

## Chapter 2

# Human Rights Framework

**Abstract** This chapter sets out the human rights framework with respect to the question of how to address pre-trial procedural violations. Several rights enshrined in the comprehensive human rights treaties are relevant to this question, in particular, the right to a fair trial and the right to an effective remedy; both are examined in this chapter. In addition, the human rights law with respect to inter-state cooperation in criminal matters (where procedural violations have been committed in that context, that is) is considered. In the examination of the right to a fair trial, consideration is given to the question of when unlawful conduct on the part of the police in the course of the investigation will impact on the fairness of the proceedings, and to the extent to which the determination of whether there has been a violation of the right depends on the particular circumstances of the case and whether public interest considerations may inform this determination. Finally, in one of the domestic jurisdictions examined in this book another aspect of human rights law has entered the discussion on how to address pre-trial procedural violations: the positive obligations arising under the ECHR. The argument is that certain responses to such procedural violations may be inconsistent with the positive obligations arising from certain substantive rights protected by the ECHR, because they prevent the court from punishing effectively the person responsible. The question of whether a duty to punish can be read into such positive obligations is therefore also addressed in this chapter.

**Keywords** right to a fair trial • Article 6 ECHR • (evidence obtained by) torture and other ill-treatment • (evidence obtained by violation of) right of access to counsel in investigative phase • (evidence obtained by violation of right not to incriminate oneself) • (evidence obtained by violation of) right to privacy • Entrapment • Non-disclosure • use of the (unlawfully obtained) evidence • balancing • public interest considerations • right to an effective remedy • Article 13 ECHR • inter-state cooperation in criminal matters • non-enquiry

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## 2.1 Introduction

The purpose of this chapter is to set out the human rights framework with respect to the question of how to address procedural violations committed in the pre-trial phase of criminal proceedings, as relevant to the central research question of this book: how should judges at the ICTs respond to procedural violations committed in the pre-trial phase of the proceedings? Before setting out the human rights framework, however, it is important to address the matter of applicability of human rights to the ICTs. Much has been written on this topic<sup>1</sup> and while it is widely accepted that the ICTs are required to observe human rights standards pertaining to the position of the suspect or accused, the precise reason for this has been subject to extensive discussion on account of such tribunals not being states and not being party to the universal and/or regional instruments that ‘provide the basic legal materials out of which human rights obligations are usually fashioned’.<sup>2</sup> The most convincing argument for such an obligation appears to be that the ICTs are international organizations and therefore bound by human rights standards that form part of general international law (i.e. customary international law and general principles of law).<sup>3</sup> Through this law, the ICTs, as international organizations, are bound by norms ‘similar or identical in content’ to those provided for in the human rights instruments.<sup>4</sup> The ICTs may, moreover (and perhaps more importantly), be said to be bound by ‘internationally recognised’ human rights on account of their own law and practice. For example, pursuant to Article 21(3) of the ICC Statute, the ICC is required to apply and interpret the law applicable to it (as provided for in Article 21 (1) and (2) of the ICC Statute) in a manner consistent with ‘internationally

<sup>1</sup> See e.g. Zappalà 2003, 5–7; Gradoni 2006, 2013, 81–83; and most recently, Zeegers 2016.

<sup>2</sup> Gradoni 2013, 81.

<sup>3</sup> See e.g. Gradoni 2013, 81.

<sup>4</sup> Gradoni 2013, 81.

recognized human rights'.<sup>5</sup> It is reasonable to assume that a right is 'internationally recognized' when it is provided for in a universal human rights instrument such as the ICCPR. This may raise questions as to whether the standards set forth in regional instruments such as the ECHR and ACHR and, more particularly, the case law of the corresponding supervisory bodies, can be considered to be binding on the ICTs. Despite (any) such questions, these standards (and, in particular, those contained in the ECHR) have been included in this chapter on the understanding that the norms contained in such regional instruments largely reflect those contained in the ICCPR, as a consequence of which the case law of the corresponding supervisory body can reasonably be regarded as providing authoritative interpretations of the norms that bind the ICTs. Moreover, it is to be noted that the case law of the ECtHR is 'over-represented' in the case law of the ICTs, thereby confirming its value as an evaluative tool.

Several rights enshrined in the ICCPR and the ECHR are relevant to the question of how judges at the ICTs should respond to procedural violations committed in the pre-trial phase of the proceedings. The right to a fair trial, provided for in Articles 14 and 6 of the ICCPR and ECHR, respectively, is an obvious starting point for addressing the aforementioned question; examination of this provision will shed light on the question on when it is necessary to address pre-trial procedural violations *within the criminal trial*. Other rights are also relevant to the question of how judges at the ICTs should address procedural violations committed in the pre-trial phase of the proceedings, although they do not require a response within the criminal trial; they *may* be provided within that context, though. The right to an effective remedy, provided for in Articles 2(3) and 13 of the ICCPR and ECHR, respectively, is often mentioned in case law and scholarly discussions on how to address procedural violations committed in the pre-trial phase of criminal proceedings,<sup>6</sup> and there is the right to compensation in case of unlawful arrest or detention, provided for in Articles 9(5) and 5(5) of the ICCPR and ECHR, respectively (which is a specific manifestation of the general right to an effective remedy). Each of these provisions is addressed below.

In setting out the human rights framework with respect to the question of how to address pre-trial procedural violations, it is important to bear in mind the specific context in which the ICTs operate: they are largely dependent on state cooperation as regards the apprehension of suspects or accused and as regards the carrying out of investigations. This raises issues that do not arise, or arise to a lesser degree, in a purely domestic context. For this reason it is important to also consider the relevant human rights law on inter-state cooperation in criminal matters. Thus, domestic courts may be confronted with acts by *foreign* public authorities that are (alleged to

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<sup>5</sup> While the source of obligation differs for the ad hoc Tribunals, according to Gradoni, this has 'no bearing on the status of human rights norms within the legal systems of international criminal tribunals'. See Gradoni 2013, 83.

<sup>6</sup> Most importantly, both of these rights have been cited in the relevant case law of the ICTs. Such case law is set out in Chaps. 5 and 6, and in order to be able to evaluate it, it is necessary to set out the relevant human rights law.

be) incompatible with the fundamental rights of the accused. In this regard it may be observed that inter-state cooperation in criminal matters, for example, extradition or the provision of mutual legal assistance,<sup>7</sup> is no longer a novelty: states increasingly cooperate with one another in order to combat terrorism and other serious crime. Inter-state cooperation in criminal matters is of particular relevance to the law and practice of the ICTs. Zeegers points out that, '[a]lthough inter-state cooperation differs from the cooperation between States and the [international criminal tribunals], the former has greatly impacted on the latter'.<sup>8</sup> Accordingly, the human rights case law on unlawfulness in the context of inter-state cooperation in criminal matters is also set out below, after first examining that on unlawfulness in a purely domestic context. This case law, which is scarce, concerns not only cases brought against the state to have *requested* cooperation (the requesting, adjudicating state), but also those brought against the state to have *been requested* to cooperate (the requested state) and, as regards the latter category of cases, the use in extradition proceedings of evidence alleged to have been obtained unlawfully (in a third state). While it is the case law regarding the responsibility of the requesting state that is most (obviously) relevant to the context of the ICTs, it is also relevant to consider the case law on the responsibility of the requested (or cooperating) state, since such case law may also shed light, albeit indirectly, on the responsibility of the requesting state in such cases: a finding that the requested state does not bear responsibility for certain conduct may well be connected to the responsibility that the requesting state bears, or should bear.<sup>9</sup> Because the case law discussed is not limited to cases brought against the requesting, adjudicating state, it is not addressed under the right to a fair trial,<sup>10</sup> but rather forms part of the general human rights framework. It may be noted at the outset that inter-state cooperation in criminal matters is widely acknowledged to be characterized by the under-protection of the (rights of the) suspect or accused, a fact that has been subject to much criticism in the literature.<sup>11</sup> Such under-protection makes a proper

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<sup>7</sup> For the distinction between extradition and mutual legal assistance, and the definition of mutual legal assistance, see Currie 2000, 144–146.

<sup>8</sup> Zeegers 2016, 115.

<sup>9</sup> The case of *Soering v UK* (App no 14038/88 (ECtHR, 7 July 1989)) is perhaps the most (in)famous case to address the responsibility of the requested state (for a flagrant denial of justice in the requesting state), but that case did not concern pre-trial procedural violations and as such is not addressed here.

<sup>10</sup> Invoking the right to a fair trial in respect of unlawfulness in the requested state is not a straight-forward matter: see Klip 2012, 424. Moreover, the right to a fair trial does not appear to apply to extradition proceedings: such proceedings so not involve the determination of a criminal charge as such. However, see *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989), para 113.

<sup>11</sup> See generally Orié 1983; Currie 2000; Van Hoek and Luchtman 2005; Hodgson 2011; Klip 2012, 422–428; Bachmaier Winter 2013; and Vogler 2013.

understanding of the human rights law and practice on the effects of unlawful conduct on the part of *national* public authorities all the more important: surely this is the minimum protection to which an accused (who is the subject of inter-state cooperation) is entitled.

Finally, in one of the domestic systems examined in this book—the Netherlands—another aspect of human rights law has entered the discussion on how to address procedural violations committed in the pre-trial phase of criminal proceedings: the positive obligations arising under the ECHR. The argument is that certain responses to such procedural violations, i.e. a stay of proceedings, the exclusion of evidence and a significant reduction of sentence, may be inconsistent with the positive obligations arising from, for example, Article 2 (which protects the right to life) and Article 3 (which prohibits torture and inhuman and degrading treatment and punishment) of the ECHR, because they prevent the court from ‘punishing effectively’ the person responsible. Proponents of this argument therefore read into such positive obligations a ‘duty to punish’.<sup>12</sup> Failure to discharge such a duty may lead to liability for the state (acting through its judicial authorities). The question of whether a duty to punish can be read into such positive obligations is therefore also addressed below, in Sect. 2.3.

On the basis of the foregoing, then, the structure of this chapter is as follows. First, the human rights case law on the question of how to address pre-trial procedural violations committed in the pre-trial phase of criminal proceedings in a purely domestic context will be set out, through the provisions identified above as being relevant to the question of how judges at the ICTs should respond to procedural violations committed in the pre-trial phase of the proceedings, and which pertain to the position of the suspect or accused.<sup>13</sup> Next, the human rights case law on the question of how to address pre-trial procedural violations in an international context will be set out, again through the standards that pertain to the position of the suspect or accused.<sup>14</sup> In Sect. 2.3, an overview will be provided of the obligations that human rights law imposes on states to address (serious) human rights violations occurring within their jurisdiction (to the extent that such obligations could bear on the question of how judges at the ICTs should respond to procedural violations committed in the pre-trial phase of the proceedings). Such standards may be said to provide protection to other persons than the suspect or accused in criminal proceedings, i.e. to the victims of crime. Finally, this chapter will conclude, in Sect. 2.4, with a brief summary of the main features of the human rights framework and the main points of analysis.

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<sup>12</sup> This argument is set out in more detail in Chap. 3.

<sup>13</sup> See Sect. 2.2.1 through 2.2.3.

<sup>14</sup> See Sect. 2.2.4.

## 2.2 Protection of the Suspect or Accused

As stated, several rights enshrined in the ICCPR and the ECHR are relevant to the question of how judges at the ICTs should respond to procedural violations committed in the pre-trial phase of the proceedings. The right to a fair trial, provided for in Articles 14 and 6 of the ICCPR and ECHR, respectively, is an obvious starting point for addressing the aforementioned question. Other rights are also relevant to the question of how judges at the ICTs should address pre-trial procedural violations, although they do not require a response within the criminal trial; they may be provided within that context, though. These are: the right to an effective remedy, provided for in Articles 2(3) and 13 of the ICCPR and ECHR, respectively, and the right to compensation in case of unlawful arrest or detention, enshrined in Articles 9(5) and 5(5) of the ICCPR and ECHR, respectively. Each of these provisions is addressed below, starting with the right to a fair trial.

### 2.2.1 *Right to a Fair Trial*

#### 2.2.1.1 Introduction

Articles 14 of the ICCPR and 6 of the ECHR provide for the right to a fair trial and afford the individual a number of procedural guarantees for the adjudication of disputes which involve ‘the determination of his civil rights and obligations or of any criminal charge against him’.<sup>15</sup> In determining a criminal charge, the domestic court may be confronted with acts by public authorities, i.e. the police or prosecutor, that are (alleged to be) incompatible with declared standards of conduct, including the fundamental rights of the accused. In the first place, this may occur when the prosecutor seeks to adduce evidence obtained unlawfully by the police in the course of a criminal investigation. In this regard it should be noted that the domestic court’s obligation to do that which is necessary to protect the fairness of the proceedings may require it *not* to use evidence obtained unlawfully, whether the evidence concerned consists of a single item or the case as a whole.<sup>16</sup> Although (as will be seen below) Article 6 of the ECHR itself does not prescribe rules on the admissibility of evidence, such rules (which entail what the domestic court is required to do in order to avoid liability under Article 6) may nonetheless be inferred from the interpretation by the European Court of Human Rights (hereafter:

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<sup>15</sup> For the distinction between substantive and procedural rights, see Strasser 1988, 595–604.

<sup>16</sup> The consequence of the non-use of the case as a whole is more akin to the national criminal procedure remedy of a stay of proceedings, whereby the proceedings are brought to a halt, than to that of exclusion of evidence. See n 171 and accompanying text.

ECtHR) of Article 6.<sup>17</sup> Nor does Article 14 of the ICCPR prescribe rules on the admissibility of evidence, but while the United Nations Human Rights Committee (hereafter: HRC) has stated that ‘[i]n order to safeguard the rights of the accused under paras 1 and 3 of Article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution’,<sup>18</sup> which, according to Safferling, ‘may imply that the court is permitted or even obliged to exclude evidence that was obtained improperly’,<sup>19</sup> no such rules can be inferred from its case law *on Article 14*. As such, the remainder of this section (on the right to a fair trial) will focus on the ECHR and corresponding case law of the ECtHR. Even where no evidence is obtained (let alone adduced), courts may be called upon to examine (what is alleged to constitute) unlawful conduct on the part of public authorities, including that which is inconsistent with fundamental rights, on account of its potential impact on the fairness of the proceedings. This may concern police *or* prosecutorial unlawfulness. The question may arise as to whether, in order for unlawful conduct on the part of the police in the conduct of the investigation to impact on the fairness of the proceedings, any evidence obtained actually needs to be used in subsequent trial proceedings.<sup>20</sup> This question is addressed below.<sup>21</sup>

The structure of this subsection is as follows. First, some general observations will be made about the manner in which the ECtHR has approached the determination of Article 6 of the ECHR where it was argued (by the applicant) that unlawful conduct on the part of the police or public prosecutor impacted on the fairness of the proceedings.<sup>22</sup> This is in order to assist the reader in understanding the case law of the ECtHR to be set out below on the determination of Article 6 of the ECHR where it was argued that unlawful conduct on the part of the police or public prosecutor impacted on the fairness of the proceedings, according to specific categories of conduct.<sup>23</sup> After setting out such case law, this subsection will address the question raised above of whether, in order for unlawful conduct on the part of

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<sup>17</sup> At the supranational level the relevant institution may be called on to examine the acts (of obtaining evidence) themselves, as well as the use by domestic courts of evidence obtained by such acts. Thus, on the one hand the ECtHR’s case law formulates standards on how public authorities may investigate crime and obtain evidence, and on the other, it formulates standards on how domestic courts may fairly use evidence. See, for a similar analysis, Ölçer 2008, 36–37.

<sup>18</sup> HRC, ‘General Comment no 13. Article 14 (Administration of justice)’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (1994) UN Doc HRI/GEN/1/Rev.1, 14, para 15.

<sup>19</sup> Safferling 2003, 293.

<sup>20</sup> Regardless of the answer to this question, it is a requirement at the supranational level that in order to be able to claim ‘victim status’ in connection with Article 6, the proceedings must not have ended in an acquittal or have been discontinued, i.e. they must have ended in a conviction. See e.g. *Osmanov and Husseinov v Bulgaria* App no 54178/00 (ECtHR, Decision of 4 September 2003), 4–5.

<sup>21</sup> See Sect. 2.2.1.4.

<sup>22</sup> See Sect. 2.2.1.2.

<sup>23</sup> See Sect. 2.2.1.3.

the police in the course of the investigation to impact on the fairness of the proceedings, any evidence obtained thereby actually needs to be used in subsequent trial proceedings.<sup>24</sup> Following this, the extent to which the ECtHR can be said to endorse a discretionary or ‘balancing’ approach to the question of how to address procedural violations committed in the pre-trial phase of criminal proceedings will be addressed.<sup>25</sup> In Chap. 1, it may be recalled, the question of the extent to which the determination of whether to attach legal consequences to established procedural violations should entail the exercise of judgement, whereby the judge has due regard to the particular circumstances of the case, i.e. the extent to which it should be *discretionary* in nature (which may be contrasted to an approach whereby the judicial response is more or less automatic) and, on a related note, that of the extent to which it should entail a ‘balancing’ approach, whereby the court (also) takes into account factors that seemingly have nothing to do with that which warranted the court’s attention in the first place, and which militate against a (potentially) far-reaching response thereto, were said to lie at the heart of the present study.

### 2.2.1.2 Fair Trial Analysis

On account of its status and internal structure, Article 6 of the ECHR has proven a challenging provision to determine when alleged to have been violated.<sup>26</sup> Regarding its status, it may be observed that Article 6 is not subject to the qualifications that the rights in Articles 8–11 of the ECHR are, which allow a certain degree of interference with such rights. At the same time, however, it does not fall within the category of non-derogable rights provided for in Article 15 of the ECHR. Article 6 is, therefore, an unqualified but derogable right. According to Goss, this status ‘raises a number of normative questions: should the Article 6 guarantee(s) be interpreted as ‘absolute’, with no infringement thereof being capable of justification? Should some infringements of Article 6 be justifiable? If so, what standard applies, and should it be similar to the standards used for the qualified rights?’<sup>27</sup> Regarding its internal structure it may be observed that Article 6 is structurally complex. It consists of three paragraphs, whereby it is unclear how such paragraphs relate to one another: are references to ‘fair trial rights’ or ‘the right to a fair trial’ ‘shorthand for all of the various rights and guarantees, express and implied, that may be found in Article 6(1), Article 6(2), and the provisions of Article 6(3)’, or do Article 6(2) and Article 6(3) ‘merely [provide] definitional assistance and elaboration on the meaning of Article 6(1)’?<sup>28</sup> According to Goss, in attempting to solve ‘the puzzle of Article 6’, i.e. the questions arising from its status and internal

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<sup>24</sup> See Sect. 2.2.1.4.

<sup>25</sup> See Sect. 2.2.1.5.

<sup>26</sup> Article 14 ICCPR has a similar status and internal structure.

<sup>27</sup> Goss 2014, 118 (footnote in original omitted).

<sup>28</sup> *Ibid.*, 118–119.



structure, the ECtHR has employed a number of different ‘analytical tools’, including the ‘proceedings as a whole’ test (whereby the determination of Article 6 is dependent on whether the proceedings as a whole were fair), ‘counter-balancing’ (whereby the question is whether a potential violation has been offset by other (counter-balancing) measures in the same proceedings), the ‘never fair’ method (whereby some infringements of Article 6 rights and some rights violations render a trial irretrievably unfair), the ‘sole or decisive’ (evidence) test, and balancing and proportionality analysis (whereby restrictions on Article 6 rights may be justified on account of public interest considerations).<sup>29</sup> As will be seen below, such tools have also been applied in cases in which Article 6 was alleged to have been violated on account of unlawful conduct on the part of police or prosecutorial authorities in the context of criminal proceedings. However, it may be observed at the outset that, in the context of unlawfully obtained evidence, the ECtHR has frequently adopted (or purported to adopt) a ‘holistic’ approach, whereby the determination of Article 6 is dependent on whether the proceedings as a whole were fair. Such an approach sits well with the notion that ‘[w]hile the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case’.<sup>30</sup> The adoption of a holistic approach in this context can moreover be explained by reference to the cautious approach traditionally adopted by the Court towards the assessment of evidence. One of the first cases to express the margin of appreciation with respect to the assessment of evidence was *Schenk v Switzerland*, in which the ECtHR held that while Article 6 of the ECHR guarantees the right to a fair trial, ‘it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law’.<sup>31</sup> Accordingly, it could ‘[not] exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible’ and only had to ascertain whether the Applicant’s trial *as a whole* was fair.<sup>32</sup> The ECtHR reiterated this position in *Khan v United Kingdom*:

It is not the role of the Court to determine, *as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible ...* The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where violation of another Convention right is concerned, the nature of the violation found.<sup>33</sup>

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<sup>29</sup> *Ibid.*, 124.

<sup>30</sup> *O’Halloran and Francis v UK* App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007), para 53.

<sup>31</sup> *Schenk v Switzerland* App no 10862/84 (ECtHR, 12 July 1988), para 46.

<sup>32</sup> *Ibid.*, para 46 (emphasis added).

<sup>33</sup> *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000), para 34 (emphasis added).

Initially, therefore, the ECtHR refused to lay down a *general principle* with respect to the admissibility of unlawfully obtained evidence, by '[disavowing] any authority to determine, as a matter of principle, whether particular types of evidence—for example, unlawfully obtained evidence—may be admissible',<sup>34</sup> only ruling on the question of whether in the particular circumstances of the case the use of such evidence was contrary to the right to a fair trial. In doing so, the ECtHR adopted a 'holistic' approach, whereby the question of whether the proceedings have been fair requires the examination of a number of factors, including 'the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found', 'whether the rights of the defence have been respected' and, in particular, 'whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use' (i.e. whether sufficient procedural safeguards were in place), 'the quality of the evidence', i.e. whether the circumstances in which it was obtained 'casts doubt on its reliability or accuracy' and whether it required corroboration, 'whether the evidence in question was or was not decisive for the outcome of the proceedings', and 'the weight of the public interest in the investigation and punishment of the particular offence in issue'.<sup>35</sup> While the ECtHR has continued to take a holistic approach, repeatedly referring to its judgment in *Schenk* that the admissibility of evidence is primarily a matter for regulation under national law and that its role is to determine whether the proceedings, as a whole, have been fair, subsequent decisions have 'sometimes ... been more overtly interventionist' than previous ones (in which the ECtHR treated issues of admissibility as matters for domestic courts),<sup>36</sup> in that the ECtHR has held (explicitly) that the use of certain types of unlawfully obtained evidence automatically, or nearly so, renders the proceedings unfair, i.e. regardless of the aforementioned factors. Thus, in a number of decisions it appears to have adopted the 'never fair' method.<sup>37</sup> These decisions are discussed in the following section.

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<sup>34</sup> Jackson 2012, 136.

<sup>35</sup> This last factor is discussed below, in Sect. 2.2.1.5.

<sup>36</sup> Jackson 2012, 136.

That the ECtHR is not entirely deferential to states with respect to the assessment of evidence is, by now, widely accepted in the literature, although accounts of the ECtHR's approach in this regard range from the (cautious) observation that despite Article 6(1) ECHR not requiring 'that any particular rules of evidence are followed in national courts in either criminal or non-criminal cases', the ECtHR 'has set certain parameters within which a state must operate' (Harris et al. 2014, 418; see also Ashworth 2012, 159–160), to referring to it as 'interventionist' and 'active', and, in certain circumstances, as providing for an exclusionary rule (See e.g. Ölçer 2013, 372; and Ambos 2009, 383; for other 'less cautious' accounts, see Chedraui 2010, 206–208; Goss 2014, 60; and Ashworth 2014, 336). A number of authors have pointed to the language of the ECtHR, that it is primarily, but not solely a matter of national law, as support for the proposition that the ECtHR is not entirely deferential.

<sup>37</sup> Goss 2014, 161–163.

### 2.2.1.3 Types of (Unlawful) Conduct

The purpose of this subsection is to set out the ECtHR's case law on the determination of Article 6 of the ECHR where it was argued (by the applicant) that unlawful conduct on the part of the police or public prosecutor impacted on the fairness of the proceedings. Such case law will be set out according to the following categories of conduct on the part of such authorities (some of which are, in and of themselves, unlawful, while others are not): torture or other ill-treatment; denial of access to counsel in the investigative phase; coercion, compulsion and deception in the context of 'questioning'; covert surveillance or interception of communication; entrapment; and non-disclosure.

#### Torture or Other Ill-Treatment

In the first place, the ECtHR has held that 'the use of evidence obtained in violation of Article 3 [of the ECHR] in criminal proceedings raises serious issues as to the fairness of such proceedings'. More specifically in relation to torture within the meaning of Article 3 of the ECHR, it has held that:

[I]ncriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should *never* be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the *Rochin* case [...], to "afford brutality the cloak of law".<sup>38</sup>

The reference to the 'use of evidence ... in criminal proceedings' and the phrase 'should never be relied on as proof of the victim's guilt', which appears in the ECtHR's assessment of the alleged violation of Article 6, imply that only where evidence obtained by torture is actually *used* by the domestic court, that is, relied on as proof of the accused's guilt or in the determination of punishment,<sup>39</sup> will the ECtHR find a violation of Article 6 of the ECHR.<sup>40</sup> Once it has been used, however, the probative value, i.e. weight, of such evidence, whether confessional or

<sup>38</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 105 (emphasis added), as referred to in *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), para 63; *Levința v Moldova* App no 17332/03 (ECtHR, 16 December 2008), para 100; *Baran and Hun v Turkey* App no 30685/05 (ECtHR, 20 May 2010), para 69; *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 166 and 167; and *Oihman (Abu Qatada) v UK* App no 8139/09 (ECtHR, 17 January 2012), para 264.

<sup>39</sup> *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 179, 180 and 186.

<sup>40</sup> In setting out the Court's general principles with respect to unlawfully obtained evidence, the ECtHR in *Gäfgen v Germany* (App no 22978/05 (ECtHR, 1 June 2010)), refers to 'the admission of statements ... as evidence to establish the relevant facts in criminal proceedings' (para 166), and 'the use at the trial of real evidence' (para 167). Also telling in this regard is the ECtHR's observation that 'an issue arises under Article 6 in respect of evidence obtained as a result of

real,<sup>41</sup> is irrelevant.<sup>42</sup> Nor is it relevant whether, for example, sufficient procedural safeguards were in place, or whether the evidence was decisive.<sup>43</sup> Moreover, regarding the use of confessional evidence, i.e. statements, obtained as a result of torture, the foregoing applies regardless of who made the statement, i.e. the defendant him- or herself, or a third party, such as a witness or co-defendant.<sup>44</sup> For evidence obtained as a result of torture, therefore, the ECtHR, through its interpretation of Article 6, prescribes an absolute exclusionary rule.<sup>45</sup> Such a rule is also

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(Footnote 40 continued)

methods in violation of Article 3 only if such evidence was not excluded from use at the applicant's trial' (para 172).

In addition to formulating this requirement in its general principles, the ECtHR has in numerous cases found the *use* of evidence obtained by violation of Article 3 ECHR to be contrary to Article 6 ECHR. See e.g. *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), paras 108 and 122; *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), para 66; *Levința v Moldova* App no 17332/03 (ECtHR, 16 December 2008), para 105; *Gladyshev v Russia* App no 2807/04 (ECtHR, 30 July 2009), para 79; *Baran and Hun v Turkey* App no 30685/05 (ECtHR, 20 May 2010), para 72; *Stanimirović v Serbia* App no 26088/06 (ECtHR, 18 October 2011), para 52; *Hajnal v Serbia* App no 36937/06 (ECtHR, 19 June 2012), para 115; *Kaçiu and Kotorri v Albania* App nos 33192/07 and 33194/07 (ECtHR, 25 June 2013), paras 118 and 129; and *Cēsnieks v Latvia* App no 9278/06 (ECtHR, 11 February 2014), para 69.

Finally, the existence of such a requirement is widely recognised in the literature. See e.g. Jackson and Summers 2012, 163; and Chedraui 2010, 212.

<sup>41</sup> See *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 105; *Baran and Hun v Turkey* App no 30685/05 (ECtHR, 20 May 2010), para 69; and *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 166 and 167.

<sup>42</sup> See e.g. *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 105; *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), para 63; *Baran and Hun v Turkey* App no 30685/05 (ECtHR, 20 May 2010), para 69; *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 166–167; and *Stanimirović v Serbia* App no 26088/06 (ECtHR, 18 October 2011), para 51.

<sup>43</sup> See e.g. *Levința v Moldova* App no 17332/03 (ECtHR, 16 December 2008), paras 100 (referring to *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), paras 63 and 66) and 105; *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), para 166; and *Stanimirović v Serbia* App no 26088/06 (ECtHR, 18 October 2011), para 51.

<sup>44</sup> *Kaçiu and Kotorri v Albania* App nos 33192/07 and 33194/07 (ECtHR, 25 June 2013), para 128, referring to *Harutyunyan v Armenia* (App no 36549/03 (ECtHR, 28 June 2007), where the ECtHR found that the use of witnesses' statements obtained as a result of torture, as well as the Applicant's own statements obtained by such means, rendered the trial against the Applicant unfair (paras 64–66), and to *Othman (Abu Qatada) v UK* (App no 8139/09 (ECtHR, 17 January 2012)), where the ECtHR ruled that the admission of co-defendants' statements, which had been obtained by torture and incriminated the Applicant, would constitute a breach of Article 6 ECHR in the event of the applicant's deportation to, and trial in Jordan (paras 285 and 287). See also *El Haski v Belgium* App no 649/08 (ECtHR, 25 September 2012), para 85.

