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Zajac, Kacper

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KACPER ZAJAC* 

THE ADMISSIBILITY OF TAINTED EVIDENCE IN CRIMINAL PROCEEDINGS AS A RULE OF LAW ISSUE UNDER THE ECHR

ABSTRACT. This Article examines the attitude of the ECtHR towards the principle of the Rule of Law in the context of criminal proceedings. The ECtHR plays an especially important role as the final arbiter of the Rule of Law standards in Europe and has deemed itself a great defender of the Rule of Law in the face of the recent backsliding in Poland and Hungary. However, despite much emphasis put on the Rule of Law, the ECtHR has consistently refused to hold domestic criminal courts accountable for tolerating the admission of evidence obtained illegally in spite of a close link between the concept of the Rule of Law and the use of evidence obtained in violation of law. This approach has been determined, to a large extent, by the Fourth Instance doctrine. However, the reliance on the Fourth Instance doctrine in this regard appears to be deficient as the ECtHR has already created a limited automatic exclusionary rule for evidence obtained by torture; the Court has already recognised some exceptions to the Fourth Instance doctrine in relation to various aspects of Article 6; finally, there have always been particular Judges advocating a stricter approach to the illegally-obtained evidence under Article 6.

I INTRODUCTION

It is often said that Europe is struggling with the Rule of Law backsliding. On the one hand, countries such as Poland and Hungary are being accused of undermining the Rule of Law, especially in the

* Kacper Zajac, PHD, Wageningen University, Law Group, Wageningen, The Netherlands. E-mail: kacperzajac93@gmail.com. European Court of Human Rights, Former Trainee to President of the ECtHR, Judge Bonjak, Strasbourg, France

The Author was a Legal Trainee to President of the ECtHR, Judge Bošnjak in 2022–23. The views expressed herein belong to the Author and are not to be attributed to the ECtHR or any of its Judges or other staff members. The Author has no financial interest to disclose.

context of judicial independence.¹ On the other hand, institutions such as the European Court of Human Rights (hereinafter the “*ECtHR*” / “*Court*”) and the European Commission attempt to push against the said backsliding. In that struggle, the ECtHR plays an especially important role as the final arbiter of the Rule of Law standards. Indeed, called upon, the ECtHR has positioned itself as a great defender of the Rule of Law in Europe; the Court has not hesitated to find violations of the European Convention on Human Rights (hereinafter the “*ECHR*” / “*Convention*”) and its (former) President, Judge Spano, was very vocal outside the courtroom on the importance of the Rule of Law.²

Nevertheless, it appears that, inasmuch as the ECtHR is ready to defend the Rule of Law in general, its understanding of that concept is relatively narrow. As such, whereas Article 6 of the ECHR has been effectively used to vindicate concepts such as judicial independence, the Court has consistently refused to uphold other elements of the Rule of Law in the context of criminal procedure, namely the right to exclude illegally-obtained evidence. The purpose of this Article is to explore the connection between the concept of the Rule of Law and its application in the context of criminal proceedings under Article 6 of the ECHR.

This Article argues that despite its seemingly bold defence of the Rule of Law, the ECtHR is missing an important area, admissibility of evidence, without which the concept is simply incomplete. At the same time, the Article refutes the traditional explanation given by the Court as to its inaction in this area as unconvincing. In doing so, the Article examines the connection between the ECHR and the Rule of Law, both inside and outside the courtroom, as well as the connection between the exclusionary rules and the concept of the Rule of Law as such.

The issues of the Rule of Law, on the one hand, and the admissibility of unlawfully-obtained evidence under the ECHR, on the other, have both been thoroughly explored. However, the value of the

¹ E.g. Aida Sanchez Alonso, “Poland & Hungary in European Commission’s rule of law spotlight again”, Euronews, <https://www.euronews.com/my-europe/2022/07/13/poland-hungary-in-european-commissions-rule-of-law-spotlight-again> [last retrieved 21/10/22].

² Robert Spano, ‘The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law.’ (2018) 18 Human Rights Law Review 473; Robert Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.’ (2021) European Law Journal 27, 211–227.

contribution brought by this Article lies in the fact that, so far, no connection has been made between the two; instead, they have generally been considered separately. On the one hand, the ECtHR has taken a bold stance on the former; on the other hand, it has failed to do the same on the latter. While considered separately, the difference in the approach to the two issues appears somehow understandable; however, it is submitted that, once taken together, the strict requirements pertaining to the Rule of Law which the ECtHR imposes on member states across various aspects of public life, including on the subject of judicial independence, appear incomplete without extending those requirements to evidence admissibility in criminal proceedings.

The paper relies on existing literature in the area of the Rule of Law concept in the human rights context,³ the principle of the Rule of Law under the ECHR⁴ and the issue of admissibility of evidence under Article 6 of the ECHR specifically.⁵ Since all these areas have

³ Hock Lai Ho, 'The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence' (2016) 10 *Criminal Law and Philosophy* 109; Randall Peerenboom, 'Human Rights and Rule of Law: What's the Relationship' (2004) 36 *Geo. J. Int'l L.* 809; Mortimer Sellers and Tadeusz Tomaszewski, *The Rule of Law in Comparative Perspective*, vol 3 (Springer Science & Business Media 2010); Scott E Sundby, 'Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)' (2012) 10 *Ohio St. J. Crim. L.* 393; Jenia Iontcheva Turner, 'The Exclusionary Rule as a Symbol of the Rule of Law' (2014) 67 *SMUL Rev.* 821; Clair Apodaca, 'The Rule of Law and Human Rights' (2003) 87 *Judicature* 292; Berta Esperanza Hernandez-Truyol, 'The Rule of Law and Human Rights' (2004) 16 *Fla. J. Int'l L.* 167; Lord Bingham, 'The Rule of Law' (2007) 66 *The Cambridge Law Journal* 67.

⁴ Council of Europe Committee of Ministers, 'The Council of Europe and the Rule of Law' CM(2008)170; Venice Commission, 'Report on the Rule of Law' (2011) 86th plenary session, Study No. 512 / 2009 CDL-AD(2011)003rev; Venice Commission, 'The Rule of Law Checklist' (2016) 106th Plenary Session; Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.' (n 2); Jens Meyer-Ladewig, 'The Rule of Law in the Case Law of the Strasbourg Court' [2012] *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action* 233.

⁵ Pavlo Pushkar, 'The Right to a Fair Trial and Use of Unlawfully Obtained Evidence and Guilty Pleas in the Case-Law of the European Court of Human Rights' (2010) 2 *Const. L. Rev.* 38; Andreas Samartzis, 'Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the European Convention on Human Rights' (2021) 21 *Human Rights Law Review* 409; Marc Thommen and Mojan Samadi, 'The Bigger the Crime, the Smaller the Chance of a Fair Trial?: Evidence Exclusion in Serious Crime Cases Under Swiss, Dutch and European Human Rights Law' (2016) 24 *European journal of crime, criminal law*

already been thoroughly explored in scholarship, a choice has been made to use such secondary sources extensively to identify relevant case law. However, once the Article moves to discuss alternative approaches adopted in minority opinions of recent judgments, it shifts partly from secondary sources to the HUDOC database⁶ where case law containing dissenting opinions on the issue of evidence admissibility was identified using appropriate filters.

At the end, it should be noted that this Article is primarily concerned with the exclusion of real evidence;⁷ other types of exclusionary rules might be mentioned, but remain outside the scope of this paper as such.⁸ Real evidence is simply physical items such as fingerprints, blood and DNA samples, weapon, narcotics, footage *etc.*; this should be contrasted with testimonial evidence in the form of witness statements.⁹ The admissibility of real evidence is crucial as this type of evidence usually carries more weight compared to other types¹⁰ and, therefore, its admission is likely to have a considerable impact on the outcome of the proceedings. Yet, as things stand now under Article 6 of the ECHR, real evidence obtained unlawfully might be admitted in criminal proceedings in compliance with the Convention.

When it comes to real evidence obtained unlawfully, this illegality could be located at several levels. Firstly, there is evidence obtained in

Footnote 5 continued

and criminal justice 65; European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights – Right to a Fair Trial (Criminal Limb)* (Council of Europe Strasbourg 2022); Wojciech Jasiński, ‘Admissibility of Evidence Obtained by Torture and Inhuman or Degrading Treatment. Does the European Court of Human Rights Offer a Coherent and Convincing Approach?’ (2021) 29 *European Journal of Crime, Criminal Law and Criminal Justice* 127; Dovydas Vitkauskas, *Protecting the Right to a Fair Trial under the European Convention on Human Rights: A Handbook for Legal Practitioners* (Council of Europe 2017).

⁶ HUDOC, [https://hudoc.echr.coe.int/#{%22documentcollectionid2%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\]}](https://hudoc.echr.coe.int/#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}) [last retrieved 18/09/2024].

⁷ Equivalent of the exclusionary rule developed under the 4th Amendment to the US Constitution.

