Israel Law Review **50**(2) 2017, pp 177–209. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2017.
doi:10.1017/S0021223717000073

In Search of 'Red Lines' in the Jurisprudence of the ECtHR on Fair Trial Rights

Shlomit Stein[*]

The use of proportionality and balancing by the European Court of Human Rights (ECtHR) is inconsistent and does not provide clear guidelines from which policies can be drafted that could strike a fair balance between individual rights and public interests while not impairing the essence of the rights at stake. While ad hoc and unprincipled balancing may be justified on the theoretical level, on the practical level a policy-maker seeking to understand which infringements constitute clear violations of the European Convention on Human Rights (ECHR) is left confused. This article adds clarity to this state of bewilderment by breaking down several aspects of the ECHR rights to a fair trial into clear-cut 'red lines', or minimum thresholds of protection. Overstepping those could result in a violation of the right concerned. Identifying these red lines is intended to assist legislators and policymakers in drafting laws and policies that conform with the obligations of their states under the ECHR, and to instruct policymakers outside the member states of the Council of Europe. Because of its unique characteristics, as well as the volume and breadth of its case law, the jurisprudence of the ECtHR can be a lodestone for the consolidation of an international human rights community based on shared values. The unique contribution of this article is the assessment of ECtHR jurisprudence not only on its own merits, but also in comparison with the jurisprudence of other international courts.

Keywords: European Court of Human Rights (ECtHR), European Convention on Human Rights (ECHR), proportionality, policy making, fair trial

1. Introduction

The use of proportionality and balancing by the European Court of Human Rights (ECtHR or the Court) is inconsistent and fails to provide clear guidelines for the drafting of policies that strike a fair balance between individual rights and public interests, while not impairing the essence of the rights at stake. This unstructured balancing process does not create a body of jurisprudence that can be analysed to determine when infringements of rights are not justified in the face of competing interests. While ad hoc and unprincipled balancing may be justified on the theoretical level,[1] on the practical level a policymaker seeking to understand which types of infringement

[*] LLM (Yale Law School); Stein.shlomit@gmail.com. The research for this article was conducted as part of the 'Proportionality in Public Policy' research project at the Israel Democracy Institute, funded by the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC Grant No 324182. I would like to thank Talya Steiner and Mordechai Kremnitzer for their support throughout the development process of the article and for their constructive comments on its several drafts. Additional thanks are owed to Felix Petersen for his insightful remarks.

[1] Kai Möller, 'Proportionality: Challenging the Critics' (2012) 10 *International Journal of Constitutional Law* 709, 728–29.

constitute clear violations of the European Convention on Human Rights (ECHR or the Convention)[2] is left puzzled.

This article will clarify this confusion by breaking down several aspects of the right to a fair trial under the ECHR into clear-cut 'red lines', or minimum thresholds of protection, which, when overstepped, constitute a clear violation of the right. The article also addresses the jurisprudence of the Court on justification for violations of those rights. 'Fair trial' is used here in the broad sense, covering rights that are dealt with under both Articles 5 and 6 of the ECHR. Identifying these red lines is intended to assist legislators and policymakers in drafting laws and policies that conform with their states' obligations under the ECHR, and also to instruct policymakers outside the Council of Europe member states.

Accordingly, the article first reviews the ECHR and its Court, including its broad scope of influence and assessing it in comparison with the jurisprudence of other international courts, followed by an examination of the Court's use of balancing and proportionality. The article then delves into five aspects of the right to a fair trial, breaking them down into the clearest possible red lines, and compares the Court's stand on these issues with that of other international tribunals and supranational institutions. Within this framework, the following five issues are discussed: (i) the admission of evidence obtained through torture or other forms of ill-treatment; (ii) the use of anonymous witnesses in trial proceedings; (iii) limitations on disclosure of information basing allegations against detainees; (iv) trials in the absence of the defendant; and (v) the legality of preventive detention for security purposes and intelligence gathering. The article concludes with a discussion of the case law of the ECtHR within the context of international law and compares the Court's position with that of other international bodies.

2. ECtHR Jurisprudence beyond the Borders of the Council of Europe

The judgments of the ECtHR can serve as instructive sources for policymaking beyond the borders of the Council of Europe, even though states which are not subject to the Court's jurisdiction are not compelled to follow its jurisprudence. The ECtHR must tread a fine line between universalism and respect for the sovereignty of member states;[3] this results in judgments that are sensitive to the need for states to pursue policies, but at times are at the expense of upholding rights. The considerations the Court weighs mirror the kind of deliberative process in which policymakers engage in seeking to reconcile collective goals with the protection of individual rights. This is true also for domestic courts that deal with administrative or constitutional complaints. However, the ECtHR is especially reluctant to define bright-line rules or to draw clear red

[2] European Convention on Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR).

[3] '[T]he next phase in the life of the Strasbourg Court might be defined as the age of subsidiarity, a phase that will be manifested by the Court's engagement with empowering the Member States to truly "bring rights home"': Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487, 491. See Protocol No 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No 213.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

lines which can be extended in a principled manner beyond ad hoc rulings. Without bright-line rules and in the absence of categorical reasoning, minimum thresholds must be identified as the minimum essence which must be protected under any circumstances.

As for institutional aspects, the ECHR is 'widely regarded as the most effective transnational judicial process for complaints brought by individuals and organizations against their own governments'.[4] This is partly as a result of the enforcement mechanisms incorporated in the Convention to ensure that the Court's judgments are implemented.[5] These procedural mechanisms contribute to embedding the Court's rulings within the law of the member states and, in turn, allow the Court to exert influence on the shaping of fundamental rights on the multinational level, as well as on domestic policymaking.[6] Yet, despite it being a regional court, the judgments of the ECtHR have been invoked by other international human rights bodies and by constitutional courts of states not parties to the ECHR.[7]

It is further noteworthy that although the ECtHR has jurisdiction to scrutinise human rights violations only when these are carried out by member states of the Council of Europe, citizenship of a member state is not a prerequisite for filing a complaint with the Court. Any individual in the world who claims to have had a protected right under the ECHR violated by a member state can turn to the ECtHR. In this sense, the Court has a cosmopolitan quality, opening its door on an individual basis, regardless of citizenship affiliation.

This 'cosmopolitan quality' can also be extrapolated from the nature of the Convention itself. The Court has interpreted the Convention as a lawmaking treaty.[8] In contrast to a contractual treaty that is designed to create reciprocal obligations binding exclusively the parties to the treaty, a lawmaking treaty is designed with a wider common aim: the protection of fundamental rights of individuals.[9] Accordingly, a ruling of a violation of the Convention is a mixture of two kinds of claim in respect of: (i) the nature of member states' obligations, and (ii) the moral rights to which individuals are entitled by virtue of being human.[10] The breadth of the Court's rulings can assist

[4] Steven Greer, *The European Convention on Human Rights: Achievements, Problems, and Prospects* (Cambridge University Press 2006) 1.

[5] ECHR (n 2) arts 41, 46. Under art 8 of the Statute of the Council of Europe (entered into force 3 August 1949) 87 UNTS 103, ETS 001, the Committee of Ministers (the political organ that supervises the execution of judgments) may expel member states that seriously violate their obligation to accept the principles of the rule of law and human rights and to collaborate sincerely in the realisation of the aims of the Council.

[6] For a survey of the influence of the ECtHR on domestic processes, see Helen Keller and Alec Stone Sweet, (eds) *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008); Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis* (Intersentia 2014). In the sphere of defendants' rights, see Nicolas AJ Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?' (2011) 11(1) *Human Rights Law Review* 91, 93.

[7] Croquet, ibid 124 and the examples discussed there.

[8] ECtHR, *Wemhoff v Germany*, App no 2122/64, 27 June 1968, para 8.

[9] Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia 2011) 16.

[10] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Geir Ulfstein, Andreas Føllesdal and Birgit Peters (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 106.

policymakers in states that are not signatories to the ECHR yet share the values on which the Convention rests.[11]

Concluded in the aftermath of the Second World War, the ECHR was modelled closely on the provisions of the United Nations (UN) Universal Declaration of Human Rights[12] and was intended to be 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.[13] Together with particular treaties, declarations and resolutions concluded by the UN and many other international forums, the jurisprudence of the ECtHR and other human rights courts form the body of international human rights law (IHRL), some of which can be considered part of customary international law.[14] Considering their shared goal to protect fundamental rights, the question of what exactly is entailed in these rights, or which concrete red lines can be deduced from abstract rights, is certainly worth discussing within broader international jurisprudence.[15] This is also evident in the cross-referencing that these courts make to the jurisprudence of their fellow courts and to international human rights instruments.[16]

As for a specific comparison of the jurisprudence of the ECtHR with the statutes and jurisprudence of international criminal tribunals, considering the unique objectives and practices of international criminal law (ICL)[17] it may be argued that there is no room for such a comparison or the bundling of the jurisprudence of the tribunals with that of a human rights court. This can be countered by the following arguments. First, ICL is not a monolithic legal regime. Notwithstanding institutional and structural resemblances, the nature of the relationship between the various tribunals is far from undisputed.[18] Second, in terms of the content of its norms, ICL is

[11] In order to argue that the Court's interpretation of rights has a legally binding effect on states that are not parties to the ECHR, one would need to demonstrate their customary status and the development of customary international law. For discussions about the ECHR and customary internal law, see Ineta Ziemele, 'Customary International Law in the Case Law of the EurCourtHR – The Method', in *The Judge and International Custom* (Council of Europe 2012) 75; Francesco Francioni, 'Customary International Law and the European Convention on Human Rights' (1999) 9 *Italian Yearbook of International Law* 11; Andrew J Cunningham, 'The European Convention on Human Rights, Customary International Law and the Constitution' (1994) 43 *International and Comparative Law Quarterly* 537.

[12] Cunningham, ibid 541.

[13] ECHR (n 2) Preamble, para 5.

[14] Cunningham (n 11) 542.

[15] This does not exclude, however, taking into consideration the particularities of each jurisdiction. Some of the Court's approaches diverge from customary international law, and could be argued to reflect unique European ideals and values, such as the Court's stand on the death penalty: Francioni (n 11) 21.

[16] For the Court's referencing to international, regional and foreign materials, see Senden (n 9) 255–58.

[17] For a discussion of the objectives of ICL, see Mirjan R Damaska, 'What is the Point of International Criminal Justice?', Yale Law School Scholarship Repository, (2008) *Faculty Scholarship Series*, Paper 1573, http://digitalcommons.law.yale.edu/fss_papers/1573; Mark Klamberg, 'What are the Objectives of International Criminal Procedure? Reflections on the Fragmentation of a Legal Regime' (2010) 79 *Nordic Journal of International Law* 279.