<sup>45</sup> This position was confirmed in *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), paras 63 and 66; *Levința v Moldova* App no 17332/03 (ECtHR, 16 December 2008), paras 99–100 and 105; *Tangiyev v Russia* App no 27610/05 (ECtHR, 11 December 2012), paras 73–76; and *Kaçiu and Kotorri v Albania* App nos 33192/07 and 33194/07 (ECtHR, 25 June 2013), para 118. In all of these cases, the use of evidence obtained by torture was found to violate Article 6 ECHR.

prescribed by Article 15 of the UNCAT<sup>46</sup> and the HRC.<sup>47</sup> The ECtHR has referred to various rationales for excluding such evidence. According to the Court, evidence obtained as a result of torture ‘should never be relied on as proof of the victim’s guilt, irrespective of its probative value’, and admitting such evidence ‘would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe’.<sup>48</sup> Other ‘compelling reasons for the exclusion of torture evidence’ include unreliability, unfairness, offensiveness ‘to ordinary standards of humanity and decency’, incompatibility ‘with the principles which should animate a tribunal seeking to administer justice’<sup>49</sup> and the need ‘to protect the integrity of the trial process [and court] and, ultimately, the rule of law itself’.<sup>50</sup>

While it is fair to say that the ECtHR prescribes an absolute exclusionary rule in respect of evidence obtained by torture (in the sense that, once it is established that evidence obtained by torture was used at trial, a finding that Article 6(1) of the ECHR is inevitable, regardless of, for example, its probative value, whether its use could be challenged and how it was used), there may be room for it to conclude that the trial was fair notwithstanding the use of such evidence, on the basis of the extent to which the torture can be considered to have been causal for the evidence. In *Harutyunyan v Armenia*, the Applicant alleged that his confessions, and those of two witnesses, were used at his trial, which had been obtained by torture. The Government accepted that the Applicant and two witnesses had been subjected to torture. In response to the Government’s attempt to justify the use of the confessions by arguing that the Applicant had confessed to the investigator and not to the police officers who had tortured him, i.e. that the statement had not been obtained as a (direct) result of the mistreatment, the ECtHR opined that:

... where there is compelling evidence that a person has been subjected to ill-treatment, including physical violence and threats, the fact that this person confessed – or confirmed a coerced confession in his later statements – to an authority other than the one responsible

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<sup>46</sup> It certainly excludes *statements* obtained by torture, and it may also exclude real evidence obtained as a result of torture. See Pattenden 2006, 9–10.

<sup>47</sup> HRC ‘General Comment no 32. Article 14: Right to equality before courts and tribunals and to a fair trial’ (23 August 2007) UN Doc CCPR/C/GC/32, para 6.

<sup>48</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 105. According to Jackson and Summers, this statement demonstrates that the use of evidence obtained as a result of torture ‘is prohibited, not necessarily because the evidence is in itself unreliable, although this may well be a factor, but principally because the use of such evidence is seen as fatally undermining the fairness of the proceedings and the legitimacy of the criminal justice system’. In their view, therefore, the ECtHR’s justification for the exclusion of evidence obtained as a result of torture is primarily non-epistemic in nature. See Jackson and Summers 2012, 162.

<sup>49</sup> *Othman (Abu Qatada) v UK* App no 8139/09 (ECtHR, 17 January 2012), para 264, referring to Lord Bingham’s opinion in *A v Secretary of State for the Home Department (No 2)* [2005] 3 WLR 1249 [52].

<sup>50</sup> *Othman (Abu Qatada) v UK* App no 8139/09 (ECtHR, 17 January 2012), para 264. Thus, the ECtHR provides both epistemic and non-epistemic justifications for the exclusion of evidence obtained as a result of torture.

for this ill-treatment should not *automatically* lead to the conclusion that such confession or later statements were not made *as a consequence of* the ill-treatment and the fear that a person may experience thereafter.<sup>51</sup>

While in the particular circumstances of the case the fact that the Applicant had confessed to a different authority than the one responsible for his mistreatment did *not* lead to the conclusion that the statements were *not* made as a consequence of the mistreatment,<sup>52</sup> this statement suggests that where a confession is made to a different authority than the one responsible for the mistreatment (amounting to torture), there is room to conclude that it was not made as a result of the mistreatment. In other words, the absolute exclusionary rule referred to above only appears to apply to evidence obtained as a *direct* result of torture.

As to the use of incriminating evidence obtained by methods falling short of torture but nonetheless falling within the ambit of Article 3, while the use of confessional evidence, i.e. statements, obtained as a result of methods amounting to ‘inhuman and degrading treatment’ automatically renders the trial unfair, regardless of the probative value of such evidence and *how* it was used,<sup>53</sup> this rule appears to be subject to the same qualification as above, i.e. it applies only to (confessional) evidence obtained as a direct result of such treatment.<sup>54</sup> Thus, in *Gäfgen v Germany*

<sup>51</sup> *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), para 65 (emphasis added).

<sup>52</sup> *Ibid.*, para 65.

<sup>53</sup> Thus, whether obtained as a (direct) result of torture of inhuman and degrading treatment within the meaning of Article 3 ECHR, the use of *confessional* evidence in criminal proceedings automatically renders the trial unfair. See *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 166 and 173; *Stanimirović v Serbia* App no 26088/06 (ECtHR, 18 October 2011), para 51; *Hajnal v Serbia* App no 36937/06 (ECtHR, 19 June 2012), paras 112–115; *Tangiyev v Russia* App no 27610/05 (ECtHR, 11 December 2012), para 73; *Kaçiu and Kotorri v Albania* App nos 33192/07 and 33194/07 (ECtHR, 25 June 2013), paras 117 and 124; *Nasakin v Russia* App no 22735/05 (ECtHR, 18 July 2013), paras 97–100; *Ryabtsev v Russia* App no 13642/06 (ECtHR, 14 November 2013), paras 91–94; and *Cēsnieks v Latvia* App no 9278/06 (ECtHR, 11 February 2014), paras 65–66 and 69.

See, however, *Haci Özen v Turkey* App no 46286/99 (ECtHR, 12 April 2007), paras 102–105 and *Gladyshev v Russia* (App no 2807/04 (ECtHR, 30 July 2009), para 79), in which the use of statements obtained as a (seemingly, direct) result of inhuman and degrading treatment did not automatically render the trial (as a whole) unfair. It is worth noting that the first two cases were decided before the Grand Chamber issued its judgment in *Gäfgen*, i.e. before the Grand Chamber clarified its findings in *Jalloh* regarding the use of evidence obtained as a result of inhuman and degrading treatment. Admittedly, in *Haci Özen*, the ECtHR does not say whether the statements were obtained as a direct result of the ill-treatment. In *Gladyshev*, however, it does appear to have been of the view that the confession evidence in question was obtained as a result of the ill-treatment (para 79).

As with evidence obtained by torture, in order for evidence obtained by inhuman and degrading treatment (within the meaning of Article 3 ECHR), whether confessional or real, to impact on the fairness of the proceedings, the evidence has to have been *used*, that is, relied on as proof of the accused’s guilt or in the determination of punishment. See n 39–40 and accompanying text.

<sup>54</sup> The ECtHR’s statement in *Harutyunyan v Armenia* (see n 51 and accompanying text) does not appear to be limited to torture; it simply refers to ‘physical violence and threats’.

the Grand Chamber appears to have endorsed the approach in *Harutyunyan v Armenia*. In the former case, the Applicant confirmed a confession obtained by methods constituting inhuman treatment within the meaning of Article 3 of the ECHR, to a different authority (in this case, the domestic court) than the one responsible for the mistreatment (the police). In such cases, there is room to conclude that the confession was not made as a result of the mistreatment.<sup>55</sup> Indeed, having had regard to the particular facts and circumstances of the case, the Grand Chamber concluded that it was not satisfied that ‘the breach of Article 3 in the investigation proceedings had a bearing on the applicant’s confession at the trial’.<sup>56</sup> In *Alchagin v Russia*, while the authority to which the Applicant confessed appears to have been the same as the one that had previously mistreated him (the police), the ECtHR’s acceptance of the Government’s submission that, ‘at the moment when the applicant made his confession statement, he enjoyed the benefit of legal advice by defence counsel of his own choice’<sup>57</sup> and, presumably, though not explicitly, of the Government’s submission that the Applicant, therefore, could not have been mistreated at the time of making his statement,<sup>58</sup> suggests the lack of a direct link between the mistreatment (which, according to the ECtHR, amounted to inhuman and degrading treatment within the meaning of Article 3 of the ECHR)<sup>59</sup> and the confession, along the lines of the approach in *Harutyunyan v Armenia*.<sup>60</sup> In *Stanimirović v Serbia*, the link between the ill-treatment in police custody and the confessions to the investigating judge also appears to have been indirect, such that the use of such confessions did not automatically render the trial as a whole unfair.<sup>61</sup> Where confessional evidence obtained as an *indirect* result of inhumane

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<sup>55</sup> This line of reasoning is reminiscent of the US doctrine of attenuation, which recognises that the connection between the (impugned) evidence and the (unlawful) conduct of the investigative authorities may be so ‘tenuous’ that the exclusion of the evidence is not warranted.

<sup>56</sup> *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 181–184. By this point in the judgment, the connection between the prohibited methods of investigation and the Applicant’s conviction and sentence was already ‘strained’, the Grand Chamber having found that the impugned real evidence, i.e. the real evidence obtained as a direct result of the confession extracted by inhuman and degrading treatment, had not been used by the domestic court to convict the Applicant, ‘but only to test the veracity of his confession’. See paras 179–180.

<sup>57</sup> *Alchagin v Russia* App no 20212/05 (ECtHR, 17 January 2012), para 70.

<sup>58</sup> *Ibid.*, para 60.

<sup>59</sup> *Ibid.*, para 57.

<sup>60</sup> The likeness of the findings in *Alchagin v Russia* to the findings of the Grand Chamber in *Gäfgen v Germany* appears to have been overlooked in the subsequent case of *Kaçiu and Kotorri v Albania* App nos 33192/07 and 33194/07 (ECtHR, 25 June 2013), in which *Alchagin v Russia* was branded ‘an exception’ to the case law on the use of confessional evidence obtained as a result of a breach of Article 3 ECHR (para 125). If such case law is understood as providing for an absolute exclusionary in respect of confessional evidence obtained as a direct result of torture, *Alchagin* is arguably in line with such case law. In *Cēsnieks v Latvia* App no 9278/06 (ECtHR, 11 February 2014), the ECtHR appears to have taken a similarly simplistic view of *Alchagin* (para 68), referring to it as though an exception that did not apply in the circumstances.

<sup>61</sup> *Stanimirović v Serbia* App no 26088/06 (ECtHR, 18 October 2011), para 52. See n 69 and accompanying text.

and degrading treatment is used, the observance of relevant safeguards is important to offset any presumption of unfairness caused by the use of such evidence (it is reasonable to assume that the same goes for confessional evidence obtained as an indirect result of torture). Thus, the Grand Chamber's conclusion in *Gäfgen* that the breach of Article 3 in the pre-trial phase had had no bearing on the Applicant's confession at the trial (and, by extension, that the use of that confession did not render the trial unfair) was based on the fact that, prior to this confession, 'the applicant had been instructed about his right to remain silent and about the fact that none of the statements he had previously made on the charges could be used as evidence against him',<sup>62</sup> that the Applicant, 'who was represented by defence counsel, stressed in his statements [at trial] that he was confessing freely out of remorse and in order to take responsibility for his offence ...',<sup>63</sup> and that the Applicant's confession at trial 'referred to many additional elements which were unrelated to what could have been proven by the impugned real evidence [obtained as a direct result of the initial pre-trial statement obtained in violation of Article 3 of the ECHR]'.<sup>64</sup> Similarly, in *Alchagin*, the ECtHR based its conclusion that the use of a confession obtained as an indirect result of the inhumane and degrading treatment did not render the trial 'wholly' unfair on the fact that 'at the moment when the applicant made his confession statement, he enjoyed the benefit of legal advice by defence counsel of his own choice',<sup>65</sup> 'that the ... statement had been cumulative to other extensive evidence against the applicant, including his own statement made during the jury trial',<sup>66</sup> and that 'the applicant was duly represented throughout the proceedings and was, therefore, afforded ample opportunity, which he took, to challenge before the domestic court the admissibility and the use of evidence obtained under pressure'.<sup>67</sup> In *Stanimirović* the ECtHR noted that, in addition to the fact that the Applicant's confession before the investigating judge was indeed a result of his ill-treatment by the police, the Applicant had not been 'able to consult properly (notably, in private) with his lawyer prior to making the confession before the investigating judge ... and made [further] statements before the investigating judge ... in the absence of his lawyer'.<sup>68</sup> According to the ECtHR, '[i]n such circumstances, ... regardless of the impact those statements had on the outcome of the criminal trial, their use rendered the trial as a whole unfair'.<sup>69</sup>

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<sup>62</sup> *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), para 182.

<sup>63</sup> *Ibid.*, para 183.

<sup>64</sup> *Ibid.*, para 184.

<sup>65</sup> *Alchagin v Russia* App no 20212/05 (ECtHR, 17 January 2012), para 70.

<sup>66</sup> *Ibid.*, para 71.

<sup>67</sup> *Ibid.*, para 72.

<sup>68</sup> *Stanimirović v Serbia* App no 26088/06 (ECtHR, 18 October 2011), para 52.

<sup>69</sup> *Ibid.*, para 52 (emphasis added). While the ECtHR's statement that 'regardless of the impact those statements had on the outcome of the criminal trial, their use rendered the trial as a whole unfair' implies that the use of the statements automatically rendered the trial unfair in that case, the ECtHR also attached importance to other factors, i.e. the lack of legal assistance at particular points. It was only '[i]n these circumstances', i.e. in view of the fact that the Applicant had not had



Regarding the use of *real* evidence obtained as a result of inhuman and degrading treatment, the ECtHR has held that the use of such evidence may require a different approach to that to the use of evidence obtained by torture. In *Gäfgen v Germany* the ECtHR held that '[i]n its [earlier] *Jalloh* judgment, the Court left open the question whether the use of *real* evidence obtained by an act classified as inhuman and degrading treatment, but falling short of torture, always rendered a trial unfair ...'<sup>70</sup> However, in the latter case, the ECtHR did not explicitly refer to real evidence: 'It cannot be excluded that on the facts of a particular case the use of evidence ... will render the trial against the victim unfair, irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.'<sup>71</sup> Nevertheless, in *Gäfgen* and in subsequent cases, the ECtHR (has) confirmed that the Grand Chamber's findings in *Jalloh* pertain to (the use of) real evidence.<sup>72</sup> Such findings imply that the use of real evidence obtained by ill-treatment not amounting to torture will not automatically render the trial unfair.<sup>73</sup> As with the use of confessional evidence that has been obtained as an indirect result of inhuman and degrading treatment, the observance of relevant safeguards is important to offset any risk to fairness presented by the use of real evidence obtained as a result of inhuman and degrading treatment. It follows that a failure to observe relevant safeguards may result in a finding that Article 6 of the ECHR has been violated. Thus, in *Jalloh*, the Grand Chamber's finding that the use in evidence of drugs obtained by the forcible administration of emetics to the Applicant, which constituted inhuman and degrading treatment within the meaning of Article 3 of the ECHR, rendered his trial as a whole unfair<sup>74</sup> was based on the fact that 'the drugs ... were the decisive element in securing the applicant's conviction',<sup>75</sup> and that 'any discretion on the part of the national courts to exclude that evidence [i.e. the drugs] could not come into play as they considered the administration of emetics

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(Footnote 69 continued)

(proper) legal assistance, that their use rendered the trial as a whole unfair, regardless of their impact on the outcome of the trial. As such, the statements were not subject to automatic exclusion on account of their use alone.

<sup>70</sup> *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), para 167 (emphasis added), referring to *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), paras 106–107.

<sup>71</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 106.

<sup>72</sup> See e.g. *El Haski v Belgium* App no 649/08 (ECtHR, 25 September 2012), para 85. In addition, the ECtHR has consistently held that the use of *confessional* evidence obtained as a result of inhuman and degrading treatment automatically renders the trial unfair. See n 53 and accompanying text.

<sup>73</sup> See also *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), para 178.

<sup>74</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), paras 82–83 and 108.

<sup>75</sup> According to Jackson and Summers, '[t]his implies that it may be permissible for the authorities to use evidence obtained by inhuman and degrading treatment providing that it is not decisive to the conviction'. See Jackson and Summers 2012, 164.

to be authorised by domestic law [thereby rendering the ability of the applicant to challenge the use of the drugs meaningless]’.<sup>76</sup>

### Denial of Access to Counsel in Investigative Phase

Another area in which the ECtHR has adopted a more principled, ‘interventionist’ approach to the admissibility (or use) of (unlawfully obtained) evidence is the right of access to a lawyer in the investigative phase, which may be read into Article 6(3)(c) of the ECHR.<sup>77</sup> In *Salduz v Turkey*, the ECtHR held that,

... in order for the right to a fair trial to remain sufficiently “practical and effective” ... Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating *statements* made during police interrogation without access to a lawyer are used for a conviction.<sup>78</sup>

Thus, the ability to contest an incriminating statement at trial, i.e. challenge its admissibility, is not sufficient to repair the prejudice caused by the denial of access to counsel at the time of police questioning if that statement ends up being used to convict the accused. In *Panovits v Cyprus*, in which the Applicant, who at the material time was a minor, was questioned without any assistance from his guardian or a lawyer, and had not been properly informed of his right to receive legal representation or of his right to remain silent, the ECtHR held that,

... although the applicant had the benefit of adversarial proceedings in which he was represented by the lawyer of his choice, the nature of the detriment he suffered because of the breach of due process at the pre-trial stage of the proceedings was not remedied by the subsequent proceedings, in which his confession was treated as voluntary and was therefore held to be admissible as evidence... despite the fact that the voluntariness of the applicant’s statement taken shortly after his arrest was challenged and formed the subject of a separate

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<sup>76</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 107. In addition, the Grand Chamber noted that: ‘[T]he public interest in securing the applicant’s conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at trial. ... the [impugned] measure targeted a street dealer selling drugs on a relatively small scale who was eventually given a six-month suspended prison sentence and probation.’ The implications of this statement are discussed below, in Sect. 2.2.1.5.

<sup>77</sup> In other words, the right is not explicitly provided for in Article 6 ECHR: it is an implied right. See e.g. Goss 2014, 91.

<sup>78</sup> *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 55 (emphasis added). This marked a significant step away from ECtHR’s earlier case law in this regard: See e.g. Ölçer 2013, 390.

trial within the main trial, and although it was not the sole evidence on which the applicant's conviction was based, it was nevertheless decisive for the prospects of the applicant's defence and constituted a significant element on which his conviction was based.<sup>79</sup>

In that case, the ECtHR found violations of Article 6 of the ECHR both on account of 'the lack of legal assistance ... in the initial stages of police questioning' and of 'the use in trial of the applicant's confession obtained in circumstances which breached his rights to due process', which 'irreparably undermined his rights of defence'.<sup>80</sup> In *Salduz* also, the ECtHR based its finding that Article 6(1) had been violated on both the lack of legal assistance at the time of questioning (such restriction having been imposed by law, which applied to offences falling within the jurisdiction of the State Security Courts) and on the use of the statements obtained thereby to convict the Applicant.<sup>81</sup> To the extent that there was any confusion as to whether the Grand Chamber's findings in *Salduz* meant that a suspect has a right to counsel during questioning (and not just a right of consultation beforehand), subsequent case law confirms that it does.<sup>82</sup> For example, in *Panovits* the ECtHR held that:

As regards *the* applicant's complaints which concern the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance *during an* applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings.<sup>83</sup>

In *Dayanan v Turkey*, it was held that Article 6 'requires that, as a rule, a suspect should be granted access to legal assistance *from the moment he is taken into police custody or pre-trial detention*', i.e. that 'an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned'.<sup>84</sup> According to the Court, an accused should be able 'to obtain the whole range of services specifically associated with legal assistance', meaning that 'counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention'.<sup>85</sup> This suggests

<sup>79</sup> *Panovits v Cyprus* App no 4268/04 (ECtHR, 11 December 2008), paras 75 and 76.

<sup>80</sup> *Ibid.*, paras 77 and 86.

<sup>81</sup> *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), paras 56–58.

<sup>82</sup> Nevertheless, it is important to note that this reading of the ECtHR's case is not accepted in all European jurisdictions. In the Netherlands, for example, the Dutch Supreme Court continues to maintain that the ECtHR's case law does not unequivocally provide for such a right.

<sup>83</sup> *Panovits v Cyprus* App no 4268/04 (ECtHR, 11 December 2008), para 66 (emphasis added). See also *Sebalj v Croatia* App no 4429/09 (ECtHR, 28 June 2011), paras 256–257; and *Navone and Others v Monaco* App nos 62880/11, 62892/11 and 62899/11 (ECtHR, 24 October 2013), paras 77–85.

<sup>84</sup> *Dayanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009), paras 31–32 (emphasis added).

<sup>85</sup> *Ibid.*, para 32.

that the purpose of providing counsel in the investigative phase is not solely to ensure respect of the right of an accused not to incriminate himself. The ECtHR appears to have recognised as much in *Salduz* itself, where it observed that ‘international human rights standards’ on the right of access to a lawyer during police custody ‘also contribute to the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused’.<sup>86</sup> Nevertheless, ensuring respect for the right not to incriminate oneself does appear to be the primary purpose of providing counsel in the investigative phase. According to Court in *Salduz*, the rationale of ‘international human rights standards’ on the right of access to a lawyer during police custody ‘relates *in particular* to the protection of the accused against abusive coercion on the part of the authorities’.<sup>87</sup> Legal assistance is required in order to ensure respect for the right not to incriminate oneself because suspects find themselves ‘in a particularly vulnerable position at that stage of the proceedings’.<sup>88</sup> Not receiving assistance at this stage can have far-reaching consequences. In this regard it should be noted that: ‘National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings.’<sup>89</sup> In other words, it may be open to the domestic court to draw adverse inferences from silence.

The Grand Chamber’s finding in *Salduz* that that ‘[e]ven where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction—whatever its justification—must not unduly prejudice the rights of the accused under Article 6’ and that the ‘rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for conviction’<sup>90</sup> should be taken to mean that even if the denial of access to a lawyer does not by itself render the proceedings unfair, the use of incriminating statements obtained thereby will.<sup>91</sup> This includes the incriminating statements of a third party obtained in violation of the principles established in *Salduz*, where it constitutes the sole and decisive evidence against the accused.<sup>92</sup> Nevertheless, the Grand Chamber’s use of the words ‘in principle’ implies that there may be situations in which the use of incriminating statements made during police questioning without access to a lawyer will not render the proceedings unfair.<sup>93</sup>

<sup>86</sup> *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 53 (emphasis added).

<sup>87</sup> *Ibid.*, para 53 (emphasis added).

<sup>88</sup> *Ibid.*, para 54.

<sup>89</sup> *Ibid.*, para 52.

<sup>90</sup> *Ibid.*, para 55.

<sup>91</sup> The implications of this analysis are discussed in more detail below, in Sect. 2.2.1.4.

<sup>92</sup> See *Şiray v Turkey* App no 29724/08 (ECtHR, 11 February 2014), para 29.

<sup>93</sup> Thus, Ölçer refers to a ‘nearly absolute rule of exclusion’ in this regard. See Ölçer 2013, 390 (emphasis added). In *Ibrahim and Others v UK*, the ECtHR appears to have considered there to be such a situation. In that case the ECtHR found that despite the fact that statements made during police questioning without legal advice had been used at trial, Article 6(1) had not been violated.

In *Mehmet Şerif Öner v Turkey*, it was not the use of an incriminating statement that was fatal to the fairness of the proceedings (the Applicant having repeatedly denied the charges against him during police questioning, as a result of which there were no incriminating statements to speak of), but the use in evidence of the result of an identification parade, in which the Applicant had taken part in police custody, during which time he had not had access to counsel (such restriction having applied pursuant to the law denying access to counsel to suspects of crimes falling within the jurisdiction of the State Security Courts). According to the ECtHR, since the trial court had relied heavily on the result of the identification parade in convicting the Applicant, the Applicant had ‘undoubtedly [been] affected by the restrictions on his access to a lawyer during the preliminary investigation’, and ‘[n]either the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the applicant’s custody period.’<sup>94</sup> Finally, even if an incriminating statement obtained in the absence of counsel is excluded from evidence, the rights of the defence may still be irretrievably prejudiced by the defects in the custody period. In *Martin v Estonia*, the facts were as follows: while the county court had used the incriminating statements of the Applicant which had been obtained in the absence of a lawyer *of the Applicant’s own choosing* to convict the Applicant, the court of appeal had excluded them. However, the court of appeal had also been of the view that despite the exclusion of the statements there was ‘nothing to prevent the use of such general knowledge; the confession of murder was to a large extent the reason why [the applicant] was committed to trial charged with murder, and the investigations were carried out on the basis of that knowledge.’<sup>95</sup> The ECtHR held as follows:

The Court considers that the exclusion of the pre-trial statements from the body of evidence reveals the importance that the Court of Appeal attaches to securing a suspect’s defence rights from the early stages of the proceedings. Although tainted evidence as such can be left aside in the subsequent proceedings, in the present case the Court of Appeal’s decision nevertheless demonstrated that the consequences of the breach of defence rights had not been totally undone.

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(Footnote 93 continued)

See *Ibrahim and Others v UK* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 16 December 2014), paras 204–224, and also the Grand Chamber’s judgment in that case (*Ibrahim and Others v UK* App nos 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR, 13 September 2016)) at para 260: ‘In its summary of the general principles applicable to the case, the Court in *Salduz* ... referred to the overall fairness assessment that had to be carried out when determining whether there had been a breach of Article 6 rights. It said that the rights of the defence would “in principle” be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer were used for a conviction, indicating that the rule, while strict, was not absolute’.

<sup>94</sup> *Mehmet Şerif Öner v Turkey* App no (ECtHR, 13 September 2011), para 21.

<sup>95</sup> *Martin v Estonia* App no 35985/09 (ECtHR, 30 May 2013), paras 48 and 94–95.

In the light of the above considerations, the Court concludes that the applicant's defence rights were irretrievably prejudiced owing to his inability to defend himself through legal assistance of his own choosing.<sup>96</sup>

Of course, it might simply be argued that the (domestic) court of appeal did in fact use the statement (contrary to its assertions), whereby it should be recalled that the use of 'incriminating statements made during police interrogation without access to a lawyer' to convict the accused will, in principle, irretrievably prejudice the rights of the defence.<sup>97</sup> However, it might also be that, despite being excluded, the statement determined the *framework* within which the charges were determined at trial.<sup>98</sup> This raises the question of whether in cases in which a suspect has been denied access to legal advice the unfairness caused thereby could always be offset by the exclusion of incriminating statements. This issue is addressed below.<sup>99</sup>

### Coercion, Compulsion and Deception in the Context of 'Questioning'<sup>100</sup>

In *Salduz v Turkey*, the right of access to a lawyer in the investigative phase of criminal proceedings was expressly linked to the right not to incriminate oneself. In underlining 'the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial', the Grand Chamber noted the 'particular vulnerability' of an accused at this stage in this regard, which in its view 'can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself'.<sup>101</sup> It is during police questioning that an accused is at his or her most vulnerable and, because it is here that the parameters of the case are set, it is of paramount importance that the accused is protected from coercion or compulsion that undermines his or her right to remain silent.<sup>102</sup> When 'questioning' is undertaken outside of the formal interrogation context, for example when undercover officers or informants are used to elicit information from the

<sup>96</sup> *Ibid.*, paras 96 and 97.

<sup>97</sup> See n 78 and accompanying text.

<sup>98</sup> See n 226 and accompanying text.

<sup>99</sup> In Sect. 2.2.1.4.

<sup>100</sup> According to Jackson and Summers: 'The notion of coercion suggests that an unwilling person has been persuaded by way of force or threats to do something, while compulsion suggests that a person has been obliged to do something or his or her cooperation has been brought about by force.' In their view, the facts of *Allan v UK* (App no 48539/99 (ECtHR, 5 November 2002), discussed below) do not 'suggest that the applicant was coerced into or compelled to make a confession'; rather 'he was deliberately tricked into making statements'. See Jackson and Summers 2012, 178. Ölçer similarly argues that *Allan v UK* is an example of deception, not coercion or compulsion. See Ölçer 2013, 381 and 387.

<sup>101</sup> *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 54.

<sup>102</sup> *Ibid.*, para 54.

suspect (de facto questioning), similar concerns arise on account of the ‘deception’ involved. Before considering the impact of coercion, compulsion and deception in the context of ‘questioning’ on the fairness of the trial, however, a general overview of the right not to incriminate oneself will be provided, in order to assist the reader in understanding the ECtHR’s findings on the right in said context.

Regarding ‘the right not to incriminate oneself’<sup>103</sup> it is important to note that not every instance of (compelled) self-incrimination constitutes a violation of Article 6(1) of the ECHR. Thus, a particular procedure may ‘engage’ the right not to incriminate oneself (or, put differently, the right may be ‘applicable’ to a particular procedure) without rendering the trial unfair.<sup>104</sup> Only where the compulsion is ‘improper’, i.e. the (very) ‘essence’ of the right not to incriminate oneself is destroyed, will there be a violation of Article 6(1) of the ECHR.<sup>105</sup> In examining whether the compulsion is improper and the essence of the right destroyed, the ECtHR looks to ‘the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put’.<sup>106</sup> In addition, the ECtHR has held that it may, in this regard, take into

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<sup>103</sup> To the extent that the ECtHR distinguishes between testimonial and real evidence in this regard (as it did in *Saunders v UK* (App no 19187/91 (ECtHR, 17 December 1996), para 69), it should be noted that the right does not appear to be ‘limited totally to the refusal to answer questions or make a statement’. See Harris, O’Boyle, Bates and Buckley (Harris et al. 2014, 422), referring to *Funke v France* App no 10828/84 (ECtHR, 25 February 1993); *JB v Switzerland* App no 31827/96 (ECtHR, 3 May 2001); and *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006). Accordingly, ‘the statement of principle advanced by the ECtHR in *Saunders v UK* is misleading or at least incomplete’. See Choo 2012, 244. Conversely, the refusal to answer questions or make a statement is not necessarily protected by the right. See *O’Halloran and Francis v UK* App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007), discussed below (see n 110–111 and accompanying text).

In order to reflect this (and to avoid confusion in this regard), this section will refer to the generic ‘right not to incriminate oneself’, rather than to the (more cumbersome) ‘right to silence’ and ‘privilege against self-incrimination’. Regarding the relationship between the latter two rights, according to Trechsel: ‘[T]he two guarantees must be seen as representing two overlapping circles. The right to silence is narrower in that it refers to acoustic communication alone, the right not to speak. The privilege clearly goes further in that it is not limited to verbal expression... On the other hand, the scope of the right to silence goes beyond that of the privilege as it does not only protect against pressure to make statements detrimental to the person concerned, but any declaration at all.’ Trechsel 2006, 342.

