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

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Abstract

The European Court of Human Rights' ('ECtHR') use of proportionality and balancing is inconsistent and does not provide clear guidelines from which policies can be drafted such that those policies can 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 a theoretical level, on a practical level, a policymaker seeking to understand which rights' interferences constitute clear violations under the European Convention on Human Rights ('ECHR') is left puzzled. This article adds clarity to this puzzle by breaking down several aspects of ECHR fair trial rights into clear cut 'red lines', or minimum thresholds of protection, which when overstepped, constitute a violation of the right. Identifying these red lines is meant to assist legislators and policymakers to draft laws and policies that conform to their states' obligations under the ECHR, yet also to instruct policymakers outside the Council of Europe member states. Due its unique characteristics, as well as the volume and breadth of its case law, the ECtHR's jurisprudence can be a lodestone for the consolidation of an international human rights community based on shared values. The article's unique contribution is the assessment of ECtHR jurisprudence not only on its own merits, but also in comparison to the jurisprudence of other international courts.

Keywords: ECtHR; ECHR; Proportionality; Policy-making; Fair trial

I. Introduction

The European Court of Human Rights' ('ECtHR' or 'the Court') use of proportionality and balancing is inconsistent and does not provide clear guidelines from which policies can be drafted that strike a fair balance between individual rights and public interests, while not impairing the essence of the rights at stake. The ECtHR's unstructured balancing process does not create a body of jurisprudence that can be analyzed as to when rights' infringements are not justified in the face of competing interests. While ad hoc and unprincipled balancing may be justified on a theoretical level,[1] on a practical level, a policymaker seeking to understand which types of rights' interferences constitute clear violations under the European Convention on Human Rights ('ECHR' or 'Convention') is left puzzled.

This article will clarify this puzzle 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. This article also addresses the courts' jurisprudence on justification for violations of those rights. 'Fair trial' is used here in the broad sense, covering rights that are dealt with under both Article 6 and 5 of the ECHR. Identifying these red lines is meant to assist legislators and policymakers to draft laws and policies that conform to their states' obligations under the ECHR, yet also to instruct policymakers outside the Council of Europe member states. Accordingly, this article first reviews the ECHR and its court, including its broad scope of influence and assessing it in comparison to the jurisprudence of other international courts. Next, the article examines the ECtHR's use of balancing and proportionality. Finally, the third part delves into five aspects of the right to fair trial., breaking them down into the clearest possible red lines, and compares the ECtHR's stand on these issues to that of other international tribunals and supranational institutions.

Within this framework, the following five issues are discussed: 1) the admission of evidence obtained through torture or other forms of ill-treatment, 2) the use of anonymous witnesses in trial proceedings, 3) limitations on disclosure of information basing allegations against detainees, 4) trials in the absence of the defendant, and 5) the legality of preventive detention for security purposes and intelligence gathering. This article concludes with a discussion of the ECtHR's case law within the context of international law and compares ECtHR's position to other international bodies.

[1] Kai Möller, 'Proportionality: Challenging the Critics', 10 *Int'l J. of Constitutional Law*, 709, 728-729 (2012) ('Möller').

II. ECtHR Jurisprudence Beyond the Borders of the Council OF EUROPE

The ECtHR's judgments can serve as instructive sources for policymaking beyond the EU borders, even though states which are not subject to the ECtHR's jurisdiction are not compelled to follow the ECtHR's jurisprudence, for several reasons. The Court must tread a fine line between universalism and respect for the member states' sovereignty[2] which results in judgments that are sensitive to the states' need to pursue policies, at times also at the expense of rights' curtailment. The considerations the Court weighs mirror the kind of deliberative process which policymakers engage in when seeking to reconcile collective goals with the protection of individual rights. This is true also for domestic high courts that deal with administrative or constitutional complaints. This deliberation does not extend to bright line rules or clear red lines which can be extended in a principled manner beyond ad hoc rulings, as discussed below. However, as demonstrated in the following part, the ECtHR is reluctant to define bright line rules or to set clear red lines which can be extended in a principle manner beyond ad hoc rulings. Therefore, if within a court characterized by balancing and abstention from categorical reasoning, one can ultimately identify minimum thresholds, then these should be considered the minimum essence which must be protected under any circumstances.

As for institutional aspects, the ECHR is "widely regarded as the most effective trans-national judicial process for complaints brought by individuals and organizations against their own governments."[3] This is due, in part, to the enforcement mechanisms incorporated in the Convention to ensure that the Court's judgments are implemented.[4] These procedural mechanisms contribute to

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[2] "…the 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'…" , see Robert Spano, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, 1 *Human Rights Law Review*, 5 (2014). For the text of Protocol 15, see Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213).

[3] Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?', 3 *UCL Human Rights Review*, 1, 1 (1998) ('Greer 1'). See also, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 3 (2008) (Helen Keller and Alec Stone Sweet, eds.) ('Keller & Stone Sweet').

[4] Under Articles 46 and 41 of the Convention. Under Article 8 of the Statute of the Council of Europe, 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 realization of the aims of the Council, see *Statute of the Council of Europe*, 87 U.N.T.S. 103, E.T.S. 1 http://assembly.coe.int/nw/xml/RoP/Statut_CE_2015-EN.pdf

embedding the Court's rulings within the member states and in turn allow the Court to exert influence on the shaping of fundamental rights on a multi-national level, as well as on domestic policymaking.[5] Yet despite it being a regional court, the ECtHR's judgments have been invoked by other international human rights bodies and by constitutional courts of states not parties to the ECHR.[6]

It is further noteworthy that although the Court has jurisdiction to scrutinize human rights violations only when these are carried out by the member states of the Council of Europe, citizenship in one of the member states 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 states can turn to the Court. In this sense, the Court has a cosmopolitan quality to it, opening its door on an individual basis, regardless of citizenship affiliation.

Such 'cosmopolitan quality' can also be extrapolated from the nature of the Convention itself. The Court has interpreted the Convention as a law-making treaty.[7] In contrast to a contractual treaty that is designed to create reciprocal obligations binding exclusively the parties to the treaty, a law-making treaty is designed for a larger common aim. Here, the common aim is the protection of fundamental rights of individuals.[8] Accordingly, the ruling of a violation of Convention is a mixture of two kinds of claims: about the nature of member states' obligations and about the moral rights to which individuals are entitled by virtue of being human.[9] The breadth of the court's rulings can assist policymakers in states which are not members to the Convention yet share the values on which the Convention rests.[10]

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5 For a survey of the Court's influence on domestic processes, see Keller & Stone Sweet, n 3; *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law: A Comparative Analysis* (Janneke Gerards and Joseph Fleuren eds., 2014) ('Gerards & Fleuren'). In the sphere of defendants' rights, see Nicolas A. J. Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' jurisprudence?', 11(1) *Human Rights Law Review*, 91, 93 (2011) ('Croquet').

6 Croquet, n 5, 124 and the examples discussed there.

7 *Wemhoff v. Germany*, app. no. 2122/64, §8 (27 June 1968).

8 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*, 16 (Intersentia, 2011) ('Senden').

9 George Letsas, *The ECHR as a Living Instrument: its Meaning and Legitimacy* in *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Geir Ulfstein, Andreas Follesdal and Birgit Peters, eds., 2013), 106.

10 In order to argue that the Court's interpretation of rights has a legally binding effect on states that are not parties to the Convention, one would need to demonstrate their customary status and the development of customary internal 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, *The Judge and International Custom* (Council of Europe, 2012); Francesco Francioni, Customary International Law and the European Convention on Human Rights, 9 *Italian Y.B. Int'l L.* 11 (1999) ("Francioni"); Andrew J. Cunningham, 'the European Convention on Human Rights, Customary International Law and the Constitution', 43(3) *Int'l and Comparative Law Quarterly*, 537 (1994) ("Cunningham").