[18] eg, art 21 of the ICC Statute (Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90), which states the formal legal sources of the ICC, limits the room for jurisprudence cross-fertilisation. Although it does not explicitly prohibit importing case law from other international courts, art 2 refers positively only to its own prior interpretation. Accordingly, the ICC has displayed reluctance to apply principles drawn by ad hoc tribunals. It is thus concluded by some that the ICC strives to establish itself as a 'separate epistemic community': Elies van Sliedregt, 'Pluralism in International Criminal Law' (2012) 25 *Leiden Journal of International Law* 847, 848–49.

a composition of domestic criminal law (from which ICL imports its fundamental legal principles) and of IHRL and international humanitarian law (IHL) (from which definitions of crimes and parameters for the assessment of offences committed during armed conflict are drawn).[19] The immediate connection between ICL and IHRL was explicitly established in the drafting of the Statute and the Rules of the International Criminal Tribunal for the former Yugoslavia (ICTY), during the course of which 'every attempt was made to comply with internationally recognized standards of fundamental human rights'.[20] Article 21 (rights of the accused), which is of particular relevance to the matters discussed here, was drafted explicitly in light of Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[21] Moreover, Article 21(3) of the ICC Statute states that the ICC has to interpret its internal legal framework in such a way as to abide by 'internationally recognized human rights' law.[22] Third, while recognising the need to interpret the statute's provisions in light of the objectives of the international tribunal, the ICTY has stated that decisions on the provisions of the ICCPR and the ECHR have been found to be authoritative and applicable.[23] Fourth, some of the issues discussed here concern rules of evidence, which belong to procedural law. The attempt to weave a patchwork that integrates continental and common law traditions in ICL has received its share of critique.[24] Without dwelling on this issue, it can be concluded that ICL has succeeded in developing a system of procedural law – a system grounded in international human rights law and the basic norm of the right to a fair trial.[25] Thus, the influence of IHRL is also apparent in procedural ICL. In particular, the ICC has significantly deferred to the case law of the ECtHR in determining the scope of the rights of the defence and their limitations, regarding them as carrying 'persuasive authority'.[26] In conclusion, notwithstanding the respective particularities of ICL and IHRL, the

[19] Carsten Stahn and Larissa van den Herik, '"Fragmentation", Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?' in Larissa van den Herik and Carsten Stahn (eds), *The Diversification and Fragmentation of International Criminal Law* (Martinus Nijhoff 2012) 1, 55 (offering a framework that acknowledges the fact that ICL is pluralistic by nature while addressing the need to maintain a certain level of internal coherence).

[20] ICTY, *Prosecutor v Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, IT-94-I-T, Trial Chamber, 10 August 1995, [25].

[21] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[22] ICC Statute (n 18) art 21(3).

[23] ICTY, *Prosecutor v Delalić*, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed 'B' through to 'M', IT-96-21-T, Trial Chamber, 28 April 1997, [27]–[28] (*Prosecutor v Delalić*).

[24] This critique has been voiced with regard to what many see as unrestrained prosecutorial discretion in ICL. Heated debate also surrounds the practice of 'witness proofing'. Whereas the ICC discarded the practice, deeming it hazardous to the spontaneity of court testimony, the ICTY and ICTR justified the practice as necessary, considering the unique circumstances of the cases brought before them: Stahn and van den Herik (n 19) 52–54; Alexander KA Greenawalt, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 *NYU Journal of International Law and Politics* 583. But see Volker Nerlich, 'Daring Diversity: Why There is Nothing Wrong with "Fragmentation" in International Criminal Procedure' (2013) 26 *Leiden Journal of International Law* 777.

[25] Gideon Boas and others, *International Criminal Law Practitioner Library: International Criminal Procedure*, Vol 3 (Cambridge University Press 2011) xiv.

[26] Croquet (n 6) 108.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

influence of the latter on ICL is undeniable and, accordingly, cross-fertilisation and comparison should be welcomed.[27]

2.1. UNSYSTEMATIC BALANCING IN THE JURISPRUDENCE OF THE ECTHR

Balancing is central to the reasoning process of the ECtHR, yet it is considered by many to be in tension with the Court's chief aim of protecting fundamental rights.[28] Balancing in the jurisprudence of the ECtHR is essentially synonymous with proportionality assessment, the adjudication method used by the Court in the vast majority of its cases.[29] Far from the textbook structured proportionality review,[30] proportionality as adopted by the ECtHR is a flexible, open-ended balancing test in which competing claims of individual rights and collective goals are weighed against each other on a case-by-case basis.[31]

The conversion of proportionality analysis to an all-inclusive balancing exercise has been a source of criticism. While some critics take aim at the Court's unique approach to proportionality, others make a more general attack on balancing and its erosion of the normative priority of rights over collective interests.[32] This critique is targeted against balancing in general. Yet it seems particularly relevant to the ECtHR as its balancing process resembles what Möller has described as

[27] For a critical discussion on cross-fertilisation between international criminal tribunals and the ECtHR see Triestino Mariniello and Paolo Lobba, 'The Cross-Fertilisation Rhetoric in Question: Use and Abuse of the European Court's Jurisprudence by International Criminal Tribunals' (2015) 84 *Nordic Journal of International Law* 363.

[28] Janneke Gerards, 'The European Court of Human Rights and the National Courts: Giving Shape to the Notion of "Shared Responsibility"' in Gerards and Fleuren (n 6) 39 (the essential object of the ECHR is 'to effectively protect individual fundamental rights and to guarantee a reasonable minimal level of protection of fundamental rights throughout the Council of Europe'); Greer (n 4) 7 (arguing that the protection of rights within the context of the principles of democracy and the rule of law is *the* ultimate aim of the Convention and should accordingly guide its interpretation).

[29] Despite its absence from the text of the ECHR, the use of proportionality in assessing violations of Convention rights has become the norm in the Court's adjudication process: Marc-André Eissen, 'The Principle of Proportionality in the Case Law of the European Court of Human Rights' in Ronald St J Macdonald, Herbert Petzold and Franz Matscher (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 125, 146 ('the principle of proportionality has acquired "the status of a general principle in the Convention system"'); Alec Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court', Yale Law School Legal Scholarship Repository, (2009) *Faculty Scholarship Series*, Paper 71, 6, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1070&context=fss_papers; Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 37.

[30] Generally, proportionality analysis is a constructed test made up of three independent, yet inter-related, substages: suitability, necessity/least restrictive means, and proportionality in the strict sense/balancing test.

[31] Stefan Sottiaux and Gerhard van der Schyff, 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights' (2008) 31 *Hastings International and Comparative Law Review* 115, 131–32.

[32] Central to this line of critique is the loss of rights' special normative force in the course of a 'neutral' balancing process where rights and public interests are weighed against each other on the same plane: Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007) 131, 141; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468, 471–74.

'balancing as reasoning'[33] – namely, the bringing together of all relevant considerations with no fixed hierarchy or blueprint as to how the various interests are to be weighed. Moreover, it implies that, as a matter of principle, public interests can always be weighed against rights. This may result in loss of the rights' special normative force.

Within a vertically structured proportionality analysis, rights clearly prevail over the public interest when the latter can be attained with the use of a less restrictive measure.[34] However, this rule in practice is inapplicable to the ECtHR, not only because of the Court's horizontal application of proportionality analysis, but also because of its inconsistent use of the less restrictive means test.[35] Analysing the Court's use of this test, Brems and Lavrysen have concluded that it is difficult to systematise the Court's use of the test, and that among those cases in which the Court does apply the test it does not consider itself under an obligation to do so.[36] Brems and Lavrysen, furthermore, have found that the test has occasionally been applied in a 'reverse' manner – to evaluate the chosen measure in comparison with more (as opposed to less) restrictive means,[37] thus running counter to the objective of the test.

The resort to an all-inclusive balancing test also carries controversial side effects that impact on the review stages preceding the proportionality assessment. The first of these concerns the definitional stage at which the scope of the right should be made explicit. According to Tsakyrakis, 'definitional generosity' is a basic methodological principle of the balancing approach.[38] The widening of the scope of rights at the definitional stage further perplexes those who seek to draw clear elements of 'do and do not' from the Court's case law, in that the finding of a prima facie interference merely triggers an assessment of whether the infringement is justified and does not serve to carve out a scope of the right which is void of any interference. Thus the recognition of the complaint as falling within the scope of a right does not elevate the normative force of the rights-holder's claim, or give the holder any position of priority over competing policy considerations.[39]

[33] Möller (n 1) 715.
[34] Tsakyrakis (n 32) 474.
[35] Christoffersen (n 29) 114 (arguing that the least restrictive means test was rejected by the ECtHR on principle grounds, meaning that the Court does not view least restrictive means to be a necessary stage in proportionality analysis).
[36] Eva Brems and Laurens Lavrysen, '"Don't Use a Sledgehammer to Crack a Nut": Less Restrictive Means in the Case Law of the European Court of Human Rights' (2015) 15 *Human Rights Law Review* 139.
[37] ibid 155–56, referring to ECtHR, M v *Switzerland*, App no 41199/06, 26 April 2011, para 66; ECtHR, *Association Rhino and Others v Switzerland*, App no 48848/07, 11 October 2011, para 65; ECtHR, *Schweizerische Radio- und Fernsehgesellschaft SRG* v *Switzerland*, App no 34124/06, 21 June 2012, para 61.
[38] Tsakyrakis (n 32) 480–81. Kumm ((n 32) 140) argues basically the same ('If all you have in virtue of having a right is a position whose strength in any particular context is determined by proportionality analysis, there are no obvious reasons for narrowly defining the scope of interests protected as a right. Shouldn't all acts by public authorities affecting individuals meet the proportionality requirement?').
[39] Kumm (n 32) 139; but see Yutaka Arai-Takahashi, 'Proportionality' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 446; George Pavlakos, 'Constitutional Rights, Balancing and the Structure of Autonomy' (2011) 24 *Canadian Journal of Law and Jurisprudence* 129.

Gerards and Senden pose an even harsher critique, arguing that the ECtHR often completely skips the definitional stage or pays lip service to it by accepting that the case falls within a Convention right without providing an explanation.[40] When the Court does address the definition of the right, it often merges this analysis with the assessment of the justification for its limitation,[41] thus avoiding the need to draw the scope of the right independently of competing policy considerations. The ECtHR, in the words of Gerards and Senden, can 'hide behind the specific circumstances of the case and avoid having to make structural decisions on the scope of a Convention right'.[42] Furthermore, the entanglement of definition and justification creates uncertainty concerning the allocation of the burden of proof, as the definition of the right falls to the group asserting its infringement and the justification for its limitation falls to the state.[43] This is usually to the detriment of the applicant, as the interests raised by the respondent government are taken into consideration in the initial stage of defining the scope of the right and the reason for interfering with it.

The second notable side effect concerns the 'legitimate aim' stage, in which illegitimate policy aims should be filtered out. Arai notes that very rarely has the Court determined a violation of ECHR rights on the basis of the legitimate aim standard because such an assessment is usually carried out with the proportionality assessment.[44] Šušnjar argues that the aim is usually upheld swiftly without extensive evaluation. At times, the legitimacy of the aim is assumed, explicitly or implicitly.[45] Similarly, Gerard holds that the ECtHR tends to accept aims that are framed in general and abstract terms and do not require further specification.[46] Gerard notes that although mentioned in each case, the Court has rarely found an aim to be illegitimate and has refrained from developing sub-requirements to help to elucidate the requirements entailed in the different prescribed aims.[47]

Sadurski has also affirmed the Court's very lax evaluation of the legitimate aim requirement.[48] He holds that even in the rare instances in which the Court expresses mild doubts concerning the aim, it brackets or disregards these doubts and proceeds to assess the proportionality of the application of the challenged measure/law.[49] The result of this process is that the illegitimacy of the aim is integrated into the proportionality assessment and is not the outcome of independent scrutiny.[50] In this context, refraining from stating clearly which aims could never justify an interference with a

[40] Janneke Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 *International Journal of Constitutional Law* 619, 632–34.
[41] ibid 634.
[42] ibid 639.
[43] ibid 644.
[44] Yutaka Arai, 'System of Restrictions' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 340; Sadurski concludes the same in Wojciech Sadurski, 'Is There Public Reason in Strasbourg?', research paper, Sydney Law School, 6 May 2015, 15/46, 2–3.
[45] Davor Šušnjar, *Proportionality, Fundamental Rights, and Balance of Powers* (Brill 2010) 90.
[46] Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11 *International Journal of Constitutional Law* 466, 479; Sadurski (n 44) 2.
[47] Janneke Gerards, 'Judicial Deliberations in the European Court of Human Rights' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond* (TMC Asser Press 2009) 407, 417, 62.
[48] Sadurski (n 44).
[49] ibid 3–5.
[50] ibid 10.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

right indirectly relaxes the definition of the right. The failure to articulate unjustified aims elevates collective goals, regardless of their incompatibility with what we value as essential to a given right.[51]