<sup>104</sup> See in this regard Choo 2013, 64.

<sup>105</sup> See the test set out in *John Murray v UK* App no 18731/91 (ECtHR, 8 February 1996), paras 45 and 49, as referred to in e.g. *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), paras 100–101. See also Harris et al. 2014, 422–426.

<sup>106</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 101.

According to Harris, O’Boyle, Bates and Buckley, this was not always the case. See Harris et al. 2014, 425, where the authors refer to *John Murray v UK* App no 18731/91 (ECtHR, 8 February 1996) and *Heaney and McGuinness v Ireland* App no 34720/97 (ECtHR, 21 December 2000), in which ‘the Court adopted a ‘degree of compulsion’ criterion to be applied when deciding whether the compulsion was ‘improper’ so that the ‘very essence’ of the right to freedom from self-incrimination had been destroyed’.

account ‘the weight of the public interest in the investigation and punishment of the offence at issue’.<sup>107</sup> Such factors should be distinguished from the factors that may be taken into account in determining whether the proceedings, as a whole, have been fair.<sup>108</sup> In view of the factors to be taken into account pursuant to the Grand Chamber’s judgment in *Jalloh v Germany*, the question of what constitutes ‘improper’ compulsion, i.e. what destroys the essence of the right not to incriminate oneself such as to violate Article 6(1) of the ECHR, does not lend itself to easy answer. Prior to the Grand Chamber’s judgment in *O’Halloran and Francis v United Kingdom*, which was delivered one year after its judgment in *Jalloh*, the ECtHR had, ‘in all cases ... in which “direct compulsion” was applied to require an actual or potential suspect to provide information which contributed, or might have contributed, to his conviction’, found a violation of the applicant’s right not to incriminate him- or herself.<sup>109</sup> However, according to the Grand Chamber in

<sup>107</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 117. The ECtHR’s consideration of the weight of the public interest in the context of Article 6 ECHR is discussed below, in Sect. 2.2.1.5.

<sup>108</sup> See n 35 and accompanying text. Ölçer speaks of a two-tiered analysis with respect to the ECtHR’s case law on the use of unlawfully obtained evidence: ‘In the first tier, the analysis seeks to determine if the [C]onvention rights were violated during the preliminary or pretrial investigation of the case in the form of violations of Article 3 ECHR (torture or inhuman and degrading treatment); Article 8 ECHR (right to privacy); Article 6(3)(c) ECHR (right to counsel) and the privilege against self-incrimination and the right to remain silent, also protected by Article 6 ECHR.’ In the second tier of analysis, ‘the [C]ourt looks to see if the admission (or use) of evidence obtained through the violation of a first tier norm violated Article 6 ECHR’, whereby the ECtHR will often, though not always, engage in balancing, i.e. look to factors such as the gravity of the violated norm, the probative value of the evidence so obtained, whether the rights of the defence have been respected and, sometimes, public interest considerations. According to Ölçer, ‘[i]n determining in [the] first-tier analysis whether a Convention right was violated, the ECtHR, especially when dealing with implied rights ... (such as the privilege against self-incrimination), will also look to broader factors, such as public interest concerns, needs brought about by the rise in organized crime, national security interests, the interests of witnesses, etc.’ See Ölçer 2013, 373–375.

The factors that the ECtHR takes into account in order to establish whether the essence of the privilege against self-incrimination has been destroyed clearly resemble those that it takes into account in its second tier analysis. To state that a violation of the right not to incriminate oneself will automatically render the trial unfair may therefore be misleading, since the balancing that would otherwise take place in the second tier analysis simply appears to have been shifted to the first tier analysis. However, it is true that once it has been established that, on balance, the right not to incriminate oneself has been violated, no further balancing may take place.

<sup>109</sup> *O’Halloran and Francis v UK* App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007), para 53. Thus, the ECtHR distinguishes between ‘direct compulsion’ and ‘indirect compulsion’: see *John Murray v UK* App no 18731/91 (ECtHR, 8 February 1996), paras 49 and 50. See also *O’Halloran and Francis v UK* App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007), para 57; and Jackson and Summers 2012, 252–253.

As to the cases in which the application of direct compulsion to provide information, i.e. direct compulsion to *cooperate*, violated the right not to incriminate oneself, see *Funke v France* App no 10828/84 (ECtHR, 25 February 1993); *Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996); *IJL, GMR and AKP v UK* App nos 29522/95, 30056/96 and 30574/96 (ECtHR, 19 September 2000); *Heaney and McGuinness v Ireland* App no 34720/97 (ECtHR, 21 December 2000); *Quinn v Ireland* App no 36887/97 (ECtHR, 21 December 2000); *JB v Switzerland* App no



*O'Halloran and Francis*, it did 'not ... follow that any direct compulsion will automatically result in a violation', thereby referring to its judgment in *Jalloh*.<sup>110</sup> In that case, the compulsion in question had been direct (i.e. legal: a criminal sanction for failure to provide answers pursuant to Section 172 of the Road Traffic Act 1988), but '[h]aving regard to all the circumstances of the case' the Grand Chamber concluded that the essence of the applicants' right not to incriminate themselves had not been destroyed.<sup>111</sup> However, even before the *Jalloh*-criteria were introduced, the question of whether the essence of the right not to incriminate oneself has been extinguished was not clear-cut. As Hoyano notes,<sup>112</sup> while in *Funke v France* it appears to have been freedom from compulsion that constituted the essence of the right,<sup>113</sup> in *Saunders v United Kingdom* it appears to have been the use at trial of evidence so obtained.<sup>114</sup> On the basis of the ECtHR's case law on the right of access to a lawyer in the investigative phase, both Hoyano and Choo argue that (once again) freedom from compulsion appears to constitute the core of the right not to incriminate oneself.<sup>115</sup> Certainly the use at trial of self-incriminating evidence obtained by direct compulsion (as proof of the accused's guilt or in the determination of punishment) presents a threat to the fairness of the proceedings (as relevant to the question of whether the essence of the right not to incriminate oneself has been extinguished),<sup>116</sup> while in cases in which information is *not* provided, i.e. there is a failure to provide the information requested (notwithstanding the threat of a criminal sanction for such failure), and therefore *not* used at trial, there must at the time of the request for information have been a genuine prospect that such information (had it been provided) would be used at trial. In other words, criminal

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(Footnote 109 continued)

31827/96 (ECtHR, 3 May 2001); *Kansal v UK* App no 21413/02 (ECtHR, 27 April 2004); and *Shannon v UK* App no 6563/03 (ECtHR, 4 October 2005). The case of *Jalloh v Germany* (App no 54810/00 (ECtHR, 11 July 2006)) is not included here because it concerned the use of force, rather than compulsion to cooperate. See in this regard Choo 2013, 45 and 117.

<sup>110</sup> *O'Halloran and Francis v UK* App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007), para 53.

<sup>111</sup> *Ibid.*, para 62. This decision has been subject to robust criticism in the literature: See e.g. Ashworth 2012, 151–152; and Choo 2013, 67–70.

<sup>112</sup> Hoyano 2014, 15.

<sup>113</sup> *Funke v France* App no 10828/84 (ECtHR, 25 February 1993), para 44.

<sup>114</sup> *Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996), paras 75–76.

<sup>115</sup> See Hoyano 2014, 15; and Choo 2013, 86. See *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 54 in this regard.

<sup>116</sup> That the use of (any) self-incriminating evidence is relevant to the violation itself is logical given the ECtHR's observation that '[t]he right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused' (*Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996), para 68) and moreover apparent from its enumeration of factors relevant to the question of 'whether a procedure has extinguished the very essence of the privilege against self-incrimination'. See n 106 and accompanying text.

proceedings against the person alleging a violation of the right not to incriminate oneself (on account of the imposition of a criminal sanction for failure to provide the information requested) must have been ‘pending or anticipated’; the prospect of such criminal proceedings being pursued must not have been ‘remote’ or ‘hypothetical’.<sup>117</sup>

Turning back now to the specific context of (police) questioning, there is a wide range of tactics that the police can resort to in order to bring about the cooperation of the suspect during questioning, but not all such tactics are inherently problematic from the point of view of the right not to incriminate oneself. Regarding de jure (that is, police) questioning of suspects, Choo observes that ‘[t]he environment in which a suspect is questioned with a view to obtaining relevant information is inherently coercive and liable to sap the suspect’s free will’, but that ‘courts will not readily find that the questioning of a suspect by the police has infringed the privilege against self-incrimination’.<sup>118</sup> De facto questioning of suspects is, however, more problematic, as is apparent from the case law of the ECtHR. In *Allan v United Kingdom* the police had, among other things,<sup>119</sup> made use of a long-standing police informant to obtain information from the Applicant, who had been arrested for the murder of a supermarket store manager and who, in the police interviews that followed his arrest, had consistently exercised his right to remain silent. The police informant, who had been instructed by the police to ‘push’ the Applicant for what he could<sup>120</sup> had been placed in the Applicant’s cell and fitted with recording devices. The recording thereby obtained was adduced in evidence at the Applicant’s trial, and the police informant also gave evidence, testifying that the Applicant ‘had admitted his presence at the murder scene’ (although this admission did not form part of the recorded interview adduced in evidence). No evidence other than the admissions alleged by the police informant at trial connected the Applicant with the murder.<sup>121</sup> The police informant’s evidence was deemed admissible by the trial judge and the evidence admitted before the jury (with directions on how to assess the reliability of such evidence, given the police informant’s criminal record), which found the Applicant guilty of murder.<sup>122</sup> In assessing the use of the police informant and the admission of the informant’s evidence at trial in the context of Article 6 of the ECHR, the ECtHR observed that:

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<sup>117</sup> See *Weh v Austria* App no 38544/97 (ECtHR, 8 April 2004), paras 50–56. See also *Funke v France* App no 10828/84 (ECtHR, 25 February 1993). In both *Funke v France* (ECtHR, 25 February 1993) and *Heaney and McGuinness* (App no 34720/97 (ECtHR, 21 December 2000)) criminal proceedings were, at least, anticipated (if not pending), unlike in *Weh*.

<sup>118</sup> Choo 2013, 80.

<sup>119</sup> In addition to the use of a police informant, the Applicant’s visits in custody from a female friend were recorded, as were his conversations with the other man arrested in connection with the killing of the supermarket manager. See *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), para 12.

<sup>120</sup> *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), para 13.

<sup>121</sup> *Ibid.*, para 16.

<sup>122</sup> *Ibid.*, paras 18–21.

While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which ... is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.<sup>123</sup>

Further, drawing on the case law of the Supreme Court of Canada, the ECtHR held that ‘the right to silence would only be infringed where the informer [who allegedly acted to subvert the right to silence of the accused] was acting as an agent of the State at the time the accused made the statement’.<sup>124</sup> In finding a violation of Article 6(1) of the ECHR, the ECtHR attached importance to the fact that the Applicant had ‘consistently availed himself of his right to silence’, that the police informant had been placed in the Applicant’s cell ‘for the specific purpose of eliciting from the applicant information implicating him in the offence of which he was suspected’, and that the admissions which formed the main or decisive evidence against the Applicant at trial ‘were not spontaneous and unprompted statements volunteered by the applicant’, but ‘induced by the persistent questioning of [the police informant] ... in circumstances which can be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution’.<sup>125</sup> While it could not identify any ‘factors of direct coercion’, the ECtHR considered that the Applicant ‘would have been subjected to psychological pressures which impinged on the “voluntariness” of the disclosures allegedly made by the applicant to the [police informant]’, on account of the fact that ‘he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take [the police informant], with whom he shared a cell for some weeks, into his confidence’.<sup>126</sup> In such circumstances, the ECtHR considered the information elicited by the police informant to have been obtained in defiance of the Applicant’s will *and* ‘its use at trial’ to have ‘impinged on the applicant’s right to silence and privilege against self-incrimination’,<sup>127</sup> thereby rendering the trial unfair contrary to Article 6(1) of the ECHR.<sup>128</sup> In finding a violation of Article 6(1), the ECtHR did

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<sup>123</sup> *Ibid.*, para 50.

<sup>124</sup> *Ibid.*, para 51.

<sup>125</sup> *Ibid.*, para 52.

<sup>126</sup> *Ibid.*, para 52. The reliance on the notion of ‘voluntariness’ has been criticized in the literature. See e.g. Jackson and Summers 2012, 178.

<sup>127</sup> *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), para 52.

<sup>128</sup> *Ibid.*, para 53.

not examine whether the prejudice caused by the use of the information elicited by the informant was compensated by, for example, the ability of the Applicant to challenge its admissibility at trial. Accordingly, this is another area in which the ECtHR appears to take a more interventionist stance towards the admissibility of evidence,<sup>129</sup> in the sense that the use of evidence obtained in circumvention of proper interrogation procedures (incorporating as they do certain safeguards) renders the proceedings unfair, i.e. regardless of, for example, whether the use of such evidence could be challenged or other safeguards were in place (a judge's direction, for example). Where, however, *de facto* questioning takes place outside of custody, the ECtHR's position is different. In the case of *Bykov v Russia*, a criminal investigation had been opened in respect of the Applicant on suspicion of conspiracy to murder after an acquaintance of the Applicant informed the police that the Applicant had ordered him to murder a former business associate and handed over the gun which he alleged to have received for this purpose. A covert operation was conducted for the purpose of obtaining evidence of the Applicant's intention to murder, in which the police staged the discovery of two dead men at the home the former business associate, and officially announced in the media that one of those killed had been identified as the former associate. The acquaintance who alleged to have been ordered to kill the former business associate was sent to see the Applicant, carrying with him a hidden radio-transmitting device for the purpose of recording his meeting with the Applicant. During the meeting, the acquaintance told the Applicant that he had carried out the murder. Despite attempts to challenge the admissibility of the recording at trial, it was admitted into evidence as lawfully obtained and relied on, together with other evidence, to convict the Applicant.<sup>130</sup> The Grand Chamber distinguished the case from *Allan v United Kingdom* as follows:

In [*Allan*] the applicant was in pre-trial detention and expressed his wish to remain silent when questioned by the investigators. However, the police primed the applicant's cellmate to take advantage of the applicant's vulnerable and susceptible state following lengthy periods of interrogation. The Court, relying on a combination of these factors, considered that the authorities' conduct amounted to coercion and oppression and found that the information had been obtained in defiance of the applicant's will... in the present case the applicant had not been under any pressure to receive V. [the Applicant's acquaintance who alleged to have been ordered to murder the former business associate] at his "guest house", to speak to him, or to make any specific comments on the matter raised by V. *Unlike the applicant in the Allan case, the applicant was not detained on remand but was at liberty on his own premises attended by security and other personnel. The nature of his relations with V. – subordination of the latter to the applicant – did not impose any particular form of behaviour on him. In other words, the applicant was free to see V. and to talk to him, or to refuse to do so. It appears that he was willing to continue the conversation started by V. because its subject matter was of personal interest to him.* Thus, the Court is not convinced

<sup>129</sup> See also Jackson and Summers 2012, 175: 'The ECtHR has taken its most activist stance on the context of the use in criminal proceedings of evidenced obtained by coercion or compulsion in the course of custodial interrogation.

<sup>130</sup> *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), paras 43–44, 95–96 and 98.

that the obtaining of evidence was tainted with the element of coercion or oppression which in the *Allan* case the Court found to amount to a breach of the applicant's right to remain silent.<sup>131</sup>

Accordingly, having examined 'the safeguards which surrounded the evaluation of the admissibility and reliability of the evidence concerned, the nature and degree of the alleged compulsion, and the use to which the material obtained through the covert operation was put', the Grand Chamber found that 'the proceedings ... considered as a whole, were not contrary to the requirements of fair trial'.<sup>132</sup>

### Covert Surveillance and the Interception of Communication

'Covert surveillance' is an umbrella term for the (covert) measures that suspects may be subjected to by the authorities in order to obtain further information.<sup>133</sup> Such measures may raise issues under the right not to incriminate oneself, as is the case in the context of de facto questioning, which was dealt with above. This section is concerned with covert surveillance to the extent that it raises issues under the right to respect for private life, as enshrined in, for example, Article 8 of the ECHR, and the impact of such measures on the fairness of the trial.

While in *Schenk v Switzerland* the covert surveillance in question (the recording of a telephone conversation between the Applicant and a third (private) party, 'Pauty', who claimed he had been commissioned by the Applicant to kill his estranged wife) was not found to violate Article 8 of the ECHR,<sup>134</sup> it was acknowledged by the Court to have been obtained unlawfully (that is, contrary to Swiss law),<sup>135</sup> and accordingly its use at the Applicant's trial was considered in the context of Article 6(1) of the ECHR. According to the Court, the use of said evidence did not violate Article 6(1) because 'the rights of the defence were not disregarded', the Applicant having had 'the opportunity ... of challenging its authenticity and opposing its use', and of putting questions to Pauty and the official in charge of the investigation.<sup>136</sup> In addition, the Court attached importance to the fact that 'the recording ... was not the only evidence on which the conviction was based'.<sup>137</sup>

In *Khan v United Kingdom*, a conversation between the Applicant and 'B.' had been recorded by an electronic listening device secretly installed by the police on

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<sup>131</sup> *Ibid.*, paras 101–102 (emphasis added).

<sup>132</sup> *Ibid.*, para 104.

<sup>133</sup> Trechsel 2006, 541.

<sup>134</sup> In fact, the ECtHR was precluded from considering this issue, the ECnHR having declared the Applicant's complaint regarding Article 8 ECHR inadmissible. See *Schenk v Switzerland* App no 10862/84 (ECtHR, 12 July 1988), paras 37, 40 and 53.

<sup>135</sup> *Schenk v Switzerland* App no 10862/84 (ECtHR, 12 July 1988), paras 43, 46 and 47.

<sup>136</sup> *Ibid.*, para 47.

<sup>137</sup> *Ibid.*, para 48.

B.'s premises in connection with B.'s suspected involvement in dealing in heroin. The recording of the conversation was ruled admissible at trial, following which the Applicant entered a plea of guilty. In proceedings before the ECtHR, the Applicant alleged breaches of, inter alia, Articles 8 and 6 of the ECHR.<sup>138</sup> According to the ECtHR, the use of the covert listening device violated Article 8 on account of there having 'existed no statutory system to regulate the use of ... [such] devices', meaning that the interference could not be considered to be "in accordance with the law", as required by Article 8(2) of the ECHR.<sup>139</sup> Next, the ECtHR considered whether the use at the Applicant's trial of the evidence obtained in violation of Article 8 was compatible with Article 6(1) of the ECHR. In this regard it noted that:

While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law ... It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found.<sup>140</sup>

In assessing whether the proceedings as a whole had been fair, the ECtHR first noted that 'in contrast to the position examined in the Schenk case, the fixing of the listening device and the recording of the applicant's conversation were not unlawful in the sense of being contrary to domestic criminal law'.<sup>141</sup> In other words, there was 'no allegation of police malpractice in relation to their internal guidelines', nor was there any 'human involvement directly with the defendant, such as to give rise to questions of entrapment or other forms of fundamental unfairness'.<sup>142</sup> Rather the 'unlawfulness "in question"' related 'exclusively to the fact that there was no statutory authority for the interference with the applicant's right to respect for private life' and, accordingly, 'such interference was not "in accordance with the law"' as required by Article 8(2) of the ECHR.<sup>143</sup> Next, it noted that while the recording 'was in effect the only evidence against the applicant and that the applicant's plea of guilty was tendered only on the basis of the judge's ruling that the evidence should be admitted', the 'relevance of the existence of evidence other

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<sup>138</sup> The Applicant also alleged a violation of Article 13 ECHR, which is discussed below, in Sect. 2.2.2.

<sup>139</sup> *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000), paras 27–28.

<sup>140</sup> *Ibid.*, para 34.

<sup>141</sup> *Ibid.*, para 36.

<sup>142</sup> Friedman 2002, 225.

<sup>143</sup> *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000), para 38. See also para 28.

than the contested matter depends on the circumstances of the case'. In this case, the tape recording had been acknowledged to be 'very strong evidence', in respect of which there was no risk of unreliability. While in *Schenk* the Court had attached importance to the fact that the recording was not the only evidence on which the conviction was based, the Court (in *Khan*) argued that in *Schenk*, the recording had in fact had decisive or, at least, 'not inconsiderable' influence on the outcome of the criminal proceedings, thereby seemingly playing down the importance of this factor in that case, also pointing out that 'this element ... [had] not [been] the determining factor in the Court's conclusion [in *Schenk*]'.<sup>144</sup> Finally, the ECtHR noted that, as in *Schenk*, the Applicant had 'had ample opportunity to challenge both the authenticity and the use of the recording'.<sup>145</sup> According to the ECtHR, therefore, the use at the Applicant's trial of the recording did not conflict with Article 6(1) of the ECHR.

In *PG and JH v United Kingdom* the use of covert listening devices at a third party's flat and in the police station was similarly found to violate Article 8 of the ECHR.<sup>146</sup> As to whether the use at the Applicants' trial of the recordings obtained thereby was compatible with Article 6(1) of the ECHR, the ECtHR adopted the 'holistic' approach taken in *Schenk* and *Khan*.<sup>147</sup> According to the Court, the use at trial of the recordings did not conflict with Article 6(1), because of the 'unlawfulness "in question"', which 'related exclusively to the fact that there was no statutory authority for the interference with the ... right to respect for private life' and because the Applicants had had 'ample opportunity to challenge both the authenticity and the use of the recordings'.<sup>148</sup> In addition, the Court attached importance to the fact that the recordings in question were *not* the only evidence against the applicants, thereby distinguishing the case from *Khan*.<sup>149</sup>

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<sup>144</sup> *Ibid.*, para 37.

<sup>145</sup> *Ibid.*, para 38. See also *PG and JH v UK* App no 44787/98 (ECtHR, 25 September 2001), para 79; *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), para 48; *Heglas v Czech Republic* App no 5935/02 (ECtHR, 1 March 2007), para 89; and *Goranova-Karaeneva v Bulgaria* App no 12739/05 (ECtHR, 8 March 2011), para 70.

<sup>146</sup> *PG and JH v UK* App no 44787/98 (ECtHR, 25 September 2001), paras 38 and 63. See also the following cases, in which the use of covert listening devices were found to violate Article 8 of the ECHR: *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), paras 35–36; *Chalkley v UK* App no 63831/00 (ECtHR, 12 June 2003), paras 24–25; *Heglas v Czech Republic* App no 5935/02 (ECtHR, 1 March 2007), paras 71–76; and *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), paras 72–83.

<sup>147</sup> See e.g. also *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), paras 42–43 and 46–48 and *Heglas v Czech Republic* App no 5935/02 (ECtHR, 1 March 2007), paras 89–93.

<sup>148</sup> *PG and JH v UK* App no 44787/98 (ECtHR, 25 September 2001), paras 78–79.

<sup>149</sup> *Ibid.*, para 79. See also *Heglas v Czech Republic* App no 5935/02 (ECtHR, 1 March 2007), para 90 and n 144 and accompanying text. As Jackson and Summers point out, '[t]he reference [in *PG and JH*] to the other corroboratory evidence is confusing in that it seems to resurrect the sole and decisive type test, which the ECtHR appeared to reject in *Khan*.' See Jackson and Summers 2012, 175.

Finally, the case of *Heglas v Czech Republic* is worth noting here.<sup>150</sup> In that case, the ECtHR found that the obtaining by the authorities of a list of telephone calls relating to the mobile phone of the Applicant, and the recording of a conversation between the Applicant and a third party (who had been fitted with a listening device) violated Article 8 of the ECHR.<sup>151</sup> In its determination of whether, notwithstanding the use of the list and recording (i.e. the evidence obtained in violation of Article 8) at trial, the trial, as a whole, had been fair, the ECtHR attached importance to the fact that the Applicant had been able to contest both the recording and the list,<sup>152</sup> and that the Applicant's conviction had not been solely based on such items.<sup>153</sup> In addition, it held that in order to determine whether the proceedings as a whole had been fair, it was appropriate to take into account 'the weight of the public interest in the prosecution of a particular offence and the sanction of its author', and that this factor could be 'put in the balance with the interest of the individual that the incriminating evidence be gathered lawfully'.<sup>154</sup> However, it noted that such public interest considerations 'cannot justify measures emptying an applicant's rights of defence of their very substance, including [the privilege against self-incrimination] guaranteed by Article 6 of the Convention'. Apparently, this was not the case as the Court expressly took the public interest into account in determining whether Article 6 had been violated, observing in this regard that the offence was serious one, which caused injuries to a third party, and that the Applicant had been sentenced to nine-years imprisonment for his part therein.<sup>155</sup>

## Entrapment

Previous sections dealt with the use of coercion, compulsion and deception in order to obtain the evidence necessary to secure a conviction for a crime already committed. The focus of the current section is on the use of deception in order to *bring about* the commission of a crime, with a view to subsequently prosecuting it.

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<sup>150</sup> Although the facts of this case, which involved a third party (a friend of the Applicant's co-accused) being fitted with a listening device, and the Applicant subsequently confessing to the third party his role in the crime, raise issues under the right not to incriminate oneself, the Applicant does not appear to have argued the point before the ECtHR. Nor did the Court find a violation of that right. Accordingly, this case is dealt with in the current section, rather than the section titled 'Coercion, compulsion and deception in the context of 'questioning'', above. Nevertheless, *Heglas* is sometimes cited in discussions on de facto questioning outside of custody. See e.g. *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), paras 100–101; and Jackson and Summers 2012, 180–181.

<sup>151</sup> *Heglas v Czech Republic* App no 5935/02 (ECtHR, 1 March 2007), paras 68 and 75–76.

<sup>152</sup> *Ibid.*, para 89.

<sup>153</sup> *Ibid.*, para 90.

<sup>154</sup> *Ibid.*, para 87.

<sup>155</sup> *Ibid.*, para 91.



The facts in *Teixeira de Castro v Portugal* were as follows. Two plain-clothes police officers approached VS, whom they suspected of ‘petty drug-trafficking’, on several occasions in the hope of identifying his supplier. Unaware that they were police officers, VS agreed to find a supplier and, after initially being unable to find one, VS mentioned the name of the Applicant. Through another of VS’s acquaintances, FO, the police officers met with the Applicant, expressing their wish to buy 20 g of heroin. The Applicant agreed and procured the heroin from a third party. Upon handing over the heroin at VS’s house, the police officers identified themselves and arrested the Applicant and VS, among others.<sup>156</sup> The Applicant was convicted for drug trafficking, the court having reached its verdict ‘on the basis of the statements of the witness, FO, the co-defendant, VS, the applicant himself and, “mainly”, of the two police officers’.<sup>157</sup> The verdict was upheld on appeal.<sup>158</sup> In proceedings before the ECtHR, the Applicant argued that he had not had a fair trial, contrary to Article 6 of the ECHR, on account of his incitement by plain-clothes police officers to commit an offence of which he was later convicted. The ECtHR first observed that: ‘The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement.’<sup>159</sup> As to what police incitement entails, according to the ECtHR, the question was whether the police officers’ role had been confined to acting as an undercover agent, which would entail investigating the Applicant ‘in an essentially passive manner’, rather than an agent provocateur, which would entail exercising ‘an influence such as to incite the commission of the offence’.<sup>160</sup> Answering this question in the negative, the ECtHR attached importance to the following circumstances: that the officers’ intervention does not appear to have taken place as part of an anti-drug-trafficking operation ordered and supervised by a judge,<sup>161</sup> and that the competent authorities did not appear to have good reason to suspect the Applicant of drug-trafficking, on the basis of either prior or ongoing involvement therein, or a predisposition to commit such offences (or, more specifically, did not have any ‘objective suspicions’ or evidence

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<sup>156</sup> *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), paras 9–12.

<sup>157</sup> *Ibid.*, para 20.

<sup>158</sup> *Ibid.*, para 22.

<sup>159</sup> *Ibid.*, para 36.

<sup>160</sup> *Ibid.*, paras 38–39.

<sup>161</sup> *Ibid.*, para 38. See also *Khudobin v Russia* App no 59696/00 (ECtHR, 26 October 2006), para 135; *Miliniénė v Lithuania* App no 74355/01 (ECtHR, 24 June 2008), para 39; *Bamnikova v Russia* App no 18757/06 (ECtHR, 4 November 2010), paras 48–50; *Veselov and Others v Russia* App nos 23200/10, 24009/07 and 556/10 (ECtHR, 2 October 2012), para 90; and *Nosko and Nefedov v Russia* App nos 5753/09 and 11789/10 (ECtHR, 30 October 2014), paras 52–53.

in this regard).<sup>162,163</sup> Regarding the second set of circumstances, the Court observed that:

... he had no criminal record and no preliminary investigation concerning him had been opened. Indeed, he was not known to the police officers ... Furthermore, the drugs were not at the applicant's home; he obtained them from a third party who had in turn obtained them from another person. Nor does the Supreme Court's judgment ... indicate that, at the time of his arrest, the applicant had more drugs in his possession than the quantity the police officers had requested thereby going beyond what he had been incited to do by the police.<sup>164</sup>

According to the ECtHR, the police officers' intervention, which went beyond the actions of an undercover agent, *and* 'its' use (i.e. the use of the evidence obtained by the intervention) in the criminal proceedings 'meant that, right from the outset, the applicant was definitively deprived of a fair trial', in violation of Article 6(1) of the ECHR.<sup>165</sup> In making this finding, the ECtHR confirmed that Article 6 is also concerned with the propriety of pre-trial proceedings.

The Court's approach in *Teixeira de Castro* was endorsed in *Ramanauskas v Lithuania*,<sup>166</sup> in which the Grand Chamber held that:

Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.<sup>167</sup>

In addition, the Grand Chamber endorsed the *Teixeira* Chamber's findings pertaining to the question of whether the police officers' actions had been confined to those of an undercover agent.<sup>168</sup> Because (in *Ramanauskas*) there was no evidence that the Applicant had committed any (corruption-related) offences beforehand, and no (objective) evidence 'other than rumours ... to suggest that he had

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<sup>162</sup> *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), paras 56 and 67, interpreting *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), para 38. See also *Vanyan v Russia* App no 53203/99 (ECtHR, 15 December 2005), para 49; *Khudobin v Russia* App no 59696/00 (ECtHR, 26 October 2006), para 134; *Malininas v Lithuania* App no 10071/04 (ECtHR, 1 July 2008), para 36; *Bannikova v Russia* App no 18757/06 (ECtHR, 4 November 2010), paras 40–42; and *Nosko and Nefedov v Russia* App nos 5753/09 and 11789/10 (ECtHR, 30 October 2014), para 52. But see *Sequeira v Portugal* App no 73557/01 (ECtHR, 6 May 2003); and *Eurofinacom v France* App no 58753/00 (ECtHR, 7 September 2004).

<sup>163</sup> As Jackson and Summers note, these two sets of circumstances are closely linked. See Jackson and Summers 2012, 188–189. See also *Nosko and Nefedov v Russia* App nos 5753/09 and 11789/10 (ECtHR, 30 October 2014), paras 51–53.

<sup>164</sup> *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), para 38.

<sup>165</sup> *Ibid.*, para 39.

<sup>166</sup> *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), paras 55–56.

<sup>167</sup> *Ibid.*, para 55.

<sup>168</sup> *Ibid.*, paras 56 and 66–67.

been intending to engage in such activity’, the Grand Chamber concluded that the actions of the individuals involved amounted to *police incitement*<sup>169</sup> and that ‘such intervention and its use in the impugned criminal proceedings’ violated Article 6(1) of the ECHR.<sup>170</sup>

The ECtHR’s case law on the consequences to be attached to evidence obtained as a result of police incitement is clear: ‘all [such] evidence ... must be excluded’,<sup>171</sup> or ‘a procedure with similar consequences must apply’.<sup>172,173</sup> As such, when faced with a claim that the accused was incited to commit an offence, the (domestic) court ‘must carry out a careful examination of the material in the file’.<sup>174</sup> Where a domestic court convicts a person for an offence that (the ECtHR has established) was the result of police incitement (by failing to exclude the evidence or applying another appropriate procedure), a finding that Article 6(1) of the ECHR

<sup>169</sup> Thus, the ECtHR rejected the Government’s argument that the prosecuting authorities ‘had not been guilty of incitement’, because the individuals to have intervened ‘had acted on their own private initiative without having first informed the authorities’. It held that: ‘The national authorities cannot be exempted from their responsibility for the actions of police officers by simply arguing that, although carrying out police duties, the officers were acting “in a private capacity”.’ This was because ‘the initial phase of the operation ... took place in the absence of any legal framework or judicial authorisation’, because ‘the authorities legitimised the preliminary phase *ex post facto* and made use of its results’ and because ‘no satisfactory explanation ... [had] been provided as to what reasons or personal motives could have led ... [the officer] to approach the applicant on his own initiative without bringing the matter to the attention of his superiors ...’. Finally, it held that: ‘To hold otherwise would open the way to abuses and arbitrariness by allowing the applicable principles to be circumvented through the “privatisation” of police incitement’. See *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), paras 62–65. See, however, *Shannon v UK* App no 67537/01 (ECtHR, 6 April 2004).

<sup>170</sup> *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), paras 67–68 and 73–74.

<sup>171</sup> See e.g. *Khudobin v Russia* App no 59696/00 (ECtHR, 26 October 2006), para 133; *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), para 60; *Bannikova v Russia* App no 18757/06 (ECtHR, 4 November 2010), para 56; and *Sepil v Turkey* App no 17711/07 (ECtHR, 12 November 2013), para 36.

In this regard Ölçer points out (in the context of the ECHR) that in case of police incitement the prosecution is doomed to fail: without the police incitement the offence would not have been committed, there won’t be any other evidence on which to base a conviction. See Ölçer 2008, 444. Similarly Kuiper (discussing the implications of the case law of the ECtHR on police incitement for Dutch criminal procedure) argues that there is a fine line between the exclusion of evidence and staying the prosecution. See Kuiper 2014, 360.

<sup>172</sup> See e.g. *Lagutin and Others v Russia* App no 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09 (ECtHR, 24 April 2014), para 117; and *Furcht v Germany* App no 54648/09 (ECtHR, 23 October 2014), para 64.

<sup>173</sup> Also relevant in this regard is the ECtHR’s finding that: ‘The public interest cannot justify the use of evidence obtained as a result of police incitement’. See e.g. *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), para 36. See also *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), paras 53–54.

<sup>174</sup> See e.g. *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), para 60; *Bannikova v Russia* App no 18757/06 (ECtHR, 4 November 2010), para 56; and *Sepil v Turkey* App no 17711/07 (ECtHR, 12 November 2013), para 36.

has been violated will ensue. If, however, the ECtHR is unable to establish with a sufficient degree of certainty that the offence was the result of police incitement (due to, for example, lack of file disclosure) such a finding may still ensue if the applicant was unable ‘to raise the issue of incitement at his trial, whether by means of an objection or otherwise’.<sup>175,176</sup>

### Non-disclosure<sup>177</sup>

A failure on the part of the prosecution to disclose to the defence information relevant to the case against the accused may raise issues under the right to a fair trial, as provided for in, inter alia, Articles 14 of the ICCPR and 6 of the ECHR. Neither of these provisions expressly provides for a ‘right to disclosure’; however, such a right has been read into the provisions in the case law. A right to disclosure has been read into Article 14(3)(b) of the ICCPR, i.e. the right of everyone charged with a criminal offence to have ‘adequate time and facilities for the preparation of his defence’, and linked to the principle of equality of arms. The HRC has stated that: “‘Adequate facilities’” must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory’, whereby ‘exculpatory’ material should be understood as including ‘not only material establishing innocence but also other evidence that could assist the defence’.<sup>178</sup> At the ECtHR, the right to disclosure has

<sup>175</sup> *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), paras 69–72. See also *Khudobin v Russia* App no 59696/00 (ECtHR, 26 October 2006), para 137; *Bannikova v Russia* App no 18757/06 (ECtHR, 4 November 2010), paras 51–52, 67; *Veselov and Others v Russia* App nos 23200/10, 24009/07 and 556/10 (ECtHR, 2 October 2012), para 94 and *Nosko and Nefedov v Russia* App nos 5753/09 and 11789/10 (ECtHR, 30 October 2014), para 55.

<sup>176</sup> In a number of ECtHR cases the ECtHR appears to have based its finding that Article 6(1) had been violated on the entrapment itself *and* on the failure to properly deal with the entrapment claim at trial. See e.g. *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), paras 68–74, *Bannikova v Russia* App no 18757/06 (ECtHR, 4 November 2010), paras 51–52; and *Lalas v Lithuania* App no 13109/04 (ECtHR, 1 March 2011), paras 45–48. As one reporter has noted in respect of the ECtHR’s findings in *Ramanauskas*, this is somewhat confusing: ‘Surely the finding that the applicant was incited to commit the offence should have been determinative of the application; the failure of the Lithuanian courts to adjudicate on whether he was incited or not, while aggravating, should not have been relevant to the issue of whether there was a breach.’ See (2008) Entrapment: incitement to commit an offence—state officials acting in a private capacity—Article 6. EHRLR 3:410, 412–413.

<sup>177</sup> As stated in Chap. 1, in this book the term ‘procedural violations committed in the pre-trial phase of international criminal proceedings’ encompasses not only those procedural violations that at the national level would be described as *police* illegality or unlawfulness, but the violation by the *prosecution* of its pre-trial obligations, of which of which disclosure to the defence (of the case against the accused or of any potentially exculpatory material) is a prime example. Accordingly, the human rights standards pertaining to the violation of disclosure standards are addressed here.

<sup>178</sup> HRC ‘General Comment no 32. Article 14: Right to equality before courts and tribunals and to a fair trial’ (23 August 2007) UN Doc CCPR/C/GC/32, para 33.

been expressly linked to the principle of the equality of arms<sup>179</sup> and that of adversarial proceedings,<sup>180</sup> both of which are inherent in the ‘fair hearing’ requirement of Article 6(1) of the ECHR. According to the ECtHR, ‘it is a requirement of fairness under para 1 of Article 6 (Article 6-1) ... that the prosecution authorities disclose to the defence all material evidence for or against the accused’.<sup>181</sup> In addition, it may be read into the more specific rights under Article 6 (3), especially the right provided for under Article 6(3)(b) of the ECHR, which provides that: ‘Everyone charged with a criminal offence has the ... [right] ... to have adequate time and facilities for the preparation of his defence’.<sup>182</sup>

However, the right to disclosure is not absolute; while Article 6(1) requires that ‘the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused’,

... the entitlement to disclosure of relevant evidence is *not an absolute right*. In any criminal proceedings there may be *competing interests*... which must be *weighed* against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important *public interest*. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.<sup>183</sup>

In other words, under Article 6 of the ECHR, the right to disclosure may be restricted on public interest grounds, provided that any prejudice caused thereby is offset by counterbalancing measures. However, it is not for the *prosecuting authorities* to determine whether the public interest justifies a restriction on disclosure; in *Rowe and Davis v United Kingdom*, the ECtHR held that ‘a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1’.<sup>184</sup> In that case, the unlawfulness lay in the prosecution’s failure to ‘lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure’, which had deprived the Applicants of a fair trial.<sup>185</sup> As to the question of how, then, conflicts between the right to disclosure and the public interest are to be resolved, in *Jasper v United Kingdom* the ECtHR found that an *ex parte* application by the prosecution to the trial judge to withhold material in its

<sup>179</sup> See e.g. *Foucher v France* App no 22209/93 (ECtHR, 18 March 1997) para 36.

<sup>180</sup> See e.g. *PG and JH v UK* App no 44787/98 (ECtHR, 25 September 2001) para 67.

<sup>181</sup> *Edwards v UK* App no 13071/87 (ECtHR, 16 December 1992) para 36.

<sup>182</sup> Harris et al. 2014, 416.

<sup>183</sup> *Jasper v UK* App no 27052/95 (ECtHR, 16 February 2000), paras 51–52 (emphasis added). See also e.g. *Edwards and Lewis v UK* App nos 39647/98 and 40461/98 (ECtHR, 27 October 2004), para 46.

<sup>184</sup> *Rowe and Davis v UK* App no 28901/95 (ECtHR, 16 February 2000), para 63.

<sup>185</sup> *Ibid.*, para 66.

possession on the grounds of public interest immunity, whereby the trial judge had examined the material in question, did not violate Article 6(1) of the ECHR.<sup>186</sup> In so finding, the Grand Chamber attached importance to the following factors: that ‘the defence were kept informed and permitted to make submissions and participate in the above decision-making process as far as was possible without revealing to them the material which the prosecution sought to keep secret on public interest grounds’;<sup>187</sup> that ‘the material which was not disclosed ... formed no part of the prosecution case whatever, and was never put to the jury’;<sup>188</sup> that the trial judge was ‘fully versed in all the evidence and issues in the case and in a position to monitor the relevance to the defence of the withheld information both before and during the trial’, whereby there had never been any suggestion that the trial judge was not impartial or independent.<sup>189</sup> In other cases, however, such *ex parte* applications have been found to violate Article 6(1) of the ECHR; in *Edwards and Lewis v. United Kingdom*, the ECtHR distinguished the facts from *Jasper v. United Kingdom*, noting that ‘the undisclosed evidence related, or may have related, to an *issue of fact decided by the trial judge*’ (at trial, both applicants had argued that they had been entrapped, and had asked the trial judge to consider whether prosecution evidence should be excluded for that reason),<sup>190</sup> whereas in *Jasper*, the undisclosed material had formed no part of the prosecution case whatsoever, and was never put to the jury. In also finding that there had been a violation of Article 6(1), the Grand Chamber referred to the Chamber’s earlier judgment,<sup>191</sup> in which it—the Chamber—had attached importance to the fact that, ‘in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue [of entrapment]’,<sup>192</sup> and in which it had held that, ‘[u]nder English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge is likely to find the balance to weigh in favour of non-disclosure’.<sup>193</sup>

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<sup>186</sup> *Jasper v UK* App no 27052/95 (ECtHR, 16 February 2000).

<sup>187</sup> *Ibid.*, para 55.

<sup>188</sup> *Ibid.*, para 55.

<sup>189</sup> *Ibid.*, para 56.

<sup>190</sup> *Edwards and Lewis v UK* App nos 39647/98 and 40461/98 (ECtHR, 27 October 2004), para 46, where the Grand Chamber reproduced the relevant parts of the Chamber’s judgment (*Edwards and Lewis v UK* App nos 39647/98 and 40461/98 (ECtHR, 22 July 2003)).

<sup>191</sup> *Edwards and Lewis v UK* App nos 39647/98 and 40461/98 (ECtHR, 22 July 2003).

<sup>192</sup> *Edwards and Lewis v UK* App nos 39647/98 and 40461/98 (ECtHR, 27 October 2004), para 46.

<sup>193</sup> *Ibid.*, para 46.

### 2.2.1.4 Use of Evidence

In most cases involving unlawfulness on the part of the police in carrying out a criminal investigation in which the ECtHR found a violation of Article 6(1), this finding has, in one way or another, been based on the fact that the evidence obtained thereby was used at trial, or otherwise relied on as proof of the accused's guilt or in the determination of punishment. Thus, in *Jalloh v Germany*, the Grand Chamber found that 'the use in evidence of the drugs obtained by the forcible administration of drugs obtained by the forcible administration of emetics to the applicant [which constituted inhuman and degrading treatment within the meaning of Article 3 of the ECHR] rendered his trial as a whole unfair'.<sup>194</sup> The risk to the fairness of the proceedings posed by such use (which was decisive in securing the Applicant's conviction) had not, in the circumstances, been offset by the observance of defence rights or justified by the public interest in the investigation and prosecution of the offence.<sup>195</sup> Earlier on in the judgment the Grand Chamber had observed that '*the use of evidence* obtained in violation of Article 3 [of the ECHR] in criminal proceedings raises serious issues as to the fairness of such proceedings'.<sup>196</sup> More specifically in relation to torture it held that:

Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should *never* be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, as it was so well put in the United States Supreme Court's judgment in the *Rochin* case [...], to "afford brutality the cloak of law".<sup>197</sup>

The reference to the 'use of evidence ... in criminal proceedings' and the phrase 'should never be relied on as proof of the victim's guilt', which appears in the ECtHR's assessment of the alleged violation of Article 6, imply that only where evidence obtained by torture is actually used by the domestic court, that is, relied on as proof of the accused's guilt or in the determination of punishment,<sup>198</sup> will the

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<sup>194</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 108.

<sup>195</sup> *Ibid.*, para 107.

<sup>196</sup> *Ibid.*, para 105 (emphasis added). See also *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), para 172.

<sup>197</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 105 (emphasis added), as referred to in *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), para 63; *Levința v Moldova* App no 17332/03 (ECtHR, 16 December 2008), para 100; *Baran and Hun v Turkey* App no 30685/05 (ECtHR, 20 May 2010), para 69; *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 166 and 167; and *Othman (Abu Qatada) v UK* App no 8139/09 (ECtHR, 17 January 2012), para 264.

<sup>198</sup> *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 179, 180 and 186.

ECtHR find a violation of Article 6 of the ECHR.<sup>199</sup> The Court's approach in *Harutyunyan v Armenia* is telling in this regard: in assessing the Applicant's complaint that the use of evidence obtained by torture violated Article 6(1) of the ECHR, the Court considered it '*necessary first of all* to address the parties' arguments as to whether the [impugned statements] were used by the domestic courts as evidence in the criminal proceedings against the applicant', which, as Jackson and Summers point out, it did at length.<sup>200</sup> The implication of the requirement that only the use at trial of evidence obtained by torture will lead to a finding that Article 6(1) has been violated is that, by itself, the resort to torture in the investigation is not sufficient to render the entire proceedings unfair.<sup>201</sup> Thus, in a case in which torture was used in the investigation, it would not be contrary to Article 6(1) if the court were to rely on *other* evidence, i.e. evidence that cannot in any way be said to have been obtained by the torture, as proof of guilt. Once it has been established that the evidence obtained by torture was used by the domestic court, it matters not *how* it was used, i.e. whether it was it was decisive in the conviction. In other words, such use cannot be offset by the observance of procedural safeguards. In *Allan v United Kingdom*, the violation of Article 6(1) was also based on the use at trial of the evidence obtained in defiance of the will of the Applicant. More specifically, the use of the evidence obtained 'in defiance of the will of the applicant' impinged on the Applicant's right to silence and privilege against self-incrimination and, accordingly, violated Article 6(1).<sup>202</sup> In that case, the use of the evidence obtained in defiance of the will of the Applicant was sufficient to render the proceedings unfair (having impinged on the Applicant's right not to incriminate himself): it mattered not, for instance, whether the use of such evidence could be challenged.

In *Teixeira de Castro v Portugal*, the ECtHR found that the intervention amounting to police incitement *and* the use of the evidence obtained thereby in subsequent criminal proceedings violated Article 6(1) of the ECHR.<sup>203</sup> Also relevant in this regard is its finding that: 'The public interest cannot justify *the use of evidence* obtained as a result of police incitement.'<sup>204</sup> While in *Teixeira de Castro* the violation of Article 6(1) was, strictly speaking, based on the fact that evidence

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<sup>199</sup> In numerous cases the ECtHR has found the *use* of evidence obtained by torture to be contrary to Article 6 ECHR. See e.g. *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), para 66; *Leviņa v Moldova* App no 17332/03 (ECtHR, 16 December 2008), para 105; *Baran and Hun v Turkey* App no 30685/05 (ECtHR, 20 May 2010), para 72; and *Kaçiu and Kotorri v Albania* App nos 33192/07 and 33194/07 (ECtHR, 25 June 2013), paras 118 and 129.

<sup>200</sup> *Harutyunyan v Armenia* App no 36549/03 (ECtHR, 28 June 2007), para 58 (emphasis added); and Jackson and Summers 2012, 163.

<sup>201</sup> For a different view, see Duff et al. 2007, 247.

<sup>202</sup> *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), paras 52–53. See also *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), para 99; and *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), paras 109 and 122.

<sup>203</sup> *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), para 39. See also *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), para 73.

<sup>204</sup> *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), para 36. See also *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), para 54.



obtained by the intervention (amounting to police incitement) was used at trial, it is important to put this in perspective. Given that in cases of entrapment (or police incitement), the unfairness arises long before any trial, before charges are brought, even (as apparent from the Court's finding that the use of evidence obtained by entrapment meant that 'right from the outset' the Applicant was definitively deprived of a fair trial),<sup>205,206</sup> it appears to be not so much the use at trial of the evidence that is problematic from the perspective of Article 6, as the fact that the person concerned was tried in the first place (which would by definition have entailed the use of the evidence).<sup>207,208</sup>

In cases involving unlawful conduct on the part of public authorities in the pre-trial phase of criminal proceedings in which the ECtHR has *not* found a violation of Article 6(1), the use of evidence obtained thereby has nevertheless played a significant role. In cases in which such conduct constitutes a violation of Article 8 of the ECHR, the use at trial of the evidence obtained thereby appears to be the mechanism by which the determination of Article 6 is triggered,<sup>209</sup> although, to date, this fact alone (i.e. the fact that the evidence was used) has not been enough to found a violation of Article 6. In determining whether, notwithstanding the use at trial of evidence obtained in violation of Article 8, the proceedings as a whole have been fair, the ECtHR looks to the "unlawfulness" in question', whether the rights of the defence were respected, 'in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use', and the quality of the evidence, 'including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy'.<sup>210</sup> It also looks to how the evidence was used and in this regard has held that: 'While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of it being unreliable, the need for supporting evidence is correspondingly weaker'.<sup>211</sup>

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<sup>205</sup> *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), para 39.

<sup>206</sup> Rainey et al. 2014, 280.

<sup>207</sup> See Roberts 2012, 181. Similarly, Ashworth has observed that 'conduct which amounts to entrapment goes beyond the mere collection of evidence and becomes the creation of an offence ...'. See Ashworth 1977, 735.

It is perhaps telling in this regard that in the ECtHR's own guide on Article 6, entrapment is dealt with separately to unlawfully obtained evidence. See *Guide on Article 6. Right to a Fair Trial (Criminal Limb)*, Council of Europe/European Court of Human Rights (2014).

<sup>208</sup> Arguably, therefore, the appropriate response to entrapment is a stay of prosecution, rather than the exclusion of evidence. See Duff et al. 2007, 247. However, Kuiper (discussing the implications of the case law of the ECtHR on police incitement for Dutch criminal procedure) argues that there is a fine line between the exclusion of evidence and staying the prosecution in this context. See Kuiper 2014, 360.

<sup>209</sup> In *Khan, PG and JH and Heglas* this is what the Applicants argued, and the ECtHR proceeded on this basis.

<sup>210</sup> See e.g. *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), para 90.

<sup>211</sup> See e.g. *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), para 90.

Finally, there is a category of unlawful conduct on the part of the police which the ECtHR has found to violate Article 6(1), but whereby such finding does not appear to be dependent on the use at trial of evidence obtained thereby. Thus, in *Salduz* the restriction of access to counsel at the time of questioning and the failure of the respondent state to justify this restriction other than to say that such restriction ‘was provided for on a systematic basis by the relevant legal provisions’ appears to have been sufficient to found a violation of Article 6(1) of the ECHR.<sup>212</sup> In *Dayanan v Turkey*, it was not disputed by the parties that the Applicant had not had legal assistance while in police custody because, according to the Court, such legal assistance ‘was not possible under the law then in force’ (the same law invoked by the Government in *Salduz*).<sup>213</sup> According to the ECtHR:

A systematic restriction of this kind [referring to the law restricting access to counsel in connection with offences falling under the jurisdiction of the State Security Courts], on the basis of the relevant statutory provisions, is *sufficient in itself* for a violation of Article 6 to be found, notwithstanding the fact that the applicant remained silent when questioned in police custody [and that no statement was obtained].<sup>214</sup>

Thus, where no statement is obtained because the suspect has elected to remain silent, a restriction that ‘*expressly and systematically*’ bars ‘certain *categories of accused* from having access to a lawyer during the *entire period* of their pre-trial detention’,<sup>215</sup> will be sufficient to render the entire proceedings unfair. This is because such a restriction would appear to make it impossible for a suspect to have legal assistance while in police custody.<sup>216</sup> Given the ‘range of services’ required by Article 6 in the context of legal assistance, which is not limited to assistance at the time of questioning and also includes ‘discussion of the case’, ‘organization of the defence’, ‘collection of evidence favourable to the accused’, ‘support of an accused while in distress’ and ‘checking the conditions of detention’,<sup>217</sup> it is, moreover, questionable whether in cases in which such a restriction applies the unfairness caused thereby could always be offset by the exclusion of incriminating statements. Where the failure to provide counsel is neither systematic nor based on statute,<sup>218</sup> i.e. the suspect *was* able to obtain the assistance of counsel, the determination of Article 6 *will* likely turn on whether any statement made during questioning (or whether any results obtained from other investigative action with

<sup>212</sup> *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 56.

<sup>213</sup> *Dayanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009), para 33 (emphasis added).

<sup>214</sup> *Ibid.*, para 33 (emphasis added). See also *Bayram Güçlü v Turkey* App no 31535/04 (ECtHR, 18 February 2014), paras 23–26; *Hikmet Yılmaz v Turkey* App no 11022/05 (ECtHR, 4 June 2013), paras 22–23; and *Hüseyin Habip Taşkin v Turkey* App no (ECtHR, 1 February 2011), paras 21–23.

<sup>215</sup> See *Zdravko Petrov v Bulgaria* App no 20024/04 (ECtHR, 23 June 2011), para 47. See also *Smolik v Ukraine* App no 11778/05 (ECtHR, 19 January 2012), para 56; and *Simons v Belgium* App no 71407/10 (ECtHR, 28 August 2012), para 31.

<sup>216</sup> See n 213 and accompanying text.

<sup>217</sup> See n 85 and accompanying text.

<sup>218</sup> See n 215 and accompanying text.

the participation of the suspect) in the absence of counsel was used in evidence, whereby it should be recalled that the use of incriminating statements made during questioning in the absence of counsel will almost certainly render the proceedings unfair.<sup>219</sup> This implies the following (i.e. in cases in which the failure to provide counsel is neither systematic nor legislative). First, where no incriminating statement (made in the absence of counsel) is adduced, this failure alone is unlikely to be sufficient to render the proceedings unfair. Thus, in *Zdravko Petrov v Bulgaria* the failure to provide the Applicant with legal assistance in the first twenty-four hours after his arrest was not sufficient in itself to render the proceedings unfair, since, unlike in the *Dayanan* case, ‘there were no legislative restrictions on access to legal assistance during pre-trial detention, and the applicant was able to obtain the assistance of counsel after one day’.<sup>220</sup> In that case, the domestic court had only based its judgment on statements obtained *after* he had been provided counsel (i.e. not on any statement obtained in the initial period after his arrest).<sup>221</sup> Second, where an incriminating statement made in the absence of counsel *is* adduced, the unfairness caused by the failure to provide counsel at the time of questioning will likely be offset by the exclusion thereof. After all, in such circumstances (i.e. where there is no systematic, legislative restriction on legal assistance) it cannot be discounted that the suspect will have obtained most of the ‘services specifically associated with legal assistance’,<sup>222</sup> in which case the prejudice caused by the failure to provide legal assistance attaches solely to the questioning, meaning that the prejudice can be offset by excluding the incriminating statement. That in cases in which the failure to provide counsel is neither systematic nor legislative the unfairness caused by the restriction may be able to be offset by the exclusion of any statement obtained thereby would appear logical given that the ECtHR expressly links the right of access to counsel in the investigative phase with the right not to incriminate oneself.<sup>223</sup> In this regard it should be noted that a suspect may incriminate himself in other ways than through the making of a statement. Thus, if *other* investigative action is carried out with the participation of the suspect (in the absence of counsel), the use of any results obtained thereby may well ‘prejudice the rights of the defence irretrievably’, regardless of whether any statement has been

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<sup>219</sup> See n 93 and accompanying text.

<sup>220</sup> *Zdravko Petrov v Bulgaria* App no 20024/04 (ECtHR, 23 June 2011), para 47.

<sup>221</sup> *Ibid.*, para 47.

<sup>222</sup> See n 85 and 217 and accompanying text.

<sup>223</sup> See *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), paras 52–54. In a number of cases the use of the self-incriminating evidence formed part of the finding that the Applicant’s right not to incriminate himself had been violated. See *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), paras 52–53. See also *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), para 99. Nevertheless, the ECtHR’s case law on the right not to incriminate oneself in this regard is complex. See n 116–117 and accompanying text.

made, and regardless of whether any statement made has been used.<sup>224</sup> Nevertheless, as suggested above,<sup>225</sup> there may be situations in which, notwithstanding the exclusion of incriminating statements on account of the absence of counsel at the time of questioning (and of any ‘poisonous fruits’ in this regard), or indeed of any other self-incriminating evidence obtained in such circumstances, it will not be possible to say that the proceedings were fair. Even when an incriminating statement is excluded at trial, it is likely to have served as a ‘blueprint’ for the remainder of the proceedings from the point of questioning onwards, setting the parameters within which further investigations would be conducted and, ultimately of course, within ‘which the offence charged [would] be considered at the trial’.<sup>226</sup> If other evidence was obtained as a result of the failure to provide access to counsel at the time of questioning, such evidence could of course be excluded as ‘poisonous fruit’. But what if as a result of the incriminating statement the investigating authorities have ‘overlooked’ potentially exculpatory evidence? If the court were to rely on *other* evidence at trial, i.e. evidence that cannot in any way be said to have been obtained by the failure to provide access to counsel at the time of questioning and that tends to confirm the incriminating statement of the accused excluded from consideration, can it reasonably be concluded that the proceedings were fair?

While the use of the evidence obtained by unlawful conduct on the part of public authorities in the pre-trial phase of criminal proceedings enters the Article 6(1) analysis in different ways, and it is therefore difficult to make any general statements in this regard, it is clear that in cases in which such conduct is alleged to engage Article 6(1), the ECtHR attaches importance to the use of the evidence so obtained. It may be that the use of the evidence obtained unlawfully is the necessary ‘link’ between the pre-trial phase and the trial phase of criminal proceedings (particularly where the underlying unlawfulness does not involve one of the rights enumerated in or otherwise flowing from Article 6). In other words, such use may be necessary in order for unlawfulness in the course of the investigation to trigger the protection of Article 6.<sup>227,228</sup> According to Ölçer, it is *the use of evidence* obtained unlawfully that poses a risk to fairness within the meaning of Article 6, which, depending on the risk posed (which, in turn, depends on the nature of the unlawfulness in question) may be mitigated by its ‘fair’ use at trial, which involves ‘balancing’ (about which more will be said below). While the use of evidence obtained in violation of Article 8 of the ECHR ‘presents a low risk to trial fairness’, whereby such risk can be offset by its fair use, the use of evidence obtained by inhuman and degrading treatment within the meaning of Article 3 ‘generally

<sup>224</sup> See n 94 and accompanying text, Nevertheless, it is worth noting that in that case the restriction in question was systematic and based on statute (it concerned the same law as in *Salduz*), which would have been sufficient in itself to render the proceedings unfair.

<sup>225</sup> See n 85–86, 216–217 and 222 and accompanying text.

<sup>226</sup> *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 54.

<sup>227</sup> See Ölçer 2013, 375. See also, generally, Ölçer 2008.

