VIII. European Criminal Law, Human Rights, and Crisis

The structure of evidentiary proceedings as reflected in the case-law of the ECtHR on article 6 (3) ECHR*

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I. Introduction

On the background of new forms of national and international crime and the complex problems of transnational criminal justice, the reform of criminal procedure emerges as a legal policy challenge in many contemporary European legal orders, regardless of their particular legal traditions and cultures. Today, even time-honoured procedural structures (such as those based on the obligatory judicial search for the truth in Germany) and institutions (like the jury trial in England) are under constant scrutiny as to their effectiveness in solving modern conflicts of penal character. In this context, and for the purpose of searching for new (alternative) procedural forms, comparative research is an important tool for the analysis of legal rules and institutions. Fragmentary solutions and arbitrary legal transplantations do not provide a coherent basis for reform. Any meaningful implementation of elements of foreign legal systems at the national level and the smooth realization of the objectives of transnational, supranational, and international criminal justice call for a reciprocal understanding

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between legal orders of different traditions in terms of their normative foundations.[1]

In the field of criminal procedure, the various structures employed by national and international legal systems for the purpose of effective fact-finding in criminal trials are of diachronic importance for comparative research. Within this context, legal comparison aims to identify systemic convergences and divergences and, ultimately, to advance a proposal of best practices and balanced solutions. Furthermore, the examination of provisions of international and supranational origin is useful for devising system-wide strategies for optimizing the national criminal process. Key in this respect are the principles, rules, and normative minimum standards of the European Convention on Human Rights (ECHR) as interpreted and implemented in the case-law of the European Court of Human Rights (ECtHR), particularly for the Member States of the Council of Europe. The autonomous[2] international "legal order" of the ECHR is often thought to provide Member States with a *sui generis* procedural model consisting of independent standards and guidelines.[3]

The present paper explores the *erga omnes*[4] obligations arising from

[1] On the (functional and model-based) comparative research in the field of criminal procedure and on the concept and importance of legal traditions, especially with respect to the historical evolution of Western criminal law systems, see Billis, *Die Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren*, Berlin 2015, pp. 1–140.

[2] See, *inter alia*, ECtHR *Engel a.o. v. the Netherlands*, 8.6.1976 (5100/71), §§ 81–82; ECtHR *König v. Germany*, 28.6.1978 (6232/73), §§ 88–89. On the Convention as a "living instrument", see ECtHR *Tyrer v. the United Kingdom*, 25.4.1978 (5856/72), § 31; ECtHR *Soering v. the United Kingdom*, 7.7.1989 (14038/88), § 102.

[3] See, for example, Jackson, 'The effect of human rights on criminal evidentiary processes: towards convergence, divergence or realignment?', *MLR* 68 (2005), 737 (747); Jackson & Summers, *The Internationalisation of Criminal Evidence*, Cambridge 2012, pp. 77–79. See also Esser, *Auf dem Weg zu einem europäischen Strafverfahrensrecht*, Berlin 2002, pp. 833–868; Satzger, 'Die Rspr des EGMR als Motor der europäischen Strafprozessrechtsharmonisierung', *JA* 2005, 656 (658).

[4] See Billis, *Die Rolle des Richters* [fn. 1], pp. 391–394 (with references).

human rights principles and procedural guidelines as provided in the ECtHR decisions with potential impact on (re-)shaping the evidentiary structures of the criminal trial in Council of Europe countries. The analysis is based on abstract concepts and definitions used by the ECtHR in interpreting art. 6 ECHR, without specifically referencing their implementation in national legal systems. Particular emphasis is placed on the guarantees of an effective defence, the disclosure of evidence, the calling of witnesses, and the right to confrontation. The paper addresses the overarching question as to whether or not, at the international level, the ECHR system sets specific procedural standards regarding the form of evidentiary proceedings, which national criminal justice systems must comply with.

II. Fair Trial Guarantees and Evidentiary Proceedings

1. *The general principles of equality of arms and adversarial proceedings*

The jurisprudence of the ECtHR relies heavily on the particular circumstances of each individual case and is therefore not always predictable with respect to the abstract interpretation of ECHR norms.[5]This complicates the attempt to implement the general provisions of the Convention uniformly and in a way that is meaningful both in theory and in practice. Still, a systematic analysis of earlier (if possible) "stable"[6] interpretations of basic guarantees relevant in terms of criminal procedure and the participation rights enshrined in art. 6 ECHR, irrespective of the particularities of each case, may be useful in order to re-balance or harmonize the criminal procedure laws in the

[5] See, e.g., ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), § 109.

[6] See Bárd, 'The role of the ECHR in shaping the European model of the criminal process', in: Aromaa & Viljanen (eds.), *International Key Issues in Crime Prevention and Criminal Justice*, Helsinki 2006, p. 42 (with references): "The maintenance of what has already been achieved is guaranteed by the Court's general practice to follow its earlier case-law and to depart normally from its precedents only if societal changes justify a higher level of protection of human rights. Thus by observing its precedents the Court may set limits to a downward evolution and the lowering of already achieved standards."

Member States or concrete structural components of their evidentiary proceedings. The analysis of the cornerstones of a fair criminal trial, which, according to the ECtHR, are the principles of equality of arms and the right to adversarial proceedings may serve as a starting point in this regard.