2.1.1. THE 'VERY ESSENCE OF THE RIGHT': A DEONTOLOGICAL CONSTRAINT ON BALANCING?

Despite the dominance of the balancing method in the jurisprudence of the ECtHR, not all aspects of the rights are 'up for grabs'.[52] The Court's jurisprudence is scattered with references to the 'essence' or 'core' of the right. This, at least in theory, suggests some kind of a deontological constraint within the balancing method. According to Tsakyrakis, '[o]nce we have accepted that this core content cannot be compromised under any circumstances we have left behind the idea that the right at stake can be weighed against competing public interests'.[53] This accords with the conclusion by Kumm and Walen that not only does balancing not exclude deontological constraints, but it actually requires the inclusion of such considerations.[54] A balancing exercise, they hold, should extend beyond interest-based balancing and attribute more normative force to the right-holder's claim in contexts in which respect for human dignity is concerned.[55] Such circumstances do not automatically elevate the right to an absolute status, but require ascribing it more weight than a neutral interest balancing would suggest.[56]

However, the ECtHR does not define 'essence' with precision. Arai-Takahashi places the 'very essence' requirement close to that of the 'practical and effective', meaning that the guarantee of the right must not be of an illusory or theoretical nature.[57] Gerards argues that the closer an aspect of a right is to the general objectives of the ECHR (defined as the maintenance and promotion of a democratic society and the protection of human dignity and personal autonomy), the greater the likelihood that the Court will submit the infringement to stricter scrutiny and narrow the margin of appreciation afforded to the respondent government accordingly.[58]

Indeed, the notion of essence is intertwined in the Court's jurisprudence with the concept of 'human dignity', the latter supposedly placing deontological constraints on the balancing process. Nevertheless, Christoffersen concludes that a finding of lack of respect for human dignity

[51] Tsakyrakis (n 32) 488.
[52] ibid 488.
[53] ibid 492.
[54] Mattias Kumm and Alec D Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 67, 69 (defining deontology broadly, as encompassing 'a range of reasons for giving some interests more or less priority over others').
[55] ibid.
[56] ibid 89.
[57] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 36. One of the interpretive principles guiding the ECtHR is the principle that the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective'. On the interpretive principles of the Court, see Greer (n 4) 193–230.
[58] Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 *European Law Journal* 80, 112.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

does not necessarily lead to a finding of a violation because of the Court's adoption of a relative theory of essence of rights. Thus, what can be ruled as constituting a violation of the essence of the right in one context can be ruled valid in a different context. This contextualism means that there is no nucleus to a right that cannot be violated.[59] In practice, the delimitation of the essence is entangled in the Court's proportionality analysis and delimited on the basis of a fair balancing test.[60]

Arai has observed that the Court's approach has undergone 'a notable shift from the restrained approach in the earlier decisions to a more assertive tendency, in the recent cases, to scrutinise the "very essence" requirements with rigour'.[61] Yet Arai's analysis of the case law supports Christoffersen's conclusion that the application of the notion of the 'very essence' still remains insufficiently articulated.[62] In the context of the rights relating to a fair trial, Goss holds that the ECtHR has displayed a tendency to refer to the standards of proportionality and 'very essence' practically interchangeably,[63] so there is hardly any significant distinction between what constitutes a disproportionate infringement and what constitutes an impairment of the very essence of the right. In conclusion, the use of the 'very essence' standard does not cure the ambiguity of balancing and proportionality analysis in the Court's case law. Without a clear standard of what constitutes the essence of a right, it is without a doubt difficult to find a set of 'red lines' to determine an unequivocal violation, yet this difficulty also amplifies the need to attempt to do so.

The lack of a clear standard creates a situation where the ability to distil guidelines from its jurisprudence is made all the more difficult. Because the ECtHR does not implement proportionality in a principled and systematic manner, it is difficult to understand what would constitute clear violations, and conversely interferences which are proportionate. Indeed, one could argue that the Court has reasons for its unsystematic use of proportionality. Nonetheless, this praxis still has its downsides – among others, the difficulty in drawing wider policy considerations. Keeping in mind the Court's rhetoric on how it would like to rule – with proportionality and balance – a deeper analysis of how the Court actually rules can be explored. In doing so, the inchoate jurisprudence on proportionality and balance will be ever more clear.

[59] Christoffersen (n 29) 145 (arguing that the growing use of the concept diminishes the scope of its protection to the extent that 'the use of the notion of human dignity entails a departure from a measure of absolute legal protection of human dignity').
[60] ibid 149. Arai-Takahashi ((n 57) 37) also holds that the notion of the 'very essence' is closely associated with or included in the proportionality assessment.
[61] Arai-Takahashi (n 57) 37.
[62] ibid 37–39.
[63] Ryan Goss, *Criminal Fair Trial Rights* (Hart 2014) 198–201; eg, ECtHR, *Goth v France*, App no 53613/99, 16 May 2002 (ruling that the requirement of surrendering to custody as a requirement of admissibility of appeal deprived the petitioner of liberty, and 'undermined the very essence of the right to appeal by placing a disproportionate burden on the appellant that upset the fair balance that had to be maintained between the need to enforce judicial decisions and the need to ensure access to the Court of Cassation and that the defence was able to exercise its rights'). See also ECtHR, *Omar v France*, App no 24767/94, 29 July 1998, para 40.

3. RED LINES IN THE JURISPRUDENCE OF THE ECtHR

3.1. THE PROHIBITION OF THE ADMISSION OF EVIDENCE OBTAINED CONTRARY TO ARTICLE 3

Article 3 of the ECHR prohibits torture and inhuman treatment. However, use of evidence derived from such measures is not explicitly prohibited. Instead, the ECtHR has derived this prohibition from the right to a fair trial in Article 6. The Court has repeatedly stated that the use of evidence obtained through torture amounts to a 'flagrant denial of justice' and is therefore in violation of the right to a fair trial, irrespective of its probative value.[64]

Over the years the ECtHR has developed a set of principles on the admissibility of evidence obtained in breach of the prohibition of torture and inhuman or degrading treatment: (i) confessions, whether obtained through torture or inhuman treatment, can never be used as evidence in a trial;[65] (ii) real evidence obtained as a result of *torture* is similarly to be excluded; (iii) real evidence obtained as a result of *inhuman treatment* will be excluded if the evidence obtained in violation of Article 3 had an impact on the conviction or sentence; (iv) these principles apply also when the victim of the ill-treatment was not the applicant himself, but a third person (such as a witness);[66] (v) these principles apply to all the states involved in the acts in breach of Article 3, irrespective of the fact that the said acts were carried out in a third state by its officials; (vi) the burden of proof imposed on an applicant claiming that disputed evidence had been obtained contrary to Article 3 need not go beyond the demonstration of a 'real risk' that evidence obtained by torture would be used in the trial;[67] and (vii) these rules apply to both criminal and administrative proceedings.

The ECtHR is less decisive in respect of real evidence obtained through inhuman or degrading treatment that falls short of torture. The admission of real evidence obtained under such circumstances does not automatically render the trial unfair, but it will be excluded in circumstances in which the evidence affected the outcome. In *Jalloh v Germany*[68] the Court addressed whether the forcible administration of emetics to the applicant to obtain evidence of a drug offence was in violation of Article 3 and whether the subsequent use of the evidence at the applicant's trial breached his right to a fair trial. Ruling in favour of the applicant, the Court held that the evidence

[64] ECtHR, *Gäfgen v Germany*, App no 22978/05, 1 June 2010, para 167; ECtHR, *Jalloh v Germany*, App no 54810/00, 11 July 2006, para 105; ECtHR, *Al Nashiri v Poland*, App no 28761/11, 24 July 2014, para 564.
[65] ECtHR, *El Haski v Belgium*, App no 649/08 25, September 2012.
[66] ECtHR, *Othman (Abu Qatada) v United Kingdom*, App no 8139/09, 17 January 2012.
[67] In response to the UK's argument that the applicant had to establish 'beyond reasonable doubt' that the evidence in issue had been obtained by torture, the ECtHR took the view that it would be unfair to impose on the applicant a burden of proof that went beyond the demonstration of a 'real risk' based on the special difficulties in proving allegations of torture: *Othman (Abu Qatada) v United Kingdom*, ibid para 276. The Committee Against Torture (ComAT) has held that the applicant is required only to demonstrate that his or her allegations of torture are 'well-founded'; this shifts the burden to the state to prove the contrary: Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008) para 82 (*CAT Commentary*).
[68] *Jalloh v Germany* (n 64).

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

collection was inhuman and degrading treatment in violation of Article 3. It also found a violation of Article 6 arising from, inter alia, the fact that the evidence collected was the *decisive element* in securing the applicant's conviction.[69]

The distinction between torture and other forms of ill-treatment was upheld in *Gäfgen v Germany*.[70] In that case the Court held that, as a rule, the effective protection of individuals from the use of investigative methods in breach of Article 3 may require the exclusion from use at trial of real evidence obtained contrary to its requirements. However, the fairness of a criminal trial was at stake only if the evidence obtained in breach of Article 3 had an impact on the defendant's conviction or sentence.[71] The majority ruled against the applicant on the ground that he had repeated his statement voluntarily in the course of his trial. Consequently, the failure of the domestic courts to exclude the disputed evidence was found to have no bearing on the applicant's conviction and sentence.

3.1.1. ECtHR Jurisprudence Situated within International Law

Discussions concerning the prohibition of evidence obtained by torture commonly begin with Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[72] (CAT), which reads as follows:

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

The provision applies to 'any proceedings' – criminal, civil, administrative, extradition – regardless of whether the torture was carried out in a third country[73] or if the evidence is used in proceedings against a person other than the victim of torture.[74] It applies exclusively to statements (not to real evidence) and to torture (not to inhuman or degrading treatment), contrary to a

[69] ibid para 119 (emphasis added).
[70] *Gäfgen v Germany* (n 64).
[71] This point received harsh critique by the dissenting judges: ibid, joint partly dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, para 9. For further discussion of the case and its ramifications, see Stijn Smet, 'Gäfgen v. Germany: Threat of Torture to Save a Life?', *Strasbourg Observers*, 6 July 2010, http://strasbourgobservers.com/2010/07/06/389.
[72] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85 (CAT), art 15.
[73] *CAT Commentary* (n 67) para 75 ('The IAPL draft explicitly referred to "any judicial or administrative proceedings". Although this explanation was deleted in the final version of Article 15, nothing in the *travaux préparatoires* suggests that the scope of application of Article 15 was meant to be reduced to judicial proceedings'). This is confirmed in contemporary case law, with no exception made for preventive purposes, and also when the torture is carried out by a third state agent (paras 76–80).
[74] Tobias Thienel, 'The Admissibility of Evidence Obtained by Torture under International Law' (2006) 17 *European Journal of International Law* 349, 357 ('The phrase "any statement" may also cover a statement of a person other than the one against whom the evidence is brought and the phrase "any proceedings" also extends to proceedings against a person other than the victim of torture').