⁸ For more, see F Pınar Ölçer, ‘The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights’, *Exclusionary Rules in Comparative Law* (Springer 2013) in Stephen C Thaman, *Exclusionary Rules in Comparative Law*, vol 20 (Springer Science & Business Media 2012) 380–81.

⁹ Findlaw, <https://www.findlaw.com/criminal/criminal-procedure/real-and-demonstrative-evidence.html> [last retrieved 18/09/2024].

¹⁰ *ibid.*

compliance with domestic law but in violation of the ECHR rights, such as those to privacy¹¹ or bodily integrity;¹² secondly evidence might be obtained in violation of domestic law (which would also make it usually in breach of the ECHR at the same time); thirdly, such evidence might be procured in general compliance with law but in ignorance of rather technical procedural rules. At the same time, the levels on which the illegality takes place should not be confused with the question of good or bad faith on the part of those who have perpetrated it. Evidence could be obtained unlawfully, even in violation of the Convention, yet in good faith, often without even being aware that the procurement is illegal for one reason or another; on the other hand, some evidence, even though seemingly obtained with only a minor breach of protocol, could be procured in bad faith. Regardless, the purpose of this Article is not to propose a fully-developed exclusion rule with specific regulations pertaining to various forms of unlawfulness in the procurement of evidence, but rather to emphasise the failure of the ECtHR to recognise a direct relevance of the admissibility of unlawfully-obtained evidence to the question of the Rule of Law.

II RULE OF LAW, HUMAN RIGHTS & CRIMINAL PROCEEDINGS

The idea of the Rule of Law dates back to the antiquity and its renewed understanding by the thinkers of the Enlightenment.¹³ Since the Enlightenment, the concept of the Rule of Law evolved slightly differently depending on the jurisdiction; on the one hand, the continental German *Rechtsstaat* and French *État de droit*, developed by Kant¹⁴ and Montesquieu¹⁵ and entrenched during the French Revolution¹⁶ (and spread during the Napoleonic era), tend to emphasise the constitutional design of public bodies; on the other hand, the Anglo-American Rule of Law, dating back to the Magna Carta¹⁷ and the Bill

¹¹ ECHR, Article 8.

¹² *ibid*, Article 3.

¹³ Peerenboom (n 3) 810.

¹⁴ Kant, I. *Metaphysical elements of justice: Part I of the metaphysics of morals*. Hackett Publishing (1999/1797).

¹⁵ See De Montesquieu, Charles. *Montesquieu: The spirit of the laws*. Cambridge University Press, 1989.

¹⁶ Declaration of the Rights of Man of 1789.

¹⁷ Magna Carta of 1215.

of Rights Act,¹⁸ and developed by A. V. Dicey,¹⁹ tends to prioritise the operation of the judicial system.²⁰

Accordingly, there is no one settled definition of the Rule of Law concept; nevertheless, historically,²¹ it has been described as comprising a number of elements – the law must be applicable generally and prospectively; public bodies must operate within the law and legal disputes must be adjudicated by an independent judicial system.²² Subsequently, additional elements have been added, including that government agents must not enjoy any wide discretion; that laws must be readily accessible and comprehensible; and that civil-dispute resolution mechanisms must be effective.²³ It is not the purpose of this paper to fully and definitely explore the contents of the Rule of Law concept,²⁴ but rather to illustrate its overall scope of application.

Accordingly, there are hardly any aspects of the operation of the Government which could escape the influence of the Rule of Law. The Rule of Law is also undeniably applicable in a general criminal context where it determines that no person could be subject to criminal sanction unless in accordance with law.²⁵ This means that, under the Rule of Law, police might enforce criminal sanctions only in accordance with existing legal regulations while judges might cooperate in the process only insofar as the attempt to enforce criminal sanctions by the police remains in accordance with law.²⁶ This also applies where judges act on evidence gathered by the police

¹⁸ Bill of Rights Act of 1689.

¹⁹ Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan 1885).

²⁰ Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 *The American Journal of Comparative Law* 331, 334–36.

²¹ See Locke, John. *Locke: Two treatises of government* (Cambridge University Press, 1967); Rousseau, Jean-Jacques. *Rousseau: The Social Contract and other later political writings* (Cambridge University Press, 2018); De Montesquieu (n15).

²² Ahmed A White, ‘Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society’ (2005) 37 *Ariz. St. LJ* 759, 764.

²³ Bingham (n 3) 69–74, 77.

²⁴ For more, see Tom Bingham, *The Rule of Law* (Penguin UK 2011); Joseph Raz, ‘The Rule of Law and Its Virtue’, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 213.

²⁵ Ho (n 3) 121.

²⁶ *ibid* 122.

in violation of the law.²⁷ In addition, the principle of the Rule of Law also has implications for judicial procedures.²⁸

Arguably, one of the most important elements of criminal procedure is the issue of evidence admissibility and, more specifically, exclusionary rules. So far, various theories have been put forward justifying the exclusion of illegally-obtained evidence, including the deterrence of police misconduct,²⁹ “disrepute”³⁰ or “detriment”³¹ to the administration of justice or “damage”³² to the integrity of the criminal proceedings.³³ Beyond these, the exclusion of illegally-obtained evidence is argued to be “a promising method of reducing human rights violations”.³⁴ However, exclusionary rules have also been linked to the concept of the Rule of Law. For instance, in Europe, according to the Venice Commission, the concept of the Rule of Law encompasses the guarantee of an independent and impartial judiciary as well as fair trial guarantees, including, *inter alia*, the exclusion of illegally-obtained evidence (in addition to the accessibility of courts, presumption of innocence, equality of arms, speedy trial as well as the rights to be heard, reasoned judgments, public hearings and appeal).³⁵ Furthermore, in the US, where the exclusionary rule originated, it has been connected to the concept of the Rule of Law by the US Supreme Court on the grounds that individuals enforcing the law must also be subject to it,³⁶ courts must guard against lawlessness in order to maintain their integrity,³⁷ government agents must be held

²⁷ *ibid.*

²⁸ Sergii M Smokov and others, ‘Rule of Law Principle as a Principle of Criminal Procedure (on Materials of the European Court of Human Rights)’ (2022) 25 J. Legal Ethical & Regul. Issues 1, 1.

²⁹ *Illinois v. Krull*, 480 U.S. 340 (1987) at 347 citing *United States v. Calandra*, 414 U.S. 338 (1974) at 347.

³⁰ Canadian Charter of Rights and Freedoms, s24(2).

³¹ Constitution of the Republic of South Africa, s35(5).

³² Rome Statute, Article 69(7).

³³ *Ho* (n 3) 112.

³⁴ Sabine Gless and Thomas Richter, *Do Exclusionary Rules Ensure a Fair Trial?: A Comparative Perspective on Evidentiary Rules* (Springer Nature 2019) 2.

³⁵ Venice Commission, ‘The Rule of Law Checklist’ (n 4) 33–45.

³⁶ *Olmstead v. United States*, 277 U.S. 438 (1928) at 485, Brandeis J. dissenting.

³⁷ *United States v Calandra* (n 29), Brennan J. dissenting, quoting *Elkins v United States* 364 US 206 (1960) at 223.

accountable for violations of law even where it generates social costs,³⁸ among others.³⁹

Accordingly, the exclusionary rule strengthens the Rule of Law by ensuring accountability before the law of both citizens and government agents, protecting the separation of powers and allowing citizens to seek redress for violation of their rights before courts.⁴⁰ It could be said that the exclusionary rule “embodies the idea of restraining government power and promoting the Rule of Law.”⁴¹ In addition, some have argued⁴² that “the exclusionary rule is justified as a means of holding the executive within the limits of the law and preventing government lawlessness from becoming rampant.”⁴³ Inasmuch as the enforcement of the exclusionary rule might result in an offender going unpunished, “the danger from governmental illegality is seen as a much more serious threat and as a potential precursor to widespread arbitrary rule.”⁴⁴ At the same time, it has been argued that illegally-obtained evidence should be excluded as a means of holding the executive to the Rule of Law as the often-cited possibility to pursue legal sanctions against the individual who broke the law is insufficient to vindicate the Rule of Law as such.⁴⁵

Finally, it has been observed⁴⁶ that the exclusionary rule was adopted by South American and Eastern European countries transitioning from dictatorships to democracies as part of a wider effort to secure individual rights and the Rule of Law.⁴⁷ Those reforms have, on some occasions, resulted in the exclusionary rule even broader than the currently recognised under the 4th Amendment to the US Constitution.⁴⁸ That exclusionary rule is indeed already relatively broad as, according to the US Supreme Court,⁴⁹ it “applies not

³⁸ *Olmstead v. United States* (n 36) at 485, Brandeis J. dissenting.

³⁹ *Turner* (n 3) 830–1.

⁴⁰ *Sundby* (n 3) 398–99.

⁴¹ *Turner* (n 3) 821.

⁴² *Sundby* (n 3) 393.

⁴³ *Turner* (n 3) 821–22.

⁴⁴ *ibid* 832.

⁴⁵ *Ho* (n 3) 126.