In accordance with the subsidiary[7] nature of the Convention's international protective system, the Court has neither the competence to create, in the abstract, rules of procedure and evidence that are generally binding and immediately applicable at national level nor the competence to enforce uniform procedural laws in all Member States.[8] The impact the directions and minimum standards stipulated in ECtHR case-law on the procedural rights of art. 6 ECHR may have on the form of national (evidentiary) proceedings is limited; in fact, their main purpose is to facilitate the consistent preservation of the Convention's guarantees while respecting the sovereignty of the national criminal justice systems.[9] Due to considerable differences between the types of procedure applied in European countries, any attempt by the Court to concretize the normative content of the provisions of the Convention in

[7] See especially arts. 13, 35(1), 41, 46–53 ECHR. On the margin-of-appreciation doctrine, see Bárd, [fn. 6], in: Aromaa & Viljanen (eds.), *International Key Issues*, pp. 39–42; Esser, *Strafverfahrensrecht* [fn. 3], pp. 843–846; Satzger, *Internationales und Europäisches Strafrecht*, 6th edition, Baden-Baden 2013, § 11 n. 20–22.

[8] See, *inter alia*, ECtHR *Schenk v. Switzerland*, 12.7.1988 (10862/84), §§ 45-46. See also ECtHR *Delta v. France*, 19.12.1990 (11444/85), § 35; ECtHR *Mirilashvili v. Russia*, 11.12.2008 (6293/04), § 161; ECtHR (GC) *Bykov v. Russia*, 10.3.2009 (4378/02), §§ 88–89; ECtHR *Sharkunov and Mezentsev v. Russia*, 10.6.2010 (75330/01), §§ 94–95; ECtHR *Duško Ivanovski v. The Former Yugoslav Republic of Macedonia*, 24.4.2014 (10718/05), § 42.

[9] See also Bárd, [fn. 6], in: Aromaa & Viljanen (eds.), *International Key Issues*, p. 40: "[…] for the sake of state sovereignty and because of the Court's limited legitimacy, the drafters of the Convention envisaged a modest, self-restraining international judicial body."

a balanced manner will prove to be difficult.[10]

On the one hand, the terms "fair trial" and "witnesses against him" stipulated in art. 6 ECHR, along with the "principle of equality of arms between prosecution and defence" originating in the wider concept of a fair trial and the guiding principle issued by the ECtHR that "criminal proceedings should be adversarial",[11] suggest, at least at first sight, an orientation towards procedural structures common to Anglo-American systems. These are typically proceedings where the parties exercise control over all the main aspects of the evidentiary hearing.[12] On the other hand, the historical origin of the systems of procedure in most Council of Europe Member States may be traced back to the Continental European legal tradition.[13] Nevertheless, the ECtHR case-law does not actually promote the adversary or any other type of procedure across Europe.[14] Instead, the Court strives to interpret the provi-

[10] See, for example, ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06), §§ 129–130; ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 108–109.

[11] See ECtHR (GC) *Jasper v. the United Kingdom*, 16.2.2000 (27052/95), § 51; ECtHR (GC) *Öcalan v. Turkey*, 12.5.2005 (46221/99), §§ 140, 146. For more details on the principles of equality of arms and adversarial proceedings, see Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings*, Cambridge 2012, pp. 30–68; Jackson & Summers, *Internationalisation* [fn. 3], pp. 79–95.

[12] See Ambos, 'Der Europäische Gerichtshof für Menschenrechte und die Verfahrensrechte', *ZStW* 115 (2003), 583 (593–594, 607); Jung, 'Neues zum Konfrontationsrecht?', *GA* 2009, 235 (235–236); Renzikowski, 'Das Konfrontationsrecht im Fokus des Anspruchs auf ein faires Verfahren', in: Hiebl *et al*. (eds.), *Festschrift für Volkmar Mehle*, Baden-Baden 2009, pp. 529–530. See also Swart & Young, 'The European Convention on Human Rights and Criminal Justice in the Netherlands and the United Kingdom', in: Fennell *et al.* (eds.), *Criminal Justice in Europe*, Oxford 1995, pp. 71–72, 83–86. See additionally Nijboer, 'Common law tradition in evidence scholarship observed from a continental perspective, *Am. J. Comp. L.* 41 (1993), 299 (311).

[13] See Billis, *Die Rolle des Richters* [fn. 1], pp. 27–62.

[14] See, e.g., ECtHR *Brandstetter v. Austria*, 28.8.1991 (11170/84), § 67; ECtHR (GC) *Öcalan v. Turkey*, 12.5.2005 (46221/99), § 146; ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06), § 130; ECtHR (GC) S*chat-*

sions and rights of art. 6 ECHR in a neutral way, complementing them with procedural guidelines that render their content applicable system-wide in a similar manner.[15] In this context, fairness is not understood as the mandatory adoption of a pure adversarial or party-centered procedural model[16] but primarily as the chance to effectively participate in, and influence the result of, the proceedings,[17] regardless of their individual structural components (especially: whether or not evidentiary hearings are controlled by the parties or conducted in line with the official obligation to search for the material truth).