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

number of proposed drafts which included these expansions. According to the commentary to the CAT, the preventive purpose of Article 15 supports such broader application to statements made as a result of cruel, inhuman or degrading treatment.[75]

Thienel argues that Article 15 CAT has achieved customary status.[76] As of March 2017, 161 states were parties to the CAT,[77] with no state party having made a reservation to Article 15. In contrast to many human rights provisions, state parties may not derogate from Article 15 in times of war or public emergency; nor is the application of the article made subject to considerations of national security or public order. Thienel further argues that general international law may lead to the inadmissibility of evidence obtained by torture in two separate ways.[78] First, the special status of the prohibition of torture as a rule of international *jus cogens* may impose on states an obligation to refuse to accept any results arising from its violation by another state. Second, he observes that state practice and *opinio juris* may have already given rise to an independent rule on the inadmissibility of such evidence.[79]

UN bodies have persistently sought to expand the scope of the exclusionary rule through the General Assembly's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[80] Principle 16 requires prosecutors to refuse to use as evidence any statement obtained 'by torture or other ill treatment except in proceedings against those who are accused of using such means'.[81] With the establishment of the ICTY, its judges adopted a rule that rendered inadmissible evidence that was 'obtained directly or indirectly by means which constitute a serious violation of internationally protected human rights'[82] – a phrase broad enough to apply to both torture and cruel, inhuman or degrading treatment. Amended in 1995, it now reads: 'No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings'.[83] According to the Tribunal's Second Annual Report, '[t]he

[75] *CAT Commentary* (n 67) para 86. Defining the scope of the exclusionary rule requires reflecting on what distinguishes torture from other cruel, inhuman or degrading treatment. The two main approaches in this respect are the purposive versus the severity. According to the severity approach, the severity of the treatment is the decisive element that distinguishes torture from cruel, inhuman or degrading treatment. According to the purposive approach, the purpose of the act, rather than its severity, is the decisive distinguishing element: Akmal Niyazmatov, 'Evidence Obtained by Cruel, Inhuman or Degrading Treatment: Why the Convention Against Torture's Exclusionary Rule Should be Inclusive' (2011) *Cornell Law School Inter-University Graduate Student Conference Papers*, Paper 44.

[76] Thienel (n 74) 365.

[77] United Nations, Status of Ratification, http://indicators.ohchr.org.

[78] Thienel (n 74) 363.

[79] ibid. Scharf has situated the prohibition in the more modest realm of 'international standards of justice', arguing for the expansion of the exceptions to the torture evidence exclusionary rule in the context of the hybrid UN Cambodia Genocide Tribunal: Michael P Scharf, 'Tainted Provenance: When, if Ever, Should Torture Evidence be Admissible' (2008) 65 *Washington & Lee Law Review* 129, 136; but see David McKeever, 'Evidence Obtained through Torture before the Khmer Rouge Tribunal: Unlawful Pragmatism?' (2010) 8 *Journal of International Criminal Justice* 615.

[80] UNGA Res 43/173 (9 December 1988), UN Doc A/RES/43/173.

[81] ibid Principle 16.

[82] ICTY, Rules of Procedure and Evidence, UN Doc IT/32/Rev. 1(1994), r 95.

[83] ICTY, Rules of Procedure and Evidence, UN Doc IT/32/Rev. 40(2007), r 95.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

amendment to Rule 95 … puts parties on notice that although a Trial Chamber is not bound by national rules of evidence, it will refuse to admit evidence – no matter how probative – if it was obtained by improper means'.[84] Similar provisions were included in the rules of the Rwanda Tribunal (ICTR),[85] the Special Court for Sierra Leone (SCSL),[86] and the International Criminal Court (ICC).[87] These provisions signal a trend towards widening the scope of the prohibition beyond mere statements made under torture.[88]

The UN Human Rights Committee (HRC) has further stated[89] that 'it is important for the discouragement of violations under Article 7 [of the ICCPR] … that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture *or other prohibited treatment*'. This has been referred to in terms of developing a 'tainted fruits of the poisonous tree' doctrine, applying it to all forms of ill-treatment.[90] In its guidelines on the admissibility of evidence obtained by torture or other prohibited treatment, the UN Working Group on Arbitrary Detention included a broader provision than Article 15 CAT, covering other forms of cruel, inhuman or degrading treatment.[91]

Returning to the jurisprudence of the ECtHR, its red line prohibiting the use of statements obtained through torture corresponds with Article 15 of the CAT, and its extension of the prohibition on statements obtained by other forms of inhuman or degrading treatment accords with the position of the UN bodies and the international criminal tribunals. As to the inclusion of all forms of evidence obtained through torture (that is, real evidence), this also accords with the international criminal tribunals, but it is the point where the tribunals, together with the ECtHR, diverge from the HRC, the latter confining the 'tainted fruits of the poisonous tree' doctrine flowing from Article 7 of the ICCPR to statements and confessions. This additional step taken by the ECtHR can be attributed to its willingness to expand the obligations of member states under the ECHR through purposive and dynamic interpretation.

The reluctance of the ECtHR to draw a clear red line on the status of real evidence obtained through means which fall short of torture also seems in tune with the provisions of the

[84] Note of the Secretary-General Transmitting the Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (23 August 1995), UN Doc A/50/365–S/1995/728, n 9.
[85] ICTR, Rules of Procedure and Evidence of the International Tribunal for Rwanda (entered into force 29 June 1995), UN Doc ITR/3/Rev.1(1995), r 95.
[86] SCSL, Rules of Procedure and Evidence of the Special Court for Sierra Leon (amended 7 March 2003), r 95.
[87] ICC Statute (n 18) art 69(7).
[88] The less categorical wording of these provisions could be attributed to the fact that they are addressed to judges, who are granted more interpretive authority than the executive in a domestic setting. Therefore, the open-ended wording should not be understood as welcoming a flexible interpretation, but as a reflection of the audience to whom it was addressed.
[89] UN, Compilation of General Comments and Recommendations adopted by Human Rights Treaty Bodies: General Comment No 20 (27 May 2008), UN Doc HRI/GEN/1/Rev 9 (Vol I) 201, para 12 (emphasis added).
[90] *CAT Commentary* (n 67) para 88.
[91] UN General Assembly, Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings before a Court (6 July 2015), UN Doc A/HRC/30/37, Guideline 12, para 77 (Admissibility of evidence obtained by torture or other prohibited treatment).

international criminal tribunals which grant broad discretion to judges to determine the scope of the vague notions of 'substantial doubt' regarding the reliability of the evidence, or whether its admission is 'antithetical to' and would 'seriously damage' the integrity of the proceedings. However, the Court's rule of excluding real evidence when shown that its inclusion has had an impact on the conviction could be interpreted as a lower threshold. In this sense, the ECtHR seems to display a willingness also to push its boundaries of exclusion. That said, in *Jalloh* the 'impact' requirement was equated with the decisiveness of the real evidence in securing the applicant's ultimate conviction (setting a relatively high threshold) and in *Gäfgen* the applicant's repetition of his confession in open court cancelled out such 'impact'. Both of these rulings stirred controversy among the Strasbourg judges.[92] Subsequent developments in the case law of the ECtHR on the matter may shed light on the question whether the Court will indeed take this extra step, or remain within the current muzzy confines.

3.2. THE USE OF STATEMENTS OF ANONYMOUS WITNESSES AS EVIDENCE TO FOUND A CONVICTION

Although the ECtHR acknowledges the reliance on sources such as anonymous informants in the course of the pre-trial investigation stage, the subsequent use of their statements by the convicting court is a separate issue which requires strict examination.[93] The Court frames its assessment of the issue within the broader question of whether the applicant was afforded a fair trial. Specifically, it examines whether the restrictions placed on the defence were sufficiently counterbalanced by the procedure followed by the judicial authorities.[94] Until recently, the Court held that even when counterbalancing procedures could be found to compensate sufficiently for the impediments under which the defence labours, a conviction based either solely or to a decisive extent on anonymous statements sets far-reaching limitations on the rights of the defence, which are generally irreconcilable with the guarantees contained in Article 6 ('the sole or decisive rule').[95]

[92] *Gäfgen v Germany* (n 64) joint partly dissenting opinion of Judges Rozakis and others, para 2 ('A criminal trial which admits and relies, to any extent, upon evidence obtained as a result of breaching such an absolute provision of the Convention cannot *a fortiori* be a fair one. The Court's reluctance to cross that final frontier and to establish a clear or "bright-line" rule in this core area of fundamental human rights is regrettable … [and] risks undermining the effectiveness of the absolute rights guaranteed by Article 3. [The] distinction … introduced into the Court's jurisprudence between the admissibility of statements obtained in breach of the absolute prohibition of inhuman and degrading treatment and the admissibility of other evidence obtained in the same manner … is difficult to sustain').

[93] ECtHR, *Teixeira de Castro v Portugal*, App no 25829/94, 9 June 1998, para 35; ECtHR, *Kostovski v The Netherlands*, App no 11454/85, 20 November 1989, para 44.

[94] *Kostovski v The Netherlands*, ibid para 41.

[95] ibid para 44; ECtHR, *Doorson v The Netherlands*, App no 20524/92, 26 March 1996, para 76; ECtHR, *Van Mechelen and Others v The Netherlands*, App nos 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997, para 55; ECtHR, *Krasniki v Czech Republic*, App no 51277/99, 28 February 2006, para 79; but see ECtHR, *Al-Khawaja and Tahery v United Kingdom*, App nos 26766/05 and 22228/06, 15 December 2011, para 46 (noting that the sole or decisive rule should not be applied in an inflexible way).

More recently, however, the ECtHR has relaxed its sole and decisive rule.[96] Instead of a definite rule, which, if not met, would result in an automatic violation, it is now one consideration among several that inform the Court's reasoning, a violation of which alone is not enough to constitute a violation of the defendant's right to examine witnesses. That stated, the Court has defined a relatively closed checklist to follow in assessing the matter. In *Ellis and Simms and Martin v United Kingdom*[97] the evidence given anonymously was not the sole evidence on the basis of which the conviction was found, but was considered 'decisive' in respect of some of the applicants. The Court clarified the considerations that must be considered in establishing whether the use of anonymous statements violates the defendant's right to examine witnesses:[98]

- whether there are good reasons to keep the identity of the witness secret;
- whether the evidence of the anonymous witness was the sole or decisive basis of the conviction;
- when a conviction is based solely or decisively on the evidence of anonymous witnesses, the proceedings must be subject to the most searching scrutiny; this means that there must be sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence.

This list illustrates that notwithstanding the decisiveness or exclusivity of the evidence provided by an anonymous witness in basing a conviction, in principle counterbalancing factors are able to 'cure' their use. That said, in *Ellis and Simms and Martin* the Court considered that the defence had the opportunity to examine the anonymous witnesses. Clearly, this is considered a weighty counterbalancing measure, especially when such evidence is of more than marginal importance.[99] Therefore, Bas de Wilde suggests that in the absence of such a measure,[100] the Court 'will not often accept anonymous statements of non-examined witnesses and that, in addition, such statements will not be allowed to be of decisive importance'. In any case, when such evidence is the sole base of a conviction, the counterbalancing measures must be very significant.[101]

The recent ruling of the ECtHR in *Balta and Demir v Turkey*[102] confirms de Wilde's prediction. The case concerned the applicants' conviction on the basis of statements made by an anonymous witness. The Court ruled in favour of the applicants, finding a violation of Article 6. Following the above list, the Court concluded that: (i) no reasons were given for the decision to preserve anonymity; (ii) the evidence was not the sole piece of evidence, but was decisive; (iii) the witness did not appear before the trial judge; (iv) the defence was not given

[96] Bas de Wilde, 'A Fundamental Review of the ECHR Right to Examine Witnesses in Criminal Cases' (2013) 17 *The International Journal of Evidence & Proof* 157.
[97] ECtHR, *Marcus Ellis and Rodrigo Simms and Nathan Antonio Martin v United Kingdom*, App nos 46099/06 and 46699/06, 10 April 2012.
[98] ibid paras 76–78.
[99] De Wilde (n 96) 180 and the references in fn 89.
[100] ibid 180.
[101] ibid 175.
[102] ECtHR, *Balta and Demir v Turkey*, App no 48628/12, 23 June 2015.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

the opportunity to direct questions to the witness; and (v) the domestic Turkish court did not even consider the use of less restrictive procedural safeguards available under Turkish law.[103] A question that still remains unanswered concerns circumstances in which the defence was denied the opportunity to question the witness, yet less restrictive means were implemented, or considered.