<sup>228</sup> See n 20 and accompanying text.

presents a high risk to fairness', which means that 'more care must be taken in the balancing process, i.e. more must be done to restore or recuperate the balance of (overall) fairness'. The use of evidence obtained by torture 'presents so high a risk to fairness' that it cannot under any circumstances be offset by its fair use.<sup>229</sup> Given that, even in cases in which the underlying conduct involves the violation of Article 3 of the ECHR the ECtHR requires evidence obtained thereby to be used, it is reasonable to assume that the same applies to cases involving other types of unlawful conduct. Indeed, where such conduct involves the violation of Article 8 of the ECHR, the use of the evidence obtained thereby appears to be the mechanism by which the determination of Article 6(1) is triggered.<sup>230</sup> It is not, however, sufficient to found a violation of Article 6(1), as it is in cases of torture. In cases in which the underlying unlawful conduct does involve a fair trial right, it is more difficult to pinpoint the use of the evidence so obtained as the trigger for the Court's determination of Article 6(1) of the ECHR, and to ascertain the significance of such use for this determination more generally. In some cases, as in cases in which the underlying unlawful conduct amounting to torture within the meaning of Article 3 of the ECHR, the fact that evidence obtained unlawfully was used is sufficient to violate Article 6(1).<sup>231</sup> In the context of the violation of the right of access to counsel at the time of questioning this is because the use of evidence obtained thereby will, in principle, irretrievably prejudice the rights of the defence.<sup>232</sup> In entrapment cases the ECtHR is less explicit in this regard, but, as observed above, it appears to be not so much the use at trial of the evidence that is problematic in such cases, as the fact that the person concerned was tried at all (which would by definition have entailed the use of the evidence).<sup>233</sup> In *Allan v United Kingdom*, the use of the evidence formed part of the finding that the Applicant's right not to incriminate himself had been violated.<sup>234</sup>

A final observation regarding the use of evidence is due here. In those cases in which the use of the evidence obtained unlawfully has not been sufficient (on its own) to render the proceedings as a whole unfair, the ECtHR has, as stated above, looked to *how* it was used. However, its case law in this regard has not always been consistent.<sup>235</sup> Thus, whereas in *Schenk v Switzerland* the Court, in finding that Article 6 had not been violated, attached importance to the fact that the evidence obtained unlawfully had not formed the sole basis for the conviction,<sup>236</sup> in *Khan v*

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<sup>229</sup> Ölçer 2013, 374.

<sup>230</sup> See n 209 and accompanying text.

<sup>231</sup> See e.g. *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998) and *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 55, although see n 93 and accompanying text. See also *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002) and n 119–129 and accompanying text.

<sup>232</sup> *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 55.

<sup>233</sup> See n 207 and 208 and accompanying text.

<sup>234</sup> See n 202 and accompanying text.

<sup>235</sup> See also Goss 2014, 171–173.

<sup>236</sup> See n 137 and accompanying text.

*United Kingdom* the Court appeared to distance itself from this ‘sole or decisive rule’.<sup>237</sup> While in *PG and JH v United Kingdom* the Court appeared to revert back to its stance in *Schenk*,<sup>238</sup> in *Allan v United Kingdom* the Court cited with approval the approach in *Khan*, holding that: ‘While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker’.<sup>239</sup> In *Heglas v Czech Republic* and *Bykov v Russia*, the ECtHR cited with approval the approach in *Allan*.<sup>240</sup>

### 2.2.1.5 ‘Balancing’ and Public Interest Considerations

It was seen above that, in the case law of the ECtHR, the use of evidence obtained unlawfully in the pre-trial phase of criminal proceedings does not automatically result in a violation of Article 6 of the ECHR. Accordingly, under the ECHR, there is no automatic exclusion for evidence obtained by violation of the suspect’s or accused’s Convention rights, let alone for evidence obtained by procedural violations more generally. Nevertheless, the ECtHR does recognize an automatic exclusionary rule for evidence obtained by torture within the meaning of Article 3 of the ECHR, and a near automatic exclusionary rule for evidence obtained in violation of the right of access to a lawyer at the time of questioning under Article 6 (3)(c). However, for other Convention violations committed in the pre-trial phase of criminal proceedings the impact of the use of evidence obtained thereby on the fairness of the proceedings depends on such factors as whether the rights of the defence were observed, and *how* it was used. The ECtHR’s practice of taking into account such factors is often referred to in the literature as ‘balancing’. It is this practice that forms the focus of the present subsection.

In respect of evidence obtained by torture within the meaning of Article 3 of the ECHR, then, the ECtHR will not engage in balancing in order to determine whether its use amounted to a violation of Article 6 of the ECHR; the use of evidence obtained by torture will always do so. In respect of evidence obtained in violation of the right not to incriminate oneself, the ECtHR will similarly refrain from embarking on a balancing exercise for the purposes of the aforementioned determination, although it is important to note that in order to determine whether the right has been violated *in the first place*, the ECtHR may have regard to such factors as the use to which the material obtained was put and the ‘weight of the public

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<sup>237</sup> See n 144 and accompanying text.

<sup>238</sup> See n 149 and accompanying text.

<sup>239</sup> *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), para 43.

<sup>240</sup> *Heglas v Czech Republic* App no 5935/02 (ECtHR, 1 March 2007), para 86; and *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), para 90.

interest in the investigation and punishment of the offence in issue'.<sup>241</sup> In respect of evidence obtained by violation of the right of access to a lawyer at the time of questioning, it will do so only exceptionally, it seems.<sup>242</sup> In respect of the prohibition of inhuman and degrading treatment within the meaning of Article 3 of the ECHR, the question of whether the use of evidence obtained thereby constitutes a violation of Article 6 depends firstly on whether the evidence obtained was confessional or real evidence, and, insofar as it concerns the latter, on whether the rights of the defence were observed—in particular, whether the defence could challenge the use of the evidence—and *how* it was used. Finally, in respect of violations of the right to privacy within the meaning of Article 8 of the ECHR, the ECtHR will also engage in balancing in order to determine whether the use of evidence obtained thereby amounted to a violation of Article 6; in addition to the aforementioned factors, the ECtHR also expressly looks to, and attaches significant importance to, the probative value (or the 'quality') of the evidence.<sup>243</sup> In one case, at least, it has also expressly looked to the public interest in the investigation and punishment of the particular offence in question. On the basis to the foregoing, it may be concluded that, for the purposes of the balancing exercise to be undertaken, i.e. the factors to be taken into account, in the determination of Article 6 of the ECHR (where such determination has been triggered by (alleged) unlawfulness in the pre-trial phase of criminal proceedings), the ECtHR distinguishes between different forms of unlawfulness; the factors that may be taken into account and/or the extent to which importance may be attached to them differs as between Convention violations.<sup>244</sup>

In the determination of Article 6 of the ECHR, where such determination has been triggered by (alleged) unlawfulness in the pre-trial phase of criminal proceedings, the ECtHR has taken into account, and in respect of some Convention violations, attached significant importance to, factors that seemingly have nothing to do with that which made the evidence problematic in the first place (the violation of a Convention right).<sup>245</sup> For example, in the context of violations of the prohibition of inhuman or degrading treatment within the meaning of Article 3 and the right to privacy within the meaning of Article 8, it has attached significant importance to the ability of the defence to challenge the use of the evidence obtained thereby. At the very least, this would appear to require that an exclusionary mechanism be provided for at the national level, which was in fact available to the accused in respect of the evidence in question. In addition, it has, in the context of the latter type of violations at least, attached significant importance to the

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<sup>241</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 117.

<sup>242</sup> See n 93 and accompanying text.

<sup>243</sup> This does not appear to be a decisive factor as regards the determination of whether the use at trial of real evidence obtained by inhuman or degrading treatment within the meaning of Article 3 ECHR violates Article 6 ECHR. See in this regard *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006).

<sup>244</sup> See similarly Ölçer 2013, 377–380.

<sup>245</sup> See similarly Ölçer 2013, 378.

probative value or ‘quality’ of the evidence; provided it is of high probative value (and that the rights of the defence have been observed), the use of evidence obtained by violation of Article 8 of the ECHR is unlikely to result in a violation of Article 6 before the ECtHR. Such factors create significant scope for the ECtHR to, in a given case, conclude that the use of the unlawfully obtained evidence did not violate the right to a fair trial. Another factor that has the potential to do so, is the public interest in the investigation and punishment of the crime in question. Arguably, public interest considerations already enter the fair trial analysis via consideration of the probative value or quality of the evidence,<sup>246</sup> even if the ECtHR does not *expressly* say so. In the paragraphs below, the relevant case law of the ECtHR<sup>247</sup> to expressly address the role of public interest considerations in the determination of Article 6 of the ECHR is set out.

In a number of decisions, the ECtHR appears to have rejected the inclusion of public interest considerations in its determination of Article 6. In *Saunders v United Kingdom*, the Applicant complained that the admission of self-incriminating statements obtained by compulsion (in the form of a legal requirement that the Applicant answer questions under pain of criminal sanction) at trial had violated the privilege against self-incrimination, which, he argued applied ‘equally to all defendants regardless of the nature of the allegations against them or their level of education and intelligence’.<sup>248</sup> The ECtHR did not accept the Government’s argument that the public interest in the investigation of corporate fraud justified a departure from the privilege.<sup>249</sup> According to the Grand Chamber,

... the general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex. The public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.<sup>250</sup>

In *Teixeira de Castro v Portugal* the Applicant complained that he had not had a fair trial on account of having been incited by plain-clothes police officers to commit an offence for which he was later convicted. In response to the Government’s arguments in the context of Article 6 on the importance of fighting drug-trafficking,<sup>251</sup> the ECtHR held that:

<sup>246</sup> See in this regard Chap. 4, n 412 and accompanying text.

<sup>247</sup> That is, its case law on in the determination of Article 6 of the ECHR, where such determination has been ‘triggered’ by (alleged) unlawfulness in the pre-trial phase of criminal proceedings.

The ECtHR has condoned the ‘balancing’ of fair trial rights against public interest considerations in other contexts also. See e.g. *Al-Khawaja and Tahery v UK* App no 26766/05 and 22228/06 (ECtHR, 15 December 2011), para 146.

<sup>248</sup> *Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996), para 60.

<sup>249</sup> *Ibid.*, para 64.

<sup>250</sup> *Ibid.*, para 74.

<sup>251</sup> *Teixeira de Castro v Portugal* App no 25829/94 (ECtHR, 9 June 1998), para 32.



The use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience. The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement.<sup>252</sup>

In other decisions, while not rejecting the inclusion of public interest considerations in the determination of Article 6 outright, the ECtHR certainly appears to have been reluctant to do so. For example, in *Heaney and McGuinness v Ireland*, the Applicants complained that their convictions for failing to provide certain information contrary to Irish anti-terrorist legislation violated their right to silence and the privilege against self-incrimination guaranteed by Article 6 of the ECHR. In response to the Government's submission that the relevant provision of the legislation in question was 'a proportionate response given the security situation pertaining in the Irish State related to Northern Ireland and the consequent concerns to ensure the effective administration of justice and to preserve public peace and order',<sup>253</sup> the ECtHR held that 'the security and public order concerns relied on by the Government cannot justify a provision *which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6 § 1 of the Convention*'.<sup>254</sup> The ECtHR's findings in these cases regarding the inclusion of public interest considerations in the determination of Article 6 of the ECHR appear less 'robust' than those adopted in *Saunders* and *Teixeira* because while they certainly appear to limit the scope for doing so, they also imply that public interest considerations can justify measures that infringe the privilege against self-incrimination provided they do not extinguish its very essence.<sup>255</sup> In *Salduz v Turkey* the Grand Chamber appeared similarly reluctant to restrict the right of access to counsel in the investigative phase on account of public interest considerations:

Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles [the importance of the investigation stage for the preparation of criminal proceedings, that the particular vulnerability of an accused at this stage can only be properly compensated for by the assistance of a lawyer

<sup>252</sup> *Ibid.*, para 36. See also *Ramanauskas v Lithuania* App no 74420/01 (ECtHR, 5 February 2008), paras 53–54.

<sup>253</sup> *Heaney and McGuinness v Ireland* App no 34720/97 (ECtHR, 21 December 2000), para 33.

<sup>254</sup> *Ibid.*, para 58 (emphasis added). See also *Quinn v Ireland* App no 36887/97 (ECtHR, 21 December 2000), para 59.

<sup>255</sup> Goss 2014, 193. Of course, the 'robustness' of these findings depends on what constitutes the essence of the privilege against self-incrimination. It may be that the ECtHR in *Saunders* considered 'the use of answers compulsorily obtained ... to incriminate the accused during ... trial proceedings' (see *Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996), para 74) to constitute the essence of the privilege (although it did not explicitly say so), in which case the statement in *Saunders* may be no more robust than the one in *Heaney*.

whose task it is to help ensure respect for the right not to incriminate oneself] are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.<sup>256</sup>

In other decisions still, the ECtHR has neither rejected the inclusion of public interest considerations in the determination of whether Article 6 of the ECHR has been violated, nor been reluctant to do so; rather, it has expressly included such considerations in the determination, seemingly marking ‘a significant step away from [its] older jurisprudence’.<sup>257</sup> In *Jalloh v Germany*, for example, in which the Applicant alleged a violation of, among other things, the privilege against self-incrimination and therefore Article 6, the ECtHR found that:

In order to determine whether the applicant’s right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; *the weight of the public interest in the investigation and punishment of the offence in issue*; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.<sup>258</sup>

Earlier on in the same judgment, the Grand Chamber enumerated the factors to which the ECtHR will have regard when examining ‘whether a procedure has extinguished the very essence of the privilege against self-incrimination’: ‘the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put’.<sup>259</sup> Given that, only a few paragraphs earlier, the Grand Chamber noted that ‘public interest concerns cannot justify measures which extinguish the very essence of an applicant’s defence rights, including the privilege against self-incrimination’,<sup>260</sup> the absence of public interest considerations in this summing-up is, perhaps, unsurprising.<sup>261</sup> Nevertheless, it is worth noting that the wording of the Grand Chamber does not preclude reliance on the public interest in this regard (since the Grand Chamber held that it would have regard ‘*in particular*, to the following elements...’).<sup>262</sup> In *Jalloh* itself, the inclusion of public interest considerations in the determination of whether the privilege against self-incrimination had been violated worked *in favour* of the Applicant:

As regards the weight of the public interest in using the evidence to secure the applicant’s conviction, the Court observes that, as noted above, the impugned measure targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation. In the

<sup>256</sup> *Salduz v Turkey* App no 36391/02 (ECtHR, 27 November 2008), para 54.

<sup>257</sup> Ashworth 2012, 152.

<sup>258</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 117.

<sup>259</sup> *Ibid.*, para 101.

<sup>260</sup> *Ibid.*, para 97

<sup>261</sup> See in this regard Goss 2014, 193–194.

<sup>262</sup> *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 101 (emphasis added).

circumstances of the instant case, the public interest in securing the applicant's conviction could not justify recourse to such a grave interference with his physical and mental integrity.<sup>263</sup>

Nevertheless, *Jalloh* appears to have 'left open the possibility that the privilege [against self-incrimination] could be infringed in the public interest'.<sup>264</sup> Similarly, Ashworth notes that '[t]he implication of the Court's ... ruling [in *Jalloh*] is apparently that, in cases where the offence is very serious (unlike small-time drug dealing), official compulsion might be permissible without violating the privilege against self-incrimination.'<sup>265</sup> After all, while it may be true that once it has been established that the essence of a fair trial right has been extinguished the public interest in the investigation and punishment of the particular offence in issue may not subsequently be invoked in order to justify such a violation, in order to determine whether the essence of the privilege against self-incrimination has been extinguished *in the first place*, the public interest may be taken into account.<sup>266</sup> While in determining whether the essence of the privilege against self-incrimination and right to silence had been destroyed the ECtHR in *O'Halloran and Francis v United Kingdom* chose to 'focus on' the nature and degree of compulsion, the existence of relevant safeguards in the procedure and the use to which any material obtained was put,<sup>267</sup> with respect to the first factor the ECtHR cited with approval Lord Bingham's opinion in *Brown v Stott*, which explicitly took the public interest into account in the determination of whether the use of an admission pursuant to Section 172 of the Road Traffic Act 1988 would undermine the right to a fair trial.<sup>268</sup> Nevertheless, it is worth noting that, since *Jalloh*, the ECtHR has not *explicitly* referred to this factor as relevant to the question of whether the privilege against self-incrimination has been violated and in a number of judgments the enumeration of factors relevant to the determination of this question, which does not include the public interest, appears to be exhaustive.<sup>269</sup> While in *Heglas v Czech*

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<sup>263</sup> *Ibid.*, para 119.

<sup>264</sup> Jackson and Summers 2012, 258.

<sup>265</sup> Ashworth 2012, 152. See also Choo 2012, 249–254.

<sup>266</sup> See n 262 and accompanying text.

<sup>267</sup> *O'Halloran and Francis v UK* App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007), para 55.

<sup>268</sup> *Ibid.*, para 57, referring to *Brown v Stott* [2003] 1 AC 681, 705 (Lord Bingham). See also *Lückhof and Spanner v Austria* App no 58452/00 61920/00 (ECtHR, 10 January 2008), para 53, referring to *O'Halloran and Francis v UK* App nos 15809/02 and 25624/02 (ECtHR, 29 June 2007), para 57.

The (implicit) inclusion of public interest considerations by the ECtHR in *O'Halloran and Francis* is widely recognised. See e.g. Chedraui 2010, 225; Jackson and Summers 2012, 259–260; Ashworth 2012, 150–152; Harris et al. 2014, 426; and Goss 2014, 195.

<sup>269</sup> See e.g. *Bykov v Russia* App no 4378/02 (ECtHR, 10 March 2009), para 92; *Aleksandr Zaichenko v Russia* App no 39660/02 (ECtHR, 18 February 2010), para 38; *Pavlenko v Russia* App no 42371/02 (ECtHR, 1 April 2010), para 100; and *Niculescu v Romania* App no 25333/03 (ECtHR, 25 June 2013), para 111. See however *Sorokins and Sorokina v Latvia* App no 45476/04 (ECtHR, 28 May 2013), para 110.

*Republic* the ECtHR explicitly referred to the public interest as a factor relevant to the determination of whether the proceedings, as a whole, were fair, in that case the question appears to have been whether the use of evidence obtained *in violation of Article 8* violated Article 6.<sup>270</sup> While this finding may well shed light on the ECtHR's approach to the use of evidence obtained in violation of 8,<sup>271</sup> in view of the balancing already envisaged in the determination of the impact of the use of such evidence on the fairness of the proceedings,<sup>272</sup> which involves consideration of the probative value or quality of the evidence,<sup>273</sup> it is hardly surprising.

Non-disclosure is another area in which the ECtHR has explicitly considered the role of public interest considerations in the determination of Article 6. According to the Court in *Jasper v United Kingdom*, while Article 6(1) requires that 'the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused',

... the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be *competing interests*... which must be *weighed* against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important *public interest*. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.<sup>274</sup>

In other words, under Article 6 of the ECHR, the right to disclosure may be restricted on public interest grounds, provided that any prejudice caused thereby is offset by counterbalancing measures. However, it is not for the prosecuting authorities to determine whether the public interest justifies a restriction on disclosure; in *Rowe and Davis v United Kingdom*, the ECtHR held that 'a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1'.<sup>275</sup>

Having set out the relevant case law with respect to the right to a fair trial, which sheds light on the question of when it is necessary to address procedural violations

<sup>270</sup> See n 150–155 and accompanying text. In *Jalloh*, the Grand Chamber took the public interest into account in the determination of whether the use of the drugs obtained by inhuman and degrading treatment within the meaning of Article 3 violated Article 6.

<sup>271</sup> Ashworth 2012, 158–159.

<sup>272</sup> See e.g. *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000) and *PG and JH v UK* App no 44787/98 (ECtHR, 25 September 2001). See also n 246 and accompanying text.

<sup>273</sup> See in this regard n 246 and accompanying text.

<sup>274</sup> *Jasper v UK* App no 27052/95 (ECtHR, 16 February 2000), paras 51–52 (emphasis added). See also e.g. *Edwards and Lewis v UK* App nos 39647/98 and 40461/98 (ECtHR, 27 October 2004), para 46.

<sup>275</sup> *Rowe and Davis v UK* App no 28901/95 (ECtHR, 16 February 2000), para 63.

committed in the pre-trial phase of criminal proceedings *within the criminal trial*, it is time to turn to those rights that do not require a response within the criminal trial to unlawfulness on the part of public authorities (including those charged with the investigation and prosecution of crime). The right to an effective remedy, provided for in Articles 2(3) and 13 of the ICCPR and ECHR, respectively, is often mentioned in case law and scholarly discussions on how to address procedural violations committed in the pre-trial phase of criminal proceedings,<sup>276</sup> and there is the right to compensation in case of unlawful arrest or detention, provided for in Articles 9(5) and 5(5) of the ICCPR and ECHR, respectively (which is a specific manifestation of the general right to an effective remedy). Each of these provisions is addressed below.

## 2.2.2 *Right to an Effective Remedy*

### 2.2.2.1 Requirements of the Right to an Effective Remedy

Article 2(3)(a) of the ICCPR confers a general right to an effective remedy on persons whose rights have been violated, including those of criminal defendants.<sup>277</sup> This provision is based on Article 13 of the ECHR, which provides that everyone whose rights and freedoms in the ECHR are violated ‘shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity’.<sup>278</sup> According to Harris, O’Boyle, Bates and Buckley, this last part of the sentence (‘notwithstanding ... official capacity’) should be construed as denying ‘effect to national laws which provide immunity to public officials or the State for some wrongful acts’.<sup>279</sup> Clapham ascribes an additional meaning to this wording: according to him it indicates that states may also be obliged ‘to provide a remedy for infringements of rights by non-state actors’.<sup>280</sup> This raises the question of whether Article 13 of the ECHR also applies to violations of the Convention by *foreign* officials. For example, in cases of inter-state cooperation in criminal matters, the requested State, in executing the request for cooperation, may have violated the rights of the suspect or accused. The question, then, is whether the suspect or accused may invoke the right to an effective remedy in the requesting, adjudicating, state in respect of violations committed in the requested State. While the wording of Article 13 does

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<sup>276</sup> Most importantly, both of these rights have been cited in the relevant case law of the ICTs. Such case law is set out in Chaps. 5 and 6, and in order to be able to evaluate it, it is necessary to set out the relevant human rights law.

<sup>277</sup> Starr 2008, 703.

<sup>278</sup> Nowak 2005, 62.

<sup>279</sup> Harris et al. 2009, 567.

<sup>280</sup> Clapham 2006, 357–358.

not appear to preclude this,<sup>281</sup> the fact that the effectiveness of the remedy depends on the ability of the national authority to properly ‘deal with the substance of the complaint’<sup>282</sup> raises obvious difficulties in this regard: is the requesting state really in a position to properly deal with the substance of a complaint concerning a violation committed by foreign officials, abroad? The same may, arguably, be said for the requested State. Thus, Van Hoek and Luchtman argue that ‘the requested state is ... often not in a position to fully test the facts of the case’.<sup>283</sup> On the contrary, ‘it is acting at the request of another state’, as a result of which a referral of a complaint of a rights violation to the requested state for the purpose of obtaining an effective remedy will ‘not necessarily provide an *effective* remedy’.<sup>284</sup>

Turning to the substantive requirements of the right to an effective remedy, it should be recalled that the English term ‘remedy’ has different meanings in the human rights context. It can refer to both ‘access to (legal) recourse’ (the procedural remedy) and to substantive redress (reparation). Regarding the latter, the HRC has stated that,

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose [ICCPR] rights have been violated. Without reparation to individuals whose [ICCPR] rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.<sup>285</sup>

Article 2(3)(a) of the ICCPR encompasses both ‘access to recourse’ and reparation, whereby the former precedes the latter: ‘Without access to recourse ... the victim of a human rights violation cannot demand or receive reparation’.<sup>286</sup> Similarly, the ECtHR has held in relation to Article 13 of the ECHR that it requires ‘the provision of a domestic remedy allowing the ‘competent national authority’ both to deal with the substance of the complaint and to grant appropriate relief’.<sup>287</sup> According to the ECtHR, the effectiveness of the remedy depends on its ability to ‘either’ prevent the alleged violation or its continuation, or provide adequate redress for any violation that has already occurred.<sup>288</sup> It does not depend on the ‘certainty of a favourable outcome for the applicant’.<sup>289</sup> Otherwise, however, states are

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<sup>281</sup> There are, moreover, other reasons to argue this: efficiency. This argument is addressed below in the evaluation of the law and practice of the international criminal tribunals in Chap. 7.

<sup>282</sup> See n 287 and accompanying text.

<sup>283</sup> Van Hoek and Luchtman 2005, 25–26.

<sup>284</sup> *Ibid.*, 26 (emphasis in original).

<sup>285</sup> HRC, ‘General Comment no 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 16.

<sup>286</sup> Schleker 2009, 330.

<sup>287</sup> *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000), para 67. See also *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000), para 157.

<sup>288</sup> *Kudla v Poland* App no 30210/96 (ECtHR, 26 October 2000), para 158.

<sup>289</sup> *Ibid.*, para 157.

afforded ‘a margin of appreciation in conforming with their obligations ... [under Article 13 of the ECHR],’ no ‘particular form of remedy’ being required.<sup>290</sup>

Reparation is an umbrella term for many different forms of redress, including (but not limited to) restitution, compensation and satisfaction, which are usually cumulative.<sup>291</sup> However, this is not true for restitution and compensation.<sup>292</sup> In international law, restitution, which seeks to restore the situation before the violation occurred, constitutes the primary objective of reparation and compensation, which in this context refers to ‘economic or monetary awards for certain losses, be they of material or immaterial, of pecuniary or non-pecuniary nature’, is due when restitution cannot be obtained.<sup>293</sup> According to the Permanent Court of International Justice in the *Chorzów Factory* case,

[t]he essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. [It must consist of r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.<sup>294</sup>

Compensation is required where restitution is ‘materially impossible’, or where it involves ‘a burden out of all proportion to the benefit deriving from restitution instead of compensation’.<sup>295</sup> In any case, the principle formulated in *Chorzów Factory* requires full reparation, ‘in that it permits no remedial shortfall (except in cases of impossibility); whatever damages cannot be corrected through in-kind restitution must otherwise be fully compensated’.<sup>296</sup>

As to the ‘institutional’ requirements of the right to an effective remedy, in *Leander v Sweden* the ECtHR held that the authority referred to in Article 13 of the ECHR ‘need not be a *judicial* authority but, if it is not, the powers and the

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<sup>290</sup> *Goranova-Karaeva v Bulgaria* App no 12739/05 (ECtHR, 8 March 2011), para 57, referring to *Smith and Grady v UK* App nos 33985/96 33986/96 (ECtHR, 27 September 1999), para 135. See also *Horvath v Australia* Comm no 1885/2009 (HRC, 27 March 2014), para 8.2.

<sup>291</sup> International Commission of Jurists (2006) *The Right to a Remedy and to Reparation for Gross Human Rights Violations. A Practitioners’ Guide*, 111. <https://www.icj.org/wp-content/uploads/2012/08/right-to-remedy-and-reparations-practitioners-guide-2006-eng.pdf>. Accessed 28 February 2017.

<sup>292</sup> *Ibid.*, 111.

<sup>293</sup> *Ibid.*, 123.

<sup>294</sup> *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 47.

It should be noted that remedies in international human rights law are drawn from other areas, including the traditional law on state responsibility. See e.g. Shelton 2005, 2.

<sup>295</sup> UN Principles on Responsibility of States for Internationally Wrongful Acts, Article 35(b) (‘Resolution adopted by the General Assembly on the report of the Sixth Committee (A/56/589 and Corr.1), Responsibility of States for Internationally Wrongful Acts’, UNGA Res 56/83 and Annex (28 Jan 2002) UN Doc A/RES/56/83).

<sup>296</sup> Starr 2008, 699.

guarantees which it affords are relevant in determining whether the remedy before it is effective'.<sup>297</sup> Moreover, the ECtHR has held that an accumulation of procedures may suffice: 'although no single remedy may itself entirely satisfy the requirements of Article 13 ... the aggregate of remedies provided for under domestic law may do so'.<sup>298</sup> In other words, Article 13 does not require the state to provide one single remedy.<sup>299</sup>

### 2.2.2.2 Relationship to the Right to a Fair Trial

Since unlawfully obtained evidence (and procedural violations more generally) may raise issues under both the right to fair trial and the right to an effective remedy, it is important to examine the relationship between the two provisions. It was seen above that certain rights violations in the investigative phase impact on the fairness of the proceedings such as to violate the right to a fair trial, primarily through the use at trial of evidence obtained as a result of such violations. This sheds light on at least one aspect of the relationship between the provisions. In the case law of the ECtHR discussions on the use of unlawfully obtained evidence, whether consisting of a single item of evidence or the case as a whole, have taken place against the backdrop of Article 6 of the ECHR, not Article 13. Where the use of unlawfully obtained evidence does not undermine the fairness of the proceedings or the rights violation has not produced any evidence, or it has, but the evidence is not adduced at trial, and the protection afforded by the right to a fair trial for rights violations committed in the investigative phase is therefore not applicable, the right to an effective remedy may come into play.<sup>300</sup> Beyond this aspect of the relationship between the provisions, however, and given that the right to an effective remedy is often cited in case law and scholarly discussions on procedural violations in (international) criminal proceedings, the question may arise as to how suitable a place criminal proceedings are to provide an effective remedy within the meaning of Article 13 of the ECHR for rights violations committed during the investigative phase. A further question arises as to the logic of invoking the right to an effective remedy in order to elicit a response to such violations *within the criminal trial*.

As to the first question, it may be observed that the duty of domestic criminal courts to ensure the right to a fair trial (and to do that which is necessary in this regard) will not necessarily be sufficient for the purposes of the right to an effective

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<sup>297</sup> *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987), para 77 (emphasis added). See also Article 2(3)(b) ICCPR.

<sup>298</sup> *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987), para 77.

<sup>299</sup> Regarding this point, however, Harris, O'Boyle, Bates and Buckley argue that while the 'approach based on 'aggregate remedies' may have been more defensible for sensitive cases such as *Leander* in the earlier years of the Court's 'life', when not all states had incorporated the Convention ... it is harder to justify it today and it is submitted the Court should be reluctant to employ it.' See Harris et al. 2014, 773.