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schaschwili v. Germany, 15.12.2015 (9154/10), §§ 108–109. See also Ambos, [fn. 12], *ZStW* 115 (2003), 583 (594); Jörg, Field & Brants, 'Are inquisitorial and adversarial systems converging'?, in: Fennell *et al*. (eds.), *Criminal Justice in Europe*, Oxford 1995, p. 56; Renzikowski, (fn. 12), *FS für Mehle*, p. 530; Swart & Young, [fn. 12], in: Fennell *et al*. (eds.), *Criminal Justice*, pp. 84–85 (with further references).

[15] See also Jackson, 'Transnational faces of justice', in: Jackson *et al*. (eds.), *Crime, Procedure and Evidence in a Comparative and International Context*, Oxford/Portland, OR: 2008, pp. 228–229, 231, 233–235. See also Delmas-Marty, 'Toward a European model of the criminal trial', in: Delmas-Marty (ed.), *The Criminal Process and Human Rights*, Dordrecht 1995, pp. 196–198; Gaede, 'Beweisverbote zur Wahrung des fairen Strafverfahrens in der Rechtsprechung des EGMR insbesondere bei verdeckten Ermittlungen', *JR* 2009, 493 (494).

[16] See, e.g., ECtHR *Mirilashvili v. Russia*, 11.12.2008 (6293/04), §§ 224–227. Jackson, [fn. 15], in: Jackson *et al*. (eds.), *Crime*, pp. 229–232; see also Rzepka, *Zur Fairness im deutschen Strafverfahren*, Frankfurt a.M. 2000, p. 85.

[17] See Renzikowski, [fn. 12], *FS für Mehle*, p. 529. According to ECtHR *Stanford v. the United Kingdom*, 23.2.1994 (16757/90), § 26: "Nor is it in dispute that Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6, – 'to defend himself in person', 'to examine or have examined witnesses', and 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court' […]." See further ECtHR *Colozza v. Italy*, 12.2.1985 (9024/80), § 27; ECtHR *Barberà, Messegué and Jabardo v. Spain*, 6.12.1988 (10590/83), § 78; ECtHR *Lagerblom v. Sweden*, 14.1.2003 (26891/95), § 49. See also ECtHR *Granger v. the United Kingdom*, 28.3.1990 (11932/86), § 47.

Specifically, the principle of equality of arms as interpreted by the ECtHR requires that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent […]. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice […]".[18] At the same time, in order to preserve the adversary nature of national (evidentiary) proceedings, "all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument".[19] All parties must be given the opportunity to have knowledge of, and comment on, the observations filed and the evidence introduced by the other party.[20] In this context, the provision of art. 6 (3d) ECHR, according to which the examination of witnesses shall occur, as a rule, in an adversarial (confrontational) manner, is of key importance in terms of

[18] ECtHR *Bulut v. Austria*, 22.2.1996 (17358/90), § 47 (with further references). See ECtHR *Foucher v. France*, 18.3.1997 (22209/93), § 34; ECtHR (GC) *Öcalan v. Turkey*, 12.5.2005 (46221/99), § 140. See further ECtHR *Delcourt v. Belgium*, 17.1.1970 (2689/65), § 28; ECtHR *Borgers v. Belgium*, 30.10.1991 (12005/86), § 24; European Commission of Human Rights *Kaufman v. Belgium*, 9.12.1986 (10938/84), Decisions and Reports 50, 110 (115).

[19] ECtHR *Barberà, Messegué and Jabardo v. Spain*, 6.12.1988 (10590/83), § 78; ECtHR *Kostovski v. the Netherlands*, 20.11.1989 (11454/85), § 41; ECtHR *Windisch v. Austria*, 27.9.1990 (12489/86), § 26; ECtHR *Lüdi v. Switzerland*, 15.6.1992 (12433/86), § 47; ECtHR *Van Mechelen a.o. v. the Netherlands*, 23.4.1997 (21363/93 a.o.), § 51; ECtHR *Krasniki v. the Czech Republic*, 28.2.2006 (51277/99), § 75.

[20] ECtHR *Brandstetter v. Austria*, 28.8.1991 (11170/84 a.o.), § 67: "The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon." See also ECtHR (GC) *Jasper v. the United Kingdom*, 16.2.2000 (27052/95), § 51; ECtHR (GC) *Öcalan v. Turkey*, 12.5.2005 (46221/99), § 146; ECtHR *Matytsina v. Russia*, 27.3.2014 (58428/10), § 151.

the structure of evidentiary proceedings.[21]

However, the right on the part of the defence to take evidence and examine witnesses in a public and adversarial hearing as well as the right to demand the disclosure of all evidence at the pre-trial stages are not absolute. As is usual in criminal proceedings, the judicial weighing of the rights of the defence against other competing interests may be necessary. The balancing of interests and the restriction of defence rights are possible, in particular, in cases where national security and other important public interests or the fundamental rights of third persons (e.g., the witnesses' right to life or rights under art. 8 ECHR) are at stake.[22] According to ECtHR case-law on the restriction of the rights of the defence under art. 6 (1) ECHR, such restrictions may occur only to the extent that they are strictly necessary. Moreover, as the Court has stated on numerous occasions, the right to a fair trial presupposes that any difficulties encountered by the defence through the limitation of its rights must be sufficiently counterbalanced by the procedures followed

[21] See, e.g., ECtHR *Barberà, Messegué and Jabardo v. Spain*, 6.12.1988 (10590/83), § 78. See also Ambos (fn. 12), *ZStW*115 (2003), 583 (594); Jackson, [fn. 15], in: Jackson *et al*. (eds.), *Crime*, pp. 231-232.