3.2.1. ECTHR JURISPRUDENCE SITUATED WITHIN INTERNATIONAL LAW

International standards that deal specifically with witness anonymity are found primarily in the rules and procedures of the international criminal tribunals. Rule 69 of the Rules of Procedure and Evidence of the ICTY and the ICTR concern the 'Protection of Victims and Witnesses'. According to the ICTY rule,[104] the prosecutor may, in exceptional circumstances, apply to a trial chamber 'to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal'. Yet, the identity of the victim or witness must 'be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence'. Under Rule 81(4) of the ICC Rules of Procedure and Evidence,[105] a Chamber shall, on its own motion or at the request of the prosecutor, the accused, or any state, take the necessary steps to protect the safety of witnesses and victims and members of their families, including by authorising the non-disclosure of their identity prior to the commencement of the trial. Decisions authorising the non-disclosure of the identity of a prosecution witness must be supported by sufficient reasoning. While the extent of the reasoning varies according to the specific circumstances of each case, it is nevertheless essential that the reasoning indicates with sufficient clarity the basis of the decision – that is, it must reveal the relevant facts underlining it.[106]

The principle guiding the major international criminal tribunals is that measures implemented for the protection of victims and witnesses must be consistent with the rights of the accused and, with regard to anonymity, it will not be permanent. The identity of the witness must be disclosed to the defence with sufficient time before the trial to allow adequate time for the preparation of the defence.[107]

On occasion, however, the ICC has allowed anonymity in segments of the trial proceedings, allowing concealment of identity 45 days before the witness is summoned to testify. In doing so,

[103] Summary based on a press release issued by the Registrar of the Court, ECHR 213 (2015), 23 June 2015, para 3 (the anonymous witness could be questioned in a room away from the hearing room, with an audio and video link, enabling the accused to put questions to the witness).
[104] ICTY, Rules of Procedure (n 83) r 69(A). r 69(A) of the ICTR Rules and Procedure reads slightly differently ('In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise').
[105] ICC, Rules of Procedure and Evidence, UN Doc ICC-ASP/1/3 and Corr.1, Pt II.A.
[106] F Gaynor and others, 'Law of Evidence' in Göran Sluiter and others (eds), *International Criminal Procedure: Principles and Rules* (Oxford University Press 2015) 1015, 1090. For the relevant rules on witness anonymity in additional international and hybrid criminal tribunals, see 1093–95.
[107] Office of the High Commissioner for Human Rights and International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations 2003) 289.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

it has underscored that in future it would not easily defer to similar requests to extend the period of anonymity beyond the pre-trial stage.[108] In any case, concealment of the witness's identity cannot cover the period during which the witness is required to testify.[109] The ICTY also addressed anonymity in the *Tadić* case, where it permitted the use of anonymous witnesses whose identity was withheld from the defendant for the purpose of protecting the latter and his family from retaliation.[110] However, this case is 'no longer good law'.[111] In his dissenting opinion in *Tadić*, Judge Stephen stressed that the ICTY Statute 'does not authorize anonymity of witnesses where this would in a real sense affect the rights of the accused'.[112] Judge Stephen's opinion has prevailed in the long run and the ICTY has never since granted such anonymity, although the witness's identity may continue to be protected from the media and the public.[113]

As detailed above, the jurisprudence of the ECtHR pivots around the 'sole and decisive rule', which requires that when a conviction is based solely or decisively on the evidence of anonymous witnesses, the proceedings must be subject to strict scrutiny. In its assessment the Court will also scrutinise the reasons underlying the decision to allow non-disclosure of the witness's identity and whether less restrictive means could have been implemented to diminish the limitation of the defendant's rights. In comparison, the rules and jurisprudence of the international criminal tribunals do not touch upon the weight given to the evidence in the conviction for the simple reason that they limit the use of anonymous witnesses to the pre-trial proceedings. The tribunals' stand is therefore more clear-cut in favour of the defendant's rights.

This conclusion should be considered given that the ICTY and the ICC both hold that the protection of victims and witnesses – which is not explicitly included in Article 6 of the ECHR[114] – is one of the primary considerations that inform its interpretation of its rules.[115] Thus, one could expect that the ECtHR would attribute more weight to defendants' rights when balancing between their rights and those of witnesses and victims, the latter falling within the interest of 'protecting the rights of others'. This considered, the Court's recent loosening of the 'sole and decisive rule' in

[108] ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the Decision on the Protection of Prosecution Witnesses 267 and 353, ICC-01/04-01/07, Trial Chamber II, 20 May 2009, [48] and [53].
[109] Croquet (n 6) 119–20.
[110] *Prosecutor v Tadić* (n 20). Note also that on 5 December 1996 the protective measures were lifted, based on the fact that less restrictive measures could suffice to satisfy the requested protection and the parties consented that the protective measures were no longer justified: ICTY, *Prosecutor v Tadić*, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, IT-94-I-T, 5 December 1996.
[111] Gregory S McNeal, 'Unfortunate Legacies: Hearsay, Ex Parte Affidavits and Anonymous Witnesses at the IHT' (2006) 4(1) *International Commentary on Evidence* 1, 2.
[112] *Prosecutor v Tadić* (n 20) separate and dissenting opinion of Judge Stephen (at RP 5025).
[113] ICTY, *Prosecutor v Blaškic*, Decision on the Application of the Prosecutor, IT-95-14-T, Trial Chamber I, 2 October 1996; and ICTY, *Prosecutor v Blaškic*, Requesting Protective Measures for Victims and Witnesses, IT-95-14-T, Trial Chamber I, 5 November 1996, [24]; *Prosecutor v Delalić* (n 23) [59].
[114] ECHR (n 2) art 6. Victims' rights are not addressed in art 6 but are considered to be protected under other Convention rights: ECtHR, *Doorson v The Netherlands*, App No 20524/92, 26 March 1996, para 70; ECtHR, *Marcello Viola v Italy*, App no 45106/04, 5 October 2006, para 51.
[115] *Prosecutor v Tadić* (n 20) [27]. As for the ICC, the implementation of r 81(4) of the ICC Rules of Procedure, discussed above, is also governed by an obligation to protect the well-being, dignity and privacy of victims: ICC Statute (n 18) art 68(1).

favour of a more flexible 'proceedings as a whole' approach is not only unfortunate, but also hinders the consolidation of a consistent body of international law on the matter.[116]

3.3. NON-DISCLOSURE OF INFORMATION FORMING THE BASIS OF ALLEGATIONS AGAINST THE DETAINEE

When a person is detained on the basis of reasonable suspicion of unlawful behaviour, the guarantee of procedural fairness under Article 5(4) requires that the detainee be given an opportunity to effectively challenge the allegations against her or him.[117] This requires authorities to disclose to the detainee the information which informs the state's allegations. In cases where there exists a strong public interest in keeping some of the relevant information secret – for example, to protect vulnerable witnesses or intelligence sources – the ECtHR acknowledges the need to place restrictions on the right of disclosure, while ensuring that the detainee is not deprived of the opportunity to effectively challenge the basis of the allegations.[118] In order to be able to 'effectively challenge', the defence must have access to information necessary to assess the lawfulness of a detention. In other words, non-disclosure cannot deny a party knowledge of the very essence of the allegations against him or her. The ECtHR has upheld this standard against weighty arguments, for example, that disclosure would jeopardise ongoing and complex criminal investigations, or that withholding information is necessary to prevent suspects from tampering with evidence and undermining the course of justice.[119]

The ECtHR has further stressed that it is the *defendant* who must be informed. Hence, the use of special advocates – who have access to secret intelligence information – does not replace the obligation to inform the defendant.[120] *A and Others* v *United Kingdom*[121] concerned 'closed material' procedures, which allowed the prosecution to introduce sensitive intelligence material in the course of secret hearings to which only the judge and special advocates had access. Some of the applicants had been charged with involvement in fundraising for, or membership of terrorist groups linked to Al Qaeda. The ECtHR accepted that during the period of the applicants' detention there existed an urgent

[116] A question in need of further exploration is whether consolidation is at all feasible or desirable considering that international criminal tribunals must assess admissibility and weight in coming up with their judgments, while the ECtHR looks, after the fact, at whether proceedings 'as a whole' were fair.

[117] ECHR (n 2) art 5(4) guarantees: 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. This provision has been interpreted to encompass fair trial guarantees.

[118] ECtHR, *A and Others v United Kingdom*, App no 3455/05, 19 February 2009, paras 202–11; ECtHR, *Ovsjannikov v Estonia*, App no 1346/12, 20 February 2014, para 72; ECtHR, *Fodale v Italy*, App no 70148/01, 1 June 2006, para 41; ECtHR, *Korneykova and Korneykov v Ukraine*, App no 56660/12, 24 March 2016, para 68.

[119] ECtHR, *Lietzow v Germany*, App no 24479/94, 13 February 2001, para 47; *Schöps v Germany*, App no 25116/94, 13 February 2001.

[120] *A and Others v United Kingdom* (n 118) para 220. Special advocates in the UK do not have traditional lawyer–client relationships with detainees, but rather are appointed from a security-cleared panel and cannot reveal the details of the case to the detainee. This clearly poses significant barriers to the possibility of effectively challenging a detention decision. For a critical analysis of the model of special advocates, see Cian C Murphy, 'Counter-Terrorism and the Culture of Legality: The Case of Special Advocates' (2013) 24 *King's Law Journal* 19.

[121] (n 118).

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

need to protect the UK population from terrorist attack, and a strong public interest in obtaining information about Al Qaeda and in maintaining the secrecy of the sources of such information.

However, while affirming that special advocates have the potential to fulfil a significant role in counter-balancing the lack of full disclosure and the lack of a full, open, adversarial hearing, the Court also noted that special advocates would be hindered in performing their function without participation by the detainee as to how to use the information. As such, the open material must be sufficiently specific, enabling the applicant 'to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations'. General assertions do not meet this standard.[122]

What is considered by the ECtHR as 'sufficiently specific'? It found that allegations that included specific details about the purchase of equipment, possession of documents linked to named terrorist suspects, and meetings with named terrorist suspects satisfied the 'sufficiently specific' benchmark.[123] On the other hand, allegations of involvement in fundraising for terrorist groups supported by open evidence – such as evidence of large sums of money moving through a bank account or of money raised through fraud – did not meet the required standard as the evidence which had allegedly provided the link between the money raised and terrorism was not disclosed.[124] The open allegations in respect of the remaining applicants, which had been of a general nature (involving membership) were similarly found to violate Article 5(4).[125]

3.3.1. ECtHR Jurisprudence Situated within International Law

The UN Working Group on Arbitrary Detention has enumerated exceptions to the detainee's right to full disclosure of the information underlying the detention.[126] The disclosure of information may be restricted where a court concludes that it is necessary in light of a legitimate aim as long as such restrictions are non-discriminatory and are consistent with relevant standards of international law, and provided that less restrictive means would be unable to achieve the same result. Any restriction must also be proportionate. In the event that the authorities refuse to disclose the disputed evidence and the court does not have the authority to compel such a disclosure, the court must order the release of the person detained.[127]

The Court of Justice of the European Union (CJEU) addressed the legitimacy of the use of secret information in the '*Kadi* trilogy'. Kadi and Al Barakaat International Foundation were considered by the UN Sanctions Committee to be associated with Osama bin Laden, Al Qaeda or the Taliban. Pursuant to Security Council resolutions, all UN member states were obliged to freeze the funds and other financial resources controlled by such persons or entities. In order to give effect to those

[122] ibid para 220.
[123] ibid para 222.
[124] ibid para 223.
[125] ibid para 224.
[126] Report of the Working Group on Arbitrary Detention, Guidelines (n 91) para 81.
[127] ibid para 82.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

resolutions within the European Community (EC), the Council adopted a regulation[128] ordering the freezing of funds and other economic resources of persons and entities and created a list of such persons. Kadi and Al Barakaat were placed on the list in October 2001. They subsequently brought actions for annulment of the regulation. They claimed that the Council was not competent to adopt the regulation at issue and that it infringed several of their fundamental rights, inter alia, the rights of defence, especially the right to be heard and the right to effective judicial review. The Court dismissed the claims,[129] concluding that the member states were required to comply with the Security Council resolutions under the terms of the UN Charter.[130]

Kadi and Al Barakaat brought appeals against those judgments before the CJEU. Deciding in their favour, the CJEU set aside the earlier judgments.[131] The CJEU found that Kadi and Al Barakaat were denied an effective review by the European courts based on the EU Charter of Fundamental Rights.[132] In reaching its decision, the Court stressed that the claimants were not properly informed of the grounds for their inclusion on the UN list and were therefore denied the opportunity to obtain judicial review of this decision, resulting in a violation of their right to be heard.[133]

Following that judgment, the European Commission disclosed to Kadi the summary of reasons for his being listed. After obtaining his comments on those reasons, the Commission decided[134] to maintain his name on the EU list. In response, Kadi brought a new action for annulment before the General Court.[135] The General Court held that because information and evidence had not been disclosed, and indications contained in the summary of reasons provided by the Sanctions Committee appeared to be too vague, Kadi's rights of defence had once again been violated. The judgment was appealed against by the Commission, the Council and the UK.

