]; *Osu v Italy* at [31]; *Pelevin v Ukraine* (App 24402/02) (20 May 2010) at [27]; *Peltier v France* at [35]; *Zvolsky and Zvolska v Czech Republic* (App 46129/99) (12 November 2002) at [47], [54]. *Guerin*-type approaches are also cited and applied in civil cases such as *Fogarty v United Kingdom* at [33]; *Beles and Ors v Czech Republic* (App 47273/99) (12 November 2002) at [61], [68]; *Ernst and Ors v Belgium* (App 33400/96) (2004) 39 EHRR 35 at [48]; *Melnyk v Ukraine* (App 23436/03) (28 March 2006) at [22], [31]; and *Jesina v Czech Republic* (App 18806/02) (26 July 2007) at [25]-[30]. But note that, despite ostensibly adopting the *Omar* and *Guerini* tests, the *Khalifaoui* Court did not expressly reach a conclusion on proportionality.

regulations preventing appeals in cassation against judgments given in absentia.⁷⁵⁸ The European Court regarded the facts of *Eliazer* as different from those in *Omar*,⁷⁵⁹ but for present purposes we note one curious aspect of the Court's analysis. The Court established the relevant test as including the 'very essence' requirement:

the right to a court....may be subject to limitations....However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved.⁷⁶⁰

And yet the Court made no reference whatsoever to the 'very essence' requirement when it concluded that there had not been a violation of Article 6. Instead, it focused on proportionality:

The decision declaring the applicant's appeal in cassation inadmissible cannot, therefore, be considered as a disproportionate limitation on the applicant's right of access to a court or one that deprived him of a fair trial. Accordingly, there has been no violation...⁷⁶¹

The terse conclusion in *Eliazer*, therefore, lends support to the notion that this series of cases appears to regard proportionality as decisive of whether the very essence of a right had been infringed. On that version, perhaps it was unnecessary for the Court to make any reference at all to the essence of the right in reaching its conclusion.⁷⁶² One might even wonder if, under this logic, the 'very essence' test is relevant at all or whether it is a circumlocution that simply amounts to a proportionality test.⁷⁶³

⁷⁵⁸ See *Eliazer v Netherlands* (App 38055/97) (2003) 37 EHRR 45 at [22][24].

⁷⁵⁹ *Ibid.* at [33].

⁷⁶⁰ See, eg, *Ibid.* at [30]; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 574-575.

⁷⁶¹ *Eliazer v Netherlands* at [36]; see also [34][35].

⁷⁶² cf *Guerin: Guerin v France* at [43].

⁷⁶³ Very similar reasoning can be seen in the civil case of *Osman v United Kingdom* (App 23452/94) (2000) 29 EHRR 245 at, eg, [147], [154].

In *Nikitin v Russia*, the European Court used the ‘very essence’ analytical tool in a different context, namely for assessing the extent to which reopening a criminal case for review after acquittal complies with Article 6:

certain special circumstances of the case may reveal that the actual manner in which [a case was reopened] impaired the very essence of a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct a supervisory review was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice.⁷⁶⁴

Most importantly for present purposes, *Nikitin* constitutes a further example of a case in which the Court describes ‘the very essence’ as being virtually synonymous with concepts of balancing and proportionality in a broad sense (‘a fair balance between the interests of the individual and the need to ensure the effectiveness of the system’).⁷⁶⁵

In this section, therefore, we have considered a line of cases in which the European Court appears to equate ‘restricting the very essence of a right’ with ‘a disproportionate restriction’. As we have demonstrated, this is important for several reasons. First, it suggests that on this logic the ‘very essence’ test may be capable of being regarded as an unnecessary circumlocution that could be jettisoned in favour of a proportionality test. Second, it suggests that public interest considerations – which would be relevant to the proportionality of a measure – may have an analytical impact on assessing whether a measure has infringed the very essence of a right. Third, and more broadly, this line of cases does not sit well with those cases considered above,

⁷⁶⁴ *Nikitin v Russia* (App 50178/99) (2005) 41 EHRR 10 at [57]. See Mowbray, ‘A study of the principle of fair balance in the jurisprudence of the ECtHR’.