<sup>300</sup> For a similar analysis, see Ölçer 2008, 211.



remedy. This is particularly so where the underlying right to have been violated is a substantive right, such as the right to privacy.<sup>301</sup> While in *Khan v United Kingdom* the ECtHR found that the fact that evidence that had been obtained in violation of Article 8 of the ECHR was used by the domestic court did not render the trial unfair, it did find a violation of Article 13 of the ECHR. In response to the Applicant's allegation that Article 13 had been breached, the Government submitted that two remedies were available to satisfy the requirements of Article 13. First, the domestic courts had the discretion under Section 78 of the Police and Criminal Evidence Act 1984 (hereafter: PACE) to take into account the fact that evidence had been obtained in circumstances which involved an arguable breach of Article 8 of the ECHR. Second, it was open to the Applicant to complain to the Police Complaints Authority in respect of the allegations of police misconduct. In relation to the discretion to exclude evidence pursuant to Section 78 of PACE, the ECtHR noted that

... the courts in the criminal proceedings were not capable of providing a remedy because, although they could consider questions of the fairness of admitting the evidence in the criminal proceedings, it was not open to them to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not "in accordance with the law"; still less was it open to them to grant appropriate relief in connection with the complaint.<sup>302</sup>

In relation to the Government's second submission, the ECtHR found that 'the system of investigation of complaints [did] not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13'. It therefore found that Article 13 had been violated.<sup>303</sup> Regarding the ECtHR's findings with respect to the exclusionary discretion under PACE, it should be noted that, at the time of the domestic criminal proceedings, the Human Rights Act 1998 had not been enacted. Prior to the enactment of the Human Rights Act 1998, individuals did not have a remedy before UK courts for breach of a Convention right. Moreover, English law did not recognise a general right to privacy. In this regard, it was 'not open' to the courts in the criminal proceedings 'to deal with the substance of the Convention complaint', let alone 'to grant appropriate relief in connection with the complaint'.<sup>304</sup>

Even if an individual is able to complain about breach of the right to privacy in the criminal proceedings, it is questionable whether the duty of domestic courts to ensure the fairness of the proceedings would always be sufficient for the purposes of the right to an effective remedy. In *Goranova-Karaeneva v Bulgaria* the Applicant complained that she had not had effective remedies in respect of her complaint

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<sup>301</sup> See n 15 and accompanying text.

<sup>302</sup> *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000), para 44.

<sup>303</sup> *Ibid.*, para 47. See also *PG and JH v UK* App no 44787/98 (ECtHR, 25 September 2001), paras 82–88.

<sup>304</sup> *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000), para 44.

under Article 8, relying on Article 13 of the ECHR in this regard.<sup>305</sup> In that case, the Applicant, a neurologist who was occasionally called upon to act as a court-appointed expert, alleged that she had been subjected to covert surveillance in breach of Article 8 of the ECHR. The covert listening devices in question had been installed by the police (pursuant to a court-issued warrant) in the Applicant's office pursuant to a tip-off that the Applicant had asked for money from a claimant in civil proceedings in exchange for her drawing up a report supporting the claim.<sup>306</sup> In response to the Applicant's complaint regarding Article 13, the ECtHR noted that the national courts dealing with the criminal case against the Applicant had examined her allegations that the covert surveillance had been unlawful. However, such courts were not capable of providing an effective remedy in this regard, since '[a]lthough they were competent to and indeed considered whether the surveillance had been carried out lawfully, they were concerned with its lawfulness only in so far as it could affect the fairness of the criminal proceedings against the applicant and the question of whether the material obtained could be admitted in evidence.' Moreover, 'even if this review could lead to a finding that the surveillance had been unlawful, such a finding could not in itself lead to any redress for the applicant'.<sup>307</sup> Presumably no redress was available before the domestic criminal court for breaches of the right to privacy that did *not* affect the fairness of the proceedings or the question of whether the material obtained could be admitted in evidence.<sup>308</sup> In this regard, Judges Garlicki and Mijović observed in their partially dissenting opinion that 'surveillance measures may have side-effects concerning private or family life', the assessment of which 'cannot be made within the framework of a criminal trial', and therefore that 'it may not be excluded that another (additional) remedy should be offered to the persons subjected to surveillance' (presumably outside of the framework of the criminal trial).<sup>309</sup> It should be recalled here that the right to an effective remedy consists of a procedural and a substantive component, whereby pursuant to the former, the competent national authority must be able to deal with

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<sup>305</sup> The ECtHR did not find a violation of Article 8 ECHR in this case, but this does not preclude a finding that Article 13 ECHR has been violated, since that provision requires only that the applicant has an 'arguable claim' that he or she is the victim of the Convention violation. In other words, a violation of Article 13 ECHR is not dependent on the actual violation of another Convention right. See *Silver and Others v UK* App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; and 7136/75 (ECtHR, 25 March 1983), para 113, referring to *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978), para 64.

<sup>306</sup> *Goranova-Karaeneva v Bulgaria* App no 12739/05 (ECtHR, 8 March 2011), para 7.

<sup>307</sup> *Ibid.*, para 59.

<sup>308</sup> Interestingly, while the focus in *Khan v UK* appears to have been the absence of a procedural remedy (which, by definition, meant the absence of a substantive remedy—see the words 'still less'), in *Goranova-Karaeneva v Bulgaria*, the ECtHR addresses the two types of remedy separately.

<sup>309</sup> *Goranova-Karaeneva v Bulgaria* App no 12739/05 (ECtHR, 8 March 2011), Partly Dissenting Opinion of Judges Garlicki and Mijović. However, in their view, Article 13 ECHR had not been violated, since no such side effects had been 'mentioned as an "accompanying violation" of Article 8'.

the substance of the complaint.<sup>310</sup> In other words, it is not sufficient to provide substantive relief (in the absence of a procedural remedy that allows the national authority to deal with the *substance* of the complaint, it is, moreover, questionable whether any consequence to be attached to a rights violation can properly be called *substantive* relief).

Also relevant in this regard is the case of *Iliya Stefanov v Bulgaria*, in which the ECtHR found that the fact that the Applicant had never been ‘formally charged, prosecuted or tried in relation to the material obtained during the search [and seizure carried out in the Applicant’s office] is of no consequence for his complaint under Article 13’ and that ‘[e]ven if the proceedings, which were stayed in 2001, are eventually discontinued and do not produce any negative consequences for him, this will not amount to appropriate relief for his complaint under Article 8.’<sup>311</sup> In that case, the Applicant alleged, among other things, that the search and seizure carried out in his office had been unlawful and unjustified and that he had not had effective remedies in this respect. The search and seizure had been ordered (pursuant to a court-issued warrant) in connection with allegations of extortion, whereby the Applicant had (allegedly) drawn up the documents that the victim of the (alleged) extortion was coerced into signing, promising, among other things, to pay money to his former employer.<sup>312</sup> That measures intended to ensure the fairness of the proceedings will not always be sufficient for the purpose of providing an effective remedy for rights violations is hardly surprising given that the right to an effective remedy is concerned with the specific harm caused by the violation in question, for example, a violation of the right to privacy, while Article 6 is only concerned with such harm insofar as it affects the fairness of the proceedings, i.e. the harm to the fairness of the proceedings. Nevertheless, this should not be taken to mean that such measures could *never* amount to appropriate relief for the purposes of the right to an effective remedy in respect of Article 8 breaches. Whether this is appropriate for such purposes may depend on the nature of the Article 8 breach and whether it affects trial fairness within the meaning of Article 6 of the ECHR. While some Article 8 breaches involve breaches of fair trial guarantees under Article 6 (‘intrinsicly’ or otherwise), others do not (directly). Where the Article 8 breach ‘intrinsicly’ involves breach of a fair trial guarantee, as for example in the case of unauthorized surveillance where a lawyer-client conversation is recorded,<sup>313</sup> and none of the aforementioned ‘side-effects concerning private or family life’ have arisen, the duty to do that which is necessary in order to ensure the fairness of the proceedings, for example the exclusion of evidence so obtained, may well constitute appropriate relief for the purposes of the right to an effective remedy in respect

<sup>310</sup> See n 286 and 287 and accompanying text.

<sup>311</sup> *Iliya Stefanov v Bulgaria* App no 65755/01 (ECtHR, 22 May 2008), para 58. In this regard the ECtHR relied on its findings in *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000) and *PG and JH v UK* App no 44787/98 (ECtHR, 25 September 2001).

<sup>312</sup> *Iliya Stefanov v Bulgaria* App no 65755/01 (ECtHR, 22 May 2008), paras 5–16.

<sup>313</sup> Ormerod 2003, 75. See also Ölçer 2008, 60.

of the Article 8 breach.<sup>314</sup> In such circumstances, the right to an effective remedy in respect of the Article 8 breach is arguably absorbed by the safeguards of Article 6.

Where, however, the right alleged to have been violated is (more) intrinsically tied up with the notion of fair trial, the added value of the right to an effective remedy (in terms of legal protection against the violation of rights) is less evident. Procedural rights such as the right not to incriminate oneself ‘lie at the heart of the notion of a fair procedure under Article 6’<sup>315</sup> and the violation thereof therefore falls squarely under the duty of the domestic criminal court to do that which is necessary in order to ensure the fairness of the proceedings. The same can be said for the other rights enumerated in, or otherwise flowing from, the right to a fair trial. Such rights are part and parcel of the notion of fair trial. Accordingly, violations thereof must be remedied within the criminal trial (on the basis of Article 6 of the ECHR): because any ‘remedy’ (within the meaning of Article 13) required for such violations must be given within the trial, Article 13 will not be of any added value in such circumstances. In other words, Article 6 of the ECHR already requires domestic criminal courts to address the violation of procedural rights (whether by the adoption of suitable compensatory measures, or by the exclusion of certain evidence), since such rights are inevitably tied up with the fairness of the proceedings, which the domestic courts are obliged to ensure pursuant to this provision. There may accordingly be said to be overlap between the duty to ensure that the suspect or accused receives a fair trial and the right to an effective remedy, insofar as the underlying violation for which legal protection is sought infringes on the fairness of the proceedings. In such circumstances, the effective remedy for the underlying violation is absorbed by the safeguards inherent in a criminal trial. If the underlying violation does *not* infringe on the fairness of the proceedings (and the domestic court is therefore not required to take action in order to ensure the right to a fair trial), the suspect or accused is nonetheless entitled to the legal protection afforded by the right to an effective remedy, although this remedy need not be given within the framework of the criminal trial,<sup>316</sup> bringing us to the second question raised above: the logic of invoking the right to an effective remedy in order to elicit a response to such violations *within the criminal trial*. Indeed, Article 13 of the ECHR only appears to require a remedy within the criminal trial insofar as the underlying violation infringes on the fairness of the proceedings, whereby it should be recalled that this protection is already inherent in the safeguards of the right to a fair trial. Thus, the fact that the suspect’s rights have been violated in the context of

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<sup>314</sup> See also Ormerod 2003 (70–71 (emphasis added)), where the author argues that ‘[b]reaches of the substantive Article 8 [ECHR] right should give rise to an effective remedy (which arguably they do [in England and Wales] in the form of damages) and not necessarily to a procedural right deriving from Article 6 [ECHR] fair trial guarantees, *unless that is shown to be effective*.’

<sup>315</sup> See e.g. *Saunders v UK* App no 19187/91 (ECtHR, 17 December 1996), para 68; *Allan v UK* App no 48539/99 (ECtHR, 5 November 2002), para 44; and *Jalloh v Germany* App no 54810/00 (ECtHR, 11 July 2006), para 100.

<sup>316</sup> For a similar analysis, see *R v P* [2002] 1 AC 146, 162, interpreting the ECtHR’s findings in *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000).

a criminal investigation, and/or that the violation of such rights in this context has resulted in a criminal prosecution (incriminating evidence having been obtained and subsequently adduced), does not mean that an effective remedy need be given within the criminal trial for that violation. In this regard it should be recalled that Article 13 simply requires ‘the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief’,<sup>317</sup> whereby the authority need not be a judicial one. Nor does it ‘require a particular form of remedy, Contracting States being afforded a margin of appreciation in conforming with their obligations in that respect’.<sup>318</sup> Moreover, an accumulation of procedures may suffice for the purposes of Article 13.<sup>319</sup> For these reasons, invoking Article 13 of the ECHR for the purposes of obtaining (better) protection against rights violations committed during the criminal investigative phase *within the framework of the criminal trial* is unlikely to produce the desired result.

### 2.2.3 *Right to Compensation in Case of Unlawful Arrest or Detention*

Article 9(5) of the ICCPR prescribes that ‘[a]nyone who has been the victim of unlawful arrest or detention has an enforceable right to compensation’. Article 5(5) of the ECHR also provides for an enforceable right to compensation in case of unlawful arrest or detention.<sup>320</sup> The claim to compensation in Article 9(5) can be considered ‘a specific type of domestic remedy within the meaning of [Article] 2(3) relating to liberty of person’.<sup>321</sup> Similarly, Article 5(5) of the ECHR ‘is a specific manifestation of the more general obligation in Article 13 of the [ECHR] to provide an effective remedy where any of the guaranteed rights and freedoms have been violated’.<sup>322</sup> Trechsel observes in respect of this provision that ‘[t]he right to

<sup>317</sup> *Goranova-Karaeneva v Bulgaria* App no 12739/05 (ECtHR, 8 March 2011), para 57, referring to *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000), para 44.

<sup>318</sup> *Goranova-Karaeneva v Bulgaria* App no 12739/05 (ECtHR, 8 March 2011), para 57, referring to *Smith and Grady v UK* App nos 33985/96 33986/96 (ECtHR, 27 September 1999), para 135.

<sup>319</sup> *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987), para 77, referring to *Silver and Others v UK* App nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; and 7136/75 (ECtHR, 25 March 1983), para 113.

<sup>320</sup> The right to compensation pursuant to Article 5(5) ECHR should not be confused with the ability of the ECtHR to award just satisfaction pursuant to Article 41 ECHR. The former exists vis-à-vis the high contracting state concerned. Non-adherence to Article 5(5) may give rise to an independent ground for complaint, which, if established, may lead to the application of Article 41.

<sup>321</sup> Nowak 2005, 237.

<sup>322</sup> Macovei 2002, 67.

compensation [thereunder] can be characterized as a kind of ‘secondary right’, dependent on and at the same time responsible for the extension of the primary right concerning personal liberty.<sup>323</sup> The (procedural) remedy envisaged by these provisions is one before a court, ‘leading to a legally binding award of compensation’.<sup>324</sup> Such compensation is usually financial,<sup>325</sup> ‘but may be broader in scope than mere financial compensation’.<sup>326</sup> The claim to compensation prescribed in Article 9(5) of the ICCPR is available to every victim of unlawful arrest or detention, regardless of whether a violation of one of the provisions in Article 9(1)–(4) has been established. In other words, it is sufficient that the arrest or detention contradicts a provision of domestic law or international law.<sup>327</sup> By contrast, Article 5(5) of the ECHR only applies where any one or more of the paras (1)–(4) has been contravened, as established by either a domestic authority or the ECtHR.<sup>328</sup> Neither Article 9(5) of the ICCPR nor Article 5(5) of the ECHR applies to acquitted persons, whose pre-trial detention was based on reasonable suspicion of having committed a crime.<sup>329</sup> As to the amount of compensation, ‘it is likely that’ states are allowed a wide margin of appreciation.<sup>330</sup> However, a very low award of compensation might be entirely disproportionate to the duration of detention and, as such, might entail a violation of the right to compensation.<sup>331</sup> In this regard, Trechsel notes that the compensation must be ‘substantial enough to highlight the value of personal liberty’.<sup>332</sup> While there is human rights case law to suggest that states are free to make an award of compensation dependent upon the ability of the person concerned to show *damage* resulting from the breach and upon the person concerned having suffered pecuniary or non-pecuniary damage,<sup>333</sup> there is also case law to suggest that an overly formalistic approach to, in particular, the question of whether non-pecuniary damage has been suffered, is problematic from the perspective of the right to compensation in case of unlawful arrest or detention.<sup>334</sup>

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<sup>323</sup> Trechsel 2006, 498.

<sup>324</sup> Harris et al. 2014, 368.

<sup>325</sup> Ibid., 368. See also Macovei 2002, 69.

<sup>326</sup> *Bozano v France* App no 9990/82 (ECnHR, 15 May 1984), 119.

<sup>327</sup> Nowak 2005, 238.

<sup>328</sup> Harris et al. 2014, 367.

<sup>329</sup> Nowak 2005, 239.

<sup>330</sup> Harris et al. 2014, 368.

<sup>331</sup> Ibid., 368.

<sup>332</sup> Trechsel 2006, 501.

<sup>333</sup> *Wassink v Netherlands* App no 12535/86 (ECtHR, 27 September 1990), para 38.

<sup>334</sup> *Danev v Bulgaria* App no 9411/05 (ECtHR, 2 September 2010), para 35. See also *Georgi Marinov v Bulgaria* App 36103/04 (ECtHR, 15 March 2011), paras 47–48.

### 2.2.4 *Procedural Violations in the Context of Inter-State Cooperation in Criminal Matters*

It was stated above that in examining the human rights framework with respect to the question of how to address procedural violations committed in the pre-trial phase of criminal proceedings, it is important to be mindful of the specific context in which the ICTs operate: they are largely dependent on state cooperation as regards the apprehension of suspects or accused and as regards the carrying out of investigations. This raises issues that do not arise, or arise to a lesser degree, in a purely domestic context. For this reason it is important to also consider the relevant human rights law on inter-state cooperation in criminal matters; the purpose of this subsection is to set such case law out. It was observed above that inter-state cooperation in criminal matters is widely acknowledged to be characterized by the under-protection of the rights of the suspect or accused. Before setting out the aforementioned case law, it is worth considering this issue in more detail.

The under-protection of the rights of the suspect or accused may occur when the prosecuting authority in the state to have requested assistance (the requesting, adjudicating state) seeks to rely on evidence obtained unlawfully by the state to which the request was directed (the requested state). It may also arise in relation to a person brought into the jurisdiction of a state by extradition (for the purpose of prosecution), whereby in executing the request for extradition, the authorities of the requested state unlawfully arrested and/or detained said person. In both situations the adjudicating (i.e. requesting) state, acting through its judicial authorities, may be unwilling to enquire into, let alone take responsibility for, any unlawfulness (alleged) to have occurred in the execution of its request for cooperation.<sup>335</sup> The unwillingness of states to enquire into, and take responsibility for, unlawfulness in the execution of requests for cooperation is tied up with the notion of mutual recognition, pursuant to which states requesting assistance in criminal matters may ‘presume the credibility and reliability’ of the state to which the request is directed, thereby allowing states to work together effectively and efficiently.<sup>336</sup> In the European Union (hereafter: EU), this ‘trust’ is based ‘upon an assumption that all Member States are human rights compliant’.<sup>337</sup> Hodgson is critical in this regard: while it ‘is true that all EU Member States are members of the Council of Europe and have ratified the ECHR ... the EU has acknowledged that compliance levels are far from uniform and enforcement mechanisms are weak’.<sup>338</sup> In addition, she

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<sup>335</sup> As to the responsibility of the requested state, Klip notes that this is difficult to determine. See Klip 2012, 424.

<sup>336</sup> Hodgson 2011, 617.

<sup>337</sup> *Ibid.*, 618.

<sup>338</sup> *Ibid.*, 618. The ECtHR also recognises this: ‘the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where ... reliable sources have reported practices resorted to or tolerated by the authorities which are

argues that the different legal systems across the EU pose particular problems for mutual recognition: ‘Safeguards for the accused vary across jurisdictions, according to the roles and responsibilities of other legal actors at various points in the process —some are stronger during the investigation, others at the trial hearing. A defendant in a cross-jurisdiction case may have the best, or the worst, of both worlds.’<sup>339</sup> Efforts are now being made at the European level to improve the position of the suspect or accused who is the subject of inter-state cooperation, both through the human rights themselves (of which the ECtHR’s case law on the right to counsel in the investigative phase is an example) and the mechanisms that enable cooperation between states.<sup>340</sup> Regarding the latter, Article 10 of the European Directive on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, for example, provides that ‘Member States shall ensure that a requested person has the right of access to a lawyer *in the executing Member State* upon arrest pursuant to the European arrest warrant’, and that:

The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer *in the issuing Member State*. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons.<sup>341</sup>

Further, Article 6 of the European Directive regarding the European Investigation Order in criminal matters provides that the state authority issuing the (investigation) order may only do so if the order is ‘necessary and proportionate’ for the purpose of criminal proceedings ‘[thereby] taking into account the rights of the suspected or accused person’, and ‘the investigative measure(s) indicated in the [European Investigation Order] could have been ordered under the same conditions in a similar domestic case’.<sup>342</sup> However, as Zeegers notes, ‘these procedures are specific to cooperation within the EU’, while the ‘general international framework applicable to [inter-state cooperation in criminal matters] ... does not impose any

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(Footnote 338 continued)

manifestly contrary to the principles of the Convention.’ See *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008), para 147; and *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011), para 353.

<sup>339</sup> Hodgson 2011, 619.

<sup>340</sup> For a discussion of such ‘efforts’, see Hodgson 2011.

<sup>341</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (2013) OJ L 294/1, Article 10(1) and (4) (emphasis added).

<sup>342</sup> Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (2014) OJ L 130/1, Article 6.



obligations on the requesting state related to the domestic safeguards that apply to the use of coercive measures'.<sup>343</sup> Traditionally, it seems, the law applicable to the execution of a request for coercive measures, has been the law of the requested state, according to the principle of *lex loci regit actum*.<sup>344</sup>

Turning now to the human rights case law on unlawfulness in the context of inter-state cooperation in criminal matters, it was stated above that an absolute exclusionary rule in respect of evidence obtained by torture flows from the case law of the ECtHR and from the UNCAT. The question that now needs to be answered is whether such a rule applies only to 'domestic' situations, whereby such evidence has been obtained by authorities of the same state to be adjudicating (through its judicial authorities) in criminal proceedings. Article 15 of the UNCAT provides that: '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.' Interpreting this provision literally, it seems that the exclusionary rule provided for therein also applies to torture evidence obtained abroad: it applies to any statement, in any proceedings.<sup>345</sup> Currie points to the importance of the prohibition of torture, its *jus cogens* status, to assert that Article 15 of the UNCAT prohibits the use of torture evidence obtained abroad.<sup>346</sup> While the ECtHR has not explicitly ruled on this issue, it is likely that under the ECHR also, the use of such evidence is prohibited. According to Ambos, 'analysis of the [ECtHR's] case law, especially with regard to the importance given to the protection of torture, implies that the Court would not rule any differently if the torture were obtained by third parties',<sup>347</sup> including, presumably, foreign authorities or private parties. If the importance attached to a particular right is an indicator that evidence obtained in violation thereof may not be used at trial (because it fatally undermines the fairness of the proceedings), it may well be that the use at trial of a statement obtained in another state in violation of the right to counsel in the investigative phase (and in any case at the time of questioning) will result in liability under Article 6 of the ECHR for the state using it. Thus, in pointing to the difficulties traditionally faced by cooperating states in protecting the rights of the suspect or accused, caused by 'differences in criminal procedural traditions', Hodgson notes the 'changing legal landscape' in Europe:

... the European Court of Human Rights ... has delivered a series of judgments that set out in the strongest terms the importance of prompt and effective custodial legal advice as part of the accused's right to a fair trial... This strand of ECtHR jurisprudence is more narrowly

<sup>343</sup> Zeegers 2016, 129, referring to the UN Model Treaty on Mutual Legal Assistance in Criminal Matters (UNGA Res 45/117 and Annex (14 December 1990) UN Doc A/RES/45/117).

<sup>344</sup> See e.g. Sluiter 2002, 204.

<sup>345</sup> See also Ambos 2009, 380; and Thienel 2006, 360.

<sup>346</sup> Currie 2000, 168.

<sup>347</sup> Ambos 2009, 385–386. See also Thienel 2006, 362–363.

prescriptive in setting out what is required, leaving no room for arguments based on procedural difference across legal traditions.<sup>348</sup>

Arguably, the terms adopted by the ECtHR and the narrow prescriptiveness of its case law implies that any statement obtained by the requested state in violation of the right to counsel would have to be excluded in proceedings in the requesting state in order to protect the fairness of the proceedings.<sup>349</sup> Nevertheless, it is to be noted that the European Directive on the right of access to a lawyer in criminal proceedings is somewhat equivocal in this regard:

Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.<sup>350</sup>

Turning now to unlawfulness in the context of transnational cooperation alleged to be in violation of the right to privacy, in *S v Austria*,<sup>351</sup> the Applicant (bank) complained that an order issued by the Austrian authorities pursuant to a request by the German authorities for a search and seizure to be carried out on its premises in order to obtain certain documents and objects related to a client of the Applicant bank suspected of tax evasion, and which led to the Applicant bank handing certain material over to the Austrian authorities executing the order, violated, inter alia, Article 8 of the ECHR.<sup>352</sup> Thus, this case concerns the responsibility of the requested or cooperating state for alleged rights violations committed by its authorities in executing a request for cooperation. According to the treaty governing mutual legal assistance between Austria and Germany, in executing a German request for cooperation, the Austrian court ‘was only required to examine whether the act requested was admissible under Austrian law, but not whether it was necessary, appropriate or proportionate’. Rather, the latter question was a matter for the German authorities. Indeed, the Austrian court did not examine this latter question, and deemed admissible the German request for cooperation on account of search and seizure being admissible under the Austrian Code of Criminal Procedure. The European Commission of Human Rights (hereafter: ECnHR) did not take issue with this stance of ‘non-enquiry’, noting only that the fact that the Austrian courts did not consider themselves competent to rule on the question of necessity,

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<sup>348</sup> Hodgson 2011, 613.

<sup>349</sup> The ECtHR’s judgement in *Stojkovic v France and Belgium* would seem to confirm this. See *Stojkovic v France and Belgium* App no 25303/08 (ECtHR, 27 October 2011) paras 55–57.

<sup>350</sup> See n 341, Article 12(2).

<sup>351</sup> *S v Austria* App no 12592/86 (ECnHR, 6 March 1989).

<sup>352</sup> It also alleged a violation of Article 6 ECHR, which the ECnHR rejected on the basis that Article 6 ECHR did not apply to proceedings in Austria relating to the German request for cooperation: such proceedings ‘did not determine a criminal charge against the applicant bank’ and did not ‘determine the applicant bank’s civil rights and obligations’. See, in this regard, Klip 2012, 424.

appropriateness and proportionality, ‘does not mean that the search actually lacked these requirements’.<sup>353</sup> According to the ECnHR there was ‘no indication that it was objectively unjustified or disproportionate’ and the search was thus covered by Article 8(2) of the ECHR.<sup>354</sup> As the Applicant bank could not arguably claim that its right to privacy under Article 8 had been violated, its claim under Article 13, the right to an effective remedy, was found to be manifestly ill-founded.<sup>355</sup>

The case of *Chinoy v United Kingdom*<sup>356</sup> concerned the use by a domestic (UK) court in extradition proceedings (whereby the United States of America was the requesting State) of recordings made in France by US authorities of conversations between the Applicant, who was suspected by US authorities of drug offences, and others (including his family), which the Applicant claimed contravened French law. In proceedings before the ECnHR the Applicant argued, inter alia, that his right to respect for his private life, home, family and correspondence (provided for in Article 8 of the ECHR) had been interfered with, on account of the ‘use’ made by the UK authorities of the tape recordings (whereby such interference commenced with ‘the existence of machinery for the receipt of the tapes by the authorities’, continued with the ‘actual receipt and subsequent internal use of the tapes in processing and assessing the case’ and the ‘reliance on and use of the tapes in processing and assessing the case’ and ended with the ‘reliance on and use of the tapes in the extradition proceedings’)<sup>357</sup> and that his right to personal liberty had been violated on account of his detention having been based on unlawfully obtained evidence (the recordings). In dismissing the first complaint, the ECnHR attached importance to the fact the UK authorities had not been involved in the decision to record the conversations or in the recording itself.<sup>358</sup> Moreover, what the UK authorities *did* do, i.e. the use to which the recordings were put (which, according to the Commission was limited to: ‘receipt of the materials from the United States authorities, examination of the material as to its relevance in the extradition proceedings, and production of the relevant parts as evidence in these proceedings’), did not amount to involvement on the part of those authorities such as to warrant liability under the Convention.<sup>359</sup> In this regard, the Commission noted that the domestic (UK) court had not relied on the recordings and transcripts involving the

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<sup>353</sup> *S v Austria* App no 12592/86 (ECnHR, 6 March 1989), 4.

<sup>354</sup> *Ibid.*, 4. It had previously found that the search had indeed constituted an interference with the right to privacy (thereby acknowledging that the right to respect for one’s home encompasses the premises of legal persons), but that it had been in accordance with law, necessary in a democratic society and for the prevention of crime.

<sup>355</sup> *Ibid.*, 4.

<sup>356</sup> *Chinoy v UK* App no 15199/89 (ECnHR, 4 September 1992).

<sup>357</sup> In this regard worth noting that Article 6 ECHR does not apply to extradition proceedings per se, because such proceedings do not involve the determination of a criminal charge or of civil rights or obligations.

<sup>358</sup> *Chinoy v UK* App no 15199/89 (ECnHR, 4 September 1992), 6.

<sup>359</sup> According to Van Hoek and Luchman, this is not consistent with the findings of the Court in *Leander v Sweden* (App no 9248/81 (ECtHR, 26 March 1987), para 48) and *Amann v Switzerland*

Applicant's family.<sup>360</sup> In addition, the Commission attached importance to the public interest in inter-state cooperation in criminal matters (citing the 'international campaign against the drugs trade and the laundering of the proceeds of drug trafficking' and the 'United Kingdom's international treaty obligations' in this regard),<sup>361</sup> and to the fact that while the lawfulness of the recordings was doubtful, the domestic (UK) court had clearly considered them to be relevant.<sup>362</sup> In relation to the second complaint the Commission found 'no indication of arbitrariness in the decision of the United Kingdom courts to admit evidence which may have been obtained, and appears to have been accepted by the domestic courts as having been obtained, in breach of French law and/or the Convention'.<sup>363</sup> Accordingly, the Applicant's complaint under Article 8 of the ECHR was deemed inadmissible.<sup>364</sup>

*Echeverri Rodriguez v The Netherlands*<sup>365</sup> also concerned the use of intercepted communications, although in this case the (alleged) unlawfulness in question was of a different nature to that in *Chinoy v United Kingdom*. The recordings of the intercepted communications had been made by US authorities in the US in the context of an investigation opened (by US authorities) against a number of persons suspected of drug trafficking and money laundering offences, which such authorities subsequently disclosed to the Dutch investigative authorities, who (also) suspected one of those persons of drug offences. In the domestic (Dutch) proceedings against the Applicant, the defence argued that full disclosure had not been made as to the investigation in the USA, which was problematic because the defence suspected that a certain 'Mr. S.' might have been involved in the investigation as an 'infiltrator',<sup>366</sup> and that the Dutch authorities might have been involved in this investigation. In addition, the defence requested to question the individual responsible for disclosing the intercepted communications to the Dutch investigative authorities, a 'Ms. D.' The Dutch Court of Appeal denied the request. In proceedings

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(Footnote 359 continued)

(App no 27798/95 (ECtHR, 16 February 2000), para 64), that the storage of data can give rise to separate responsibilities under Article 8(1) ECHR. See Van Hoek and Luchtman 2005, 17.

<sup>360</sup> *Chinoy v UK* App no 15199/89 (ECnHR, 4 September 1992), 6.

<sup>361</sup> *Ibid.*, 7. See in this regard Vogler 2013, 33; and Van Hoek and Luchtman 2005, 17.

<sup>362</sup> *Chinoy v UK* App no 15199/89 (ECnHR, 4 September 1992), 7. According to Van Hoek and Luchtman the 'Commission seemed to balance the uncertainty with regard to the unlawfulness of the information against the clear relevance of the same to the extradition proceedings'. Van Hoek and Luchtman 2005, 17.

<sup>363</sup> *Chinoy v UK* App no 15199/89 (ECnHR, 4 September 1992), 8.

<sup>364</sup> According to Klip, this decision raises the question of 'whether a complaint against France might have been more successful', given that, while it is 'in the interest of the applicant to complain against all the possible states involved in the alleged violation', 'such a collective complaint may be declared inadmissible, because the applicant might not have exhausted the national remedies in all states against which the complaint is directed'. Klip 2012, 425.

<sup>365</sup> *Echeverri Rodriguez v Netherlands* App no 3286/98 (ECtHR, Decision of 27 June 2000).

<sup>366</sup> The suggestion is that the defence suspected that this Mr. S. incited or influenced the importation of the cocaine which led to the Applicant's arrest. *Echeverri Rodriguez v Netherlands* App no 3286/98 (ECtHR, Decision of 27 June 2000), 5.

before the ECtHR, the Applicant argued that his right to a fair trial had been violated on account of his request to question Ms. D. having been rejected, as a result of which he was unable to verify whether, if indeed an ‘infiltrator’ had been used, this use had been subject to the same limitations as those imposed by Dutch law. The ECtHR found as follows:

Insofar as the applicant complains that the Court of Appeal refused to take oral evidence from the USA Assistant Attorney Ms. D. as she could have clarified issues in relation to the investigation carried out in the USA, the Court considers that the Convention does not preclude reliance, *at the investigating stage*, on information obtained by the investigating authorities from sources such as foreign criminal investigations. Nevertheless, the *subsequent* use of such information can raise issues under the Convention where there are reasons to assume that in this foreign investigation defence rights guaranteed have been disrespected.<sup>367</sup>

In convicting the Applicant, the Dutch Court of Appeal had not relied on the intercepted communications.<sup>368</sup> In other words, it had not used the intercepted communications at trial. They were ‘only’ used in the investigation. On the one hand the ECtHR appears to apply a ‘more rigorous test’ to the use *at trial* of evidence obtained abroad in the course of an investigation (than the one that applies to the use *in the investigation* of such evidence).<sup>369</sup> the way in which it was obtained must not ‘disrespect’ the rights of the defence. Thus, it recognises that the use of evidence obtained unlawfully abroad may render the subsequent trial in the requesting state unfair.<sup>370</sup> On the other hand, there must be ‘reasons to assume’ that in the investigation carried out abroad, defence rights were disrespected (either because the court, of its own accord, believes this to be the case or because the defence has made it sufficiently plausible that the evidence was obtained in such a manner). In other words, in the absence of such reasons, the presumption is that the evidence was obtained in a manner which respected the rights of the defence.<sup>371</sup>

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<sup>367</sup> *Echeverri Rodriguez v Netherlands* App no 3286/98 (ECtHR, Decision of 27 June 2000), 8 (emphasis added).

<sup>368</sup> According to the ECtHR, it relied on: ‘the applicant’s statement before the Regional Court, statements taken from Mr. X. before the police and the investigating judge, statements taken from other persons before the police and/or the investigating judge, formal records and the results of a forensic examination of substances seized by the police on 3 August 1995’. *Echeverri Rodriguez v Netherlands* App no 3286/98 (ECtHR, Decision of 27 June 2000), 6.

<sup>369</sup> Vogler 2013, 33. See also Van Hoek and Luchtman 2005, 18.

<sup>370</sup> See also *PV v FRG*, which concerned the use at trial in Germany of witness evidence obtained in Turkey. The Applicant complained that that witness had never been heard by the domestic court and that he had not had the opportunity to examine the witness. While the ECnHR noted that ‘the German authorities cannot be held responsible for the non-observance of provisions of the Turkish law by a Turkish court’ and that the domestic court ‘was not responsible for the examination of C on commission’, it held that ‘it is in principle conceivable that the use of the evidence thereby obtained could be contrary to that provision [Article 6(1) ECHR]’. See *PV v FRG* App no 11853/85 (ECnHR, 13 July 1987), 6 and 7.

<sup>371</sup> Accordingly, the test set forth by the ECtHR in *Echeverri* is a form of ‘qualified non-inquiry’. See Vogler 2013, 34.

In the circumstances, there were no reasons to assume that in the investigation in the USA, defence rights had been disrespected.

In *Sari v Turkey and Denmark* the applicant complained of the excessive length of the proceedings against him and therefore a violation of Article 6(1) of the ECHR. Shortly after a murder was committed in Denmark, the Applicant, who was suspected by the Danish authorities of having committed the murder, fled the country. The Danish authorities sought assistance from Turkey, where the Applicant was thought to be. Approximately two and a half years after fleeing Denmark, the Applicant was arrested in Istanbul, and for a further six and a half years, until the Applicant was convicted by a Turkish court for the murder, the Danish and Turkish authorities quarrelled over matters related to the transfer of jurisdiction over the crime to Turkey. In looking to the particular circumstances of the case the ECtHR found that the case was complex not on account of the nature of the offence but of the fact that the Applicant had fled Denmark, thereby making it necessary for the relevant national authorities to resort to inter-state cooperation.<sup>372</sup> It also found that the Applicant had contributed significantly to the delay by fleeing Denmark shortly after the murder and remaining at large for more than two years.<sup>373</sup> As to the conduct of the Danish authorities, the ECtHR found that the periods of inactivity on the part of such authorities was the joint responsibility of Denmark and Turkey and that any delay in transferring jurisdiction to the Turkish judiciary was the result of a system of mutual legal assistance which ‘unfortunately’ was time-consuming, making delay ‘inevitable’.<sup>374</sup> Nor were the Turkish authorities to blame, any periods of inactivity in the cooperation process being the joint responsibility of Turkey and Denmark.<sup>375</sup>

In sum, while the ECnHR and the ECtHR have recognized that the way in which evidence was gathered abroad may render the subsequent trial in the requesting state unfair, it seems that only flagrant rights violations, i.e. rights violations that, on their face, pose a high risk to the fairness of the proceedings or are obviously offensive to other fundamental values, are capable of doing so, where evidence obtained thereby is used at trial;<sup>376</sup> after all, there must be ‘reasons to assume’ that in the investigation carried out abroad defence rights were ‘disrespected’. In case of torture, where evidence obtained thereby is subsequently used at trial, there will be

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(Footnote 371 continued)

This places a heavy burden on applicants in proceedings before the ECtHR to show unlawfulness. As Van Hoek and Luchtman observe, ‘[i]n most cases this is far from simple’. Van Hoek and Luchtman 2005, 18. See also Klip 2012, 425.

<sup>372</sup> *Sari v Turkey and Denmark* App no 21889/93 (ECtHR, 8 November 2001), paras 76–79.

<sup>373</sup> *Ibid.*, paras 84–88.

<sup>374</sup> *Ibid.*, paras 91 and 92.

<sup>375</sup> *Ibid.*, para 96.

<sup>376</sup> Bachmaier Winter 2013, 140. In relation to state practice, Currie comes to a similar conclusion: ‘State practice, as embodied in the judgements of criminal courts, would seem to posit ... an international exclusionary rule, but only in the most heinous or “shocking” cases.’ See Currie 2000, 177–178.

reasons to assume that defence rights were disrespected.<sup>377</sup> Similarly, violation of the right of access to counsel at the time of questioning is likely to constitute a flagrant rights violation. In delay cases, the international dimension of the case, even when this is unrelated to the underlying offence, appears to be a factor militating against founding a violation of Article 6(1) of the ECHR.<sup>378</sup> This, and the ECtHR's application of a 'qualified' rule of non-enquiry<sup>379</sup> in cases concerning the use of evidence obtained abroad may well warrant the conclusion that the ECtHR attaches more importance to international cooperation than to the protection of individual rights.<sup>380</sup>

### 2.3 Protection of Others

In the introduction to this chapter it was stated that in one of the domestic jurisdictions examined in this book, the discussion (in both the literature and the case law) on how to address procedural violations committed in the pre-trial phase of criminal proceedings was informed not only by human rights standards that protect the suspect or accused in criminal proceedings, but also by human rights standards that purport to protect other persons, i.e. the victims of crime. According to proponents of an approach which (also) takes into account the latter set of human rights standards, certain judicial responses to pre-trial procedural violations *may* be inconsistent with the positive obligations arising from, for example, Articles 2 and 3 of the ECHR, because they prevent the effective punishment of the person responsible for the serious human rights violation, i.e. for the crime, in question.<sup>381</sup> Thus, a stay of proceedings prevents the case from proceeding to a verdict on the merits (and therefore the establishment of criminal responsibility), the exclusion of evidence may lead to an acquittal (if any remaining evidence is insufficient to found a conviction), and a significant reduction of sentence precludes the imposition of punishment commensurate with the criminal responsibility established. Such an approach appears to read into the positive obligations flowing from the substantive provisions of the ECHR a 'duty to punish', whereby the lack of punishment that

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<sup>377</sup> Evidence obtained by torture cannot be said to have been obtained in compliance with the privilege against self-incrimination.

<sup>378</sup> *Ibid.*, 19. See also Klip 2012, 425.

<sup>379</sup> See n 371 and accompanying text.

<sup>380</sup> Vogler 2013, 38. Currie appears to come to a similar conclusion in relation to state practice. See Currie 2000.

<sup>381</sup> See e.g. Kuiper 2014, 346–351; Van de Westelaken 2010, 151; and Vellinga-Schootstra and Vellinga 2008, 41–43.

results from the court attaching a certain consequence to a pre-trial procedural violation would amount to failure to discharge this duty.

The purpose of this section is to provide an overview<sup>382</sup> of the obligations that human rights law imposes on states on how to address (serious) human rights violations occurring within their jurisdiction (to the extent that such obligations could bear on the question of how to address pre-trial procedural violations), including whether, under human rights law, there exists a duty to punish. Given the central research question of this book, the question that must ultimately be answered here is whether any duty to prosecute imposed on states under human rights law can be said to apply to the international criminal tribunals. While it was observed above that the ICTs are bound by internationally recognized human rights, the duty to prosecute raises questions that warrant addressing the matter of its applicability to the ICTs separately. Accordingly, this matter is dealt with below, after first setting out the obligations of states in this regard.

### ***2.3.1 States' Duties in Responding to Serious Human Rights Violations***

It is, by now, widely accepted that states' human rights obligations are not limited to abstaining from conduct that violates the human rights of their subjects; such obligations may also require states to take action in order to ensure their subjects' enjoyment of such rights, i.e. to take measures to prevent human rights violations and to address adequately such violations when they occur. Such 'positive obligations' or 'affirmative duties' are derived from substantive rights such as the right to life and the prohibition of torture and inhuman and degrading treatment and punishment,<sup>383</sup> and states are required to discharge their positive obligations (to address adequately serious abuses when they occur) when state authorities have committed the human rights violation, as well as when a private individual has committed a serious abuse, such as murder.<sup>384</sup>

In order to ensure that its subjects are able to exercise their human rights effectively (or, put differently, in order to ensure that states discharge their positive obligations under the applicable human rights treaties), states are increasingly being required to take measures in the criminal law (enforcement) sphere. Thus, the

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<sup>382</sup> It is beyond the scope of this book to provide a comprehensive analysis of the human rights law in this regard. For such an analysis see Seibert-Fohr 2009.

<sup>383</sup> That is, read in conjunction with the relevant provision on the obligation to protect human rights (for the HRC this is Article 2 ICCPR, for the ECtHR this is Article 1 ECHR). See also Seibert-Fohr 2009, 117.

Positive obligations also flow from other substantive provisions than the right to life and the prohibition of torture and inhuman and degrading treatment and punishment. See e.g. Mowbray 2004.

<sup>384</sup> See Seibert-Fohr 2009, 222.



bodies charged with supervising the compliance with, and implementation of, the comprehensive human rights treaties have called for the criminalization of certain types of (particularly serious) abuse,<sup>385</sup> and for the criminal investigation and prosecution thereof. Moreover, such bodies have in some cases looked to the *punishment*, i.e. criminal sanction, imposed in determining whether the state in question has discharged its positive obligations, and, in particular, its duty to prosecute, under the relevant human rights treaty. Under the comprehensive human rights treaties there is a duty to *investigate* human rights violations.<sup>386</sup> An investigation

... sheds light on the facts and identifies those responsible. The participation of the victims and their families is an important factor in the healing process. By conducting an investigation, a State demonstrates that it does not condone the abuse. It also re-establishes the validity of a right in principle, acknowledges the suffering of victims and condemns the injustice suffered by them. Acknowledgment is an important element of reconciliation. At the same time, the intention to avoid repetition is demonstrated.<sup>387</sup>

Moreover, there appears to be growing consensus that for particularly serious human rights violations the investigation required is a criminal one.<sup>388</sup> Indeed, the ECtHR has held in relation to the positive obligations that arise under the right to life, within the meaning of Article 2 of the ECHR, that: ‘In order to be “effective” as this expression is to be understood in the context of Article 2 of the Convention, an

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<sup>385</sup> At the HRC, See e.g. HRC, ‘General comment no 20. Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies (1994)* UN Doc HRI/GEN/1/Rev.1, 32, para 13 (‘States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate Article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.’); at the ECtHR, See e.g. *Osman v UK* App no 23452/94 (ECtHR, 28 October 1998), para 115; and at the IACtHR See e.g. *Goiburú and Others v Paraguay* Series C no 153 (IACtHR, 22 September 2006), paras 91–92.

<sup>386</sup> See e.g. Seibert-Fohr 2009, 34, 190; and Shelton 2005, 153–155.

<sup>387</sup> Seibert-Fohr 2009, 209.

<sup>388</sup> *Ibid.*, 191–192. In this regards she notes that: ‘Apart from seeking out offenders and holding them accountable, States parties are also obliged to take additional measures to deal adequately with human rights violations. Regardless of whether there is a duty to prosecute, the Committee recognizes a duty to investigate and compensate victims’ and that while an investigation ‘is usually part of criminal proceedings’, the duty to investigate ‘exists independently’. *Ibid.*, 34 n 129.

investigation into a death that engages the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be *capable of leading to the identification and punishment of those responsible*.<sup>389</sup> In light of this understanding of ‘criminal investigation’, there may in cases of serious human rights violations be overlap between the duty to investigate and the duty to prosecute, whereby it is difficult to tell when the duty to conduct a criminal investigation ends, and the duty to prosecute begins. Indeed, under human rights law, there may be said to exist a duty to prosecute *serious* human rights violations, whereby the determination of the seriousness of a violation is informed by the human right at issue, as well as the gravity of the violation.<sup>390</sup> Thus, a violation of the right to life need not give rise to a duty to prosecute; it depends on the facts and circumstances of the case.<sup>391</sup> Murder, it seems, does give rise to a duty to prosecute.<sup>392</sup> However, violation of another right than the right to life or the prohibition of torture and inhuman and degrading treatment and punishment, need not do so; other measures may suffice. In other words, there is no *comprehensive* duty to prosecute human rights violations, i.e. to prosecute *all* human rights violations, regardless of their seriousness. Whereas the lack of *punishment*, i.e. where no criminal sanction has been imposed, will not necessarily amount to a failure to discharge the duty to *investigate* if criminal proceedings have been initiated that have adequately brought to light the violation in question, it may, depending on the circumstances, amount to a failure to discharge the duty to *prosecute*. More will be said about this issue

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<sup>389</sup> *Ramsahai and Others v The Netherlands* App no 52391/99 (ECtHR, 15 May 2007), para 324 (emphasis added). According to Seibert-Fohr, this should not be taken to mean that the ECtHR views criminal punishment as a personal remedy for the victim: ‘When the Court requests an investigation capable of leading to the punishment of those responsible it has been cautious not to proclaim an individual right of the victim for the criminal punishment of the perpetrator. In those cases in which a lack or inadequacy of prosecution was criticized as contrary to the victim’s rights it was not because of the lack of punishment... [rather] it was generally the failure to conduct an independent official investigation which was held to be in violation of the victim’s rights. In *X. and Y. v The Netherlands* it was not the failure to punish but the lack of initiation of criminal proceedings which was held to be a violation of the victim’s rights. It is thus the aspect of bringing to light a violation rather than criminal accountability which leads the Court to assume a right of the victim to investigation. The emphasis is clearly on the duty to investigate allegations of misconduct. The Court has not accepted that punishment is required in the interest of a particular victim.’ Seibert-Fohr 2009, 148–149, referring to *X and Y v Netherlands* App no 8978/80 (ECtHR, 26 March 1985).

<sup>390</sup> Seibert-Fohr 2009, 200–201.

<sup>391</sup> *Ibid.*, 201.

<sup>392</sup> See n 384 and accompanying text.

below. In principle, though, the duties of states to investigate and prosecute are obligations of means, not of result.<sup>393</sup> Indeed, the ECtHR has held that:

An obligation to *investigate* “is not an obligation of result, but of means”: not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant’s account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible.<sup>394</sup>

Further, the ECtHR has held that the obligation to *prosecute* serious human rights violations does not entail ‘an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence’.<sup>395</sup> In other words, punishment is not a necessary component of the duty to prosecute. For one thing, in prosecuting those alleged to be responsible for serious human rights violations, courts are required to respect due process or fair trial guarantees.<sup>396</sup> In this regard, Seibert-Fohr has observed that: ‘It would not be in accordance with the right to a trial by an independent court and with the presumption of innocence if the outcome of a trial was predetermined by a duty to punish.’<sup>397</sup> Shelton also recognizes the importance of observing fair trial guarantees when prosecuting serious human rights violations, which she argues is essential for the credibility of the results of a prosecution: ‘The emphasis in criminal trials on full and reliable evidence in accordance with due process usually makes the results more credible than those of other, more political proceedings, including truth commissions.’<sup>398</sup> In light of the central question of this research (how should judges at the international criminal tribunals respond to procedural violations committed in the pre-trial phase of the proceedings?), it may be noted that respect for ‘due process’ guarantees may be a

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<sup>393</sup> Nevertheless, according to Seibert-Fohr, as the human rights bodies are increasingly seeking ‘to ensure that those responsible for serious human rights violations serve an adequate sentence as a matter of general human rights protection’, ‘the assertion that the conduct of criminal proceedings is not an obligation of result, is losing ground’. *Ibid.*, 138. More will be said about this below; see n 419–424 and accompanying text.

<sup>394</sup> *Kopylov v Russia* App no 3933/04 (ECtHR, 29 July 2010), para 132 (emphasis added). See also *Al-Skeini and Others v UK* App no 55721/07 (ECtHR, 7 July 2011), para 166; *Ramsahai and Others v The Netherlands* App no 52391/99 (ECtHR, 15 May 2007), para 324; and *Mikheyev v Russia* App no 77617/01 (ECtHR, 26 January 2006), para 107. See also e.g. *Velásquez Rodríguez v Honduras* Series C no 4 (IACtHR, 29 July 1988), para 177.

<sup>395</sup> *Öneryıldız v Turkey* App no 48939/99 (ECtHR, 30 November 2004), para 96. See also *Rizvanović and Rizvanović v Bosnia and Herzegovina* Comm no 1997/2010 (HRC, 21 March 2014), para 9.5: ‘The Committee recalls its jurisprudence according to which the obligation to investigate allegations of enforced disappearances and to bring the culprits to justice is not an obligation of result, but of means...’

<sup>396</sup> See e.g. *Osman v UK* App no 23452/94 (ECtHR, 28 October 1998), para 116.

<sup>397</sup> Seibert-Fohr 2009, 203. While acknowledging that the ‘quest for justice may be frustrated if the evidence is not sufficient and the accused is subsequently acquitted’ she argues that ‘justice and the integrity of the legal system are better served in the long run if a criminal system abides by its own rules. Seibert-Fohr 2009, 225.

<sup>398</sup> Shelton 2005, 397. See also Ochoa-Sanchez 2013, 61.

reason for a criminal court to respond to pre-trial procedural violations by staying the proceedings, excluding the evidence obtained thereby, or by reducing the sentence. The salient question, then, is *when* respect for due process may reasonably be said to require such a response, which is inevitably tied up with the particular rationale or rationales adopted by the court in question when ruling on unlawfulness on the part of the police or the public prosecutor. These rationales are explored in the following two chapters, Chaps. 3 and 4, on national law and practice.

On the one hand, then, measures such as the duty to investigate, including the duty to conduct a criminal investigation, and the duty to prosecute are obligations of means, not result; on the other hand, however, the bodies charged with supervising the compliance with, and implementation of, the comprehensive human rights treaties are increasingly looking to the punishment, i.e. criminal sanction, imposed in determining whether the state in question has discharged its positive obligations, and, in particular, its duty to prosecute, under the relevant human rights treaty. Criminal punishment, it seems, is ‘increasingly regarded as a necessary element of human rights protection’.<sup>399</sup> It is worth recalling here that ‘classic’ responses to procedural violations committed in the pre-trial phase of criminal proceedings may prevent the imposition of punishment; thus, a stay of proceedings prevents the case from proceeding to a verdict on the merits, and the exclusion of (unlawfully obtained) evidence may lead to an acquittal if any remaining evidence is insufficient to found a conviction. And sentence reduction entails the reduction of punishment. Accordingly, the question arises as to whether the duty to prosecute (serious human rights violations) entails a duty to punish.

In order to answer this question, it is important to consider how measures in the criminal law (enforcement) sphere may protect human rights, i.e. allow a state’s subjects to exercise their human rights effectively, which goes to the question of how such measures may be rationalized under human rights law. Various legal rationales have been advanced in this regard by the bodies charged with supervising the compliance with, and implementation of, the comprehensive human rights treaties, ranging from the prevention of future human rights violations<sup>400</sup> to avoiding retroactive complicity<sup>401</sup> to ensuring adherence to the rule of law<sup>402</sup> to

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<sup>399</sup> Seibert-Fohr 2009, 281.

<sup>400</sup> See e.g. *Öneryıldız v Turkey* App no 48939/99 (ECtHR, 30 November 2004), para 96 (where the Court refers to the ‘deterrent effect of the judicial system’ and the judicial system’s ‘role ... in preventing violations of the right to life’); and ‘Comments of the Human Rights Committee: Sri Lanka’ (27 July 1995) UN Doc CCPR/C/79/Add.56, para 15.

<sup>401</sup> See e.g. HRC, ‘Summary record of the 1519th meeting: Peru’ (1 November 1996) UN Doc CCPR/C/SR.1519, para 44.

<sup>402</sup> See e.g. *Öneryıldız v Turkey* App no 48939/99 (ECtHR, 30 November 2004), para 96 (where the Court states that ‘the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished’ because this ‘is essential for maintaining public confidence and ensuring adherence to the rule of law’).

providing the victim with redress or satisfaction.<sup>403</sup> Generally speaking, though, the (call for the) prosecution of human rights violations may be rationalized in two main ways: to protect human rights in general (in the interests of society as a whole), whereby the *preventive* function of punishment is emphasized, or to protect the individual victim, whereby the *remedial* function of punishment is emphasized.<sup>404</sup> Regarding the latter rationalization, Seibert-Fohr observes that this is sometimes based on ‘the assumption that punishment serves retrospective protection of the infringed right’ and sometimes on remedial rights such as the right to an effective remedy.<sup>405</sup> The first rationalization, then, sees prosecution as a means of preventing the commission of serious human rights violations<sup>406</sup> *in the future*, whereas the second sees it as a means of protecting the individual victim. Nevertheless, the distinction is not always easy to draw, as the notions are often mixed: ‘... prosecution is deemed necessary to deter future violations; while at the same time ... prosecution serves the interest in the individual.’ Conversely, ‘the award of pecuniary damages may not only serve the interest of the victim but also deter further violations in general and re-establish the validity of the affected right’.<sup>407</sup> Regarding such rationalizations, it is important to note that, whereas the first rationalization of prosecution is relatively uncontroversial, the second is (more) controversial, in practice (in the sense that there is no consensus among the supervisory bodies that such a duty exists for this purpose), in theory (in the sense that it is difficult to reconcile the notion of punishment (understood as retribution or retaliation) with human rights remedial theory),<sup>408</sup> and in the literature (in the sense that there is no consensus that such a duty exists for this purpose).<sup>409</sup>

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<sup>403</sup> See e.g. *Nikolova and Velichkova v Bulgaria* App no 7888/03 (ECtHR, 20 December 2007), para 64 (where the Court found that the criminal measures taken by the authorities (including the imposition of criminal punishment) ‘failed to provide appropriate redress to the applicants’); and HRC, ‘General Comment no 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 16 (where the HRC notes that ‘bringing to justice the perpetrators of human rights violations’ can be a form of reparation within the meaning of the right to an effective remedy provided for in Article 2(3) ICCPR).

<sup>404</sup> Seibert-Fohr 2009, 190.

<sup>405</sup> *Ibid.*, 190. In the context of the ACHR, it has also been based on the right to a fair trial, which has been read by the IACtHR to include a right of the victim to have criminal proceedings instituted against perpetrators of serious human rights violations. See *ibid.*, 59–64.

<sup>406</sup> In other words, only in case of *serious* human rights violations does it require *criminal* punishment. See e.g. Seibert-Fohr 2009, 224; Shelton 2005, 395; and Ochoa-Sanchez 2013, 1–97.

<sup>407</sup> See Seibert-Fohr 2009, 282. See also Shelton 2005, 396 and 465.

<sup>408</sup> See in this regard Seibert-Fohr 2009, 207–211.

<sup>409</sup> According to Seibert-Fohr, there is a ‘duty to punish serious human rights violations if it is necessary for the protection of human rights in general. But there is not a necessary element of reparation for the victim.’ See Seibert-Fohr 2009, 223. However, Shelton appears to see prosecution of serious human rights violations not only as a preventive measure but also as a personal remedy. Shelton 2005, 396. Similarly, in setting out the legal basis for states’ obligations (general human rights protection and protection of the individual) under the ICCPR, Ochoa-Sanchez does not appear to distinguish between investigation (which is widely acknowledged to be required in

How, then, has the duty to prosecute serious human rights violations been rationalized in practice? Traditionally when the HRC has required criminal *prosecution* (in respect of serious human rights violations), whereby it should be recalled that in principle, the duty to prosecute (serious human rights violations) is an obligations of means, not of result in the sense that it does not entail ‘an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence’;<sup>410</sup> it has done so as a matter of general human rights protection, i.e. as a matter of *prevention*,<sup>411</sup> while repeatedly denying an individual right to demand prosecution on the basis of the right to an effective remedy.<sup>412</sup> Thus, the HRC recognises no comprehensive duty to prosecute (even serious) human rights violations *in the interests of the individual*.<sup>413</sup> Similarly, when the ECtHR has required

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(Footnote 409 continued)

order to provide the individual victim with a remedy) and prosecution (which is not) and also argues (on the basis of the case law) that the right to an effective remedy requires not only a criminal investigation, but also the prosecution, trial and punishment of those responsible. In relation to the ECHR, he argues that the ECtHR’s case law is unclear in this regard. Ochoa-Sanchez 2013, 40–42 and 46–48.

<sup>410</sup> See n 393–395 and accompanying text.

<sup>411</sup> This is apparent from the fact that the duty to prosecute those responsible for serious human rights violations is ‘most prominently’ based on the first two paragraphs of Article 2 ICCPR, rather than the third paragraph. See in this regard Seibert-Fohr 2009, 15–17.

According to Seibert-Fohr prevention should be construed broadly to include not only deterrence but also the ‘re-establishment of trust in the rule of law’. *Ibid.*, 224.

<sup>412</sup> See e.g. *HCMA v Netherlands* Comm no 213/1986 (HRC, 30 March 1989), para 11.6; *RAVN and Others v Argentina* Comm nos 43, 344 and 345/1988 (HRC, 26 March 1990), para 5.5; *SE v Argentina* Comm no 275/1988 (HRC, 26 March 1990), para 7.3; *MS v Netherlands* Comm no 396/1990 (HRC, 22 July 1992), para 6.2; *Kulomin v Hungary* Comm no 521/1992 (HRC, 16 March 1994), para 6.3; *Rodriguez v Uruguay* Comm no 322/1988 (HRC, 19 July 1994), para 6.4; and *Horvath v Australia* Comm no 1885/2009 (HRC, 27 March 2014), para 8.2. In a number of cases the HRC has rejected such an individual right, while simultaneously holding that the state is under a duty ‘to prosecute criminally, try and punish those held responsible’ for serious human rights violations. See e.g. *Bautista de Arellana v Colombia* Comm no 563/1993 (HRC, 27 October 1995), para 8.6; *Vicente and others v Colombia* Comm no 612/1995 (HRC, 29 July 1997), para 8.8; and *Rajapakse v Sri Lanka* Comm no 1250/2004 (HRC, 14 July 2006), para 9.3. According to Seibert-Fohr, such decisions should be read as recognising a duty to prosecute *despite* the absence of a corresponding individual right (thereby confirming that prosecution serves purposes other than providing redress to the victim). Seibert-Fohr 2009, 24. This is confirmed by a number of decisions in which the HRC appears to distinguish between what is required for the right to an effective remedy (Article 2(3) ICCPR), including an investigation and compensation, and the duty to prosecute serious human rights violations. See e.g. *Zheikov v Russian Federation* Comm no 889/1999 (HRC, 17 March 2006), para 9; *Boucherf v Algeria* Comm no 1196/2003 (HRC, 30 March 2006), para 11; *Njaru v Cameroon* Comm no 1353/2005 (HRC, 19 March 2007), para 8; *Grioua v Algeria* Comm no 1327/2004 (HRC, 10 July 2007), para 9; and *El Alwani v Libya* App no 1295/2004 (HRC, 11 July 2007), para 8.

<sup>413</sup> HRC, ‘General Comment no 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 8.

prosecution it has done so as a matter of prevention,<sup>414</sup> while consistently rejecting the claim that there exists an individual right to demand the prosecution and punishment for serious human rights violations.<sup>415</sup> While the IACtHR has also underscored the importance of prosecution for general human rights protection, i.e. for the prevention of future human rights violations,<sup>416</sup> unlike the HRC and ECtHR it unequivocally recognises that prosecution and (criminal) punishment may (also) be in the interests of the individual victim, i.e. that they have a remedial function, for example on the basis of the right to a fair trial (provided for Article 8 of the ACHR)<sup>417</sup> and of the right to an effective remedy (Article 25 of the ACHR).<sup>418</sup> It is important to note that while the HRC and ECtHR have consistently denied an individual right to demand prosecution, a ‘new trend’ may be emerging in the HRC’s interpretation of the ICCPR at least, whereby ‘criminal punishment is increasingly regarded also as a remedy for serious human rights violations’.<sup>419</sup> Such

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<sup>414</sup> See e.g. *Öneryıldız v Turkey* App no 48939/99 (ECtHR, 30 November 2004), para 96 (where the Court refers to the ‘deterrent effect of the judicial system’ and the judicial system’s ‘role ... in preventing violations of the right to life’).

<sup>415</sup> See e.g. *Öneryıldız v Turkey* App no 48939/99 (ECtHR, 30 November 2004), para 96. See for more recent cases *Kolyadenko and Others v Russia* App nos 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05 (ECtHR, 28 February 2012), para 192; and *Budayeva and Others v Russia* App nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02 (ECtHR, 20 March 2008), para 144. According to Seibert-Fohr: ‘When the Court requests an investigation capable of leading to the punishment of those responsible it has been cautious not to proclaim an individual right of the victim for the criminal punishment of the perpetrator... The Court has not accepted that *punishment* is required in the interest of a particular victim.’ Seibert-Fohr 2009, 148–149 (footnotes in original omitted). However, the ECtHR has looked to the sentence imposed in criminal proceedings in the context of general human rights protection, i.e. prevention. Thus, in *Nikolova and Velichkova v Bulgaria* the Court looked to the sentences imposed in order to determine whether the authorities had discharged their positive obligations under Article 2 ECHR: ‘The Court’s task here consists in reviewing whether and to what extent the national courts may be deemed to have submitted the case to the careful scrutiny required by Article 2, so that the *deterrent* effect of the judicial system in place and the significance of the role it is required to play in *preventing* violations of the right to life are not undermined.’ See *Nikolova and Velichkova v Bulgaria* App no 7888/03 (ECtHR, 20 December 2007), paras 60–62 (emphasis added). According to Seibert-Fohr, the Court is thus increasingly seeking ‘to ensure that those responsible for serious human rights violations serve an adequate sentence as a matter of general human rights protection’, although with this development, ‘the assertion that the conduct of criminal proceedings is not an obligation of result, is losing ground’. *Ibid.*, 138.

<sup>416</sup> See e.g. *Velásquez Rodríguez v Honduras* Series C no 4 (IACtHR, 29 July 1988), para 175.

<sup>417</sup> See e.g. *Blake v Guatemala* Series C no 36 (IACtHR, 24 January 1998), paras 96–97. Seibert-Fohr is critical in this regard. Seibert-Fohr 2009, 62–64.

<sup>418</sup> See e.g. *Castillo-Páez v Peru* Series C no 34 (IACtHR, 3 November 1997), paras 106–107.

<sup>419</sup> Seibert-Fohr 2009 e.g. 22–23 and 25–27. According to her, this is best illustrated by HRC, ‘General Comment no 31. The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 16, because here the HRC notes that ‘bringing to justice the perpetrators of human rights violations’ (which appears to refer to the prosecution of human rights violations which are ‘recognized as criminal under either domestic or international law’, i.e. to the criminal prosecution of human rights violations (see para

a trend is also visible in the ECtHR's interpretation of the ECHR.<sup>420</sup> In *Nikolova and Velichkova v Bulgaria*, the Applicants had alleged that their husband and father had died as a result of ill-treatment by two police officers, and that the ensuing criminal proceedings, in which the police officers had been convicted of 'wilfully inflicting grievous bodily harm negligently resulting in death', and received (suspended) sentences of three years' imprisonment, had failed to provide an effective remedy.<sup>421</sup> For the ECtHR, the question was 'whether the suspended sentences imposed on the officers at the close of excessively lengthy criminal proceedings were sufficient to discharge the authorities' positive obligations under Article 2 of the Convention'.<sup>422</sup> It held that: 'By punishing the officers with suspended terms of imprisonment, more than seven years after their wrongful act, and never disciplining them, the State in effect fostered the law-enforcement officers' "sense of impunity" and their "hope that all [would] be covered up"'.<sup>423</sup> The ECtHR concluded that the measures taken by the authorities 'failed to *provide appropriate redress to the applicants*'.<sup>424</sup> Therefore, in this case at least, the ECtHR seemed to treat the duty to prosecute as an obligation of result (by looking to the sentence imposed), and also as a remedial measure for the victim.<sup>425</sup> Nevertheless, the fact

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(Footnote 419 continued)

18) is a form of 'reparation' within the meaning of the right to an effective remedy provided for in Article 2(3) ICCPR).

<sup>420</sup> See *Nikolova and Velichkova v Bulgaria* App no 7888/03 (ECtHR, 20 December 2007), para 64.

<sup>421</sup> *Nikolova and Velichkova v Bulgaria* App no 7888/03 (ECtHR, 20 December 2007), para 3.

<sup>422</sup> See n 393 and accompanying text.

<sup>423</sup> *Nikolova and Velichkova v Bulgaria* App no 7888/03 (ECtHR, 20 December 2007), para 63.

<sup>424</sup> *Ibid.*, para 64 (emphasis added). According to Seibert-Fohr: 'The difference with previous cases is as follows: while the court had so far dealt with criminal prosecution as a matter of general human rights protection in *Nikolova and Velichkova v Bulgaria* it was called upon to decide whether the failure to resort to criminal measures (not simply to investigation) affected the individual victim. By considering criminal proceedings and enforcement as remedial measures for the victim, the Court went beyond its earlier jurisprudence which required only investigation as a necessary remedy. Previously, accountability had been considered only as a matter of general human rights protection, not as a remedy for the victim.' Seibert-Fohr 2009, 150.

<sup>425</sup> See also *Atalay v Turkey* App no 1249/03 (ECtHR, 18 September 2008), para 46 (where the Court refers to both preventive and remedial aspects of punishment); *Enukidze and Girgvlani v Georgia* App no 25091/07 (ECtHR, 26 April 2011), para 275 (where the Court held that the 'unreasonable leniency' of the sentences imposed 'deprived the criminal prosecution of the four officers of any remedial effect under Article 2 of the Convention' (emphasis added)); and *Uğur v Turkey* App no 37308/05 (ECtHR, 13 January 2015), para 102 (where the Court said that 'whether the national authorities did all that could be expected of them in order to examine the applicants' allegations of ill-treatment and prosecute the defendants in a timely fashion ... [would] ... enable ... [it] to determine whether or not the national authorities did all they could to provide the applicants with adequate redress by prosecuting and punishing the persons responsible for their ill-treatment', although the violation of Article 3 in that case was based not on the failure to prosecute or punish, but to carry out an effective investigation (see para 110)).



that the HRC has acknowledged the remedial aspects of punishment does not mean that it has ‘accepted an individual right to demand punishment for serious human rights violations’.<sup>426</sup> The same may be argued in respect of the ECtHR. In numerous cases since *Nikolova and Velichkova* in which the Court has looked to the criminal punishment imposed by the domestic court, the Court has focused on the preventive function of punishment.<sup>427</sup> By contrast, the duty to *investigate* has been required as a matter of individual redress. Thus, while the victim of a serious human rights violation does not appear to have an *individual right* to demand the prosecution and punishment thereof, he or she does have a right to an *investigation*.<sup>428</sup> There is thus a duty to *investigate* serious human rights violations, as recognised by the HRC, IACtHR and the ECtHR,<sup>429</sup> whereby such duty serves to protect both society as a whole and the individual victim (and is, accordingly, both preventive and remedial in nature).

Prosecution, then, may be called for as a matter of general human rights protection, rather than of individual redress for the victim,<sup>430</sup> whereby it should be

<sup>426</sup> Seibert-Fohr 2009, 223 and 282. See, moreover, the recent case of *Horvath v Australia* Comm no 1885/2009 (HRC, 27 March 2014), para 8.2.

<sup>427</sup> See in this regard the following cases in which the court, in considering the (enforcement of the) criminal punishment imposed by the domestic court (whether for the purpose of determining whether the Applicant possessed victim status or the respondent state’s compliance with substantive rights), cited the preventive (rather than the remedial) function of punishment: *Kasap and Others v Turkey* App no 8656/10 (ECtHR, 14 January 2014), paras 60–61; *Külâh and Koyuncu v Turkey* App no 24827/05 (ECtHR, 23 April 2013), paras 42–43; *Austrianu v Romania* App no 16117/02 (ECtHR, 12 February 2013), para 74; *Shishkin v Russia* App no 18280/04 (ECtHR, 7 July 2011), para 103; *Kopylov v Russia* App no 3933/04 (ECtHR, 29 July 2010), para 141 (interestingly, in *Shishkin* and *Kopylov* the Court refers to the relevant findings in *Nikolova and Velichkova*, but not the paragraph in which the Court finds that the criminal measures adopted, including the punishment imposed, failed to provide the Applicants with appropriate redress); *Gäfgen v Germany* App no 22978/05 (ECtHR, 1 June 2010), paras 121 and 124; *Fadime and Turan Karabulut v Turkey* App no 23872/04 (ECtHR, 27 May 2010), paras 47–48; and *Bektaş and Özalp v Turkey* App no 10036/03 (ECtHR, 20 April 2010), paras 52–53. In *Beganović v Croatia* no criminal punishment was imposed (because the facts of the case were never established by a competent court of law), but the Court nevertheless emphasized the preventive function of criminal punishment, both in terms of special and general deterrence: *Beganović v Croatia* App no 46423/06 (ECtHR, 25 June 2009), para 85.

<sup>428</sup> In this regard Seibert-Fohr observes that: ‘Apart from seeking out offenders and holding them accountable, States parties are also obliged to take additional measures to deal adequately with human rights violations. Regardless of whether there is a duty to prosecute, the Committee recognizes a duty to investigate and compensate victims’ and that while an investigation ‘is usually part of criminal proceedings’, the duty to investigate ‘exists independently’. Seibert-Fohr 2009, 34 n 129.

<sup>429</sup> See e.g. *Horvath v Australia* Comm no 1885/2009 (HRC, 27 March 2014), para 8.2; *Kaya v Turkey* App no 22729/93 (ECtHR, 19 February 1998), para 107; and *Velásquez Rodríguez v Honduras* Series C no 4 (IACtHR, 29 July 1988), para 174.

<sup>430</sup> Drawing such a conclusion would seem to require distancing from the approach taken by the Inter-American human rights institutions, for which there are good reasons. See in this regard Seibert-Fohr 2009, 108–109: ‘The Inter-American human rights institutions have been very ambitious and strict in their jurisprudence on prosecution and punishment. This not only concerns

recalled that the lack of *punishment*, i.e. where no criminal sanction has been imposed, may, depending on the circumstances, amount to a failure to discharge the duty to *prosecute*;<sup>431</sup> the next question is whether it matters that this is the case. After all, it may be argued that since prosecution may well have the *effect* of providing redress to an individual,<sup>432</sup> it matters not that its primary purpose is general human rights protection. In this regard it may be observed that different considerations are likely to apply under each rationale. General human rights protection is concerned with prevention; when criminal prosecution is construed as general human rights protection, its purpose is to prevent similar human rights violations in the future. In light of this, it seems that a relevant (or, even, pertinent) consideration under the rationale of general human rights protection is whether the abuse in question forms part of a wider pattern of abuse, as well as whether the criminal law enforcement machinery already in place is sufficient to prevent, by way of deterrence, similar human rights violations in the future. Similarly, Seibert-Fohr argues that:

*Especially* where there is a climate of impunity which gives rise to further serious human rights violations, there is undoubtedly a duty to punish grave human rights abuses. This duty derives from the duty to ensure the enjoyment of fundamental human rights. The pronouncements of the international human rights bodies should be understood in this sense since these usually concern systematic failures to prosecute serious human rights abuses. A culture of impunity is contrary to human rights law regardless of whether the abuses are committed by State officials or private individuals.<sup>433</sup>

By contrast, the existence of a wider pattern of abuse is not likely to be a relevant (let alone pertinent) consideration under the rationale of individual redress for the victim; what matters under that rationale is the harm suffered by the victim. Accordingly, it *does* matter that prosecution may be called for as a matter of general

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(Footnote 430 continued)

the right to justice but also the ban on amnesties. It is, however, doubtful whether these standards should also be adopted by other human rights bodies. It is submitted that they are context-specific and need to be recognized as a result of the particular regional situation. They evolved in the context of gross and systematic human rights violations. The Court and the Commission developed their doctrine on the basis of experience gained over decades in Latin America. Serious shortcomings of the criminal justice system in several Latin-American States had led to an escalation of crimes. There are still grave systemic deficits in the criminal justice system. Large-scale impunity prevails in several OAS Member States. Therefore, the Inter-American human rights mechanism is regarded as the only means of remedy. In this situation it comes as no surprise that the Inter-American Court assumes a leading role in protecting the rule of law. Its uncompromised call for criminal prosecution seeks to combat a general situation which is detrimental to the enjoyment of human rights. Neither the Court nor the Commission is in favour of a margin of appreciation for the States parties. Otherwise their fight against the phenomenon of *impunidad* could be weakened.' See in this regard also Shelton 2005, 154.

<sup>431</sup> Accordingly, insofar as punishment is required to discharge the duty to prosecute, its rationale is general rights protection, rather than the provision of individual redress for the victim.

<sup>432</sup> See n 407 and accompanying text.

<sup>433</sup> Seibert-Fohr 2009, 202 (emphasis added).

human rights protection, rather than of individual redress for the victim; under the former rationale, whether the abuse forms part of a wider pattern of abuse is likely to be a pertinent consideration, and this has the potential to limit the number of cases in which prosecution may be said to be required in order to allow persons to exercise their human rights effectively. By extension, it has the potential to limit the number of cases in which punishment may be said to be required in order to do so.

The question that now needs to be answered is what this all means for a judge in criminal proceedings, seized with a case whereby the crime charged involves a serious human rights violation (for example, murder),<sup>434</sup> such that there is a duty to prosecute, and being called upon to provide relief in respect of procedural violations committed in the pre-trial phase of criminal proceedings. First, it should be recalled, that, in principle, the duty to prosecute is an obligation of means, not result. In other words, the obligation to *prosecute* serious human rights violations does not entail 'an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence'.<sup>435</sup> Nevertheless, in some cases, the fact that punishment, i.e. a criminal sanction, has not been imposed *will* mean a failure to discharge the duty to prosecute.<sup>436</sup> The rationale of the duty to prosecute is general human rights protection, i.e. prevention of future human rights violations; accordingly, in those cases in which the fact that a criminal sanction has not been imposed would amount to a failure to discharge the duty to prosecute, punishment is being required as a means of general human rights protection. In light of the fact that punishment is 'only' required as a matter of general human rights protection, the judge in criminal proceedings, seized with a case whereby the crime charged involves a serious human rights violation such that there is a duty to prosecute, and being called upon to provide relief in respect of pre-trial procedural violations, is (at most) required to make an assessment of whether, in not being able to punish the accused as a result of staying the proceedings or excluding unlawfully obtained evidence (where any remaining evidence is insufficient to found a conviction), or in imposing a lesser sentence, the deterrent value of the system would be undermined, whereby relevant considerations are whether the abuse in question forms part of a wider pattern of abuse, as well as whether the criminal law enforcement machinery already in place is sufficient to prevent similar human rights violations in the future. In other words, the fact that a murder prosecution has not resulted in the imposition of a criminal sanction will not necessarily amount to a failure to discharge the duty to prosecute serious human rights violations; it will not automatically undermine the deterrent value of the system already in place. Put differently again, the fact that a murder prosecution has not resulted in punishment does not necessarily mean that the criminal law system in question is not being implemented effectively, and, by

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<sup>434</sup> See n 384 and 392 and accompanying text.

<sup>435</sup> See n 393–395 and accompanying text.

<sup>436</sup> See n 399 and accompanying text.

extension, not providing for effective deterrence.<sup>437</sup> It depends on the particular criminal law (enforcement) system in question, whereby what matters is ‘the coherence and effectiveness within ... [that] system’.<sup>438</sup> In short, there is no ‘absolute obligation to *punish* every serious human rights abuse’.<sup>439</sup>

### 2.3.2 *Applicability of States’ Duty to Prosecute to International Criminal Tribunals*

Having provided an overview of the obligations that human rights law imposes on states on how to address (serious) human rights violations occurring within their jurisdiction, it is time now to turn to the matter of applicability of such obligations to the ICTs. Whether the ICTs are bound by states’ duty pursuant to human rights law to prosecute (and in some cases, punish) serious human rights violations is a question that does not lend itself to easy answer. It was argued above<sup>440</sup> that while the ICTs are not states, they are, as international organizations, bound by human rights standards that form part of general international law (which covers the unwritten sources of international law, including customary international law and general principles of law), although the precise ‘mechanism’ by which they are (considered to be) bound differs per international criminal tribunal.<sup>441</sup> Thus, it is uncontroversial to state that the ICTs are bound by human rights standards that are aimed at protecting the suspect or accused to the extent that they form part of general international law.<sup>442</sup> Nevertheless, the fact that the ICTs are not states may have implications for the scope of the human rights protection afforded by such tribunals to the suspect and accused. Zeegers argues that the ‘fundamental factual differences’ between states on the one hand and international criminal tribunals on the other mean that the tribunals ‘simply cannot be bound by certain human rights standards’ and that other standards ‘must be interpreted ‘contextually’” in order for the tribunals to be able to apply them.<sup>443</sup> The differences between states on the one hand and international criminal tribunals on the other may also be relevant to the question of whether such tribunals are bound by the duty imposed on states to prosecute the most serious crimes, whether pursuant to human rights law,

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<sup>437</sup> See in this regard Seibert-Fohr 2009, 202: ‘There is a general duty on States to establish an effective criminal law system. It goes without saying, that a criminal law system provides for effective deterrence only if it is implemented.’

<sup>438</sup> Seibert-Fohr 2009, 202.

<sup>439</sup> *Ibid.*, 202 (emphasis added).

<sup>440</sup> At the beginning of this chapter, where the applicability of human rights to the ICTs is addressed.

<sup>441</sup> Zeegers 2013, 366–381.

<sup>442</sup> However, according to Zappalà, the ‘extension of the notion of fair trial to international criminal proceedings’ is ‘more a *policy* issue than a legal question’. See Zappalà 2003, 5–7.

<sup>443</sup> Zeegers 2013, 392.

international humanitarian law or other international law. In this regard it is important to note that while the ICTs are bound by human rights standards (to the extent that they form part of general international law), they are *not* bound by the general and specific human rights treaties themselves. As Jacobs points out in relation to the argument made by some that the ‘international criminal tribunals are under the same duty to prosecute as States ... that arises from treaty and customary law *in the case of each particular [international] crime*’,<sup>444</sup> it is important to ‘distinguish the *substantial and procedural content of the norms* we are concerned with’.<sup>445</sup> Thus, ‘[t]he fact that international criminal tribunals will be to a large extent dependent on the *substantial content of a crime in international law*, especially as they are aimed at individuals, in no way implies that they are bound by the *implementation mechanisms* imposed on the signatories of the treaties, or the recipients of the customary norms’.<sup>446</sup> Accordingly, Jacobs argues that ‘the international criminal court, as an international institution is not bound by a duty to prosecute that arises in relation to States’.<sup>447</sup> The same may be argued in respect of the duty to prosecute the most serious human rights violations that flows from human rights law (as set out above). Moreover, specifically in relation to human rights law Jacobs observes that, ‘the duty to prosecute in human rights covers acts that only partially overlap with international criminal law’,<sup>448</sup> while according to Seibert-Fohr, ‘the purpose for which punishment is sought in international human rights is not identical to that in international criminal law’,<sup>449</sup> thereby calling into question the applicability of the duty to prosecute derived from human rights law to international criminal law. If the ICTs are indeed *not* bound by the duty to prosecute imposed on states pursuant to human rights law (and it is certainly arguable that they are not),<sup>450</sup> international humanitarian law or other international law, the question arises as to whether they are under any other duty to prosecute that might bear upon the question of how to address procedural violations committed in the pre-trial phase of criminal proceedings.<sup>451</sup> In this regard it may be noted that the mandate of the ICTs to prosecute those alleged to be responsible for committing the crimes that fall within their jurisdiction might be construed as a ‘duty to prosecute’. Thus, Jacobs speaks of a ‘statutory duty to prosecute’ for the international criminal tribunals.<sup>452</sup> This statutory duty to prosecute, it should be noted, is subject to the

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<sup>444</sup> Jacobs 2012, 337.

<sup>445</sup> Jacobs 2012, 337–338 (emphasis added).

<sup>446</sup> *Ibid.*, 338 (emphasis added).

<sup>447</sup> *Ibid.*, 337.

<sup>448</sup> *Ibid.*, 338. See also Seibert-Fohr 2009, 289.

<sup>449</sup> Seibert-Fohr 2009, 290.

<sup>450</sup> Accordingly, the duty under human rights law to prosecute serious human rights violations will receive no further attention in this book.

<sup>451</sup> See n 12 and accompanying text.

<sup>452</sup> Jacobs 2012, 31–32.

principle of ‘primacy’ at the ad hoc Tribunals<sup>453</sup> and that of ‘complementarity’ at the ICC.<sup>454</sup> Like states’ duty to prosecute pursuant to human rights law, the international criminal tribunals’ ‘duty’ is subject to the condition that due process guarantees be observed, including the presumption of innocence.<sup>455</sup> Like their ‘duty to prosecute’, the obligation to observe such guarantees is derived from the ICTs’ Statutes.

Both the duty of states pursuant to human rights law to prosecute serious human rights violations and the international criminal tribunals’ (statutory) ‘duty to prosecute’ are obligations of means, not result, in the sense that, in prosecuting an alleged perpetrator (of a serious human rights violation or an international crime, respectively), due process or fair trial guarantees must be observed. Again, it may be noted that respect for such guarantees may be a reason for a criminal court to respond to pre-trial procedural violations by staying the proceedings, excluding the evidence obtained thereby, or by reducing the sentence. And the salient question, then, is when respect for due process or fair trial may be said to require such a response. This question is addressed below, in Chap. 7.

## 2.4 Conclusion

The purpose of this chapter was to set out the human rights framework with respect to the question of how to address pre-trial procedural violations. In this section, the main features of that framework and main points of analysis are summarized.

Several rights enshrined in the ICCPR and the ECHR are relevant to the question of how judges at the ICTs should respond to procedural violations committed in the pre-trial phase of the proceedings. The right to a fair trial, provided for in Articles 14 and 6 of the ICCPR and ECHR, respectively, is an obvious starting point for addressing the aforementioned question; it sheds light on the question of when it is necessary to address pre-trial procedural violations *within the criminal trial*. Other rights are also relevant to the question of how judges at the ICTs should address

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<sup>453</sup> ‘Under [the principle of] ‘primacy’, the international tribunal takes precedence over national courts, and need not demonstrate, as a question of admissibility for the case, that the national justice system is failing to investigate or prosecute.’ See Schabas 2010, 52, referring to Articles 9 (2) ICTY Statute and 8(2) ICTR Statute.

<sup>454</sup> In the ICC case of *Lubanga*, the Pre-Trial Chamber said that: ‘The principle of complementarity ... provides that the Court shall only exercise jurisdiction over the crimes provided for in the Statute if the States concerned are not taking, or have not taken, action with regard to the said crimes, or are unwilling or unable to carry out their own national proceedings. The principle of complementarity of the Court vis-a-vis national jurisdictions is based on the premise that the investigation and prosecution of the crimes provided for in the Statute lies primarily with national jurisdictions.’ See *Prosecutor v Lubanga* (Decision on the Practices of Witness Familiarisation and Witness Proofing) ICC-01/04-01/06, T Ch (8 November 2006) para 34 n 38.

<sup>455</sup> See Articles 21 ICTY Statute, 20 ICTR Statute and 55, 66 and 67 ICC Statute.

procedural violations committed in the pre-trial phase of the proceedings, although they do not require a response within the criminal trial (they may be provided within that context, though).

Turning first the ECtHR's case law with respect to the right to a fair trial provided for in Article 6 of the ECHR,<sup>456</sup> it was seen that in cases in which unlawfulness on the part of public authorities in the pre-trial phase of criminal proceedings is alleged to engage Article 6(1) of the ECHR, the ECtHR attaches significant importance to the use of the evidence so obtained. Put differently, it is *the use of evidence* obtained unlawfully that triggers the protection of Article 6 of the ECHR; on its own, unlawfulness on the part of public authorities in the pre-trial phase, even in case of torture, is not sufficient to do so. While the ECtHR recognizes that an accused person may, on account of such unlawfulness, be deprived of a fair trial 'right from the outset', it has only done so in the context of entrapment, where evidence will by definition have been used.

While the use of evidence obtained unlawfully triggers the protection of Article 6, it does not automatically result in a violation of Article 6 of the ECHR. Accordingly, under the ECHR, there is no automatic exclusion for evidence obtained by violation of the suspect's or accused's Convention rights, let alone for evidence obtained by pre-trial procedural violations more generally. Nevertheless, the ECtHR does recognize an automatic, or near automatic exclusionary rule for some rights violations. Thus, it recognizes an automatic exclusionary rule for evidence obtained by torture within the meaning of Article 3 of the ECHR, and a near automatic exclusionary rule for evidence obtained in violation of the right of access to a lawyer at the time of questioning under Article 6(3)(c). However, for other Convention violations committed in the pre-trial phase of criminal proceedings the impact of the use of evidence obtained thereby on the fairness of the proceedings depends on such factors as whether the rights of the defence were observed, *how* it was used and the public interest in the investigation and prosecution of crime. The ECtHR's practice of taking into account such factors is often referred to in the literature as 'balancing'. In respect of evidence obtained by torture within the meaning of Article 3 of the ECHR, then, the ECtHR will not engage in balancing in order to determine whether its use amounted to a violation of Article 6 of the ECHR; the use of evidence obtained by torture will always do so. In respect of evidence obtained in violation of the right not to incriminate oneself, the ECtHR will similarly refrain from embarking on a balancing exercise for the purposes of the aforementioned determination, although it is important to note that in order to determine whether the right has been violated in the first place, the ECtHR may have regard to such factors as the use to which the material obtained was put and the public interest in the investigation and punishment of crime. In respect of evidence obtained by violation of the right of access to a lawyer at the time of questioning, it will do so only exceptionally, it seems. In respect of the prohibition

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<sup>456</sup> For the reasons provided in Sect. 2.2.1.1, the analysis of the right to a fair trial focussed on the ECHR and corresponding case law of the ECtHR.

of inhuman and degrading treatment within the meaning of Article 3 of the ECHR, the question of whether the use of evidence obtained thereby constitutes a violation of Article 6 depends firstly on whether the evidence obtained was confessional or real evidence, and, insofar as it concerns the latter, on whether the rights of the defence were observed—in particular, whether the defence could challenge the use of the evidence—and *how* it was used. Finally, in respect of violations of the right to privacy within the meaning of Article 8 of the ECHR, the ECtHR will also engage in balancing in order to determine whether the use of evidence obtained thereby amounted to a violation of Article 6; in this context, the ECtHR also expressly looks to, and attaches significant importance to, the probative value (or the ‘quality’) of the evidence. Accordingly, for the purposes of the balancing exercise to be undertaken, i.e. the factors to be taken into account, in the determination of Article 6 of the ECHR (where such determination has been triggered by (alleged) unlawfulness in the pre-trial phase of criminal proceedings), the ECtHR distinguishes between different forms of unlawfulness; the factors that may be taken into account and/or the extent to which importance may be attached to them differs as between Convention violations.

While on its own, unlawfulness on the part of public authorities in the pre-trial phase is not sufficient to trigger the protection of Article 6 of the ECHR, under the ECHR (and under the ICCPR) the victim of such unlawfulness nevertheless has remedies to pursue in this regard. Articles 2(3)(a) and 13 of the ICCPR and ECHR, respectively, provide for the right to an effective remedy, and Articles 9(5) and 5(5) of the ICCPR and ECHR, respectively, provide for the right to compensation in case of unlawful arrest or detention, whereby the latter right may be viewed as a specific manifestation of the former. While the latter right requires a remedy before a court, the former does not.

Regarding procedural violations committed by public authorities in an international context, while the ECnHR and the ECtHR recognise that the way in which evidence was gathered abroad may render the subsequent trial in the requesting state unfair, it seems that only flagrant rights violations are capable of doing so, where evidence obtained thereby is used at trial. This would include, most obviously, evidence obtained abroad by torture. As to what else might constitute a ‘flagrant rights violation’: a trial may be rendered unfair by the use (at trial) of evidence obtained abroad if the evidence was obtained in such a way as to disrespect the defence rights guaranteed in the Convention. This is likely to include a violation of the right of access to counsel in the investigative phase. In delay cases, the international dimension of the case, even when this is unrelated to the underlying offence, appears to be a factor militating against founding a violation of Article 6(1) of the ECHR. This, and the ECtHR’s application of a ‘qualified’ rule of non-enquiry in cases concerning the use of evidence obtained abroad<sup>457</sup> may well warrant the conclusion that the ECtHR attaches more importance to international cooperation than to the protection of individual rights.

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<sup>457</sup> See n 371 and accompanying text.



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