[22] See, for example, ECtHR *Unterpertinger v. Austria*, 24.11.1986 (9120/80), esp. §§ 29–31; ECtHR *Kostovski v. the Netherlands*, 20.11.1989 (11454/85), §§ 41, 44. According to ECtHR *Doorson v. the Netherlands*, 26.3.1996 (20524/92), § 70: „It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify." See also ECtHR (GC) *Jasper v. the United Kingdom*, 16.2.2000 (27052/95), §§ 51–52; ECtHR (GC) *Rowe and Davis v. the United Kingdom*, 16.2.2000 (28901/95), §§ 60–62.

by the national judicial authorities.[23]

2. *The specific guarantees under art. 6 (3) ECHR*

EFFECTIVE DEFENCE, DISCLOSURE OF EVIDENCE, AND THE CALLING OF WITNESSES

In addition to the general principles mentioned above, the individual guarantees under art. 6(3) ECHR, explicitly recognized by the Court as specific aspects of the general concept of a fair trial set forth in art. 6 (1) ECHR,[24] may have a direct impact on the design of evidentiary proceedings in national criminal justice systems. Particularly significant in this regard are the directions of the ECtHR case-law on the right to (prepare an) effective defence, the right to disclosure of evidence, the right to obtain the attendance and examination of witnesses, and the right to confrontation.[25]

These are the key guidelines stipulated by the Court regarding the need of the accused to be thoroughly informed in advance about the case and the evidence brought by the prosecution (who, as a rule, bears the burden of proof),[26] the preparation of an effective and active defence strategy in general, and the opportunity for the defendant to call

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[23] ECtHR (GC) *Jasper v. the United Kingdom*, 16.2.2000 (27052/95), § 52. See also ECtHR *Doorson v. the Netherlands*, 26.3.1996 (20524/92), § 72; ECtHR *Van Mechelen a.o. v. the Netherlands*, 23.4.1997 (21363/93 a.o.), §§ 54, 58.

[24] See ECtHR *Van Mechelen a.o. v. the Netherlands*, 23.4.1997 (21363/93 a.o.), § 49; ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), § 100.

[25] For more details see Billis, *Die Rolle des Richters* [fn. 1], pp. 398–403.

[26] See ECtHR *Barberà, Messegué and Jabardo v. Spain*, 6.12.1988 (10590/83), § 77: "Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him." See also ECtHR (GC) *Allen v. the United Kingdom*, 12.7.2013 (25424/09), § 93. *Jackson/Summers*, Internationalisation [fn. 3], pp. 217–228.

witnesses on his/her behalf:

– On the right of the defence to be informed:
"[… In] criminal matters the provision of full, detailed information concerning the charges against a defendant […] is an essential prerequisite for ensuring that the proceedings are fair. [… The] right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence."[27]
– On the right to be present and the right to an adequate defence:
"[… In] the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial […], and that the duty to guarantee the right of a criminal defendant to be present in the courtroom […] ranks as one of the essential requirements of Article 6 […]. It is also of crucial importance for the fairness of the criminal justice system that the accused be adequately defended […]."[28]
– On the right to an effective participation:
"The right of an accused under Article 6 to effective participation in his or her criminal trial generally includes, inter alia, not only the right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained, in particular, in sub-paragraph (c) of paragraph 3 of Article 6 – 'to defend himself in person' […]. 'Effective participation' in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. The defendant should be able, inter alia, to explain to his own lawyer his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put

[27] ECtHR (GC) *Pélissier and Sassi v. France*, 25.3.1999 (25444/94), §§ 52, 54.

[28] ECtHR *Sinichkin v. Russia*, 8.4.2010 (20508/03), §§ 30, 34 (with further references).

forward in his defence […]. The circumstances of a case may require the Contracting States to take positive measures in order to enable the applicant to participate effectively in the proceedings […]."[29]

– On legal assistance and the fundamental aspects of a person's defence:
"Indeed, the fairness of proceedings requires that an accused be able to obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organization 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."[30]
– On the disclosure of evidence:
"The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party […]. In addition 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, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. Nonetheless, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6

[29] ECtHR *Liebreich v. Germany*, 8.1.2008 (30443/03) (with further references).
[30] ECtHR *Dayanan v. Turkey*, 13.10.2009 (7377/03), § 32.