⁷⁶⁵ See also Mowbray, ‘A study of the principle of fair balance in the jurisprudence of the ECtHR’ 302-303, 308-311.

especially those in which the Court sternly warns against the use of public interest balancing. Indeed, the approaches adopted in the categories of cases discussed above – most notably those cases in which the very essence of a right is intended to act as a safeguard on proportionality analysis – appears to contradict the approach adopted in the cases considered in this section. Either ‘restrictions on the very essence of a right’ are simply disproportionate restrictions, or they are restrictions that are identified as unacceptable following an analysis conducted in the absence of public interest and proportionality considerations. The European Court appears to be having it both ways.

E.6.6 Concluding this section

In this section, we have demonstrated that the European Court has numerous answers to the question of whether public interest arguments can be used to justify restrictions on Article 6. In a large group of cases, the Court stood firmly against this form of proportionality or balancing in the Article 6 context. In another group of cases, the Court enthusiastically embraced public interest considerations in several contexts. In yet another group of cases, the Court allowed public interest arguments in a limited way. In a fourth group of cases, the Court appeared to allow public interest arguments in a way that undermined the limits set in the third line of cases. Within each class of case, moreover, significant incoherence and uncertainty was demonstrated. Perhaps equally important is the fact that it was extremely rare for any case from one class to acknowledge that alternative views had been adopted in other classes of case. To take but one example from the cases discussed above, the Court’s decision in *Ramanauskas* is notably inconsistent with its reasoning in cases such as *Jalloh* and *Heglas*, two cases that were decided just two years before and one year before *Ramanauskas* respectively.

And yet the judgment in *Ramanauskas* does not even attempt to reconcile the two groups of cases; neither *Jalloh* nor *Heglas* is mentioned anywhere in the judgment. The incoherence and uncertainty in the European Court's case law is extremely problematic.

E.7 Conclusion to Part E

In this Part, we looked at how the European Court assesses alleged violations of the Article 6 rights. The Part charted the Court's attempts to solve the puzzle of Article 6: how should alleged violations of Article 6 be assessed in the absence of an express metaprinciple guiding that assessment? After identifying the origins of this puzzle in the *travaux*, this Part charted a series of Court attempts to solve it. Moving from the proceedings as a whole test through counterbalancing and defect-curing to the never fair jurisprudence, this Part demonstrated inconsistency and incoherence between these analytical tools. This Part then looked at how the Court has dealt with the extent to which the public interest may justify restrictions on Article 6, and how this has played out in the context of attempts to carry out structured balancing and proportionality analysis.

As the macro-arguments made in this Part demonstrated, the European Court's assessment of alleged violations of Article 6 involves the use of a variety of analytical tools, seemingly chosen and deployed with minimal explanation of why one tool is used in one situation and another is used in another situation. Moreover, looking at each of these analytical tools in isolation demonstrated considerable uncertainty and incoherence within each tool.

If the European Court wished to design a finely-calibrated and nuanced analytical framework in which particular methods of analysis were tailored to particular violations, it could do so. But even then, the interests of predictability and coherence demand that there be an explanation for why one method of assessment is appropriate in one Article 6 context but not another, and why using alternative methods for seemingly-similar violations is not inconsistent. In any event, the European Court has not done either of these things.

CONCLUSION

The questions outlined at the beginning of this thesis were these: how does the European Court's criminal fair trial case law fare in relation to our measuring stick? To what extent is the case law consistent, predictable, locally coherent, and capable of acting as a guide to citizens, lawyers, officials, and judges? This thesis considered these questions in the context of how the European Court interprets Article 6, how the European Court sees its role in Article 6 cases, how the Court approaches the internal structure of Article 6, the Court's implied rights jurisprudence, and how the Court assesses alleged violations of Article 6. In this conclusion, we summarise the thesis' answers and conclude our argument by gathering together the various strands of argument.

The thesis pursued an original doctrinal approach to the material, and provides a complement to the existing scholarship. The argument was presented in five Parts. Part A laid the foundations for what followed by examining the Court's interpretative approaches through two principal lines of inquiry. The Part considered various general interpretative approaches and demonstrated uncertainty about the rationales for these approaches, and uncertainty as to when one should be preferred over another. In particular, Part A considered the democratic catchphrase and established that the catchphrase was used in an under-reasoned and poorly explained way.