⁴⁶ Mirjan Damaška, ‘Free Proof and Its Detractors’ (1995) 43 *The American Journal of Comparative Law* 343.

⁴⁷ *Turner* (n 3) 822–23.

⁴⁸ *ibid* 824–25.

⁴⁹ *Silverthorne Lumber Co v United States* 251 U S 385 (1920).

only to the illegally obtained evidence itself, but also to other incriminating evidence derived from the primary evidence”⁵⁰ (the fruit of poisonous tree doctrine).

III RULE OF LAW UNDER ECHR

The idea of the Rule of Law expressly features in the most fundamental documents of the Council of Europe⁵¹ – its Statute and the ECHR.⁵² In addition, the Rule of Law made its way to Resolution 1594⁵³ issued by the Parliamentary Assembly of the Council of Europe.⁵⁴ Another organ of the organisation, the ECtHR,⁵⁵ has also expressly included the concept of the Rule of Law in its operation as “inherent in all the Articles of the Convention”.⁵⁶ Indeed, according to the former President of the ECtHR, Judge O’Leary,⁵⁷ “[ever] since *[Golder v. the United Kingdom, the court has] used the rule of law as an interpretative tool for the development of substantive guarantees set forth in the Convention*”; at the same time, according to another former President of the Court, Judge Spano, there is “a common thread running through the institutional requirements of Article 6 § 1, in that they are guided by the aim of upholding the fundamental principles of the rule of law and separation of powers”.⁵⁸

⁵⁰ Charles H Whitebread and Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* (Foundation Press New York 2020) 33–34.

⁵¹ For more, see Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (OUP Oxford 2013).

⁵² Venice Commission, ‘Report on the Rule of Law’ (n 4) 5.

⁵³ Resolution 1594 (2007).

⁵⁴ Venice Commission, ‘Report on the Rule of Law’ (n 4) 6.

⁵⁵ *Lekić v Slovenia* [2018] App Nr 36480/07 [GC] [94]; *Selahattin Demirtaş v Turkey (No 2)* [2020] App No 14305/17 [GC] [249].

⁵⁶ Spano, ‘The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law.’ (n 2) 215.

⁵⁷ Michal Bobek and Jeremias Adams-Prassl, *The EU Charter of Fundamental Rights in the Member States* (Bloomsbury Publishing 2020) 60.

⁵⁸ Katerina Tsampi, ‘Separation of Powers and the Right to a Fair Trial under Article 6 ECHR: Empowering the Independence of the Judiciary in the Subsidiarity Epoch’, *Fair Trial: Regional and International Perspectives= Procès équitable: perspectives régionales et internationales: Liber amicorum Linos-Alexandre Sicilianos* (Anthémis 2020) 693 cited in Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.’ (n 2) 218.

However, despite there being a consensus that the concept of the Rule of Law is inherent in the Council of Europe legal order, not one document comprehensively explains the contents of the principle.⁵⁹ Nevertheless, yet another organ of the Council of Europe, the Venice Commission, has identified a range of elements which make up the Rule of Law; in its works, the Commission mentions the concepts of legality and legal certainty, the availability of judicial redress, prohibition on arbitrary exercise of power and discrimination as well as the respect for human rights in general.⁶⁰ This description relies on a wide range of binding⁶¹ and non-binding⁶² legal documents relevant to the Rule of Law concept.⁶³

As explained by Judge Spano, when it comes to the ECtHR specifically, “*the Rule of Law has been the lodestar guiding the development of the case-law*”.⁶⁴ Accordingly, inasmuch as there is not one Convention right to the Rule of Law, various elements of that concept are to be found in jurisprudence pertaining to a number of the rights protected by the Convention, most notably the right to a fair hearing under Article 6 of the ECHR. As such, it is possible to identify two lines of case law concerning the Rule of Law; as part of the first line, concerned with the quality of the law, the ECtHR has

⁵⁹ Venice Commission, ‘Report on the Rule of Law’ (n 4) 5.

⁶⁰ *ibid* 10–13; Venice Commission, ‘The Rule of Law Checklist’ (n 4).

⁶¹ See EU Charter of Fundamental Rights, ICCPR, Statute of the Council of Europe, American Convention on Human Rights, African Union Constitutive Act, African Union Charter on Democracy, Elections and Governance

⁶² See Venice Commission’s Report on the Rule of Law (n 4); Council of Europe Committee of Ministers’s report titled “The Council of Europe and the Rule of Law”; The European Commission for the Efficiency of Justice’s Evaluation of European Judicial Systems project; Communication from the European Commission to the European Parliament and the Council titled “A new EU Framework to strengthen the Rule of Law”; Council of the EU, Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, EU Accession Criteria; OSCE’s Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE and Decision titled “Further strengthening the rule of law in the OSCE area”, Inter-American Democratic Charter as well as OSCE’s Document of the Moscow meeting of the Conference on the Human Dimension of the CSCE.

⁶³ Venice Commission, ‘The Rule of Law Checklist’ (n 4) 57–59.

⁶⁴ Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.’ (n 2) 212.

insisted that laws be readily accessible, precise,⁶⁵ foreseeable⁶⁶ and certain,⁶⁷ among others.⁶⁸ The second line of case law, concerned with the functioning of the judicial system, focuses on independence from internal and external influences⁶⁹ as well as potential structural problems such as the unavailability of domestic remedies,⁷⁰ an excessive length of judicial proceedings⁷¹ or non-execution of judgments,⁷² among others.⁷³ In addition, the ECtHR has laid down general principles regulating the operation of legal systems whereby the exercise of the governmental power must not be capricious,⁷⁴ new legal rules must be prospective,⁷⁵ stable,⁷⁶ of general applicability⁷⁷ and immune to abuse,⁷⁸ and such.⁷⁹ Finally, the ECtHR has required

⁶⁵ *Hasan and Chaush v Bulgaria* [2000] App No 30985/96 [84]; *The Sunday Times v UK (No 1)* [1979] App No 6538/74 31.

⁶⁶ *Margareta and Roger Andersson v Sweden* [1992] App No 12963/87 [75].

⁶⁷ *SW v UK* [1995] 87/18 [35].

⁶⁸ Meyer-Ladewig (n 4) 237–38.

⁶⁹ *Parlov Taklčić v Croatia* [2009] App No 24810/06.

⁷⁰ *Gazsó v Hungary* [2015] App No 48322/12.

⁷¹ *Dimitrov and Hamanov v Bulgaria* App Nos 48059/06 & 2708/09 (2011); *Rutkowski and Others v Poland* [2015] App No 72287/10.

⁷² *Burdov v Russia (no 2)* [2009] App No 33509/04; *Olaru and Others v Moldova* [2009] App Nos 476/07, 22539/05, 17911/08 & 13136/07; *Yuriy Nikolayevich Ivanov v Ukraine* [2009] App No 40450/04.

⁷³ Jernej Letnar Čerňič, ‘Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe’ (2018) 10 Hague journal on the rule of law 111, 126–27.

⁷⁴ *Sinkova v Ukraine* [2018] App No 39496/11 [68]; *Baydar v The Netherlands* [2018] App No 55385/14 [39].

⁷⁵ *Del Río Prada v Spain* [2013] App No 42750/09 [GC] [78–80].

⁷⁶ *Panorama Ltd and Miličić v Bosnia and Herzegovina* [2017] App Nos 69997/10 & 74793/11 [62].

⁷⁷ *Selahattin Demirtaş v. Turkey (No. 2)* (n 55).

⁷⁸ *Işikirik v Turkey* [2017] App No 41226/09 [57–58].

⁷⁹ Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.’ (n 2) 213.

that laws be interpreted within an independent judicial system⁸⁰ capable of issuing binding rulings.⁸¹

Within the various elements of the Rule of Law concept under the ECHR, the ECtHR appears to have focused mostly on the issues related to the independence of courts⁸² and the (subjective⁸³ and objective⁸⁴) impartiality of judges.⁸⁵ Independence is examined in reference to the manner of appointment (*i.e.* the independence from the legislature and the executive⁸⁶) and the duration of term (no minimum terms⁸⁷) as well as the presence of guarantees against outside influence (immunity from removal mid-term,⁸⁸ sovereignty of judicial proceedings⁸⁹) and the appearance of independence as such (“*justice must not only be done, it must also be seen to be done*”⁹⁰).⁹¹ In addition, courts (*i.e.* both the tribunal as such as and its composition in any particular set of proceedings⁹²) must be “*established by law*”.⁹³ Accordingly, judicial panels in all cases must be composed of judges

⁸⁰ *Panorama Ltd. and Miličić v. Bosnia and Herzegovina* (n 76) para 62; *Ireland v UK* [1978] App No 5310/71 [122].

⁸¹ Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.’ (n 2) 213.

⁸² *Findlay v UK* [1997] App No 22107/93; *Campbell and Fell v UK* [1984] App Nos 7819/77 & 7878/77.

⁸³ *Micallef v Malta* [2009] App No 17056/06; *Kyprianou v Cyprus* [2004] App No 73797/01.

⁸⁴ *De Cubber v Belgium* [1985] App No 9186/80.