In the third round,[136] the CJEU held that in proceedings relating to the listing of an individual on the suspected terrorist list, the competent EU authority must disclose to the individual the evidence underpinning its decision. Accordingly, the individual must be able to obtain the summary of reasons provided by the Sanctions Committee to support the committee's decision to impose restrictive measures on him. That authority must also ensure that the individual is given the

[128] Council Regulation (EC) 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures directed against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaeda Network and the Taliban, and repealing Council Regulation (EC) No 467/2001 [2002] OJ L 139/9.
[129] Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3544 and T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3659.
[130] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.
[131] C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.
[132] Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.
[133] *Kadi and Al Barakaat* (n 131) para 336.
[134] Commission Regulation (EC) 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002 Imposing Certain Specific Restrictive Measures directed against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaeda Network and the Taliban [2008] OJ L 322/25.
[135] Case T-85/09 *Yassin Abdullah Kadi v Commission* [2010] ECR II-5177.
[136] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council, United Kingdom v Yassin Abdullah Kadi* [2013]; CJEU Press Release No 93/13, 18 July 2013, http://www.statewatch.org/news/2013/jun/ecj-kadi-ms-appeal-prel.pdf.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

opportunity to respond with his views on the grounds for the listing and must examine whether those reasons are well founded.[137]

The CJEU held that in the event that the listed person challenges the lawfulness of the decision, the courts of the EU may request the competent authority to submit to it the information or evidence needed to assess whether those reasons are capable of supporting the inclusion of the listed person. If the authority is unable to accede to the request, it is then the duty of those courts to base their decision solely on the material which has been disclosed to them. If that material is insufficient to allow a finding that a reason is well founded, the EU courts must disregard that reason as a basis for the contested decision to list or maintain a listing.[138]

If a court is satisfied that the reasons for the imposition of restrictive measures, relied on by the authority, do indeed preclude the disclosure to the person concerned of information or evidence produced before it, the court is allowed to consider possibilities such as disclosure of a summary outlining the content of the information or that of the evidence in question. At least one of the reasons mentioned in the summary must be sufficiently detailed, specific and substantiated, and must in itself constitute a sufficient basis to support the imposition of the restrictive measures at hand. In the absence of one such reason, the court must annul the decision.[139]

Summing up the international instruments and bodies discussed above, it is possible to form a few common minimum standards. The need to restrict disclosure of information to claimants, suspects or defendants is widely acknowledged for the protection of competing interests – primarily, but not restricted to, national security, witness protection, and when disclosure may prejudice further or ongoing investigations. As it clearly runs counter to the principle of adversarial proceedings and places a significant obstacle on the right to an effective defence, non-disclosure, or restricted disclosure, should not only pursue a legitimate aim, but also be a last resort after less restrictive measures have been ruled out. In any case, the reasons informing a court's decision to allow non-disclosure should be made clear to all parties. The spirit of the CJEU *Kadi* rulings also entails the requirement that any decision on disclosure should be open to an appeal.

Even when non-disclosure satisfies these requirements, a certain core of the secret information must be disclosed to the defence. It is unclear though what constitutes 'enough' information in order not to completely empty the right to an effective defence. The CJEU has accepted a summary of the non-disclosed evidence, provided that it is sufficiently detailed and specific to allow effective exercise of the rights of the defence and judicial review of the lawfulness of the contested measure. The case law of the ECtHR discussed provides some examples,[140] as do the

[137] *Commission, Council, the United Kingdom v Kadi*, ibid paras 111–16.

[138] ibid paras 117–27. The ECtHR has recently decided a case involving a similar factual background, holding, inter alia, that the Swiss authorities have a duty to ensure, before freezing assets, that the UN Security Council's listings were not arbitrary: *Al-Dulimi and Montana Management Inc v Switzerland*, App no 5809/08, 21 June 2016.

[139] *Commission, Council, UK v Kadi* (n 136) paras 128–37.

[140] In *A and Others v UK* (n 118) para 220, the ECtHR reasoned that an applicant accused of attending a terrorist training camp would have to be informed of the specific location and the dates of his alleged attendance so that he could provide the special advocate with exonerating evidence, for example, of an alibi or an alternative explanation

Kadi rulings. What stands out in the jurisprudence of these courts, and from the critique by the ECtHR of the UK's closed material procedures, is that the *defendant* must have access to the core of the evidence against him or her. The use of special advocates cannot substitute the requirement that defendants have control over their lines of defence.[141]

Among the EU member states, there is no clear consensus regarding the role and legitimacy of the use of secret evidence.[142] Considering the disparity of practices and standards of protection, the jurisprudence of European courts should be attributed significant weight in attempting to consolidate international standards on the specificity of information that must be disclosed, notwithstanding competing interests. The central role of the ECtHR jurisprudence in the process of forming these international standards has been acknowledged by the ICC, which has interpreted its rules on the matter in light of corresponding ECtHR case law.[143]

3.4. THE LIMITS OF TRIAL IN ABSENTIA

The duty to guarantee a defendant the right to be present in the courtroom (either during the original proceedings or at a retrial) is ranked by the ECtHR as one of the essential requirements of Article 6.[144] A defendant who wishes to be present at his or her trial, therefore, has a right to be present at the trial, subject to behaviour that does not obstruct the course of the trial. This does not mean that proceedings carried out in the absence of the defendant are in themselves contrary to Article 6.[145] However, the Court maintains:[146]

> A denial of justice will nonetheless occur where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he has waived his right to appear and to defend himself.

The unequivocal waiver must be accompanied by safeguards that recognise the importance of the right of appearance. A complete retrial before a first instance court or tribunal is not mandatory, provided that an appeal hearing allows the submission of new evidence and new legal arguments.[147]

---

for his presence there. Provision of specifics on the allegations obviates the need for specifics on the source. Equally, if that allegation did not form the sole or decisive basis for the order, it could remain closed.

[141] For a critique of the ECtHR ruling on the matter, see Fiona de Londras, 'Counter-Terrorist Detention and International Human Rights Law' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 401, 415.

[142] For a survey conducted across a selection of EU member states on the matter (UK, France, Germany, Spain, Italy, the Netherlands and Sweden), see Didier Bigo and others, 'National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges', CEPS Paper in Liberty and Security in Europe No 78, January 2015.

[143] Croquet (n 6) 117–19.

[144] ECtHR, *Stoichkov v Bulgaria*, App no 9808/02, 24 March 2005, para 56.

[145] ECtHR, *Krombach v France*, App no 29731/96, 13 February 2001, para 85.

[146] ECtHR *Somogyi v Italy*, App no 67972/01 18 May 2004, para 66.

[147] ECtHR, *Sejdovic v Italy* [GC] App no 56581/00, 1 March 2006, para 85.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

In the case of *Sejdovic v Italy* the Grand Chamber detailed the conditions under which a defendant is considered to have waived his right to participate in the trial. A waiver must (i) be informed voluntarily in an established unequivocal manner; (ii) be attended by minimum safeguards commensurate with its importance; and (iii) not run counter to any important public interest. In addition, it must also be shown that the defendant could reasonably have foreseen the consequences of her or his conduct, and a person charged with a criminal offence must not carry the burden of proving that he was not seeking to evade justice or that his absence was as a result of *force majeure*.[148]

The ECtHR has made it clear that a defendant who decides not to appear does not lose the right to effective representation by counsel.[149] While acknowledging the need for the ability to discourage unjustified absences, the right to an effective defence is held by the Court to be 'one of the fundamental features of a fair trial', which may not be subject to such a restriction.[150] Therefore, the denial of legal representation as a sanction for absence in the proceedings is a disproportionate sanction.[151]

3.4.1. ECtHR Jurisprudence Situated within International Law

The right of a criminal defendant to be present at his or her trial is universally recognised as a fundamental right, enshrined in Article 14(3)(d) of the ICCPR. Notwithstanding the apparently mandatory wording of the article,[152] the state parties to the ICCPR do not consider the right to be absolute, but subject to certain restrictions.[153] This view has been reaffirmed by the HRC.[154] In General Comment No 13, the HRC stated:[155]

> The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

---

[148] ibid paras 86–88.
[149] ECtHR, *Poitrimol v France*, App no 14032/88, 23 November 1993, paras 32–39.
[150] *Krombach v France* (n 145) para 89.
[151] *Sejdovic v Italy* (n 147) paras 91–92.
[152] ICCPR (n 21) art 14(3)(d) ('In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing').
[153] Wayne Jordash and Tim Parker, 'Trials in Absentia at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law' (2010) 8 *Journal of International Criminal Justice* 487, 489.
[154] HRC, *Daniel Monguya Mbenge v Zaire*, Communication No 16/1977, UN Doc CCPR/C/OP/2, para 14.1 ('This provision and other requirements of due process enshrined in Article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances … permissible in the interest of the proper administration of justice').
[155] UN International Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies (29 July 1994), UN Doc HRI/GEN/1/Rev.1, 186, General Comment 13, art 14, para 11 (on equality before the courts and the right to a fair and public hearing by an independent court established by law).

However, it does not define what those 'justified reasons' are. Among the regional human rights bodies, the ECtHR is the only one that has elaborated on the reasoning of the HRC and defined the legitimate scope of the exceptions to trials in absentia,[156] as described above.

International criminal courts have taken a different approach (the Special Tribunal of Lebanon being a criticised exception).[157] Following the path paved by the International Military Tribunal at Nuremburg, which used its power to try defendants in absentia only once,[158] the statutes of the modern international criminal tribunals have not allowed trials in absentia.

As a rule, the ICTY and the ICTR do not allow trials in absentia (subject to the exception of disruptive behaviour on the part of the defendant).[159] Trial in absentia was a contested issue during the drafting of the ICTY Statute owing to the difficulty in reaching a compromise among the different approaches taken in civil law, common law and international jurisdictions.[160]

The final version, found in Article 21(d) of the ICTY Statute and Article 20(d) of the ICTR Statute, affords the accused the right to be tried in his presence, making no mention of exceptions.[161]

Summing up, subject to limitations, full trials in absentia are generally accepted under international law.

---

[156] Maggie Gardner, 'Reconsidering Trials in Absentia at the Special Tribunal for Lebanon: An Application of the Tribunal's Early Jurisprudence' (2011) 43 *The George Washington International Law Review* 91, 103.

[157] Jordash and Parker (n 153) (arguing that art 22 of the Statute of the Special Tribunal for Lebanon (annexed to UNSC Res 1757 (30 May 2007), UN Doc S/RES/1757), which governs trial in absentia, violates international law because, as an ad hoc tribunal, it cannot effectively guarantee a retrial and because it authorises the holding of a trial in the absence of the defendant in circumstances which exceed those narrowly constructed under international law); but see Yvonne McDermott, *Fairness in International Criminal Trials* (Oxford University Press 2016) 68–72 (detailing case law which allows voluntary absence from trial).