§ 1. Furthermore, 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 […]."[31]

– On the right of the defence to co-determine the scope of evidence by calling witnesses (and experts[32]):
"[… As] a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce. More specifically, Article 6 § 3 (d) leaves it to them, again as a general rule, to assess whether it is appropriate to call witnesses, in the 'autonomous' sense given to that word in the Convention system; it does not require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions', is a full 'equality of arms' in the matter. The concept of 'equality of arms' does not, however, exhaust the content of paragraph 3 (d) of Article 6, nor that of paragraph 1 of which this phrase represents one application among many others […]. The

[31] ECtHR *Edwards and Lewis v. the United Kingdom*, 22.7.2003 (39647/98, 40461/98), §§ 52–53. See also ECtHR (GC) *Jasper v. the United Kingdom*, 16.2.2000 (27052/95), §§ 50–53; ECtHR (GC) *Rowe and Davis v. the United Kingdom*, 16.2.2000 (28901/95), §§ 59–62 (with further references); ECtHR *Cevat Soysal v. Turkey*, 23.9.2014 (17362/03), §§ 64–65.

[32] On expert evidence see ECtHR *Matytsina v. Russia*, 27.3.2014 (58428/10), §§ 167–169 (with further references): "[…] Subject to some exceptions, the general rule is that the domestic judge has a wide discretion in choosing amongst conflicting expert opinions and picking one which he or she deems consistent and credible. However, the rules on admissibility of evidence may sometimes run counter to the principles of equality of arms and adversarial proceedings, or affect the fairness of the proceedings otherwise […]. In the context of expert evidence, the rules on its admissibility must not deprive the defence of the opportunity to challenge it effectively, in particular by introducing or obtaining alternative opinions and reports. In certain circumstances the refusal to allow an alternative expert examination of material evidence may be regarded as a breach of Article 6 § 1 […]." See also Decaigny, 'Inquisitorial and adversarial expert examinations in the case law of the European Court of Human Rights, *NJECL* 2014, 149 (154–166).

> Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair […]."[33]

THE RIGHT TO CONFRONTATION

The right of the accused to examine or have examined the witnesses[34] against him/her gives rise to a series of complex problems for criminal law theory and practice.[35] The ECtHR has found violations of art. 6 (3d) ECHR mainly in scenarios involving "anonymous witnesses" (e.g., undercover agents or informers), "absent witnesses" (e.g., in case of death, disappearance, or refusal to appear), or witnesses who

[33] ECtHR *Solakov v. the Former Yugoslav Republic of Macedonia*, 31.10.2001 (47023/99), § 57. See also ECtHR *Engel a.o. v. the Netherlands*, 8.6.1976 (5100/71 a.o.), § 91; ECtHR *Barberà, Messegué and Jabardo v. Spain*, 6.12.1988 (10590/83), § 78; ECtHR *Bricmont v. Belgium*, 7.7.1989 (10857/84), § 89; ECtHR *Vidal v. Belgium*, 22.4.1992 (12351/86), § 33 (with further references).

[34] On the autonomous meaning of the term "witnesses against him" in the Convention system and on hearsay evidence, see European Commission of Human Rights *Unterpertinger v. Austria*, Rep. v. 11.10.1984 (9120/80), § 73; ECtHR *Gossa v. Poland*, 9.1.2007 (47986/99), § 56. See also ECtHR *Kostovski v. the Netherlands*, 20.11.1989 (11454/85), § 40–44; ECtHR *Delta v. France*, 19.12.1990 (11444/85), § 34; ECtHR *Isgrò v. Italy*, 19.2.1991 (11339/85), § 33; ECtHR *Asch v. Austria*, 26.4.1991 (12398/86), § 25; ECtHR *Artnerv. Austria*, 28.8.1992 (13161/87), § 19; ECtHR *Pullar v. the United Kingdom*, 10.6.1996 (22399/93), § 45; ECtHR *S.N. v. Sweden*, 2.7.2002 (34209/96), § 45; ECtHR *Trofimov v. Russia*, 4.12.2008 (1111/02), § 34. Also, ECtHR *Unterpertinger v. Austria*, 24.11.1986 (9120/80), § 31; ECtHR *Sharkunov and Mezentsev v. Russia*, 10.6.2010 (75330/01), § 111; ECtHR *Mirilashvili v. Russia*, 11.12.2008 (6293/04), §§ 158–160; ECtHR *Windisch v. Austria*, 27.9.1990 (12489/86), §§ 23–31. On experts, see ECtHR *Mirilashvili v. Russia*, 11.12.2008 (6293/04), § 158; European Commission of Human Rights *Bönisch v. Austria*, Rep. v. 12.3.1984 (8658/79), §§ 85–91. On co-defendants, see ECtHR *Lucà v. Italy*, 27.2.2001 (33354/96), §§ 22, 30, 40–44; ECtHR *Kaste and Mathisen v. Norway*, 9.11.2006 (18885/04, 21166/04), §§ 50–55; ECtHR *Gossa v. Poland*, 9.1.2007 (47986/99), § 54–56.