⁸⁵ Matteo Mastracci, ‘Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland’ (2019) 5 Athens JL 323, 332.

⁸⁶ *Filippini v San Marino* [2021] App No 7025/21; *Henryk Urban and Ryszard Urban v Poland* [2010] App No 23614/08; *Maktouf and Damjanović v Bosnia and Herzegovina* [2013] App Nos 2312/08 & 34179/08; *Crociani, Palmiotti, Tanassi, Lefebvre D’ovidio v Italy* [1980] App Nos 8603/79, 8722/79, 8723/79 & 8729/79; *Zand v Austria* [1978] App No 7360/76.

⁸⁷ *Incal v Turkey* [1998] App No 22678/93; *Maktouf and Damjanović v. Bosnia and Herzegovina* (n 86).

⁸⁸ *Campbell and Fell v. UK* (n 82).

⁸⁹ *Sovtransavto Holding v Ukraine* [2002] App No 48553/99.

⁹⁰ *Denisov v Ukraine* [2018] App No 76639/11 [63].

⁹¹ Mastracci (n 85) 332–37.

⁹² *Gurov v Moldova* [2006] App No 36455/02; *Posokhov v Russia* [2003] App No 63486/00.

⁹³ Mastracci (n 85) 334.

whose appointment to the judiciary as such as well as to that panel complied with domestic law; as explained in the case of *Guðmundur Andri Ástráðsson v. Iceland*,⁹⁴ those issues are to be examined by looking whether the appointment was associated with any identifiable breach of domestic law, whether the breach was fundamental to the entire process and whether an adequate judicial redress was available.⁹⁵ Consequently, as noted by Judge Spano,⁹⁶ the concept “*of the rule of law is “an empty vessel without independent courts embedded within a democratic structure which protects and preserves fundamental rights. Without independent judges, the Convention system cannot function”*”.⁹⁷

Over the last several years, the ECtHR has been willing and able to enforce the various elements of the Rule of Law in the face of the so called Rule of Law backsliding in Poland and Hungary. The existence of the crisis is widely recognised (including by various Council of Europe organs⁹⁸) and discussed extensively in scholarship.⁹⁹ Accordingly, in a series of rulings against Poland, the

⁹⁴ *Guðmundur Andri Ástráðsson v Iceland* [2020] App No 26374/18 [GC] [243–52].

⁹⁵ Dimitry Kochenov and Petra Bárd, ‘Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe’ 4.

⁹⁶ Robert Spano, Conference of the Ministers of Justice of the Council of Europe: “Independence of Justice and the Rule of Law”, Strasbourg, 9 November 2020; Robert Spano, Human Rights Lecture at the Justice Academy of Turkey – “Judicial Independence – The Cornerstone of the Rule of Law”, Ankara, 3 September 2020.

⁹⁷ Spano, ‘The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.’ (n 2) 218.

⁹⁸ Council of Europe, Parliamentary Assembly, Resolution 2188 (2017); See Council of Europe, PACE, The functioning of democratic institutions in Poland, Resolution 2316 (2020); Council of Europe, PACE, Judges in Poland and in the Republic of Moldova must remain independent, Resolution 2359 (2021); Venice Commission, Poland. Opinion on the draft Act amending the Act on the National Council of the Judiciary, on the draft Act amending the Act on the Supreme Court, and on the Act on the organisation of ordinary courts, Opinion 904/2017, 11 December 2017; Venice Commission, Poland. Joint urgent opinion on amendments to the Law on the common courts, the Law on the Supreme Court, and some other laws, Opinion No. 977/2019, 16 January 2020; Venice Commission, Poland. Joint Urgent Opinion on amendments to the Law on the Common Courts, the Law on the Supreme Court, and some other laws, Opinion No 977/2020, 22 June 2020.

⁹⁹ Letnar Černič (n 73) 117; Luke Dimitrios Spieker, ‘The Conflict over the Polish Disciplinary Regime for Judges—an Acid Test for Judicial Independence, Union Values and the Primacy of EU Law: *Commission v. Poland*’ (2022) 59 *Common Market Law Review*.

ECtHR¹⁰⁰ held that, under the principles laid down in the case of *Guðmundur Andri Ástráðsson v. Iceland*,¹⁰¹ the Polish Constitutional Court could not qualify as a “*tribunal established by law*” under Article 6 of the ECHR because of violations of national law perpetrated through the appointment of its recent members.¹⁰² Furthermore, the ECtHR¹⁰³ has also held that the Disciplinary Chamber of the Polish Supreme Court (tasked with sanctioning sitting judges) could not qualify as a “*tribunal established by law*” neither because of “*the irregularities in the appointment process*”.¹⁰⁴ Moreover, the ECtHR¹⁰⁵ held that the Chamber of Extraordinary Review and Public Affairs of the Polish Supreme Court also violated Article 6 of the ECHR because both its operation as well as the composition were defective (mainly due to the membership of the newly-reconstructed judicial appointment body which was itself flawed).¹⁰⁶ Indeed, when considering the Civil Chamber of the Polish Supreme Court, the ECtHR¹⁰⁷ rejected the entire appointment procedure conducted by the newly-reconstructed judicial appointment body as unlawful domestically and, therefore, also in violation of Article 6 of the ECHR.¹⁰⁸ The ECtHR has continued its examination of the newly-reconstructed judicial appointment body in subsequent cases¹⁰⁹ where it held that the body could not qualify as independent due to the premature termination of tenure of its previous members, the lack of access to judicial review of those decisions as well as the shift in appointment from sitting judges to members of Parliament.¹¹⁰ This

¹⁰⁰ *Xero Flor v Poland* [2021] App No 4907/18.

¹⁰¹ *Guðmundur Andri Ástráðsson v. Iceland* (n 94) paras 243–52.

¹⁰² Barbara Grabowska-Moroz, ‘Judicial Dialogue about Judicial Independence in Times of Rule of Law Backsliding: Getin Noble Bank’ [2023] DI Working Paper, CEU 11–12.

¹⁰³ *Reczkowicz v Poland* [2021] App No 43447/19 [280].

¹⁰⁴ Laurent Pech and Dimitry Kochenov, ‘Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case’ (2021) 3 SIEPS, Stockholm 91.

¹⁰⁵ *Dolińska Ficek and Ozimek v Poland* [2021] App Nos 49868/19 & 57511/19.

¹⁰⁶ Grabowska-Moroz (n 102) 12.

¹⁰⁷ *Advance Pharma v Poland* [2022] App No 1469/20.

¹⁰⁸ Grabowska-Moroz (n 102) 12.

¹⁰⁹ *Grzęda v Poland* [2022] App No 43572/18.

¹¹⁰ Mathieu Leloup and David Kosař, ‘Sometimes Even Easy Rule of Law Cases Make Bad Law: ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda v Poland*’ (2022) 18 *European Constitutional Law Review* 753, 758–59.

line of reasoning was reaffirmed by the ECtHR¹¹¹ a couple of months later where the Court confirmed its approach as explicitly based on the concept of the Rule of Law.¹¹²

Finally, in a cases against Hungary, the ECtHR¹¹³ extended the legal immunities awarded to regular civil servants¹¹⁴ to judges, thereby securing the access to judicial review for dismissals from the bench.¹¹⁵ In doing so, the ECtHR¹¹⁶ explicitly rendered the permissibility of imposing limitations on the access to judicial review conditional on the upholding of the Rule of Law.¹¹⁷ In addition, the ECtHR reinforced the freedom of speech of judges under Article 10 of the ECHR,¹¹⁸ as closely connected to their independence under Article 6 of the ECHR,¹¹⁹ and expanded the protection against dismissal of judges from their administrative functions as triggering the right to private¹²⁰ life under Article 8 of the ECHR.¹²¹ Consequently, over the last decade, the ECtHR has been very active in attempting to stem the tide of “*a worrying regression in the Rule of Law*”¹²² in Europe.¹²³ In doing so, the Court has not hesitated to establish, expand and effectively apply various elements of the Rule of Law under Article 6 of the ECHR; this pertains to the organisation of domestic legal systems as well as procedures governing judicial proceedings.

This recent acceleration of the Rule of Law push by the ECtHR should be considered to have been prompted by the current situation

¹¹¹ *Żurek v Poland* [2022] App No 39650/18.

¹¹² *Leloup and Kosař* (n 110) 759–60.

¹¹³ *Baka v Hungary* [2016] App No 20261/12.

¹¹⁴ *Vilho Eskelinen v Finland* [2007] App No 63235/00 (GC).

¹¹⁵ *Harabin v Slovakia* [2018] App No 58688/11 [132].

¹¹⁶ *Baka v. Hungary* (n 113) paras 115–22.

¹¹⁷ Ivana Jelić and Dimitrios Kapetanakis, ‘European Judicial Supervision of the Rule of Law: The Protection of the Independence of National Judges by the CJEU and the ECtHR’ (2021) 13 *Hague Journal on the Rule of Law* 45, 53.