We demonstrated in Part B that despite the Court's rhetorically-emphatic descriptions of its own role, the Court's sense of its own role is poorly defined and poorly explained. Moreover, particularly in the context of the fourth instance doctrine

and the Court's approach to evidence, the thesis demonstrated significant incongruence between the Court's stated view of its own role and the way in which the case law suggests the Court operates in reality. The fourth instance doctrine was shown to be riddled with largely unacknowledged exceptions and qualifications.

Part C continued the broad macro-arguments that run throughout the thesis, focussing on the Court's approach to the internal structure of Article 6. In particular, it was demonstrated that the European Court has adopted a series of different approaches to Article 6, and that these approaches offer irreconcilable alternatives to the correct way to view the relationship between Article 6(1) and Article 6 as a whole, the relationship between the various component parts of Article 6, and to whether alleged violations of multiple provisions should be taken separately or together. Moreover, Part C demonstrated that the Court has no clear sense of what it means to 'take together' multiple violations. As was the case with so many other sections of the thesis, Part C established that it is difficult to find reasoned, predictable explanations of why certain classes of case fall under one approach, while other classes do not.

In Part D the argument on the internal structure of Article 6 continued, albeit with a focus on the implied rights. Part D established the European Court's failure to rationalise and explain its implied rights jurisprudence in any coherent or consistent way, by exploring the various foundations for those rights, their relationship with the explicit rights, and the 'dogs that did not bark'.

The largest element of the thesis was Part E, which evaluated the Court's attempts to solve what was described as the puzzle of Article 6: how should violations of Article 6 be assessed in the absence of an express metaprinciple? Having sketched the foundations of this puzzle, Part E analysed the Court's attempts to resolve the puzzle. The Part established radical uncertainty within, and considerable incoherence between, notions such as the proceedings as a whole test, counterbalancing and defect-curing, and the never fair jurisprudence. In considering the extent to which the public interest may justify restrictions on Article 6, and how this has played out in the context of attempts to carry out structured balancing and proportionality analysis, the Part established further incoherence.

Running through all of these Parts were the two broad classes of argument set out in the Introduction. First, the thesis established that there was inconsistency, and uncertainty *within* each of the various tools and approaches used by the European Court. Second, throughout the thesis, it was demonstrated that there was significant incoherence *between* those approaches. These two macro-arguments, interrelated and running throughout the thesis, combine to demonstrate significant ways in which the European Court's criminal fair trial rights case law has failed to provide guidance of the sort required by our measuring stick of predictability, coherence, and consistency.

What is the significance of these arguments? We argue that the thesis has established that the European Court's Article 6 case law is incoherent to an extent that raises real questions about its ability to guide lawyers, citizens, and officials. Indeed, we have shown that the Court's case law provides flawed guidance on how the Court

chooses between one interpretative approach or another in a given case, how the Court views its role, how the Court views the internal structure of Article 6, how the Court conceptualises the implied rights, and how the Court assesses alleged violations of Article 6. The case law, as described in the thesis, is marked by this sense of irrational flexibility.

This irrational flexibility means that the Court can approach an individual application in an unpredictable multitude of ways: the Court may be deferential or not, the relevant test may be said to be one part of Article 6 or several, the relevant basis for the implied rights may be said to be one thing or another, and the alleged violation may be assessed using any one of a number of incoherent approaches. The consequences of choices to adopt a ‘taken together’ approach combined with a ‘proceedings as a whole’ test and a willingness to consider community interest balancing arguments will look very different from the consequences of a choice to adopt a ‘minimum guarantee’ approach combined with a ‘never fair’ assessment and a rejection of expedient public interest balancing. Any one of these areas of uncertainty would be problematic. Read as a whole, what the thesis shows is that these areas of uncertainty have the potential to act as cogs turning one another, generating uncertainty and incoherence greater than the sum of the individual parts. Of course, as has been emphasised throughout, there is nothing wrong with flexibility, and our rule of law and guidance measuring stick does not preclude a degree of flexibility. If the Court wished to deploy different approaches in similar situations – or different approaches in different situations – the interests of predictability and consistency simply demand that it adequately explain itself.

While this thesis has not made a substantive normative argument, it may, nonetheless, be read as a robust and targeted call for the European Court to adopt in this area of law a renewed, rejuvenated approach that is more consistent, more coherent, and better explained: a call for a jurisprudence capable of providing the citizens of the Contracting States with vital guidance on their rights, and a jurisprudence that meets the onus of justification. For a provision as heavily-litigated as Article 6, and one that thus affects so many people in day to day lives, it is particularly crucial that the European Court make its views clear and predictable. It is hoped that the thesis makes a significant contribution to understanding the case law related to this vitally-significant provision, and that, together with the existing scholarship in this field, the thesis provides a foundation on which a stronger jurisprudence may be built.

APPENDIX: The European Court rarely uses the margin of appreciation in Article 6 criminal cases

The European Court occasionally refers to the margin of appreciation in its Article 6 criminal case law. These references are, however, much less common than they are in the context of rights such as those guaranteed by Articles 8-11.⁷⁶⁶ This Appendix considers the limited ways in which the Court has occasionally referred to the margin in Article 6 criminal cases.⁷⁶⁷

At this point, we distinguish between two categories of case. First, there are cases in which the European Court states that its role is a modest and limited one, and that particular issues are the responsibility of the domestic courts. In these cases, the Court does not expressly refer to any ‘margin of appreciation,’ but it does employ reasoning broadly analogous to some of the reasoning used in those areas of law in which the margin is commonly used. Such cases are considered throughout Part B.

Second, there are cases in which the European Court expressly refers to a margin of appreciation. We consider this second class of case here. In doing so, however, it may be noted that this distinction ‘is not carefully drawn in either the jurisprudence or the literature’.⁷⁶⁸ It must be emphasised that the margin of appreciation is not frequently used in Article 6 cases, especially in criminal cases. Moreover, our purpose is not to make a normative argument about whether the margin of

⁷⁶⁶ Indeed, see Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 224.

⁷⁶⁷ See also Part B.1.

⁷⁶⁸ Greer, *The European Convention on Human Rights: achievements, problems and prospects*, 251.

appreciation should or should not be used in these sorts of case – it is about *how* the Court explains and describes the margin when it does expressly refer to that concept in Article 6 cases.

Express references to the margin of appreciation in Article 6 criminal cases are infrequent. In most of the cases in which such reference is made, the Court does not explain what the relevant margin of appreciation is, or how it is to function. In *Croissant v Germany*, for example, the applicant alleged an Article 6(3)(c) violation because ‘he was required to pay the costs of two lawyers appointed by the court with his consent and a third appointed essentially to ensure the continuance of the trial’.⁷⁶⁹ The Court went on to discuss the alleged Article 6 violation with reference to a margin of appreciation:

An appointment [of counsel] that runs counter to those wishes will be incompatible with the notion of fair trial under [Article 6(1)] if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification.⁷⁷⁰

The *Croissant* Court did not mention a margin of appreciation anywhere else in the judgment, and did not refer to jurisprudence or doctrinal reasons for its use of the margin in this context. As such it is difficult to discern the basis and possible limits for its use. It should be noted that, even having taken this margin into account, an appointment might violate Article 6 if it lacked ‘justification’. It is thus somewhat unclear what is added by the ‘margin of appreciation’ reference, given that the decisive factor is ‘relevant and sufficient justification’.

⁷⁶⁹ *Croissant v Germany* (App 13611/88) (25 September 1992) at [24].

⁷⁷⁰ *Ibid.* at [27].

But it was not only in *Croissant* that the Court used the margin of appreciation without explaining what that term meant in the Article 6 context. In *Medenica*, an Article 6 criminal case concerning trial *in absentia*, the European Court stated that:

regard being had to the margin of appreciation allowed to the Swiss authorities, the applicant's conviction in absentia and the refusal to grant him a retrial at which he would be present did not amount to a disproportionate penalty.⁷⁷¹

The *Medenica* Court did not explain or analyse the nature of the margin. But from the statement above, it appears that the margin of appreciation was taken into account as a factor relevant to a proportionality assessment.⁷⁷²

The European Court's case law on fair trial rights in *civil* cases is beyond the scope of this thesis. However, it is worth noting that the Court does refer to the margin of appreciation in the context of the right of access to a court in civil cases.⁷⁷³ The way the Court structures its analysis in these cases seems to mean the margin of appreciation is, ostensibly at least, a subsidiary consideration. This is reflected in civil cases such as *Seal*, where the Court mentions the margin of appreciation but focused its

⁷⁷¹ *Medenica v Switzerland* at [59]; see also [55]; cf [1] of Dissenting Opinion of Judge Bonello; cf *Colozza v Italy* at [30]. Similar reasoning deployed in *Demebukov v Bulgaria* at [58]. See also van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 591.

⁷⁷² Compare the use of the margin in a balancing exercise in *Nortier v Netherlands* (App 13924/88) (1994) 17 EHRR 273 at Concurring Opinion of Judge Morenilla; *T and V v United Kingdom* in the Concurring Opinion of Lord Reed.

⁷⁷³ As examples, see *Ashingdane v United Kingdom* at [57]; *Waite and Kennedy v Germany* (App 26083/94) (18 February 1999) at [59]; *Stubbings and Ors v United Kingdom* (App 22083/95) (22 October 1996) at [50]; *Tinnelly & Sons Ltd & Ors and McElduff & Ors v United Kingdom* (App 20390/92) (10 July 1998) at [72]; *Beer and Regan v Germany* (App 28934/95) (18 February 1999) at [49]; *McElhinney v Ireland* at [34]; *Klasen v Germany* (App 75204/01) (5 October 2006) at [43]; *Itslayev v Russia* (App 34631/02) (9 October 2008) at [33]; *Kohlhofer and Minarik v Czech Republic* (App 32391/03) (15 October 2009) at [90]; *Kart v Turkey* (App 8917/05) (3 December 2009) at [79]; *Cudak v Lithuania* (App 15869/02) (23 March 2010) at [55]; *Seal v United Kingdom* (App 50330/07) (7 December 2010) at [75]; *Kulikowski v Poland* at [58]; *Boyajyan v Armenia* (App 38003/04) (22 March 2011) at [42]. See also Arai-Takahashi; van Dijk and van Hoof, *Theory and practice of the European Convention on Human Rights*, 570.

analysis almost exclusively on the proportionality of the restriction,⁷⁷⁴ but this approach has also spilled in over into a small number of criminal cases. In these cases the margin of appreciation seems to have been almost an afterthought.⁷⁷⁵

There is some overlap between the two classes of case identified at the beginning of this Appendix: in a small number of cases, the Court refers to its Article 6 role – particularly its role with respect to the admissibility of evidence – and summarises its approach in margin of appreciation terms. In *Koval v Ukraine*, for example, the European Court made its standard statement about its reluctance to dictate rules of admissibility to national courts.⁷⁷⁶ Unlike in *Schenk*, however, *Koval* then described this approach as involving a margin of appreciation:

the Court cannot conclude that the adversarial nature of the proceedings was not respected or that the national courts exceeded the *margin of appreciation* they have in the admission and assessment of evidence.⁷⁷⁷

It is unclear why the Court referred to a margin in this case but not in others. Perhaps similarly, the Court has made passing reference to the margin in civil cases relating to a domestic court's ability to choose which evidence and arguments may be presented by an applicant,⁷⁷⁸ and cases in which the domestic authorities evaluate evidence as to

⁷⁷⁴ See *Seal v United Kingdom* at [79]-[83].

⁷⁷⁵ *Kulikowski v Poland* at [58]. *Seal* postdated *Kulikowski*. See also *Antonicelli v Poland* (App 2815/05) (19 May 2009) at [33].

⁷⁷⁶ *Koval v Ukraine* at [115].

⁷⁷⁷ *Ibid.* at [117](emphasis added).

⁷⁷⁸ *Suominen v Finland* (App 37801/97) (1 July 2003) at [36]. See also *Kuznetsov and Ors v Russia* at [83]; *Olujic v Croatia* (App 22330/05) (5 February 2009) at [82].

unsoundness of mind.⁷⁷⁹ These cases, as with the Court's use of the margin of appreciation in Article 6 cases more generally, are not characterised by clear explanations of the meaning of the margin or reasoning indicating that the reference to the margin is anything other than a circumlocution in Article 6 cases.

In this Appendix, therefore, we have seen that the margin of appreciation is used in few Article 6 criminal cases. Where it is used, it has been argued, it is used opaquely and with little explanation of its analytical. Moreover, often it seems that the real analytical work is being done by another tool and that the margin in these Article 6 cases risks appearing circumlocutive.

⁷⁷⁹ *Salontaji-Drobnjak v Serbia* (App 36500/05) (13 October 2009) at [125]-[126]; see also *Shtukaturov v Russia* (App 44009/05) (27 March 2008) at [67]-[68].

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