[35] For details on the various problems and aspects of the right, see Billis, *Die Rolle des Richters* [fn. 1], pp. 403–409 (with further references).

are both anonymous and absent.[36] For purposes of the present study, the focus is on the following material aspects of the right to confrontation as interpreted by the Court:

According to ECtHR case-law, art. 6 (1 and 3d) ECHR typically requires that the accused be given *adequate and proper opportunity to question and challenge* (the reliability and credibility of)[37] a witness against him/her (especially the one providing direct evidence), either when he/she makes his/her statements or at a later stage in the national proceedings.[38] In a recent judgment, the Court stated that even where the defence was able to cross-examine a witness at the police investigation stage, this cannot replace cross-examination at trial: "It is an important element of fair criminal proceedings that the accused is confronted with the witness in the presence of the judge who ultimately decides the case in order for that judge to hear the witness directly, to observe his demean our and to form an opinion about his credibility […]".[39] Overall, the Convention States are obliged, according to the Court, to take positive steps to enable the accused to examine or have examined witnesses against him or her; however, the impossibility of securing the appearance of a witness at trial does not in itself make it necessary

[36] See ECtHR *Al-Khawaja and Tahery v. the United Kingdom*, 20.1.2009 (26766/05, 22228/06), § 35 (with further references).

[37] See ECtHR *Windisch v. Austria*, 27.9.1990 (12489/86), § 28. See also ECtHR *Saïdi v. France*, 20.9.1993 (14647/89), § 41; ECtHR *Delta v. France*, 19.12.1990 (11444/85), § 37; ECtHR *Van Mechelen a.o. v. the Netherlands*, 23.4.1997 (21363/93 a.o.), §§ 59, 62. See also Friedman, 'The confrontation right across the systemic divide', in: Jackson *et al*. (eds.), *Crime, Procedure and Evidence in a Comparative and International Context*, Oxford/Portland, OR: 2008, p. 268.

[38] ECtHR *Lüdi v. Switzerland*, 15.6.1992 (12433/86), § 47. See also ECtHR *Kostovski v. the Netherlands*, 20.11.1989 (11454/85), § 41; ECtHR *Windisch v. Austria*, 27.9.1990 (12489/86), § 26; ECtHR *Saïdi v. France*, 20.9.1993 (14647/89), § 43; ECtHR *Van Mechelen a.o. v. the Netherlands*, 23.4.1997 (21363/93 a.o.), § 51; ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06), § 118; ECtHR *Matytsina v. Russia*, 27.3.2014 (58428/10), § 152; ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), § 105.

[39] ECtHR *Matytsina v. Russia*, 27.3.2014 (58428/10), § 153.

to halt the prosecution, provided there was no negligence on the part of the national authorities.[40]

In addition to the above directions, the ECtHR has applied, since 2001, the so-called *Lucà* test in order to ascertain whether or not the national criminal proceedings as a whole (including the way in which evidence was taken) were fair and, specifically, to examine potential infringements of the right to confrontation. The standards for this test are as follows:[41]

- There may be exceptions to the principle that evidence must be produced at a public hearing, in the presence of the accused, and with a view to adversarial argument, however, such exceptions must not infringe the rights of the defence.
- During trial it may become necessary, in certain circumstances, to refer to depositions taken during the investigative stage. If the accused has been given an adequate and proper opportunity to challenge such depositions, either when made or at a later stage, their admission in evidence will not in itself contravene art. 6 (1 and 3d) ECHR.
- The rights of the defence are restricted to an extent that is incompatible with the guarantees provided by art. 6 ECHR if the conviction is based *solely or to a decisive*[42] *degree* on depositions of a person

[40] See ECtHR *Khametshin v. Russia*, 4.3.2010 (18487/03), §§ 31–32 (with further references); ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 107, 111–113, 119–122.

[41] See ECtHR *Lucà v. Italy*, 27.2.2001 (33354/96), §§ 38–40 (with further references). See also ECtHR *Gossa v. Poland*, 9.1.2007 (47986/99), §§ 54–55; ECtHR *Babkin v. Russia*, 8.1.2009 (14899/04); ECtHR *Taxquet v. Belgium*, 13.1.2009 (926/05), § 58; ECtHR *Al-Khawaja and Tahery v. the United Kingdom*, 20.1.2009 (26766/05, 22228/06), §§ 36–37 and ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06), esp. §§ 118–147; ECtHR *Mika v. Sweden*, 27.1.2009 (31243/06), § 35; ECtHR *Caka v. Albania*, 8.12.2009 (44023/02), § 102; ECtHR *Sharkunov and Mezentsev v. Russia*, 10.6.2010 (75330/01), §§ 113–114.

[42] The Court has defined the term "decisive" in ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06), § 131 as follows: "[The] word 'decisive' should be narrowly understood as indicating evidence of such sig-

whom the accused had no opportunity to examine or have examined, whether during the investigation or at trial.

3. *The overall fairness of the proceedings*

The ECtHR has not always applied the *Lucà* test and the other guidelines for safeguarding the adversarial way of evidence-taking in a strict, consistent, and systematic manner. In fact, while the Court still refers to the aforementioned aspects of a fair evidentiary process, it promotes, at the same time, at least in its most recent judgments, the overall examination of the fairness of the proceedings as the ultimate method for establishing violations of art. 6 ECHR.[43] However, the extensive use of this method in the jurisprudence of the ECtHR may lead at national level to inconsistent, limiting, or even opportunistic interpretations of the core content of the guarantees prescribed in art. 6 (3) ECHR.[44] By predominantly applying the overall examination method in order to answer procedural and evidentiary questions in the individual cases pending before it, the ECtHR makes it more difficult, in theory and in practice, to identify the common structural elements that need to be uniformly applied in the evidentiary proceedings of the Member States based on the interpretation of the particular rights of art. 6 (3) ECHR. It gets even more complicated in view of the fact that the Court's opinion on the exact scope and rank of the overall examination as one of the methods for testing Convention infringements has not been consistent throughout, as evidenced in the following juxtapo-

nificance or importance as is likely to be determinative of the outcome of the case. Where the untested evidence of a witness is supported by other corroborative evidence, the assessment of whether it is decisive will depend on the strength of the supportive evidence; the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive." See also ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 123–124.