¹¹⁸ *Wille v Liechtenstein* [1999] App No 28396/95; *Albayrak v Turkey* [2008] App No 38406/97; *Kudeshkina v Russia* [2009] App No 29492/05.

¹¹⁹ *Baka v. Hungary* (n 113) paras 155–57.

¹²⁰ *Erményi v Hungary* [2016] App No 22254/14.

¹²¹ Jelić and Kapetanakis (n 117) 55 & 63.

¹²² Robert Spano, Solemn Hearing for the Opening of the Judicial Year, 24 June 2022, 5.

¹²³ Barbara Grabowska-Moroz and others, ‘Reconciling Theory and Practice of the Rule of Law in the European Union’ (2022) 14 *Hague Journal on the Rule of Law* 101, 101.

in member states like Poland and Hungary (and therefore a product of external circumstances), but also a result of internal processes unfolding within the ECtHR. Inasmuch as the quasi-judicial reforms pursued since 2015 in certain jurisdictions have forced the Court's hand on the issue, this has only accelerated an underlying long-term process whereby the ECtHR is transitioning from a substantive-based approach to human rights towards a process-based approach.¹²⁴ The new approach strengthens the principle of subsidiarity and thereby puts the domestic authorities firmly in charge of protecting human rights.¹²⁵ However, such a shift from Strasbourg to national capitals could only be made so long “as *“national decision-makers are structurally capable of fulfilling that task. This means that the foundations of the domestic legal order have to be intact. States that do not respect the rule of law [...] and do not ensure the impartiality and independence of their judicial systems [...] cannot expect to be afforded deference under process-based review.”*¹²⁶ As such, now the ECtHR sees the Rule of Law in domestic legal systems as a *sine qua non* requirement for its transition towards the process-based approach to human rights. This is because the ECtHR does not intend to fully retreat from the scene; instead, it will continue to perform a supervisory role under the ECHR.¹²⁷ This transition cannot be fully achieved unless all member states accept the Court's jurisprudence on the Rule of Law and its various aspects. In those circumstances, the prioritisation of the Rule of Law by the ECtHR is likely to remain a prominent feature of the Court's jurisprudence in the foreseeable future. It is in this context that the issue of allowing the admission of unlawfully-obtained evidence under the ECHR should be considered.

IV ADMISSIBILITY OF EVIDENCE UNDER ARTICLE 6

Article 6 of the ECHR governs the conduct of criminal (and civil) judicial proceedings.¹²⁸ More specifically, the provision determines that criminal defendants must be accorded a “*fair hearing*”,¹²⁹ a

¹²⁴ Spano, ‘The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law.’ (n 2).

¹²⁵ *ibid.*

¹²⁶ *ibid* 493.

¹²⁷ *ibid* 492.

¹²⁸ Pushkar (n 5) 38.

¹²⁹ ECHR, Article 6(1)

flexible standard which the ECtHR has been tasked with defining.¹³⁰ This framing has led the Court¹³¹ to adopt the approach whereby the fairness of proceedings for the purposes of Article 6 of the ECHR is to be assessed holistically.¹³² It has been argued¹³³ that this overall fairness test approach remains in line with the general approach of the ECtHR towards other Articles of the Convention whereby it employs the concept of proportionality, leading regularly to some form of balancing between competing interests (as opposed to clear-cut rules).¹³⁴ Accordingly, it has been observed¹³⁵ that the ECtHR assesses the overall fairness of the proceedings in reference to issues such as the ability to exercise defendant's right, the proper examination of the accusation, the appearance of the proper administration of criminal justice, the defendant's participation in the process, the adversarial nature of the process as well as the equality of arms, among others.¹³⁶

When it comes to the question of the use of evidence, the ECtHR established in the landmark case of *Schenk v Switzerland*¹³⁷ that Article 6 of the ECHR did “*not lay down rules on admissibility of evidence as such, which is primarily a matter of regulation under national law*”.¹³⁸ Accordingly, the role of the ECtHR¹³⁹ under Article 6 of the ECHR is to ascertain the overall fairness of the proceedings rather than to decide whether any particular piece of evidence should have been excluded.¹⁴⁰ The Court¹⁴¹ offered very little explanation as to its approach in that case; instead, it merely pointed out that the defendant had been aware of the illegally-obtained evidence, was able to

¹³⁰ Pushkar (n 5) 39.

¹³¹ *Edwards v UK* [1992] App No 13071/87 [34].

¹³² Pushkar (n 5) 41.

¹³³ Timothy AO Endicott, ‘Proportionality and Incommensurability’ in Grant Huscroft, Bradley W Miller and Grégoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 329–30.

¹³⁴ Samartzis (n 5) 421.

¹³⁵ Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Sweet & Maxwell 2019) 66.

¹³⁶ Pushkar (n 5) 41–42.

¹³⁷ *Schenk v Switzerland* [1988] App No 10862/84 [46].

¹³⁸ Thommen and Samadi (n 5) 76.

¹³⁹ *Khan v UK* [2000] App No 35394/97 [34]; *Allan v UK* [2002] App No 48539/99 [42].

¹⁴⁰ Thommen and Samadi (n 5) 76.

¹⁴¹ *Schenk v. Switzerland* (n 137) paras 47–48.

challenge it, examined the persons responsible as well as the fact that the evidence in question was not the only evidence used against them.

In this particular context, as clarified in the subsequent case of *Jalloh v. Germany*,¹⁴² Article 6 of the ECHR requires a balancing exercise whereby courts consider (a) the severity of the accusation, (b) the public interest in punishment of the offender, (c) the extent of the reliance on the evidence in question in arriving at a conviction and (d) the ability of the defendant to challenge the admission of the evidence in question.¹⁴³ As part of the balancing exercise, Article 6 of the ECHR empowers the defendant to challenge the authenticity and reliability of the evidence in question (according to the ECtHR,¹⁴⁴ the more reliable the evidence in question, the weaker the need for any corroborating evidence); however, no automatic exclusionary rule operates in this context.¹⁴⁵

That being said, in certain limited circumstances, the admission of some categories of evidence has been recognised as automatically leading to a violation of Article 6 of the ECHR. Accordingly, Article 6 of the ECHR requires an exclusion of evidence obtained by torture¹⁴⁶ within the meaning of Article 3 of the ECHR.¹⁴⁷ In this context, the ECtHR¹⁴⁸ explained that “*no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself.*”¹⁴⁹

Nevertheless, as established in the landmark case of *Gäfgen v. Germany*,¹⁵⁰ the admission of real evidence procured by a form of mistreatment amounting to an inhumane or degrading treatment

¹⁴² *Jalloh v Germany* [2006] App No 54810/00 (GC) [106–7].

¹⁴³ *Jasiński* (n 5) 134.

¹⁴⁴ *Bykov v Russia* [2009] App No 4378/02 [89].

¹⁴⁵ European Court of Human Rights (n 5) 44.

¹⁴⁶ *Gäfgen v Germany* [2010] App No 22978/05 (GC) [167]; *Harutyunyan v Armenia* [2007] App No 36549/03.

¹⁴⁷ *Thommen and Samadi* (n 5) 76.

¹⁴⁸ *Othman (Abu Qatada) v UK* [2012] App No 8139/09 [264].

¹⁴⁹ *Jasiński* (n 5) 133.

¹⁵⁰ *Gäfgen v. Germany* (n 146) para 108.

within the meaning of Article 3 of the ECHR (but not torture as such¹⁵¹) does not trigger any automatic exclusionary rule under Article 6 of the ECHR.¹⁵² Instead, according to the ECtHR,¹⁵³ the issue remains if, and to what extent, the evidence in question has had an impact on the outcome of the proceedings.¹⁵⁴ This position was adopted in the judgment following a short discussion on the competing interests arising with the question of exclusionary rules wherein the Court¹⁵⁵ explained that “*on the one hand, the exclusion of – often reliable and compelling – real evidence at a criminal trial will hamper the effective prosecution of crime. There is no doubt that the victims of crime and their families as well as the public have an interest in the prosecution and punishment of criminals, and in the present case that interest was of high importance. [...] On the other hand, a defendant in criminal proceedings has the right to a fair trial, which may be called into question if domestic courts use evidence obtained as a result of a violation of the prohibition of inhuman treatment under Article 3, one of the core and absolute rights guaranteed by the Convention.*”

As such, the ECtHR¹⁵⁶ has been willing to tolerate, at least on some occasions, a partial reliance on evidence obtained through inhumane or degrading treatment (within the meaning of Article 3 of the ECHR) in issuing criminal convictions as compatible with Article 6 of the ECHR.¹⁵⁷ At no point does the ECtHR explain where the differentiation between torture, on the one hand, and inhumane or degrading treatment, on the other, comes from under Article 6 of the ECHR.¹⁵⁸

Furthermore, the ECtHR also confirmed in the landmark case of *Khan v UK*¹⁵⁹ that Article 6 of the ECHR did not require any

¹⁵¹ For discussion, see Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Bloomsbury Academic 2021).

¹⁵² Thommen and Samadi (n 5) 77.