Concluded in the aftermath of World War II, the ECHR was closely based on the provisions of the United Nations Universal Declaration of Human Rights[11] and was intended as "the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."[12] Together with particular treaties, declarations and resolutions concluded by the U.N. 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.[13] 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.[14] 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.[15]

As for the specific comparison of the ECtHR jurisprudence with the statutes and jurisprudence of international criminal tribunals, considering the unique objectives and practices of international criminal law ("ICL")[16] it may be argued that there is no room to compare or to bundle its courts' jurisprudence with that of a human rights court. This is incorrect for four reasons. First, ICL is itself not a monolithic legal regime. Notwithstanding institutional and structural resemblances, the nature of the relationship between the various tribunals is far from undisputed.[17] Second, also in terms of the content of its norms, ICL is a composition of domestic criminal law (from which ICL imports its fundamental legal principles) and of IHRL and IHL, (from which definitions of crimes and parameters for assessment of offences committed during armed conflict

[11] Cunningham, n 10 537, 541.
[12] ECHR Preamble, §5.
[13] Cunningham, n 10, 542.
[14] This does not exclude, however, taking into consideration the particularities of each jurisdiction. Some of the ECtHR's approaches diverge from customary international law, and could be argued as reflecting unique European ideals and values, eg the ECtHR's stand on death penalty, see Francioni, n 9, 21.
[15] For the ECtHR's referencing to international, regional and foreign materials, see Senden, n 8, 255-258.
[16] For a discussion about the objectives of ICL, see Mirjan R. Damaska, 'What is the Point of International Criminal Justice?' *Faculty Scholarship Series*, Paper 1573 http://digitalcommons.law.yale.edu/fss_papers/1573 (2008); Mark Klamberg, What are the Objectives of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime, 79(2) *Nordic Journal of International Law*, 279 (2010).
[17] Eg, article 21 of the ICC Statute, which states the court's formal legal sources, limits the room for jurisprudence cross-fertilization. Although it does not explicitly prohibit importing case law from other international courts, Article 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', see, respectively: Article 21 of the UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 18 May 2016] (ICC Statute'); Elies Van Sliedregt, *Pluralism in International Criminal Law*, 25 Leiden Journal of International Law, 847, 848-849 (2012).

are drawn).[18]

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"), in the course of which "every attempt was made to comply with internationally recognized standards of fundamental human rights."[19]Article 21 (rights of the accused), which is of particular relevance to the matters discussed here, was explicitly drafted in light of Article 14 of the International Covenant on Civil and Political Rights ('ICCPR').[20] Moreover, Article 21(3) of the ICC Statute states that the Court has to interpret its internal legal framework in such a way as to abide by 'internationally recognized human rights' law. Third, while recognizing 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[21] and the ECHR have been found authoritative and applicable.[22] Fourth, some of the issues discussed here concern rules of evidence, which belong to procedural law. The attempt to weave a patchwork integrating continental and common law traditions in ICL has received its share of critique.[23] 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.[24] 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 when determining the scope of defence rights and their limitations, regarding

[18] Carsten Stahn & Larissa van den Herik, ``Fragmentation', Diversification and `3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?', *The Diversification and Fragmentation of Int'l Criminal Law*, 1, 55 (Larissa van den Herik and Carsten Stahn eds. 2012) ('Stahn & Herik') (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).

[19] ICTY, *Prosecutor v. Tadic*, No. IT-94-I-T (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, §25 (Aug. 10, 1995) (hereinafter, "Prosecutor v. Tadic, Decision on the Prosecutor's Motion").

[20] Ibid.

[21] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 5 May 2016] ('ICCPR').

[22] ICTY, *Prosecutor v. Delalic*, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M", §§27-28 (28 April 1997) (hereinafter "Prosecutor v. Delalic, Decision on the Motions").

[23] This critique has been voiced in regards 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, see Stahn & Herik, n 8, 52-54; Alexander K. A Greenawalt, Justice 'Without Politics? Prosecutorial Discretion and the International Criminal Court', 39 *NYU Journal of Int'l Law and Politics*, 583 (2007). but see Volker Nerlich, 'Daring Diversity- Why there is Nothing Wrong with 'Fragmentation in International Criminal Procedure', 26 *Leiden Journal of Int'l Law*, 777 (2013).

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

them as carrying 'persuasive authority'.[25] In conclusion, notwithstanding the respective particularities of ICL and IHRL, the influence of the latter on the former is undeniable and accordingly, cross-fertilization and comparison should be welcomed.[26]

A. Unsystematic Balancing in the Jurisprudence of the ECtHR

Balancing is central to the ECtHR's reasoning process, yet it is considered by many to be in tension with the ECtHR's chief aim of protecting fundamental rights.[27] Balancing in the jurisprudence of the ECtHR is essentially synonymous with proportionality assessment, the adjudication method used by the Court in its vast majority of cases.[28] Far from the textbook structured proportionality review,[29] proportionality as adopted by the Court 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.[30]

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 (discussed below), others have a more general attack on balancing and its erosion of rights' normative priority over collective interests.[31] This critique is targeted against balancing in general. Yet, it seems particularly relevant to the ECtHR since its balancing process resembles what Möller

[25] Croquet , n 5, 108.

[26] For a critical discussion on cross-fertilisation between ISTs and the ECtHR, see: *The Cross-fertilisation Rhetoric in Question: Use and Abuse of the European Court's Jurisprudence by International Criminal Tribunals*, 84 NJIL (2015).

[27] Gerards & Fleuren, n 5, 39 (the essential object of the Convention 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 1 n 3, 7 (arguing that the protection of rights within the context of the principles of the democracy and the rule of law is *the* ultimate aim of the Convention and should accordingly guide its interpretation).

[28] Despite its absence from the text of the Convention, the use of proportionality in assessing violations of Convention rights has become the norm in the Court's adjudication process, see Marc-André Eissen, The Principle of Proportionality in the Case-Law of the European Court of Human Rights, *The European System for the Protection of Human Rights* (Macdonald, Matscher and Petzold ed., Nijhoff, Netherlands, 1993) 125, 146 ("Eissen")("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', *Faculty Scholarship Series*, (2009). Paper 71, 6; Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarty and Primarity in the European Convention on Human Rights,* 37 (Nijhoff, Leiden, 2009) ('Christoffersen').

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

[30] Stefan Sottiaux & Gerhard Van Der Schyff, Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights, 31 *Hastings Int'l & Comp. L. Rev.* 115, 131-132 (2008).

[31] 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, 131, 141, Law, Rights and Discourse: The Legal Philosophy of Robert Alexy, (George Pavlakos ed., (2007) ('Kumm'); Stavros Tsakyrakis, Proportionality: An Assault on Human Rights? 7(3) *Int'l J. Constitutional Law*, 468, 471-474 ('Tsakyrakis').

has described as "balancing as reasoning",[32] 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 results 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.[33] However this rule is inapplicable to the Court, not only due to the Court's horizontal application of proportionality analysis, but also to its inconsistent use of the less restrictive means test.[34] Analyzing the Court's use of this test, Brems and Lavrysen have concluded that it is difficult to systematize the Court's use of the test and that also among those cases in which the Court does apply the test it does not consider itself under an obligation to do so.[35] Brems and Lavrysen have furthermore found that the test has occasionally been applied in a 'reverse' manner, i.e., to evaluate the chosen measure in comparison to more (as opposed to less) restrictive means,[36] thus running counter to the end of the test.

The resort to an all-inclusive balancing test also carries controversial side effects that impact the review stages preceding the proportionality assessment. The first concerns the definitional stage in which the scope of the right should be made explicit. According to Tsakyrakis, 'definitional generosity' is a basic methodological principle of the balancing approach.[37] The widening of the scope of rights at the definitional stage further perplexes one who seeks to draw clear 'do and do-not's' from the Court's case law, since 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

[32] Möller, n 1, 716.
[33] Tsakyrakis, n 30, 474.
[34] Christoffersen, n 27, 114 (arguing that the least restrictive means test was rejected by the Court on principle grounds, meaning that the Court does not view least restrictive means ("LRM") to be a necessary stage in proportionality analysis).
[35] 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', 15 *Human Rights Law Review*, 139 (2015) (Brems & Lavrysen').
[36] Brems & Lavrysen, n 34 155 referring to: M v. Switzerland, no. 41199/06, § 66, ECHR 2011; Association Rhino and Others v Switzerland, no. 48848/07, § 65, ECHR 2011; Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland, no. 34124/06, § 61, ECHR 2012.
[37] Tsakyrakis, n 30 480-481. Kumm argues basically the same, see Kumm, n 30, 140 ("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?")

scope of a right does not elevate the normative force of the rights-holder's claim, or give her any position of priority over competing policy considerations.[38]

Gerards & Senden pose an even harsher critique, arguing that the Court often skips all together the definitional stage or pays lip service to it by accepting that the case falls within a Convention right without providing an explanation.[39] When the Court does address the right's definition it often merges this analysis with the assessment of the justification for its limitation,[40] thus avoiding the need to draw the scope of the right independent of competing policy considerations. The Court, in Gerards & Sendens' words, can "hide behind the specific circumstances of the case and to avoid to have to make structural decisions on the scope of a Convention right."[41] 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.[42] This is usually to the detriment of the applicant, since the interests raised by the respondent government are taken into consideration already in the initial stage of defining the scope of the right and its interference.