[43] See, e.g., the recent judgment ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 100–101.

[44] See Billis, *Die Rolle des Richters* [fn. 1], pp. 409–413.

sition of the two judgments on the *Al-Khawaja and Tahery*-case.[45]

As noted in the above analysis of the case-law on the specific guarantees of art. 6 (3) ECHR, and especially on the right to confrontation, the ECtHR does not consider it its mission to regulate the admissibility and assessment of evidence or to rule on whether witness statements were properly admitted in evidence, but, rather, emphasizes the importance of ascertaining whether or not the national criminal proceedings were fair as a whole, including the way in which evidence was taken.[46] In this context, the right of the defence to adversarial evidentiary proceedings and direct examination of witnesses in a public hearing has to be considered, according to the ECtHR, in conjunction with other fair trial aspects, whereas any restriction due to competing interests may be compensated, depending on the circumstances of each case, through the overall fairness of the entire national proceedings. However, while the Court did provide a number of examples (e.g., witness examination by video conferencing or the use of recorded evidence), it has not yet clearly and systematically established all the counterbalancing factors and procedural safeguards[47] sufficient for such compensation.[48] In compliance with the role of an international

[45] ECtHR *Al-Khawaja and Tahery v. the United Kingdom*, 20.1.2009 (26766/05, 22228/06) and ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06). For a more recent attempt to systematically analyse the respective problems, see ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 100–131.

[46] ECtHR *Doorson v. the Netherlands*, 26.3.1996 (20524/92), § 67. See also ECtHR *Kostovski v. the Netherlands*, 20.11.1989 (11454/85), § 39; ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), § 101.

[47] See ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06), §§ 118, 141, 144, 147.

[48] See, e.g., ECtHR *Kostovski v. the Netherlands*, 20.11.1989 (11454/85), esp. §§ 38–39, 41–45; ECtHR *Windisch v. Austria*, 27.9.1990 (12489/86), esp. §§ 25–28, 30–32; ECtHR *Doorson v. the Netherlands*, 26.3.1996 (20524/92), esp. §§ 68–69, 72–80, 83. See also ECtHR *Unterpertinger v. Austria*, 24.11.1986 (9120/80), esp. §§ 29–31. For a recent overview, see ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 125–131.

human rights court, the ECtHR first identifies in each case, *ex post* and *in concreto*, the circumstances with a potentially negative impact on the fairness of the national proceedings due to a restriction or violation of the fair trial guarantees of art. 6 (1 and 3) ECHR; in a second step, the Court continues to examine the overall fairness by looking at the national proceedings as a whole and by taking into account the existence of procedural guarantees and counterbalancing factors securing a fair trial.[49]

Despite this basic method for establishing a Convention infringement, the ECtHR expressly stated in its first judgment (2009) on the *Al-Khawaja and Tahery*-case that, as with the other elements of art. 6 (3) ECHR, the right to confrontation is a minimum right of the accused. As minimum rights, the provisions of art. 6 (3) ECHR constitute *express guarantees* and cannot be read as simple illustrations of matters to be taken into account when considering whether or not a fair trial has been held. According to the same judgment, in the context of the examination of the overall fairness, the general right to a fair trial guaranteed by art. 6 (1) ECHR requires the Court to ascertain whether the proceedings were fair as a whole *even* in cases where the minimum rights of art. 6 (3) ECHR *have been respected*.[50]

Nevertheless, in the second judgment (2011) on the *Al-Khawaja and Tahery*-case, the Grand Chamber of the ECtHR not only ruled to the contrary on some of the Convention infringement claims but also adopted a different (wider) approach regarding the scope and effect of the overall examination method. This approach allows for further restrictions and disregard of the minimum standards character of the rights enshrined in art. 6 (3) ECHR as well as for the imposition, at na-

[49] See ECtHR *Doorson v. the Netherlands*, 26.3.1996 (20524/92), § 83; ECtHR *Mirilashvili v. Russia*, 11.12.2008 (6293/04), §§ 164–166 [§ 166: "In sum, in order to determine whether there has been a breach of Article 6 §§ 1 and 3, the Court may have to examine separately each limb of the applicant's complaint and then make an overall assessment"].

[50] See ECtHR *Al-Khawaja and Tahery v. the United Kingdom*, 20.1.2009 (26766/05, 22228/06), § 34.

tional level, of solutions based solely on the final assessment of the overall reliability of evidence.[51] This new approach ("*Al-Khawaja* test")[52] may be summarized as follows:[53]

– While the Court reiterated the meaning and importance of the *Lucà* test for preserving the minimum core of the right to confrontation, it concluded that the *sole or decisive* rule of this test is not an absolute one whose violation automatically results in an infringement of art. 6 (1) ECHR.
– Instead, the focus must be on the examination of the overall fairness of proceedings, to be carried out "by having regard to such factors as the way in which statutory safeguards have been applied, the extent to which procedural opportunities were afforded to the defence to counter handicaps that it laboured under and the manner in which the proceedings as a whole have been conducted by the trial judge" (§§ 143–144).
– In this context, it would not be correct, in the opinion of the Grand Chamber, to apply the *sole or decisive* rule in an inflexible manner or to ignore the specificities of the national legal systems and, in particular, their rules of evidence (in this case: the English legal system and its rules on hearsay evidence).[54] To do so would transform the *sole or decisive* rule "into a blunt and indiscriminate instrument that

[51] See ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06), esp. §§ 89–90, 118–119, 127–128, 139–141, 142–144, 146–147, 155–158, 165; ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 114–118, 123–131.

[52] See ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 110–118.

[53] See ECtHR (GC) *Al-Khawaja and Tahery v. the United Kingdom*, 15.12.2011 (26766/05, 22228/06), §§ 143–144, 146–147. See also the recent judgments ECtHR *Blokhin v. Russia*, 14.11.2013 (47152/06), §§ 162–163; ECtHR *Rosin v. Estonia*, 19.12.2013 (26540/08), §§ 50–53; ECtHR *Lučić v. Croatia*, 27.2.2014 (5699/11), §§ 71–73; ECtHR *Matytsina v. Russia*, 27.3.2014 (58428/10), § 152; ECtHR *Cevat Soysal v. Turkey*, 23.9.2014 (17362/03), §§ 74–75; ECtHR S*chatschaschwili v. Germany*, 17.4.2014 (9154/10), §§ 62–66; ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), §§ 100–131 (with further references).

[54] See also ECtHR (GC) S*chatschaschwili v. Germany*, 15.12.2015 (9154/10), § 109.

runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice" (§ 146).

– In conclusion, the Court stated that the admission of unconfronted evidence, as the basis for conviction, either solely or to a decisive degree, will not automatically result in a breach of art. 6 (1) ECHR. However, in cases where a conviction is based solely or decisively on the evidence of witnesses the accused had no opportunity to examine or have examined, the ECtHR must subject the national proceedings to the most thorough scrutiny. "Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales […] and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case" (§ 147).

III. Concluding Remarks

The above analysis has demonstrated that, in view of the international legal obligations of the Member States of the Council of Europe, the identification and systematic consideration of autonomous guiding principles in the case-law of the ECtHR relating to the equality of arms, the adversarial character of a fair trial, and the other minimum standards and participation rights of art. 6 (1, 3) ECHR may eventually facilitate the harmonization of specific aspects of national evidentiary proceedings.[55] However, the limited and very specific competences of

[55] On the Convention system in terms of the models of procedure and evidence, see Billis, *Die Rolle des Richters* [fn. 1], pp. 413-417.

the Court, the "flexible" methods it applies for examining possible breaches of the Convention, along with its fragmentary, sometimes inconsistent, and not altogether clear jurisprudence that is largely based on the individual circumstances of each case, do not make feasible the provision of a comprehensive archetype or neutral model for rebalancing the structural shortcomings and excesses of the national systems of criminal procedure.

Major disincentives need to be factored in when attempting to interpret and apply the provisions of the ECHR and the guidelines of the ECtHR on fair trial as a coherent and uniform international solution to basic structural problems in domestic criminal and evidentiary proceedings. First, although the ECtHR often adopts a comparative approach in its case-law when dealing with procedural trends, structural particularities, and basic criminal law principles in more than one legal order and family, its role is neither that of an international legislative organ nor of an institute or forum for conducting large-scale comparative research or planning and transnationally promoting reform policies. On the contrary, recent political developments within the Council of Europe, as reflected, in particular, in Protocol No. 15 that will amend the ECHR as soon as it enters into force, speak in favour of strengthening the subsidiary nature of the Convention system and further limiting the Court's scope of action based on the margin-of-appreciation doctrine.[56] Moreover, the provisions of art. 6 (1, 3) ECHR, as interpreted by the ECtHR, refer to subjective rights, which the accused may choose not to exercise at any time,[57] and not to the objective purpose and external form of the criminal trial or the role allocation within the national evidentiary proceedings. The Court's few and cautious references to questions of evidence should not be understood as independent principles of procedure and should only be interpreted in accor-

[56] See art. 1 Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (24.6.2013, CETS No. 213) and its Explanatory Report (§§ 7-9).

[57] See Grabenwarter, *European Convention on Human Rights – Commentary*, Munich 2014, art. 6 n. 135, 141.

dance with the content of the subjective rights of art. 6 ECHR. Besides, as already noted, the ECtHR does not promote a specific type of procedure for all Convention States, even if the concepts used in the relevant judgments sometimes echo common law terminology. In its case-law, the Court considers and safeguards procedural fairness as a universal and stand-alone claim, irrespective of any legal tradition or model of procedure. In contrast, the general structure of criminal proceedings remains, for the time being, a matter to be decided by the national legal orders.