¹⁵³ *Gäfgen v. Germany* (n 146) para 178; *El Haski v Belgium* [2012] App No 649/08 [85].

¹⁵⁴ European Court of Human Rights (n 5) 45.

¹⁵⁵ *Gäfgen v. Germany* (n 146) para 175.

¹⁵⁶ *Alchagin v Russia* [2012] App No 20212/05 [68].

¹⁵⁷ Bernadette Rainey, Pamela McCormick and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (Oxford University Press, USA 2020) 322.

¹⁵⁸ Jasiński (n 5) 146.

¹⁵⁹ *Khan v. UK* (n 139).

automatic exclusion of evidence obtained in violation of the right to private life under Article 8 of the ECHR.¹⁶⁰ The Court¹⁶¹ relied heavily on *Schenk*, raising again the ability of the defendant to challenge illegally-obtained evidence; however, at the same time, it even further expanded the admissibility criteria by minimising the importance of being the only or central evidence against the defendant. As such, according to the ECtHR,¹⁶² the issue of breach of the right to private life is to be addressed outside the parameters of criminal proceedings as the admission of evidence obtained in breach of Article 8 of the ECHR does not render the proceedings unfair as a whole under Article 6 of the ECHR.¹⁶³ When it comes to this type of cases, Article 6 of the ECHR requires a balancing exercise rather than any automatic exclusion.¹⁶⁴

Finally, it should be mentioned that when it comes to the use of evidence other than real one (*e.g.* self-incriminating statements), procured in violation of various procedural rights of the accused, the effect of Article 6 of the ECHR is even more limited;¹⁶⁵ in this context, the ECtHR¹⁶⁶ has also refused to develop a fully-fledged exclusionary rule.¹⁶⁷ The same could be said about the lack of automatic exclusionary rules concerning hearsay testimonies whose use the ECtHR¹⁶⁸ tolerates in a relatively wide range of circumstances.¹⁶⁹ In both sets of cases, the ECtHR seems to rely predominantly on balancing exercises rather than to require an automatic exclusion of the impugned evidence.¹⁷⁰

¹⁶⁰ *Thommen and Samadi* (n 5) 78.

¹⁶¹ *Khan v. UK* (n 139) paras 37–38.

¹⁶² *Dragojevic v Croatia* [2015] App No 68955/11 [131].

¹⁶³ *Thommen and Samadi* (n 5) 78.

¹⁶⁴ European Court of Human Rights (n 5) 45.

¹⁶⁵ For more, see Fenella MW Billing, *The Right to Silence in Transnational Criminal Proceedings: Comparative Law Perspectives* (Springer 2016).

¹⁶⁶ *Schmid-Laffer v Switzerland* [2015] App No 41269/08; *Ibrahim v UK* [2016] App No 5878/08 (GC) [274].

¹⁶⁷ *Reid* (n 135) 340; *Vitkauskas* (n 5) 87.

¹⁶⁸ *Al-Khawaja and Tahery v UK* [2011] App Nos 26766/05 and 22228/06 (GC) [118–47]; *Schtschaschwili v Germany* [2015] App No 9154/10 (GC) [110–18].

¹⁶⁹ David John Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Oxford University Press 2018) 483.

¹⁷⁰ For more, see *Samartzis* (n 5).

Accordingly, despite the acknowledged connection between the Rule of Law and the exclusion of evidence,¹⁷¹ Article 6 of the ECHR does not require an automatic triggering of the exclusionary rule in the vast majority of cases, even where the relevant evidence has been obtained in violation of domestic law,¹⁷² various provisions of the Convention¹⁷³ or even through some physical mistreatment.¹⁷⁴ Interestingly, under other Articles of the ECHR, the issue of domestic legality is always at the forefront of the Court's analysis¹⁷⁵ of the compatibility of the government's action with the Convention.¹⁷⁶

It is worth noting that in the Schenk-Khan-Jalloh-Gäfgen line of cases, the ECtHR failed to properly engage with the Rule of Law argument pertaining to the admission of illegally-obtained evidence in criminal proceedings. In Khan,¹⁷⁷ the applicant raised this argument specifically by arguing "*that it is contrary to the rule of law to permit a criminal conviction to be based solely on evidence obtained by illegal acts of law-enforcement agents.*" In Gäfgen,¹⁷⁸ the Court even acknowledged there was indeed "*a vital public interest in preserving the integrity of the judicial process and thus the values of civilised societies founded upon the rule of law.*" Nevertheless, in none of those cases did the ECtHR properly deal with that issue. As such, despite the ECtHR's repeated claims that the concept of the Rule of Law is "*one of the features of the common spiritual heritage of the member States of the Council of Europe*"¹⁷⁹ and that "*it is "underlying the Convention"*"¹⁸⁰ as a whole,¹⁸¹ the Court is clearly unwilling to properly enforce the Rule of Law in the context of criminal proceedings.

¹⁷¹ *Othman (Abu Qatada) v. UK* (n 148) para 264.

¹⁷² *Allan v. UK* (n 139).

¹⁷³ *Khan v. UK* (n 139).

¹⁷⁴ *Jalloh v. Germany* (n 142).

¹⁷⁵ *Khan v. UK* (n 139).

¹⁷⁶ *Ho* (n 3) 122.

¹⁷⁷ *Khan v. UK* (n 139) para 31.

¹⁷⁸ *Gäfgen v. Germany* (n 146) para 175.

¹⁷⁹ *Golder v UK* [1975] App No 4451/70 [3].

¹⁸⁰ *Ramda v France* [2017] App No 78477/11 [60].

¹⁸¹ Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.' (n 2) 212.

V THE RATIONALE BEHIND THE NO EXCLUSIONARY RULE

The issue of admission of unlawfully-obtained evidence lies somewhere in between the need to afford the defendant a fair trial, on the one hand, and the need to secure effective law enforcement and the uncovering of material truth, on the other hand.¹⁸² This is indeed a precarious position because, as Zuckerman¹⁸³ explains, a persistent admission of unlawfully-obtained evidence could be perceived as the acceptance of law enforcement malpractice; on the other hand, the exclusion of such evidence could be considered the abandonment of the duty to protect the public from crime.¹⁸⁴ In summary, in scholarship, the justification for the exclusion of unlawfully-obtained evidence comes down to the simple principles of reliability (of evidence), deterrence (of law enforcement malpractice), protection (of individual rights) and integrity (of the justice system).¹⁸⁵ Indeed, these are the same justifications which the ECtHR accepts in circumstances in which it requires certain types of evidence to be excluded.¹⁸⁶

On the other hand, the unwillingness to develop robust exclusionary rules under Article 6 of the ECHR is not justified based on any policy argument; instead, it is generally justified on the grounds of the Fourth Instance doctrine whereby the ECtHR¹⁸⁷ does not consider itself to be a court of final appeal tasked with an appellate-style review of errors of fact or law.¹⁸⁸ The Fourth Instance doctrine is part of a wider principle of subsidiarity¹⁸⁹ governing the relation-

¹⁸² Michele Panzavolta, Anna Mosna and Elise Maes, 'Streamlining the Exclusion of Illegally Obtained Evidence in Criminal Justice' (2022) KU Leuven 79.

¹⁸³ Adrian Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989) 345.

¹⁸⁴ Panzavolta, Mosna and Maes (n 182) 79.

¹⁸⁵ *ibid* 80–81.

¹⁸⁶ Jasiński (n 5) 142–43.

¹⁸⁷ *Ringeisen v Austria* [1980] App No 2614/65 [97].

¹⁸⁸ Ryan Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Bloomsbury Publishing 2014) 43–44.

¹⁸⁹ Herbert Petzold, *The Convention and the Principle of Subsidiarity* (1993) in ; Ronald St J Macdonald, Franz Matscher and Herbert Petzold, *The European System for the Protection of Human Rights* (M Nijhoff 1993) 257–76.

ship between the ECtHR and domestic courts of member states.¹⁹⁰ The doctrine started to develop in the Court's jurisprudence¹⁹¹ as early as the 1950s/60s.¹⁹² It has been justified primarily in reference to the question of legitimacy of far-away judges overriding decisions of local institutions¹⁹³ as well as the scarcity of resources.¹⁹⁴

As such, according to the ECtHR,¹⁹⁵ the impact of the Fourth Instance doctrine in the area of criminal proceedings is "*that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention 'incorporates' the rules of that law*".¹⁹⁶ Accordingly, the prevailing approach to Article 6 of the ECHR, articulated in the landmark case of *Schenk v. Switzerland*¹⁹⁷ is that, as far as the ECtHR is concerned, "*it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.*"¹⁹⁸ Consequently, when it comes to the issue of admissibility of evidence specifically, the ECtHR¹⁹⁹ clarified that it was not its role "*to determine, as a matter of principle, whether particular types of evidence [...] may be admissible*".²⁰⁰ In those circumstances, the Fourth Instance doctrine appears to constitute the main obstacle to the development of fully-fledged exclusionary rules under Article 6 of the ECHR.