[158] William A Schabas, 'In Absentia Proceedings before International Criminal Courts' in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009) 335, 336–53.

[159] ICTY, Rules of Procedure and Evidence, UN Doc IT/32/Rev 44 (2009), r 80(b); ICTR, Rules of Procedure and Evidence (n 85) r 80(b). The ICC Statute prohibits trials in absentia except in the narrow circumstances in which the accused may be removed from the courtroom on the ground of continuous disruption of the trial. Such measures 'shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required': ICC Statute (n 18) art 63. r 125 of the ICC Rules of Procedure and Evidence (n 105) allows charges to be confirmed in the absence of the defendant, yet defendants must nonetheless be present for at least part of their trials.

[160] Compare Human Rights Watch, Letter to the Secretariat of the Rules and Procedures Committee, Extraordinary Chambers of the Courts of Cambodia, 17 November 2016, https://www.hrw.org/sites/default/files/related_material/Letter%20Cambodia-HRW-ECCC%20Rules%2011.17.06_0.pdf (noting rejection of the French recommendation to allow proceedings in absentia with automatic retrial upon arrest) with UNSC, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (3 May 1993), UN Doc S/25704, and UNSC, Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993): Corrigendum, UN Doc S/25704/Corr.1, Pt V.A, para 101 (the UN Secretary-General's Report on the establishment of the ICTY suggested that the interpretation of art 14(3) ICCPR required prohibiting the conduct of trials in absentia).

[161] Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993), UN Doc S/RES/827 (ICTY Statute), art 21(4)(d); Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994), UN Doc S/RES/955 (ICTR Statute), art 20(4)(d). The Statute of the Special Court for Sierra Leone (UNSC Res 1315 (14 August 2000), UN Doc S/RES/1315) includes the same provision in art 17(4)(d). Yet r 60(A) of the Special Court's Rules of Procedure and Evidence (n 86) allows for much wider exceptions; conducting full trials in absentia is in any case prohibited.

Similarly, the ECtHR does not require an initial appearance by the accused in court in order to satisfy the fair trial guarantees contained in the ECHR according to the conditions discussed above. This being the state of the art, the principled approach of the international criminal tribunals seems to be the odd one out. This may be attributed to the unique complexity and sensitivity of the proceedings[162] or to the importance of adhering to strict rules of procedure, especially in light of the criticism of illegitimacy which these courts often face. Although full trials in absentia are prohibited, the tribunals have allowed trials to continue when the defendant refused to attend further proceedings, reckoning that any other outcome would allow the accused 'to impede the administration of justice' and would be 'tantamount to judicial abdication of the principle of legality and a capitulation to a frustration of the ends of justice without justification'.[163] The tribunals, therefore, in practice have come closer to the approach taken by the ECtHR, provided that a waiver can be established.

The ECtHR has persistently ruled against states which have placed heavy sanctions on defendants who failed to appear in court. As Gardner observed, the scrutiny by the ECtHR in recent decades has shifted the civil law sanction-based paradigm to a more rights-based approach. This can be seen in its rulings that the denial of legal representation as a sanction for waiving the right to be present is disproportionate.[164] In this respect, by the practice of the ECtHR, the traditional divergences between the civil and common law systems are gradually shrinking by moving closer to the common law model.

3.5. Preventive Detention for Security Purposes or for Intelligence Gathering

Article 5 protects the right to liberty and security, prohibiting detention which does not fall within one of the enumerated exceptions. The third exception, which is the most relevant for the discussion of detention for preventive purposes, read as follows:[165]

> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

Although the text of Article 5(1)(c) lends itself to the interpretation that preventive detention before the commission of an offence is in line with the ECHR ('… or when it is reasonably considered necessary to prevent his committing an offence') the Court has made it clear that detention within the meaning of Article 5(1)(c) is permitted only for the purpose of initiating

[162] Gardner (n 156) 104.
[163] SCSL, *Prosecutor v Sesay*, SCSL-04-15-T-194, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7 July 2004 and Succeeding Days, 12 July 2004, [8]; see also SCSL, *Prosecutor v Barayagwiza*, ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, [24].
[164] Gardner (n 156) 102 and the text accompanying n 65.
[165] ECHR (n 2) art 5.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

criminal proceedings within a reasonable time.[166] Therefore, preventive detention is, as a rule, prohibited under the Convention.[167] For preventive detention to be lawful there must be *concrete and specific* offences which a person is to be prevented from committing. Vague references to offences of an extremist nature are insufficient. The detention of persons based on general suspicions, accordingly, is never permitted.[168]

The case of *Ostendorf v Germany*[169] concerned a football supporter's complaint about his four-hour detention in police custody for the purpose of preventing him from organising and partaking in a violent brawl between football hooligans. The ECtHR was satisfied that the police had had sufficient information to assume that the applicant was planning a hooligan brawl during which concrete and specific offences, namely bodily assaults and breaches of the peace, would be committed. His detention could thus be classified as effected 'to prevent his committing an offence'. However, for the preventive detention to conform with Article 5(1)(c), it was further necessary to be 'effected for the purpose of bringing him before the competent legal authority'. The Court observed that the legal basis according to which the applicant was detained was aimed exclusively at preventing and not at prosecuting offences. The German courts had subsequently justified his police custody only by relying on preventive purposes. He had not been suspected of having committed a criminal offence, as his preparatory acts were not punishable under German law. His police custody had thus served purely preventive purposes and was not aimed at bringing him before a judge in a criminal trial.

The ECtHR dismissed the German government's opinion that the Court's case law should be reversed to the effect that Article 5(1)(c) be interpreted to extend to preventive police custody. The Court further dismissed the government's argument that the state's obligation under Articles 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment) to protect the public from offences should be taken into account in the interpretation of Article 5(1) to authorise preventive police custody.[170]

The interpretation of Article 5(1)(c) also excludes preventive detention for security purposes (security detention).[171] Thus, administrative detention for national security reasons such as the fight against terrorism is treated as an exception to the Convention guarantees, which may be justified exclusively by virtue of derogation from Article 5.[172] Yet the ECtHR has underscored that

[166] ECtHR, *Ciulla v Italy*, App no 11152/84, 22 February 1989, para 38; ECtHR, *Al-Jedda v United Kingdom*, App no 27021/08, 7 July 2011, para 100; ECtHR, *Lawless v Ireland* (*No 3*), App no 332/57, 1 July 1961, paras 13–14; ECtHR, *Ireland v United Kingdom*, App no 5310/71, 18 January 1978, para 196; ECtHR, *Guzzardi v Italy*, App no 7367/76, 6 November 1980, para 102; ECtHR, *Jecius v Lithuania*, App no 34578/97, 31 July 2000, paras 47–52.

[167] *Jecius v Lithuania*, ibid para 51; *Guzzardi v Italy*, ibid para 102; *Ciulla v Italy*, ibid; ECtHR, *M v Germany*, App no 19359/04, 17 December 2009, para 89; ECtHR, *Shimovolos v Russia*, App no 30194/09, 21 June 2011, para 54.

[168] *Guzzardi v Italy* (n 166) para 102.

[169] ECtHR, *Ostendorf v Germany*, App no 15598/08, 7 March 2013.

[170] ibid para 87.

[171] The Court has rejected security detention in strong terms: *Lawless v Ireland* (*No 3*) (n 166) para 14.

[172] ECHR (n 2) art 15 ('Derogation in time of emergency') permits derogation from the Convention under the circumstances described therein; art 15(2) lists rights which cannot be derogated from; art 5 is not listed among them, and therefore is subject to derogation.

even under a justified derogation from Article 5 of the ECHR, 'derogation is not a carte blanche'.[173] Measures adopted under derogation – such as pre-trial detention without judicial control – must last no longer than is 'strictly required by the exigencies of the emergency requiring derogation'.[174]

In the 1961 *Lawless v Ireland* judgment, the ECtHR considered Ireland's detention of an IRA activist for five months under an emergency statute that authorised a minister of state to order detention whenever the minister 'is of opinion that any particular person is engaged in activities which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State'.[175] The Court ruled that the security detention could not be justified by Article 5(1)(c) and then considered whether the detention was justified by virtue of the government's derogation from Article 15. The Court concluded in the affirmative, based on what it considered to be sufficient procedural safeguards.[176] Cassel, however, argues that, in light of a recent British ruling[177] as well as recent rulings of the ECtHR which limit the length of permitted detentions to approximately one week even under justified derogations,[178] 'it is unclear whether prolonged security detention can still be justified by derogation from the ECHR'.[179]

The detention of an individual for the sole purpose of questioning as part of an intelligence-gathering exercise is also in violation of Article 5, as this ground in itself does not satisfy the Article 5(1)(c) 'reasonable suspicion' requirement.[180] That stated, under derogation, detention for interrogation can be justified[181] 'only in a very exceptional situation' provided that the

[173] ECtHR, *Murray v United Kingdom*, App no 18731/91, 8 February 1996, para 58.
[174] UN ICCPR, General Comment No 29: States of Emergency (Article 4) – Derogations during a State of Emergency (31 August 2001), UN Doc CCPR/C/21/Rev.1/Add.11, para 4.
[175] *Lawless v Ireland* (*No 3*) (n 166) para 12.
[176] ibid paras 31–38 (eg, supervision by Parliament; the establishment of a Detention Commission, consisting of a military officer and two judges, which could hear complaints from detainees and, if its opinion was favourable to release, was binding on the government; the ordinary courts could compel the Detention Commission to carry out its functions; the government publicly announced that it would release any detainee who gave an undertaking to respect the law and the security act).
[177] UK House of Lords, *A v Secretary of State for the Home Department* [2004] UKHL 56.
[178] eg, despite the difficulties concerning the investigation of terrorist offences, periods of 12–14 days prior to judicial intervention were held to be irreconcilable with the notion of 'speedy': ECtHR, *Sakik and Others v Turkey*, App nos 23878/94, 23879/94 and 23880/94, 26 November 1996. In the context of derogation, the ECtHR decided that a detention period of 4 days and 6 hours breached art 5(3): ECtHR, *Brogan and Others v United Kingdom*, App nos 11209/84, 11234/84, 11266/84 and 11386/85, 29 November 1988. See also ECtHR, *Mehmet Bilen v Turkey*, App no 5337/02, 8 April 2008 (9 days were found to be a violation of art 5); ECtHR, *Tanrikulu and Others v Turkey*, App nos 29918/96, 29919/96 and 30169/96, 6 October 2005 (10 days were held to be a violation of art 5).
[179] Douglass Cassel, 'Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints under International Law' (2008) 98 *The Journal of Criminal Law & Criminology* 811, 837.
[180] ECtHR, *Fox, Campbell and Hartley v United Kingdom*, Apps nos 12244/86, 12245/86 and 12383/86, 30 August 1990, paras 28–36.
[181] *Ireland v UK* (n 166) para 212 ('Many witnesses could not give evidence freely without running the greatest risks …; the competent authorities were entitled to take the view, without exceeding their margin of appreciation, that it was indispensable to arrest such witnesses so that they could be questioned in conditions of relative security and not be exposed to reprisals. Moreover and above all, Regulation 10 authorised deprivation of liberty only for a maximum of forty-eight hours').

detention is proved to be a measure strictly required by the exigencies of the situation and is accompanied by sufficient safeguards.

3.5.1. ECtHR Jurisprudence in the Context of International Law

Security detention is governed by both IHRL and IHL. Considering the focus of this contribution, I shall focus on the IHRL norms guiding the issue and not discuss security detention in circumstances which call for the application of IHL.[182] Nor will I directly engage with the issue of procedural constraints, but turn my attention to the legitimate grounds for detention.