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 Convention rights on the basis of the legitimate aim standard because such an assessment is usually carried out with the proportionality assessment.[43] Davor also argues that the aim is usually upheld swiftly without extensive evaluation. At times, the aim's legitimacy is assumed, whether explicitly or implicitly.[44] Similarly, Gerard holds that the Court tends to accept aims that are framed in general and abstract terms and do not require further specification.[45] Gerard notes that although mentioned

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[38] Kumm, n 30, 139. But see Yutaka Arai-Takahashi, 'Proportionality', *The Oxford Handbook on Int'l Human Rights Law* (2013) (D. Shelton (ed)); G. Pavlakos, 'Constitutional Rights, Balancing and the Structure of Autonomy' 24 Canadian Journal of Law and Jurisprudence 129 (2011).

[39] Janneke Gerards & Hanneke Senden, The Structure of Fundamental Rights and the European Court of Human Rights, 7(4) *Int'l Journal of Constitutional Law*, 619-653, 632-634 (2009) ('Gerards & Senden').

[40] Ibid, 634.

[41] Ibid, 639.

[42] Ibid, 644.

[43] *Theory and Practice of the European Convention on Human Rights* (Pieter van Dijk, Fried van Hoof, Arjen van Rijn and Leo Zwaak, eds) (Fourth Edition, 2006)- Chapter 5, the System of Restrictions, revised by Yutaka Arai, 340 (Arai, Theory and Practice'); Sadurski concludes the same, in Wojciech Sadurski, 'Is There Public Reason in Strasbourg?' (May 6, 2015), *Sydney Law School Research Paper* No. 15/46, 2-3. http://ssrn.com/abstract=2603473 ('Sadurski').

[44] Davor Šušnjar, *Proportionality, Fundamental Rights, and Balance of Powers*, (Brill, 2010) 90.

[45] Janneke Gerards, How to improve the necessity test of the European Court of Human Rights, 11(2) *ICON*, 466-490, 479 (2013); Sadurski, n 42, 2.

in each case, the Court has rarely found an aim to be illegitimate and has refrained from developing sub-requirements to help elucidate the requirements entailed in the different prescribed aims.[46]

Sadurski has also affirmed the Court's very lax evaluation of the legitimate aim requirement.[47] He holds that even in the rare instances in which the Court expresses mild doubts concerning the aim, the Court brackets or disregards these doubts and proceeds to assess the proportionality of the application of the challenged measure/law.[48] The result of this process is that the illegitimacy of the aim is integrated into the proportionality assessment and is not the outcome of an independent scrutiny.[49] In this context, refraining from stating clearly which aims could never justify an interference with a 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.[50]

1. The 'Very Essence of the Right': a Deontological Constraint on Balancing?

Despite the dominance of the balancing method in the Court's jurisprudence, not all aspects of the rights are "up for grabs".[51] The Court's jurisprudence is scattered with references to the "essence" or "core" of the right. This, at least in theory, suggests some sort of a deontological constraint within the balancing method. According to Tsakyarakis, "Once 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."[52] This accords with Kumm and Walens' conclusion that not only does balancing not exclude deontological constraints, but actually requires the inclusion of such considerations.[53]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.[54] Such circumstances do not automatically

[46] Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights*, in: The Legitimacy of Highest Courts' Rulings. Judicial Deliberations and Beyond, N. Huls, M. Adams and J. Bomhoff (eds.) (The Hague: T.M.C Asser Press 2009), 407, 417, 62.
[47] Sadurski, n 42.
[48] Ibid, 3-5.
[49] Ibid, 10.
[50] Tsakyrakis, n 30, 488.
[51] Ibid, 488.
[52] Ibid, 492.
[53] Mattias Kumm and Alec D. Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing', Proportionality and the Rule of Law: Rights, Justification, Reasoning, 67, 69, (Grant Huscroft, Bradley W. Miller, Gregoire Webber, eds.,) ("Kumm & Walen") (defining deontology broadly, as encompassing "a range of reasons for giving some interests more or less priority over others.")
[54] Ibid, 69.

elevate the right to an absolute status, but require ascribing it more weight than a neutral interest balancing would suggest.[55]

However, the Court 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 illusory or theoretical nature.[56] Gerards argues that the closer an aspect of a right is to the general objectives of the Convention (defined as the maintenance and promotion of a democratic society and the protection of human dignity and personal autonomy), the more likelihood that the Court submits its infringement to stricter scrutiny and narrows accordingly the margin of appreciation afforded to the respondent government. [57]

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, Christeffersen concludes that a finding of lack of respect for human dignity 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 can be not be violated..[58] 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.[59]

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 scrutinize the 'very essence' requirements with rigour."[60] Yet his analysis of the case-law supports Christeffersen's conclusion that the application of the notion remains still insufficiently articulated and too elusive.[61] In the context of the fair trial rights, Goss' holds that the Court has displayed a

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[55] Ibid, 89.

[56] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 36 (2002 Intersentia) ('Arai-Takahashi'). 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 Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, 193-230 (Cambridge University Press, 2006).

[57] Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, European Law Journal, 17(1), 80, 112 (2011).

[58] Christoffersen, n 27, 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").

[59] Christoffersen, n 27 149. Arai-Takashi also holds that the notion of the 'very essence' is closely associated with or included in the proportionality assessment, Arai-Takahashi, n 55, 37.

[60] Arai-Takahashi, n 55, 37.

[61] Ibid, 37-39.

tendency to refer to the standards of proportionality and 'very essence' practically interchangeably,[62] 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 distill guidelines from its jurisprudence is made all the more difficult. Due to the fact that the Court does not implement proportionality in a principled and systematic manner, it is difficult to understand what would constitute as clear violations, and conversely as interferences which are proportionate. Indeed, one could argue that the Court has a reasons for its unsystematic use of proportionality. Nonetheless, this praxis still has its downsides, among others, the difficulty to draw wider policy considerations. Keeping the difference between 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.

III. Red Lines in the ECtHR's Jurisprudence

A. The Prohibition on the Admission of Evidence Obtained Contrary to Article 3

Article 3 of the Convention prohibits torture and inhumane treatment. However, use of evidence derived from such measures is not explicitly prohibited. Instead, the Court 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

[62] Ryan Goss, *Criminal Fair Trial Rights*, 198-201 (Oxford: Hart Publishing, 2014). Eg, *Goth v. France* (press release), app. no. 53613/99 (16 May 2002) (ruling that the requirement of surrendering to custody as a requirement of admissibility of appeal deprived the movant 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, GC, *Omar v. France*, app. no. 24767/94, §40 (29 July 1998).

violation of the right to a fair trial, irrespective of its probative value.[63]

Over the years the Court has developed a set of principles on the admissibility of evidence obtained in breach of the prohibition of torture and inhumane or degrading treatment: (i) confessions, whether obtained through torture or inhuman treatment, can never be used as evidence in a trial;[64] (ii) real evidence obtained as a result of torture is likewise 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 also apply when the victim of the ill-treatment was not the applicant himself, but a third person (e.g., a witness);[65] (v) these principles apply to all the states involved in the acts breaching Article 3, irrespective if 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;[66] and (vii) these rules apply to both criminal and administrative proceedings.

The Court is less decisive in respect to real evidence obtained through inhumane 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 will be excluded in circumstances in which the evidence impacted the outcome. In *Jalloh v. Germany*[67] 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 favor of the applicant, the Court held that the evidence collection was inhuman and degrading treatment in violation of Article 3. The Court also found a violation of Article 6 due, *inter alia*, to the fact that evidence collected was the decisive element in

[63] GC, *Gäfgen v. Germany*, app. no. 22978/05, § 167 (1 June 2010); GC, *Jalloh v. Germany*, App No 54810/00, § 105 (11 July 2006); ECtHR, *Al Nashiri v Poland*, app. no. 28761/11, § 564 (24 July 2014).
[64] ECtHR, *El Haski v. Belgium*, app. no. 649/08 (25 September 2012).
[65] ECtHR, *Othman (Abu Qatada) v. UK*, App. no. 8139/09) (17 January 2012).
[66] 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 Court 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, see ibid., §276. The Committee Against Torture has held that the applicant is only required to demonstrate that his or her allegations of torture are 'well-founded'. This shifts the burden to the state to prove the contrary, see Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, §82 (OUP, 2008) ('CAT Commentary').
[67] *Jalloh v. Germany*, n 62

securing the applicant's conviction.[68]

The distinction between torture and other forms of ill-treatment was upheld in *Gäfgen v. Germany*.[69] There the court held that, as a rule, the effective protection of individuals from the use of investigation 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 only at stake if the evidence obtained in breach of Article 3 had an impact on the defendant's conviction or sentence.[70] The majority ruled against the applicant due to the fact 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.

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[71] ('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', i.e., criminal, civil, administrative, extradition, regardless of whether the torture was carried out in a third country [72] or if the evidence is used in proceedings

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[68] Ibid, §119 (emphasis added).
[69] *Gäfgen v. Germany*, n 62.
[70] This point received harsh critique by the dissenting judges, see ibid, Joint partly dissenting opinion of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power, §9. For further discussion of the case and its ramifications, see Stijn Smet, 'Gäfgen v. Germany: Threat of Torture to Save a Life*?', Strasbourg Observer*, blog entry. (July 6 2010) Available at: http://strasbourgobservers.com/2010/07/06/389/ (last visited: 16 October 2015).
[71] Article 15 of the UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html [accessed 18 May 2016].
[72] CAT Commentary, §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 for preventive purposes, also when the torture is carried out by a third state agent (§§76-80).

against a person other than the victim of torture.[73] It applies exclusively to statements (and not to real evidence) and to torture (and not to inhumane or degrading treatment), contrary to a number of proposed drafts which included these expansions. According to the commentary on the CAT, the preventive purpose of Article 15 supports such broader application to statements made as a result of cruel, inhuman or degrading treatment.[74]

Thienel argues that Article 15 CAT has achieved customary status.[75] As of May 2016, 159 states are parties to CAT,[76] with no state party having made a reservation to Article 15.[77] In contrast to many human rights provisions, party states cannot 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]

U.N. bodies have persistently sought to expand the scope of the exclusionary rule through its *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.[80] Principle

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[73] Tobias Thienel, The Admissibility of Evidence Obtained by Torture Under International Law, 17(2) *EJIL*, 349, 357 (2006) ('Thienel'). ("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.")

[74] CAT Commentary, §86. Defining the scope of the exclusionary rule requires reflecting on that which distinguishes torture from other cruel, inhuman, or degrading treatment ('CIDT'). 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 CIDT. According to the purposive approach, the purpose of the act, rather than its severity, is the decisive distinguishing element. See Niyazmatov, Akmal, 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.

[75] Thienel, n 72, 365.

[76] UN's information on status of signatories, at: http://indicators.ohchr.org/(last visited 2 May 2016).

[77] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited 2 May 2016).

[78] Thienel, n 72, 363.

[79] Ibid, 363. 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, see Michael P. Scharf, 'Tainted Provenance: When, if Ever, Should Torture Evidence Be Admissible', 65 *Wash. & Lee L. Rev.*, 129, 136 (2008). But see David McKeever, 'Evidence Obtained Through Torture Before the Khmer Rouge Tribunal: Unlawful Pragmatism?' 8 *Journal of Int'l Criminal Justice*, 615 (2010).

[80] UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment : resolution / adopted by the General Assembly, 9 December 1988, A/RES/43/173, available at: http://www.refworld.org/docid/3b00f219c.html [accessed 18 May 2016].

16 requires prosecutors to refuse to use as evidence statements 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 rendering inadmissible evidence which 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, "The 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,[85] the Special Court for Sierra Leone,[86] and the International Criminal Court (ICC).[87] These provisions signal a trend of widening the scope of the prohibition beyond mere statements made under torture.[88]

The U.N. Human Rights Committee ('HRC') has further stated 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".[89] 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 U.N. Working Group on Arbitrary Detention included a broader provision than Article 15 CAT, covering other

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[81] Ibid, Principle 16.
[82] Int'l Crim. Tribunal for the Former Yugo. R.P. & Evid. 95, U.N. Doc. IT/32/Rev.I (1994).
[83] Int'l Crim. Tribunal for the Former Yugo. R.P. & Evid. 95, U.N. Doc. IT/32/Rev.40 (2007).
[84] The Secretary-General, 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, art.26 n.9, delivered to the Security Council and the General Assembly, U.N. Doc. C/1995/728, A/50/365 (Aug.23, 1995).
[85] Int'l Crim. Tribunal for Rwanda R.P. & Evid. 95, U.N. Doc. ITR/3/Rev.1 (1995).
[86] Special CT. of Sierra Leone R.P. & Evid. 95 (amended 7 March 2003).
[87] Article 69(7) of the ICC statute, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html (last accessed October 14, 2016.
[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] General Comment No. 20, in United Nations Compilation of General Comments, p. 141, § 12. Emphasis added.
[90] CAT Commentary, §88.

forms of cruel, inhumane or degrading treatment.[91]

Returning to the ECtHR's jurisprudence, its red line prohibiting the use of statements obtained through torture corresponds to Article 15 CAT, and its extension of the prohibition to statements obtained by other forms of inhumane or degrading treatment accords with the position of the U.N. bodies and the international criminal tribunals. As to the inclusion of all forms of evidence obtained through torture, i.e. real evidence, this also accords with the international criminal tribunals, but is a point where the tribunals, together with the ECHR, 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 member states' obligations under the Convention through purposive and dynamic interpretation.

The ECtHR's reluctance 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 international criminal tribunals which grant broad discretion to judges to determine the scope of the vague notions of 'substantial doubt' on the reliability of the evidence or if its admission is 'antithetical', and would 'seriously damage', the integrity of the proceedings.' However, the Court's rule of exclusion of real evidence when shown that its inclusion had 'impact' on the conviction could be interpreted as a lower threshold. In this sense, the Court seems to display a willingness to also 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 (i.e. setting a relatively high threshold) and in *Gäfgen* the applicant's repeating of his confession in open court cancelled out such 'impact'. Both these rulings stirred up controversy among the Strasbourg judges.[92] Subsequent developments of the Court's case law 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.

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[91] 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, A/HRC/30/37, guideline 12 (Admissibility of evidence obtained by torture or other prohibited treatment) (6 July 2015).

[92] Gäfgen v. Germany , n 62, (Joint partly dissenting opinion of Judges Rozakis, snd others), §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.").

B. The Use of Statements of Anonymous Witnesses as Evidence to Found a Conviction

Although the Court 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, the Court examines whether the restrictions placed on the defence were sufficiently counterbalanced by the procedure followed by the judicial authorities.[94] Up until recently, the Court held that even when counterbalancing procedures could be found to compensate sufficiently the handicaps 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]

Lately, the Court has relaxed its sole and decisive rule. [96] Instead of a definite rule, that if not met would result in an automatic violation, it is now a 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 when assessing the matter. In *Ellis and Simms and Martin v. the UK*[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 to some of the applicants. The Court clarified which considerations must be considered in establishing whether the use of anonymous statements violated the defendant's right to examine witnesses:

a. Whether there are good reasons to keep secret the identity of the witness.

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[93] ECtHR, *Texeira De Castro v. Portugal*, app. no. 25829/94, §35 (9 June 1998); ECtHR, *Kostovski v. the Netherlands*, app. no. 11454/85, §44 (20 November 1989).
[94] *Kostovski v. the Netherlands*, n 94 §41.
[95] Ibid,§44; ECtHR, *Doorson v. the Netherlands*, app. no. 20524/92, §76 (26 March 1996); ECtHR, *Van Mechelen and Others v. the Netherlands*, apps. nos. 21363/93, 21364/93, 21427/93 and 22056/93, §55 (23 April 1997); ECtHR, *Krasniki v. the Czech Republic*, app. no. 51277/99, §79 (28 May 2006). But see *Al-Khawaja and Tahery v. UK*, no. 26766/05 and 22228/06 (15 Dec. 2011)(noting that the sole or decisive rule should not be applied in an inflexible way).
[96] Bas de Wilde, 'A Fundamental Review of the ECHR Right to Examine Witnesses in Criminal Cases', 17 *The Int'l Journal of Evidence & Proof*, 157 (2013) ('de Wilde').
[97] ECtHR, *Ellis and Simms and Martin v. UK*, apps. nos. 46099/06 and 46699/06 (25 April 2012).

b. Whether the evidence of the anonymous witness was the sole or decisive basis of the conviction.

c. 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 to take place.[98]

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 measure, 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."[100] In any case, when such evidence is the sole base of a conviction, the counterbalancing measures must be very significant.[101]

The Court's recent ruling in *Balta & 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 list above, the Court concluded that: (1) no reasons were given for the decision to preserve anonymity; (2) the evidence was not sole, but decisive; (3) the witness did not appear before the trial judge; (4) the defence was not given the opportunity to direct questions to the witness; and (5) the domestic Turkish court did not even consider the use of less restrictive procedural safeguards available in Turkish law.[103] A question which still remains unanswered concerns circumstances in which the defence was denied the opportunity to question the witness, yet least restrictive means <u>were</u> implemented, or considered.

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[98] Ibid, §§ 76-78.
[99] De Wilde, n 97 180 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).
[103] Summary based on the press release issued by the Registrar of the Court ECHR 213 (2015) 23.06.2015 (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).

1. ECtHR Jurisprudence Situated Within International Law

International standards which deal specifically with witness anonymity are primarily found 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 tribunals concern the "Protection of Victims and Witnesses". According to the ICTY rule, 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."[104] Under Rule 81(4) of the ICC Rules, 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 authorizing the non-disclosure of their identity prior to the commencement of the trial.[105] Decisions authorizing the non-disclosure of the identity of a witness of the prosecutor 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, i.e., 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, as to anonymity, it will not be permanent. The identity of the witness must be disclosed to the defence with sufficient time prior to 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 the concealment of the identity 45 days before summoned to testify. In doing so, it underscored that, in the future, it would not easily defer to similar requests to extend the period of

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[104] UN Documentation, International Criminal Tribunal for the former Yugoslavia§ (A). Rule 69 of the ICTR reads slightly differently ("(A) 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] U.N. Doc. A/CONF.183/9, PCNICC/199/INF/3

[106] *International Criminal Procedure: Principles and Rules*, 1090 (Göran Sluiter and others, eds.) (Oxford University Press, 2015). For the relevant rules on witness anonymity in additional international/hybrid criminal tribunals, see F. Gaynor, D. Jacobs, M. Klamberg and V. Tochilovsky, Law of Evidence,1093-1095, ibid.

[107] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, 289 (United Nations, 2003) available at: http://www.ohchr.org/Documents/Publications/training9chapter7en.pdf

anonymity beyond the re-trial stage.[108] In any case, concealment of the witness's identity cannot cover the period in which the witness must testify.[109] The ICTY has also addressed anonymity in the *Tadic* 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 the Tadic case, 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 in the long run prevailed and the ICTY has never since granted such anonymity, although the witness's identity may continue to be protected from the media and public.[113]

As detailed above, the ECtHR's jurisprudence 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 scrutinize 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 tribunal's stand is therefore more clear-cut in favor of the defendant's right.

This conclusion should be considered given that the ICTY and the ICC both hold that the protection of victims and witnesses is one of the primary considerations that inform its interpretation of its rules[114] both of which are not explicitly included in Article 6 of the ECHR.[115]

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[108] Situation in the Democratic Republic of Congo in the case of the *Prosecutor v Katanga* and Ngudjolo Chui, Public redacted version of the Decision on the protection of prosecution witnesses 267 and 353 of 20 May 2009, ICC-01/04-01/07 (2009), §§ 48 and 53.

[109] Croquet, n 5, 119-120.

[110] *Prosecutor v. Tadic*, No. IT-94-I-T (10 Aug. 1995) (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses. Note also that on 5 December 1996, based on the fact that less restrictive measures could suffice to satisfy the requested protection, and the parties consent that the protective measures were no longer justified, the protective measures were lifted. *Prosecutor v. Tadic*, No. IT-94-I-T (5 Dec. 1996).

[111]Gregory S. McNeal, Unfortunate Legacies: Hearsay, Ex Parte Affidavits and Anonymous Witnesses at the IHT. 4(1) *Int'l Commentary on Evidence*, Article 5, 2 (2006). Available at SSRN: http://ssrn.com/abstract=1087827.

[112] *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion', n 19, (Judge Stephen's dissenting opinion at RP 5025).

[113]*Prosecutor v Tihomir Blaskic*, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, Case No.: IT-95-14-T, T.Ch. I, § 24 (5 Nov. 1996).; Prosecutor v. Delalic, Decision on the Prosecutor's Motions, n 19, §59.

[114] *Prosecutor v. Tadic*, Decision on the Prosecutor's Motion, n 19 §27. As for the ICC, the implementation of Rule 81(4) of the ICC discussed above is also governed by an obligation to protect the well being, dignity and privacy of victims, see: Article 68(1) of the ICC Statute.

Thus, one could expect that the ECHR would attribute more weight to defendants' rights when balancing between their rights and those of the witnesses and victims, the latter falling under the interest of 'protecting the rights of others'. This considered, the ECtHR's recent loosening of the 'sole and decisive rule' in favor 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]

C. Non-Disclosure of Information Forming the Base of Allegations Against the Detainee

When a person is detained on the basis of a reasonable suspicion of unlawful behavior, 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 to disclosure, while ensuring that the detainee is not deprived of the possibility to effectively challenge the basis of the allegations against her.[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 it. The Court has upheld this standard against weighty arguments, e.g., that disclosure would jeopardize on-going and complex criminal investigations, or that withholding of information is necessary to prevent suspects from tampering with evidence and undermining the course of justice.[119]

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[115] Victims' rights are not addressed under Article 6 but are considered to be protected under other Convention rights, see ECtHR, *Doorson v. the the Netherlands*, app. no. 20524/92, §70 (26 March 1996); ECtHR,*Marcello Viola v Italy*, app. no. 45106/04, §51 (5 October 2006).

[116] A question which needs 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 at whether proceedings 'as a whole' were fair, after the fact.

[117] Article 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][GC], *A and Others v. UK* ,app. no. 3455/05, § 202-211 (19 February 2009); ECtHR, *Ovsjannikov v. Estonia*, app. no. 1346/12, §72 (20 February 2014); <NAME OF COURT> *Fodale v. Italy*, app. no. 70148/01, § 41 (1 June 2006); ECtHR, *Korneykova and Korneykov v. Ukraine*, app. no. 56660/12, §68 (24 March 2016).

[119] ECtHR,*Lietzow v. Germany*, app. no. 24479/94 and *Schöps v. Germany*, app. no. 25116/94 (13 February 2001).

The Court has further stressed that it is the defendant himself that must be informed. Hence, the use of special advocates—who have access to secret intelligence information—does not substitute the obligation to inform the defendant.[120] *A and Others v. UK*[121] concerned 'closed material procedures', which allowed the prosecution to introduce sensitive intelligence material in the course of secret hearings that only the judge and special advocates could access. Some of the applicants had been charged with involvement in fundraising for or membership in terrorist groups linked to al-Qaeda. The Court accepted that during the period of the applicants' detention there existed an urgent need to protect the U.K. 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 the special advocate has the potential to fulfill a significant role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing, the Court also noted that the special advocate would be hindered in performing its 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 Court as 'sufficiently specific'? The Court found that allegations which 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 fund-raising 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 since the evidence which had allegedly provided the link between the money raised and terrorism was not

[120] A and Others v. UK, n 118, §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 detail of the case to the detainee. This clearly poses significant barriers on the possibility to effectively challenge 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', 24 *KLJ* 19 (2013).
[121] Ibid.
[122] Ibid, §220.
[123] Ibid, §222.

disclosed.[124] The open allegations in respect to the remaining applicants, which had been of a general nature, namely, involving membership were likewise found to violate Article 5(4).[125]

1. ECtHR Jurisprudence Situated Within International Law

The U.N. Working Group on Arbitrary Detention has enumerated exceptions to the detainee's right to full disclosure of the information underlying her detention.[126] The disclosure of information may be restricted where the court concludes that it is necessary in light of a legitimate aim as long as such restrictions are non-discriminatory and 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') has addressed the legitimacy of the use of secret information in the known 'Kadi trilogy'. Kadi, and Al Barakaat International Foundation were considered by the U.N. Sanctions Committee as being associated with Usama bin Laden, Al-Qaeda or the Taliban. Pursuant to Security Council resolutions, all U.N. 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 resolutions within the European Community, the Council adopted a regulation[128] ordering the freezing of the funds and other economic resources of the 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 the defence, especially the right to be heard and the right to effective judicial review. The Court dismissed the claims, concluding that the member states were required to comply with the Security Council resolutions under the terms of the U.N. Charter.[129]

Kadi and Al Barakaat brought appeals against those judgments before the CJEU. Deciding

[124] Ibid, §223.
[125] Ibid, §224.
[126] Report of the Working Group on Arbitrary Detention, guidelines, n 92 guideline 13, §§ 81-81.
[127] Ibid, §82.
[128] Council Regulation (EC) No 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 (OJ 2002 L 139, p. 9).
[129] Case T-306/01 Yusuf and Al Barakaat Foundation v Council and Case T-315/01 Kadi v Council and Commission (21 September 2005).

in their favor, the CJEU set aside the earlier judgments.[130] The CJEU found that Kadi and Al Barakaat were denied an effective review by the Community's courts based on the EU's Charter of Fundamental Rights. 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.[131]

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[132] to maintain his name on the EU list. In response, Kadi brought a new action for annulment before the General Court.[133] 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 were once more violated. The judgment was appealed by the Commission, the Council and the UK.

In the third round,[134] the CJEU held that in proceedings relating to listing of an individual on the suspected terrorist list the competent EU authority must disclose to the individual the evidence underpinning its decision. Accordingly, that individual must be able to obtain the summary of reasons provided by the Sanctions Committee to support that committee's decision to impose restrictive measures on him. That authority must also ensure that that individual can respond with his views on the grounds for the listing and must examine whether those reasons are well founded.[135]

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

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130 C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (3 September 2008).
131 C-402/05 P and C-415/05 P, n 131, §336.
132 Commission Regulation (EC) No 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 (OJ 2008 L 322, p. 25).
133 Case T-85/09, *Yassin Abdullah Kadi v Commission* (30 September 2010).
134 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission, Council, *UK v Yassin Abdullah Kadi* (18 July 2013),see also press release no. 93/13.
135 Ibid, §§111-116.

insufficient to allow a finding that a reason is well founded, the EU courts shall disregard that reason as a basis for the contested decision to list or maintain a listing.[136]

If the courts are 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 them, they are allowed to consider possibilities such as the disclosure of a summary outlining the information's content or that of the evidence in question. At least one of the reasons mentioned in the summary must be sufficiently detailed, specific, substantiated and must in itself constitute sufficient basis to support the imposition of the restrictive measures at hand. In the absence of one such reason, the courts shall annul the decision.[137]

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 were ruled out. In any case, the reasons informing a court's decision to allow non-disclosure should be made clear to all the parties. The spirit of the CJEU Kadi rulings also entails the requirement that any decision of 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 ECtHR's case law discussed provides some examples,[138] as do the Kadi rulings. What stands out in the jurisprudence of these courts and from the ECtHR's critique of

[136] Id., §§117-127. The ECtHR has recently decided a case involving a similar factual background, holding, *inter alia*, that the Swiss authorities have a duty to ensure that the UN Security Council's listings were not arbitrary before freezing of assets, see *Al-Dulimi and Montana Mgmt Inc. v. Switzerland*, app. no. 5809/08 (21 June 2016).
[137] Ibid, §§128-137.
[138] In A and Others v. UK, the Court 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 of an alternative explanation 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. There, §220.

the UK's closed material procedures is that the defendant itself must have access to the core of the evidence against her. The use of special advocates cannot substitute the requirement that the defendant has control over her line of defence. [139]

Among the EU member states, there is no clear consensus regarding the role and legitimacy of the use of secret evidence. [140] Considering the disparity of practices and standards of protection, the jurisprudence of European courts should be attributed significant weight when attempting to consolidate international standards on the specificity of information which must be disclosed, notwithstanding competing interests. The central role that 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.[141]

D. 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 in a retrial) is ranked by the Court as one of the essential requirements of Article 6.[142] A defendant who wants to be present in the trial has, therefore, a right to be present in his trial, subject to behavior 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.[143] However, the Court maintains that "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."[144] The unequivocal waiver must be accompanied by safeguards to the importance of the right of

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

[140] For a survey a survey conducted across a selection of EU member states on the matter (the 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 Liberty and Security in Europe*. CEPS Liberty and Security in Europe No. 78/January 2015.

[141] Croquet, n 5, 117-119.

[142] ECtHR *Stoichkov v. Bulgaria*, app. no. 9808/02, §56, (24 March 2005).

[143] ECtHR, *Krombach v. France*, app. no. 29731/96, §85 (13 February 2001).

[144] ECtHR *Somogyi v. Italy*, app. no. 67972/01, § 66 (18 May 2004).

appearance. A complete retrial before a first instance is not mandatory, provided that an appeal hearing allows the submission of new evidence and new legal arguments.[145]

In the case of *Sejdovic and Slovakia (intervening) v Italy*[146] the Grand Chamber detailed the conditions under which a defendant is considered to have waived his right to participate in trial. A waiver must: (1) be informed voluntarily in an established unequivocal manner; (2) be attended by minimum safeguards commensurate to its importance; (3) not run counter to any important public interest; (4) it must also be shown that the defendant could reasonably have foreseen the consequences of her/his conduct; (5) last, 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 due to *force majeure*.[147]

The Court has made it clear that a defendant who decides not to appear does not lose the right to effective representation by council.[148] While acknowledging the need to have the ability to discourage unjustified absences, the right to 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.[149] Therefore, the denial of legal representation as a sanction for absence in the proceedings is a disproportionate sanction. [150]

1. ECtHR Jurisprudence Situated Within International Law

The right of a criminal defendant to be present in her trial is universally recognized as a fundamental right, enshrined in Article 14(3)(d) of the ICCPR. Notwithstanding the apparently mandatory wording of the Article,[151] the state's parties to the ICCPR do not consider the right to be absolute, but subject to certain restrictions.[152] This view was reaffirmed by the HRC.[153] In General

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145 GC, *Sejdovic and Slovakia (intervening) v Italy* [GC] app. no. 56581/00, §85 (1 March 2006)
146 Ibid.
147 Ibid. §§ 86-88.
148 ECtHR, *Poitrimol v. France*, app. no. 14032/88, §§ 32-39 (23 November 1993).
149 *Krombach v. France*, n 142, § 89.
150 *Sejdovic and Slovakia (intervening) v Italy*, 144, §§ 91–92.
151 ICCPR, n 21 Article 14(3)(d) ("3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:.. (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;…").
152 Wayne Jordash and Tim Parker, Trials in Absentia at the Special Tribunal for Lebanon Incompatibility with International Human Rights Law, 8 *Journal of Int'l Criminal Justice*, 487, 489 (2010) ("Jordash & Parker").
153 *Mbenge v. Zaire*, HRC Communication No. 16/1977, reported at 78 ILR 18, 19, UNHR Comm. 1983, § 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.")

Comment No. 13, the HRC stated that "[t]he accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses 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 defense is all the more necessary."[154] However, it does not define what those 'justified reasons' are. Among the regional human rights bodies, the ECtHR is the only one that elaborated on the HRC's reasoning and defined the legitimate scope of the exceptions to trials in absentia,[155] as described above.

International criminal courts have taken a different approach (the Special Tribunal of Lebanon being a criticized exception).[156] Following the path paved by the International Military Tribunal at Nuremburg, which used its power to try defendants in absentia only once,[157] the statutes of the modern international criminal tribunals have not allowed trials in absentia.[158]

As a rule, the ICTY and the ICTR do not allow trials in absentia (subject to the exception of disruptive behavior 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 to reach a compromise among the different approaches taken in civil law, common law, and international jurisdictions.[160] The final version,

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[154] UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 (1994), § 11 (1994) (on equality before the courts and the right to a fair and public hearing by an independent court established by law).

[155] Maggie Gardner, Reconsidering Trials in Absentia at the Special Tribunal for Lebanon: an Application of the Tribunal's early Jurisprudence, 43 *The George Washington Int'l Law Review*, 91, 103 ('Gardner').

[156] Jordash & Parker, n 151 (arguing that Article 22 of the Statute of the Special Tribunal for Lebanon which governs trial in absentia violates international law because, as an ad-hoc tribunal, it cannot effectively guarantee a retrial and because it authorizes to hold a trial in the absence of the defendant in circumstances which exceed those narrowly constructed under international law). But see McDermott, Fairness in International Criminal Trials (2016), pp. 68-72 (detailing case law allowing voluntary absence from trial).

[157] William A. Schabas, 'In Absentia Proceedings Before International Criminal Courts', Inernational Criminal Procedure: Towards a Coherent Body of Law, 335, 336–353 (Göran Sluiter & Sergey Vasiliev eds., 2009).

[158] HRW letter, n 152.

[159] Rules of Procedure and Evidence 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, Article 80(b), IT/32/Rev. 44 10 December 2009; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Article 80(b), U.N. Doc. ITR/3/REV.1 (1995). The ICC Rome Statute prohibits trials in absentia except in the narrow circumstances in which the accused may be removed from the courtroom due to 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." (supra n 17, ICC Statute, Art.63). Rule 125 of the Rules of Procedure and Evidence 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 HRW letter, n 152, 3 (noting rejection of French recommendation to allow proceedings in absentia with automatic retrial upon arrest) with Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, May 3, 1993, and Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993): Corrigendum, UN Doc. S/25704/Corr.1, July 30, 1993, Part V.A., § 101 (the

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.[162] Likewise, the ECtHR does not require an initial appearance of the accused in court in order to satisfy the Convention's fair trial guarantees, under 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[163] or to the importance to adhere to strict rules of procedure especially in light of critique 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."[164] The tribunals, have, therefore, in practice come closer to the approach taken by the ECtHR, provided that a waiver can be established.

The ECtHR has persistently ruled against states which placed heavy sanctions on defendants which failed to appear in court. As Gardner observed, the ECtHR's scrutiny in the 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.[165] In this respect, under the lead of the ECtHR, the traditional divergences between the civil and common law systems are gradually shrinking by moving closer to the common

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U.N. Secretary General's Report on the establishment of the ICTY suggested that the interpretation of Article 14(3) ICCPR required prohibiting the conduct trials in absentia)

161 Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), S.C. Res. 827, U.N. Doc. S/RES/827 (1993), as amended, http://www.un.org/icty/legaldoc-e/index.htm, art. 21 (4)(d); Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), S.C. Res. 955, U.N. Doc. S/RES/955 (1994), as amended, http://69.94.11.53/ENGLISH/basicdocs/statute.html, art. 20(4)(d). The Statute of the Special Court for Sierra Leone includes the same provision [Statute of the Special Court for Sierra Leone (SCSL Statute), January 16, 2002,…. art. 17(4)(d)] Yet, Rule 60 of the Special Court's Rules of Procedure and Evidence allows for much wider exceptions. [Rules of Procedure and Evidence of the Special Court for Sierra Leone (SCSL RPE),… March 7, 2003, rule 60(A)]. Conducting full trials in absentia is in any case prohibited.

162 Ibid, 102.

163 Gardner, n 153, 104.

164 Special Court for Sierra Leon, *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, 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, ¶ 8 (July 12, 2004); see also <NAME OF COURT> *Prosecutor v. Jean- Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, ¶ 24 (Nov. 2, 2000).

165 Gardner, n 154, 102 and the text accompanying fn.65.

law model.

E. Preventive Detention for Security Purposes or for Intelligence Gathering

Article 5 protects the right to liberty and security, prohibiting detention which does not fall under one of the enumerated exceptions.[166] The third exception which is the most relevant for the discussion of detention for preventive purposes, read as follows:

> "(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 prior to the commission of an offence is in line with the Convention ("…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 criminal proceedings within a reasonable time.[167] Therefore, preventive detention is, as a rule, prohibited under the Convention.[168] 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 is accordingly never permitted.[169]

The case of *Ostendorf v. Germany*[170] concerned a football supporter's complaint about his four-hour police custody for the purpose of preventing him from organising and partaking in a violent brawl between football hooligans. The Court was satisfied that the police had had sufficient information to assume that the applicant was planning a hooligan brawl during which concrete and

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[166] Article 5 ECHR.
[167] ECtHR, *Ciulla v. Italy*, app. no. 11152/84, §38 (22 February 1989); GC, *Al-Jedda v. UK*, app. no. 27021/08, §100 (7 July 2011); ECtHR *Lawless v. Ireland* (no. 3), app. no. 332/57, §§ 13-14 (1 July 1961); ECtHR *Ireland v. UK*, app. no. 5310/71, §196 (18 January 1978); ECtHR *Guzzardi v. Italy*, app. no. 7367/76, §102 (6 November 1980); ECtHR *Jecius v. Lithuania*, app. no. 34578/97, §§47-52 (31 July 2000).
[168] *Jecius v. Lithuania*, n 167, §51; *Guzzardi v. Italy*, n 167, §102; *Ciulla v. Italy*, n 167; ECtHR *M. v. Germany,* app. no. 19359/04, §89 (17 December 2009); Shimovolos v. Russia, app. no. 30194/09, §54 (21 June 2011).
[169] Guzzradi v. Italy, n 167., §102.
[170] ECtHR, *Ostendorf v. Germany*, app. no. 15598/08 (7 March 2013).

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 Court 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 cover also 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 authorize preventive police custody.[171]

The interpretation of Article 5(1)(c) also excludes preventive detention for security purposes ('security detention').[172] 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 exclusively justified by virtue of derogation from Article 5.[173] Yet, the ECtHR has underscored that also under a justified derogation from Article 5 of the ECHR, "derogation is not a carte blanche."[174] Measures adopted under derogation—such as pretrial detention without judicial control—must last no longer than "strictly required by the exigencies of the emergency requiring derogation."[175]

In the 1961 *Lawless v. Ireland* judgment, the Court considered Ireland's detention of an IRA activist for five months under an emergency statute that authorized a Minister of State to order detention whenever the Minister "is of opinion that any particular person is engaged in activities

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171 Ibid, §87.

172 The Court has rejected security detention in strong terms, see *Lawless v. Ireland* (No. 3), n 167, §14.

173 Article 15 ECHR ('Derogation in time of emergency') permits derogation from the Convention under the circumstances described there. Article 15(2) lists rights which cannot be derogated from. Article 5 is not listed among them, and therefore is subject to derogation.

174 ECtHR, Murray v. UK, 8 Feb. 1996 (ECHR)§58.

175 UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency,31 August 2001, CCPR/C/21/Rev.1/Add.11, §4 available at: http://www.refworld.org/docid/453883fd1f.html [accessed 9 May 2016].

which, in his opinion, are prejudicial to the preservation of public peace and order or to the security of the State."[176] 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 5. The Court concluded in the affirmative, based on what it considered as sufficient procedural safeguards.[177] Cassel argues however, that, in light of recent British ruling,[178] as well as recent rulings of the ECtHR which limit the length of permitted detentions to approximately one week even under justified derogations,[179]"…it is unclear whether prolonged security detention can still be justified by derogation from the ECHR."[180]

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.[181] That stated, under derogation, detention for interrogation can be justified, "only in a very exceptional situation" provided that the detention is proved to be a measure strictly required by the exigencies of the situation and is accompanied by sufficient safeguards.[182]

1. ECtHR Jurisprudence in the Context of International Law

Security detention is governed by both IHRL and IHL. Considering the focus of the contribution, I shall focus on the IHRL norms guiding the issue and not discuss security detention

[176] *Lawless v. Ireland* (No.3), n 167 §12.
[177] Ibid, §§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 favorable 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.)
[178] UKHL, *A. v. Sec'y of State for the Home Dep't.*, [2004] UKHL 56.
[179] 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' (Sakik and others v. Turkey, apps. nos. 23878/94 23879/94 23880/94 (26 November 1996)); Within the context of derogation, the ECtHR decided that a detention period of 4 days and 6 hours breached Article 5(3) (Brogan and others v. UK, apps. nos. 11209/84; 11234/84; 11266/84; 11386/85 (29 November 1988)). See also <NAME OF COURT >*Bilen v. Turkey*, app. no. 5337/02 (8 April 2008) (9 days were found to be in violation of Article 5 violates); <NAME OF COURT >*Tanrikulu and others v. Turkey*, apps. nos. 29918/96, 29919/96 and 30169/96 (6 0ctober 2005) (10 days were held to be in violation of Article 5).
[180] Douglass Cassel, 'Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law', 98(3), *The Journal of Criminal Law & Criminology*, 811, 837 (2008) ('Cassel').
[181] ECtHR, *Fox, Campbell and Hartley v UK*, apps. nos. 12244/86 12245/86 12383/86, §§ 28-36 (30 August 1990).
[182] *Ireland v. UK*, n 167, §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.").

in circumstances which call for the application of international humanitarian law.[183] 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 when dealing with security detention. While preventive detention for security grounds is as a rule prohibited under the ECHR in 'normal' times (i.e. non-emergency times), pure security-based detention is permitted under the ICCPR, as long as it is considered reasonably necessary to contain the security threat at hand.[184] 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 (substantive aspect); and adheres to procedural safeguards (procedural aspect).[185] 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.[186] 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 IL.[187] 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 due to their arbitrariness, disproportionality or procedural deficiencies.[188] Hakimi argues that invalidation of detention is, however, 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 initiating the detention. When reviewing the U.S. detention regime in Guantanamo Bay, the HRC did not dismiss

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183 Cassel, n 180, 815. The use of security detentions is usually discussed in the context of suspected terrorists. Their detention is subject to roughly four IL frameworks: peacetime and public emergencies short of war, which are governed by IHRL norms, and armed conflicts of either international or non-international character which are considered to be subject to both IHRL and IHL norms, despite some states' argument to the contrary, see, eg: *International Humanitarian Law and International Human Rights Law: Pas de Deux* (edited by Orna Ben-Naftali); Cordula Droege, The Interplay Between IHL & IHRL in Situations of Armed Conflict, 40(2) *ISR. L. REV.*, 310-355 (2007).

184 Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 33 *Yale J. Int'l L.*, 369, 392 (2008) ('Hakimi').

185 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/his right to legal assistance, see Cassel, n 180, 822-823

186 Cassel, n 180,832, 836.

187 Human Rights Comm., Concluding Observations: Israel, 21, U.N. Doc. CCPR/C/79/Add.93, (Aug. 18, 1998), text accompanying note 96; Human Rights Comm., Second Periodic Report Addendum" Israel, 125-28, U.N. Doe. CCPR/C/ISR/2001/2 (Dec. 4, 2001).

188 Cassel, n 180 834.

the use of administrative detention (as opposed to the possibility to detain under criminal law) and also bypassed the question whether the Guantanamo detentions would be 'arbitrary' even if accompanied by sufficient procedural safeguards.[189]

Hakimi perceives the HRC's neglect to elaborate on and scrutinize the standard of non-arbitrariness "endemic to its jurisprudence on pure security-based detention."[190] 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 under the HRC's review as procedural issues.[191]

Different to security detention which is principally permitted under IL, indefinite detention, solely or primarily for purposes of gathering intelligence and interrogation, is, according to Cassels' assessment, probably not lawful under U.S. or IL, although not explicitly prohibited under IHRL.[192] 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.[193] The report concludes that 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."[194] However, the report's conclusions suggest an

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[189] Hakimi, n 185 392-393. See also Situation of detainees at Guantánamo Bay - Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, UN Human Rights Commission doc. E/CN.4/2006/120 (27 Feb. 2006), available at: https://documents-dds ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement (last accessed 1/23/2017).

[190] Ibid, 393.

[191] Ibid, 393-394 and the text accompanying fns. 102-112.

[192] Cassel, n 181, 831.

[193] Remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to ring proceedings before a court: A Comparative and Analytical Review of State Practice (April 2014). Available at: 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 and finding general acceptance of the security detention and that detention for intelligence gathering is also practiced and further only China, the ECHR, and Sri Lanka require a reasonable suspicion of actual involvement in a planned or completed terrorist attack of the detained persons.

[194] Ibid, §46.

emergence of a customary internal law norm prohibiting detention on grounds of security or intelligence gathering that has no maximum duration. [195]

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 Art. 5(1)(c) has been interpreted by the ECtHR as requiring concrete and specific suspicions that the detained 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 Art 5 is impaired'.[196] Due to the absence of a standard within IHRL for the quantity or quality of evidence needed to justify security detention,[197] the ECtHR's rulings on the issue can serve as illustrative examples.[198]

The ECtHR tends to grant the member states a wide margin of appreciation when assessing whether their domestic situation amounts to an emergency allowing for derogation, especially when domestic courts have reviewed and upheld the executive's decision.[199] 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 ECtHR's attempt to limit the acceptability of security detentions to emergency situations and its prohibition on detention for intelligence gathering signals that within the boundaries of an international community which does accept the use of security

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[195] Ibid, 13-15, §47-52.

[196] ECtHR, *O'Hara v UK* (2002) 34 EHRR 32 [35]; see also *Fox, Campbell and Hartley v UK*, n 182;

[197] Cassel, n 181 836.

[198] Eg, *O'Hara v. the UK* § 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 Article 5 (1) (c) is impaired.); GC, *Labita v. Italy*, §§ 155-161 (6 April 2000) (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*, §§ 56-63, app. no. 31247/96 (21 December 2004) (incriminating statements dating back to a number of years and later withdrawn by the suspects did not remove the existence of a reasonable suspicion against the applicant. Furthermore, it did not have an effect on the lawfulness of the arrest warrant).

[199] 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', 23(3) *Human Rights Quarterly*, 625 (2001); Alan Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights, 12(11) *German Law Journal*, 1764 (2011), 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?', 8(1) *Essex Human Rights Review*, 124 (2011). But see, *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges* (Europäisches Parlament Think Tank) (2014) available at: http://www.europarl.europa.eu/thinktank/de/document.html?reference=IPOL_STU(2014)509991 (Concluding that the member states' margin of appreciation in cases connected with national security is no longer uniformly broad.)

detention, inherent danger to liberty must be appreciated and its use kept to an absolute minimum.[200]

IV. 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. Due to the centrality of balancing and proportionality in the ECtHR's jurisprudence, the task of extracting clear-cut 'DO NOT's' is not easy. Such an attempt could also be perceived as a categorical error in light of the fact that balancing is inherent to the ECHR and accordingly to its interpretation by the ECtHR. The article did not set out to rebuke such an argument.[201] Instead, its aim was more modest and pragmatic: in light of the Convention's aim to guarantee rights that are 'practical and effective', how can a policymaker seeking 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 policy-making 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 delimit 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 formed a list which structures the strict scrutiny which such circumstances call for.

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

[200] Cassel, n 181, 851.

[201] Such an argument could be rebuked by arguing 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, see Alec Stone Sweet, On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court, *Revue Trimestrielle des Droits de l'Homme* (2009); Senden, n 8, 16-20.

interpretation and consolidation of IHRL.

The contextualization within international law and the comparison of the ECtHR's jurisprudence with that of other bodies raised varying conclusions. As to anonymous witnesses, for example, the ECtHR'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 to the ICL tribunals' stand that 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 ECtHR's laxer approach cannot be brushed away considering that—contrary to the ICL tribunals statutes—the rights of witnesses and victims are not specifically protected under the ECHR. Thus, we could expect that the defendant's rights under the ECHR would receive at least the same protection as those of the ICL tribunals' defendant which, pursuant to statute provisions, must be balanced against witnesses' and victim's rights. As to the limits of non-disclosure of evidence to the defence, to give another example, the ECtHR's 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 due to the lack of consensus among states on the matter.

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