However, at this point it should be mentioned that despite the Fourth Instance doctrine being entrenched in the ECHR system, the ECtHR has, to date, recognised a wide range of exceptions whereby it conducts a proper review despite a matter falling with the competencies of domestic courts; these include waivers restricting the right

¹⁹⁰ Maija Dahlberg, 'It Is Not Its Task to Act as a Court of Fourth Instance: The Case of the European Court of Human Rights' (2014) 7 Eur. J. Legal Stud. 77, 85.

¹⁹¹ *X v Belgium* [1960] App No 458/59.

¹⁹² Dahlberg (n 190) 94.

¹⁹³ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia nv 2002) 235–36.

¹⁹⁴ Dahlberg (n 190) 95.

¹⁹⁵ *Pelipenko v Russia* [2012] App No 69037/10 [65].

¹⁹⁶ Dahlberg (n 190) 96.

¹⁹⁷ *Schenk v. Switzerland* (n 137) para 45.

¹⁹⁸ Goss (n 188) 45.

¹⁹⁹ *Bykov v Russia* (n 144) para 89.

²⁰⁰ Dahlberg (n 190) 107–8.

of access to court,²⁰¹ a flawed legal reasoning,²⁰² the use of unreliable confessions for convictions,²⁰³ a reasoning of certain judgments,²⁰⁴ the stance of trial judges during the proceedings,²⁰⁵ the use of presumptions of fact or law²⁰⁶ as well as some minor issues related to criminal procedure²⁰⁷ and the use of evidence,²⁰⁸ among others.²⁰⁹ In addition, as confirmed by the ECtHR,²¹⁰ exceedingly arbitrary decisions of domestic courts might also attract a review by the ECtHR where the Fourth Instance doctrine would otherwise preclude it.²¹¹ This includes circumstances wherein domestic courts disregard some properly-adduced evidence, fail to address a major line of legal argumentation, employ an unattainable burden of proof²¹² or face a breakdown in the link between relevant law, established facts and the outcome of the proceedings,²¹³ among others.²¹⁴

Accordingly, it is clear that the Fourth Instance doctrine incorporates a sufficient degree of flexibility to allow for a number of exceptions whereby the ECtHR corrects domestic courts in areas which generally fall within the scope of their seemingly-exclusive competences. As such, there is nothing preventing the ECtHR from developing an exception concerning the rules on admissibility of evidence. This is even more so given that the Court has already developed a partial automatic exclusionary rule under Article 6 of the ECHR concerning the admission of evidence obtained by torture (within the meaning of Article 3 of the ECHR). The case for that is only further strengthened by the ECtHR's characterisation of itself as a guarantor of the Rule of Law in the face of an ongoing backsliding.

²⁰¹ *Deweer v Belgium* [1980] App No 6903/75.

²⁰² *Hanzevacki v Croatia* [2009] App No 17182/07.

²⁰³ *Brennan v UK* [2002] App No 39846/98.

²⁰⁴ *Hadjianastassiou v Greece* [1993] App No 12945/87.

²⁰⁵ *CG v UK* [2002] App No 43373/98.

²⁰⁶ *Salabiaku v France* [1991] App No 10519/83.

²⁰⁷ *Walchli v France* [2007] App No 35787/03.

²⁰⁸ *Koval v Ukraine* [2009] App No 65550/01.

²⁰⁹ Goss (n 188) 48–57.

²¹⁰ *Moreira Ferreira v Portugal (no 2)* [2017] App no 19867/12 (GC) [85].

²¹¹ Reid (n 135) 103.

²¹² *Khamidov v Russia* [2007] App No 72118/01 [170–75].

²¹³ *Andelković v Serbia* [2013] App no 1401/08.

²¹⁴ Reid (n 135) 103.

As the ECtHR has not generally justified the lack of exclusionary rules in connection to any set of policy-based arguments, it does not appear necessary to approach this question from that angle. To the contrary, the Court seems relatively accepting of policy-based arguments for the exclusion of certain types of evidence; it is the argument based on the Fourth Instance doctrine which prevents the expansion of the already-existing, yet limited, exclusionary rules, across the board. However, as already explained, that argument seems faulty at best.

VI ALTERNATIVE APPROACH IN THE ECHR

It appears that despite a clear connection between the admissibility of evidence and the concept of the Rule of Law, as well as the ECtHR's focus on the latter in the recent years, the Court firmly refuses to develop fully-fledged exclusionary rules under Article 6 of the ECHR. That being said, there have always been Judges (in the minority) advocating for a stricter approach to the question of admissibility of evidence under the ECHR. For instance, in the landmark case of *Schenk v. Switzerland*,²¹⁵ Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo argued that “*no court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the Convention.*” Furthermore, in the case of *Khan v. UK*,²¹⁶ Judge Loucaides maintained that he “*cannot accept that a trial can be ‘fair’, as required by Article 6, if a person’s guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention. [...] the term ‘fairness’, when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention.*”

Subsequently, similar views were expressed by Judges Spielmann, Rozakis, Tulkens, Casadevall and Mijović in the case of *Bykov v. Russia*²¹⁷ where they reiterated that “*the question of the admission in criminal proceedings of evidence obtained in breach of Article 8 is a*

²¹⁵ *Schenk v. Switzerland* (n 137), Joint Dissenting Opinion of Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo.

²¹⁶ *Khan v. UK* (n 139), Partly Concurring, Partly Dissenting Opinion of Judge Loucaides.

²¹⁷ *Bykov v Russia* (n 144), Partly Dissenting Opinion of Judge Spielmann Joined by Judges Rozakis, Tulkens, Casadevall and Mijović, para 5.

question of principle that deserved an answer of principle, particularly as regards the need to ensure consistency between the Court's findings under the two Articles of the Convention (what is prohibited under Article 8 cannot be permitted under Article 6) and the need to stress the importance of the Article 8 rights at stake (bearing in mind the growing need to resort to unlawful investigative methods, especially in fighting crime and terrorism)." Judges Spielmann, Rozakis, Tulkens, Casadevall and Mijović²¹⁸ also invoked the earlier partly dissenting opinion of Judge Tulkens in the case of *P.G. and J.H. v. UK*²¹⁹ wherein he explained that *"the term 'fairness', when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention."* Moreover, in the landmark case of *Gäfgen v. Germany*,²²⁰ Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power claimed that the impact of strict exclusionary rules might be *"that, at times, often reliable and compelling evidence may have to be excluded and that the effect upon the prosecution of a crime may thereby be compromised. Furthermore, the exclusion of such evidence may result in an accused person receiving a lighter sentence than he or she might otherwise have received. However, where this occurs the ultimate responsibility for any such "advantage" to the accused lies, firmly, with the State authorities whose agents, irrespective of their motivation, permitted the perpetration of inhuman treatment and thereby risked compromising the subsequent conduct of criminal proceedings"*.

What is more, in the case of *Dragoş Ioan Rusu v. Romania*,²²¹ Judges Pinto De Albuquerque and Bošnjak also argued in their separate partly concurring opinion that the ECtHR's approach to the question of admissibility of evidence under Article 6 of the ECHR lacked coherence, persuasiveness and clarity and had never led to a finding of a violation of the provision, therefore it should be recon-

²¹⁸ *ibid*, Partly Dissenting Opinion of Judge Spielmann Joined by Judges Rozakis, Tulkens, Casadevall and Mijović, para 6.

²¹⁹ *PG and JH v UK* [2001] 44787/98, Partly Dissenting Opinion of Judge Tulkens, para 1.

²²⁰ *Gäfgen v. Germany* (n 146), Joint Partly Dissenting Opinion Of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku And Power, para 11.

²²¹ *Dragoş Ioan Rusu v Romania* [2017] App No 22767/08, Joint Partly Concurring Opinion of Judges Pinto De Albuquerque and Bošnjak.

sidered.²²² The Judges²²³ declared that exclusionary rules were the only effective manner of creating deterrence; that a breach of the right to private life under Article 8 of the ECHR caused by the illegal gathering of evidence already required a balancing approach²²⁴ (so a finding of a violation should automatically extend to the right to a fair hearing under Article 6 of the ECHR); and that there appeared to be a European consensus against conditioning the admissibility of evidence on its probative value only.²²⁵ In addition, Judges Pinto De Albuquerque and Bošnjak²²⁶ also observed that, as a minimum, there was a “*difference between evidence obtained by a simple breach of national law and evidence obtained in violation of the rights and guaranteed by the Convention, which is an issue undoubtedly falling within the competence of the Court*”.²²⁷ Finally, more recently, in *Zličić v. Serbia*,²²⁸ Judge Bošnjak again asserted that “*evidence secured in breach of Article 3 and thereafter admitted into trial cannot be regarded as having had no bearing upon the subsequent development and outcome of the proceedings [...] [A] criminal trial which admits and relies, to any extent, upon evidence obtained as a result of breaching such an absolute provision of the Convention cannot a fortiori be a fair one*” and “*the most effective way of guaranteeing the absolute prohibition of violations of Article 3 is a strict application of the exclusionary rule when it comes to Article 6*” of the ECHR; “*this is because criminal activity may not be investigated, nor an individual’s conviction secured, at the cost of undermining the absolute right not to be subjected to inhuman treatment as guaranteed under Article 3. To hold otherwise would involve sacrificing core values and bringing the administration of justice into disrepute*”.²²⁹

²²² Samartzis (n 5) 410.