The ECtHR and the HRC have demonstrated different approaches in dealing with security detention. While preventive detention for security grounds is, as a rule, prohibited under the ECHR in 'normal' times (of non-emergency), pure security-based detention is permitted under the ICCPR as long as it is considered reasonably necessary to contain the security threat in question.[183] Preventive detention for security purposes is generally permitted by international law, provided that it is based on grounds established by law; is not arbitrary, discriminatory or disproportionate (the substantive aspect); and adheres to procedural safeguards (the procedural aspect).[184] A detention is considered arbitrary or disproportionate when the use of the measure extends beyond what is strictly necessary to achieve the objective of preventing the security threat.[185] An extreme example is the detention of persons based not on individual necessity, but on their worth as 'bargaining chips' for future negotiations – a practice prohibited under international law.[186] These substantive requirements apply also in times of public emergency in the context of a justified derogation from the right to liberty under the ICCPR.

Detentions can thus be in violation of IHRL as a result of their arbitrariness, disproportionality or procedural deficiencies.[187] Hakimi argues that invalidation of detention, however, is rarely based on substantive grounds. She critically points out that the HRC has neglected to provide guidance on when security detention is considered 'reasonably necessary', preferring to focus exclusively on procedural constraints instead of on the legitimacy of the substantial grounds

[182] Cassel (n 179) 815. The use of security detentions is usually discussed in the context of suspected terrorists. Their detention is subject to roughly four international law frameworks: peacetime and public emergencies short of war, which are governed by IHRL norms, and armed conflicts of either an international or a non-international character, which are considered to be subject to both IHRL and IHL norms, despite some states' arguments to the contrary: see, eg, Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law: Pas de Deux* (Oxford University Press 2011); Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310.

[183] Monica Hakimi, 'International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide' (2008) 33 *Yale Journal of International Law* 369, 392.

[184] eg, the detention must be registered; must not be incommunicado for more than a few days; the detainee must be informed of the reasons for the detention and of her or his right to legal assistance: Cassel (n 179) 822–23.

[185] ibid 832, 836.

[186] UN HRC, Concluding Observations of the Human Rights Committee: Israel (18 August 1998), UN Doc CCPR/C/79/Add.93; UN HRC, Second Periodic Report Addendum: Israel (4 December 2001), UN Doc CCPR/C/ISR/2001/2.

[187] Cassel (n 179) 834.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

that initiated the detention. When reviewing the US detention regime in Guantánamo Bay, the HRC did not dismiss the use of administrative detention (as opposed to the possibility of detaining under criminal law) and also bypassed the question of whether the Guantánamo detentions would be 'arbitrary' even if accompanied by sufficient procedural safeguards.[188]

Hakimi perceives the HRC's failure to elaborate on and scrutinise the standard of non-arbitrariness as 'endemic to its jurisprudence on pure security-based detention'.[189] The HRC 'ducks the question of arbitrariness' not only in cases in which such detention runs counter to the procedural constraints flowing from the ICCPR, but also in the course of reviewing the practice of states which admit to implementing security detention while arguing to do so in compliance with their ICCPR obligations. Leading examples are the HRC's review of detention policies in India and in Israel, cases in which Hakimi argues that substantive constraints were violated, but were dealt with as procedural issues in the HRC review.[190]

Unlike security detention – which is principally permitted under international law – indefinite detention, solely or primarily for purposes of gathering intelligence and interrogation, is, according to Cassel's assessment, *probably* not lawful under US or international law, although not explicitly prohibited under IHRL.[191] This conclusion does not correspond so well with up-to-date state practice as documented in the Oxford Pro Bono Publico report on the matter.[192] The report concludes:[193]

> [To] the extent that a trend in state practice can be detected, there may be a slight trend in favour of permitting administrative detention for, as a minimum standard, the purposes of securing evidence, gathering intelligence, or ensuring the availability of witnesses. However, the divergence in the practice of the jurisdictions under study makes it difficult to draw any conclusions regarding the potential content of customary international law on this issue.

However, the report's conclusions suggest an emergence of a customary international law norm prohibiting detention on grounds of security or intelligence gathering with no maximum duration.[194]

---

[188] Hakimi (n 183) 392–93. See also UN Economic and Social Council, Situation of Detainees at Guantánamo Bay, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention (27 February 2006), UN Doc E/CN.4/2006/120.
[189] Hakimi (n 183) 393.
[190] ibid 393–94 and the text accompanying nn 102–12.
[191] Cassel (n 179) 831.
[192] Oxford Pro Bono Publico, 'Remedies and Procedures on the Right of Anyone Deprived of his or her Liberty by Arrest or Detention to Bring Proceedings before a Court: A Comparative and Analytical Review of State Practice', University of Oxford, Faculty of Law, April 2014, http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2014/05/2014.6-Arbitrary-Detention-Project.pdf (covering Argentina, Australia, Austria, Belgium, Canada, China, Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, Russia, Singapore, South Africa, Sri Lanka, Switzerland, the UK, the US and Uruguay, and the jurisprudence of the ECtHR; also finding general acceptance of security detention, that detention for intelligence gathering is also practised, and further that only China, the ECtHR, and Sri Lanka require reasonable suspicion of actual involvement in a planned or completed terrorist attack of the detained person).
[193] ibid para 46.
[194] ibid paras 13–15 and 47–52.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

Returning to the jurisprudence of the ECtHR, the red line observed is the prohibition of security detention in the absence of a public emergency which may justify derogation from Article 5. In addition, the 'reasonable suspicion' requirement incorporated in Article 5(1)(c) has been interpreted by the ECtHR as requiring concrete and specific suspicion that the detainee would otherwise commit an offence. In the context of terrorism the requirement is slightly weakened. A member state is not required to establish the reasonableness by disclosing confidential sources of information, yet 'exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the safeguard secured by Article 5 is impaired'.[195] Because of the absence of a standard in IHRL for the quantity or quality of evidence needed to justify security detention,[196] the ECtHR rulings on the issue can serve as illustrative examples.[197]

The Court tends to grant member states a wide margin of appreciation in assessing whether their domestic situation amounts to an emergency that allows for derogation, especially when domestic courts have reviewed and upheld the decision of the executive.[198] Thus, the crux of its review is – similar to Hakimi's argument with respect to the HRC – the member states' compliance with procedural constraints. Nevertheless, the attempt by the ECtHR to limit the acceptability of security detentions to emergency situations and its prohibition of detention for intelligence gathering signals that, within the boundaries of an international community which does accept the use of security detention, inherent danger to liberty must be appreciated and its use kept to an absolute minimum.[199]

[195] ECtHR, *O'Hara v United Kingdom*, App no 37555/97, 16 October 2001, para 35; see also *Fox, Campbell and Hartley v United Kingdom* (n 180).
[196] Cassel (n 179) 836.
[197] eg, *O'Hara v United Kingdom* (n 195) para 35 (in the context of terrorism, though the member states cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the exigencies of dealing with terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the safeguard secured by art 5(1)(c) is impaired); ECtHR, *Labita v Italy*, App no 26772/95, 6 April 2000, paras 155–61 (uncorroborated hearsay evidence of an anonymous informant was held not to be sufficient to found 'reasonable suspicion' of the applicant being involved in Mafia-related activities); but see ECtHR, *Talat Tepe v Turkey*, App no 31247/96, 21 December 2004, paras 56–63 (incriminating statements dating back to a number of years and later withdrawn by the suspects did not remove the existence of reasonable suspicion against the applicant; furthermore, it did not have an effect on the lawfulness of the arrest warrant).
[198] Oren Gross and Fionnuala Ní Aoláin, 'From Discretion to Security: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23(3) *Human Rights Quarterly* 625; Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 *German Law Journal* 1764; Richard Smith, 'The Margin of Appreciation and Human Rights Protection in the "War on Terror": Have the Rules Changed before the European Court of Human Rights?' (2011) 8 *Essex Human Rights Review* 124; but see *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges* (European Parliament Think Tank 2014) (concluding that the member states' margin of appreciation in cases connected with national security is no longer uniformly broad).
[199] Cassel (n 179) 851.

https://doi.org/10.1017/S0021223717000073 Published online by Cambridge University Press

4. CONCLUSION

This contribution set out to break down the right to a fair trial in the broad sense to a number of concrete guidelines, or 'red lines', which when overstepped will result in a violation of the right to a fair trial. Because of the centrality of balancing and proportionality in the jurisprudence of the ECtHR, the task of extracting clear-cut 'do nots' is not easy. Such an attempt could also be perceived as a categorical error in light of the fact that balancing is inherent in the ECHR and accordingly to its interpretation by the ECtHR. The article did not set out to refute such an argument.[200] Instead, its aim was more modest and pragmatic: in light of the aim of the Convention in guaranteeing rights that are 'practical and effective', how can a policymaker who seeks to implement these rights in a domestic setting extract guidelines from the vast sea of ad hoc case law? This is not to imply that the process of policymaking itself should not incorporate balancing, but that such balancing should not be totally unconstrained. Accordingly, the examples discussed show that even when quasi-guidelines can be identified, some room for discretion is always left. Yet these red lines do help in delimiting the sphere of discretion. For example, although the Court has relaxed its rule that a conviction based solely or to a decisive extent on anonymous statements is never fair, it has developed a list which structures the strict scrutiny that such circumstances call for.

The position of the ECtHR on the issues examined was subsequently set within the broader context of international law and compared with the jurisprudence of IHRL bodies and ICL courts. The ECHR is a treaty. Legally, it places obligations only on states parties to it. However, because of its lawmaking character and its explicit objective to enforce and give concrete interpretation to certain rights of the Universal Declaration of Human Rights, any country that defines itself as a member of the community of values which underlie the Convention should look to the Court's interpretation of the fundamental rights which it protects. As the most effective system of rights protection in the world, the ECHR and the ECtHR case law deserve a weighty position in the interpretation and consolidation of IHRL.

The contextualisation within international law and the comparison of the jurisprudence of the ECtHR with that of other bodies raised varying conclusions. As to anonymous witnesses, for example, the Court's approach leaves relatively little room for discretion when evidence obtained from anonymous statements is decisive in the finding of a conviction, and certainly when it is the sole evidence. However, it seems much less strict in comparison with the stand taken by ICL tribunals which limits the use of anonymous statements to pre-trial proceedings. This difference can be explained by the respective objectives of the ECHR and ICL and by the unique trials conducted in ICL tribunals. However, the more lax approach of the ECtHR cannot be brushed away considering that – contrary to the statutes of the ICL tribunals – the rights of witnesses and

[200] Such an argument could be refuted by suggesting that the ECtHR is moving away from ad hoc judgments in the direction of consolidated principled rulings. A more theoretical response could build on the literature which argues that the ECtHR has over time developed into a constitutional court, focusing more on constitutional, rather than on individual justice: Stone Sweet (n 29); Senden (n 9) 16–20.

victims are not specifically protected under the ECHR. Thus, we could expect that a defendant's rights under the ECHR would receive at least the same protection as those of the ICL tribunals' defendant which, pursuant to statutory provisions, must be balanced against the rights of witnesses and victims. As to the limits of non-disclosure of evidence to the defence, to give another example, the ECtHR case law on the specificity of information which forms the 'essence of the allegations' (and therefore must be disclosed, regardless of competing interests) is of significant importance because of the lack of consensus among states on the matter.

The limited number of issues discussed here does not enable the drawing of broader conclusions regarding the position of the ECtHR in relation to other IHRL and ICL regimes. It is also not clear that there is necessarily an overarching pattern. However, further contextualisation of specific ECHR rights and the red lines extracted from them in broader international law will help in assessing the Court's jurisprudence from a wider and richer point of view – and will enable, for example, putting into perspective characteristics of the Court as either activist and overly imposing obligations on its member states or, alternatively, conservative and hesitant in expanding the scope of Convention rights.