²²³ *Dragoş Ioan Rusu v. Romania* (n 221), Joint Partly Concurring Opinion of Judges Pinto De Albuquerque and Bošnjak.

²²⁴ ECHR, Article 8(2).

²²⁵ Samartzis (n 5) 410.

²²⁶ *Dragoş Ioan Rusu v. Romania* (n 221), Joint Partly Concurring Opinion of Judges Pinto De Albuquerque and Bošnjak, para 6.

²²⁷ Samartzis (n 5) 410.

²²⁸ *Zličić v Serbia* [2021] App Nos 73313/17 & 20143/19, Partly Dissenting Opinion of Judge Bošnjak, paras 64–65 & 67.

²²⁹ Mikko Pursimo, ‘Self-Incriminating Evidence, Ill-Treatment, and the Notion of Fair Trial under the European Convention on Human Rights’ [2021] Åbo Akademi University 20.

Despite those repeated calls from individual Judges for the revisiting of the rules concerning the exclusion of evidence under Article 6 of the ECHR in the past decades, the ECtHR continues to maintain the distinction between evidence obtained by way of torture,²³⁰ inhumane or degrading treatment²³¹ and a breach of the right to a private life.²³² Accordingly, the Court continues to tolerate the admission of evidence obtained illegally, including through some form of physical force, in an unyielding disregard for the Rule of Law and its requirement for public authorities to act within the limits of the law.

VII CONCLUSIONS

The purpose of this article was to analyse the approach of the ECtHR to the concept of the Rule of Law in the context of criminal proceedings. Although both the issue of exclusionary rules under Article 6 of the ECHR and the concept of the Rule of Law under the Convention are thoroughly explored elsewhere, this paper brings them together for the first time in light of the ongoing process of transitioning from a substantive-based approach to human rights towards a process-based approach.²³³ The ECtHR plays an especially important role as the final arbiter of the Rule of Law standards in Europe and has deemed itself a great defender of the Rule of Law in the face of the recent backsliding.²³⁴ However, unfortunately, despite much emphasis put on the Rule of Law in the Court's jurisprudence,²³⁵ the ECtHR consistently refuses to hold domestic criminal courts accountable for tolerating the admission of evidence obtained

²³⁰ ECHR, Article 3.

²³¹ *ibid.*, Article 3.

²³² *ibid.*, Article 8.

²³³ Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law.' (n 2).

²³⁴ *ibid.*; Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary.' (n 2).

²³⁵ *Baka v. Hungary* (n 113); *Erményi v. Hungary* (n 120); *Guðmundur Andri Ás-tráðsson v. Iceland* (n 94); *Xero Flor v. Poland* (n 100); *Reczkowicz v. Poland* (n 103); *Dolińska Ficek and Ozimek v. Poland* (n 105); *Advance Pharma v. Poland* (n 107); *Grzęda v. Poland* (n 109); *Żurek v. Poland* (n 111).

illegally.²³⁶ This is despite a clear connection between the concept of the Rule of Law and the use of evidence²³⁷ obtained in violation of domestic law or the ECHR. Instead, the ECtHR relies on balancing exercises whereby, in the vast majority of cases, domestic courts are permitted to admit tainted evidence without violating Article 6 of the ECHR.²³⁸

The current approach of the ECtHR to the impact of the concept of the Rule of Law on criminal proceedings has been determined, to a large degree, by the Fourth Instance doctrine which determines that the ECtHR does not act as a court of final appeal.²³⁹ Accordingly, the ECtHR leaves the issue of evidence admissibility to domestic courts.²⁴⁰ However, this rationale is deficient at best. Firstly, the ECtHR has already created a limited automatic exclusionary rule under Article 6 of the ECHR for evidence obtained by torture within the meaning of Article 3 of the ECHR.²⁴¹ As such, there is nothing preventing the Court from extending this rule to a wider range of circumstances; at minimum, the ECtHR could abolish the distinction between obtaining evidence by way of torture, on the one hand, and inhumane and degrading treatment, on the other hand.²⁴² Secondly, the ECtHR²⁴³ has already recognised a host of exceptions to the Fourth Instance doctrine in various aspects of Article 6 of the ECHR. As such, there is nothing preventing the Court from recognising another exception for the purposes of excluding tainted evidence. Thirdly, despite the ECtHR having been unwilling to deal with admissibility of evidence for decades, there have always been Jud-

²³⁶ *Khan v. UK* (n 139); *Jalloh v. Germany* (n 142); *Bykov v Russia* (n 144); *Gäfgen v. Germany* (n 146); *Alchagin v. Russia* (n 156); *Schmid-Laffer v. Switzerland* (n 166); *Ibrahim v UK* (n 166); *Dragojevic v. Croatia* (n 162); *Al-Khawaja and Tahery v UK* (n 168); *Schatschaschwili v. Germany* (n 168).

²³⁷ *Smokov and others* (n 28); *Sundby* (n 3); *Ho* (n 3); *Gless and Richter* (n 34); *Turner* (n 3).

²³⁸ For more, see *Samartzis* (n 5).

²³⁹ *Goss* (n 188) 43–44.

²⁴⁰ *Schenk v. Switzerland* (n 137) para 46.

²⁴¹ *Gäfgen v. Germany* (n 146) para 167; *Harutyunyan v. Armenia* (n 146).

²⁴² *Zličić v. Serbia* (n 228), Partly Dissenting Opinion of Judge Bošnjak at paras 64–65 & 67.

²⁴³ *Deweere v Belgium* (n 201); *Hanzevacki v Croatia* (n 202); *Brennan v UK* [2002] App No 39846/98; *Hadjianastassiou v Greece* (n 204); *Salabiaku v France* (n 206); *CG v UK* (n 205); *Walchli v. France* (n 207); *Koval v Ukraine* (n 208); *Moreira Ferreira v. Portugal (no. 2)* (n 210); *Khamidov v. Russia* (n 212); *Andelković v. Serbia* (n 213).

ges²⁴⁴ (in the minority) advocating for a stricter approach to the illegally-obtained evidence under Article 6 of the ECHR. Some of those Judges²⁴⁵ continue to voice their concern against the use of tainted evidence in criminal proceedings to this day.

Consequently, despite undertaking the role of the protector of the Rule of Law in Europe, the ECtHR continues to refuse to include the issue of evidence admissibility in that concept and, thereby, to develop proper exclusionary rules for evidence obtained by way of violations of domestic law, the ECHR itself²⁴⁶ or even violence.²⁴⁷ What is more, there seems to be no prospects of the Court changing its course in the foreseeable future, despite the repeated calls from Judges who keep finding themselves in the minority.²⁴⁸

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²⁴⁴ *Gäfgen v. Germany* (n 146), Joint Partly Dissenting Opinion Of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku And Power; *Bykov v Russia* (n 144), Partly Dissenting Opinion of Judge Spielmann Joined by Judges Rozakis, Tulkens, Casadevall and Mijović; *P.G. and J.H. v. UK* (n 219), Partly Dissenting Opinion of Judge Tulkens; *Khan v. UK* (n 139), Partly Concurring, Partly Dissenting Opinion of Judge Loucaides; *Schenk v. Switzerland* (n 137), Joint Dissenting Opinion of Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo.

²⁴⁵ *Zličić v. Serbia* (n 228), Partly Dissenting Opinion of Judge Bošnjak; *Dragoş Ioan Rusu v. Romania* (n 221), Joint Partly Concurring Opinion of Judges Pinto De Albuquerque and Bošnjak.

²⁴⁶ *Khan v. UK* (n 139).

²⁴⁷ *Gäfgen v. Germany* (n 146) para 178; *El Haski v. Belgium* (n 153) para 85; *Zličić v. Serbia* (n 228) para 119.

²⁴⁸ *Zličić v. Serbia* (n 228), Partly Dissenting Opinion of Judge Bošnjak; *Dragoş Ioan Rusu v. Romania* (n 221), Joint Partly Concurring Opinion of Judges Pinto De Albuquerque and Bošnjak; *Gäfgen v. Germany* (n 146), Joint Partly Dissenting Opinion Of Judges Rozakis, Tulkens, Jebens, Ziemele, Bianku And Power; *Bykov v Russia* (n 144), Partly Dissenting Opinion of Judge Spielmann Joined by Judges Rozakis, Tulkens, Casadevall and Mijović; *P.G. and J.H. v. UK* (n 219), Partly Dissenting Opinion of Judge Tulkens; *Khan v. UK* (n 139), Partly Concurring, Partly Dissenting Opinion of Judge Loucaides; *Schenk v. Switzerland* (n 137), Joint Dissenting Opinion of Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo.