Illegally Obtained Evidence in European Treaty of Human Rights (ETHR) Law

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I. Introduction

I.1. The Concept of Illegally Obtained Evidence in ECHR Law, Structure of Discussion

At the conference held on the 26th of January 2009 by the Istanbul University Faculty of Law, the concept of illegally obtained evidence was discussed from the perspective of the four legal systems represented, namely Turkey, the United States, the Netherlands and the *sui generis* legal system of the European Treaty of Human Rights (ETHR).[1] Providing a most interesting opportunity for comparative study, the object of the Istanbul conference was to develop familiarity with the formats of this legal concept in the various systems, as well as similarities and contrasts between them.

This contribution envisages expansion of some of the comparative themes laid down and discussed at the Istanbul Conference, from the particular perspective of ETHR law. As such, regard will be had to the fact that ECHR law does not represent a national criminal procedural system, but is an international human rights treaty. As the concept of evidence

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1 The focus of the Istanbul conference was not only evidence exclusion, but also anonymous witness testimony and the concept of mediation. Those issues will not be discussed in this contribution.

exclusion functions in a special environment in ETHR law, its nature and structure differs from that of other, national models. The object here is thus not only to depict the positive content of the ETHR model, but to identify particular features of the environment in which it is operational.

Whilst the origin of the concept of evidence exclusion is not clear in ETHR law, 'the exclusionary rule' is commonly accepted as a product of the case law of the U.S. Supreme Court. Taking as a point of departure that the U.S. model has exerted broad influence in many legal systems – possibly also in ETHR law – it is useful to start (comparative) analysis with a depiction of the exclusionary rule as it is currently interpreted by the U.S. Supreme Court. That case law will be explored in the second part of this contribution. The third part of this contribution will describe the concept of evidence exclusion in ETHR law. The ETHR model will be depicted from the perspective of the special context in which it is based and functions, namely art. 6 ETHR.

II. Illegally Obtained Evidence In U.S. Law

II.1 Evidence Exclusion as a Response to Pre-Trial Impropriety, Constructing a Base-Line for Comparison

From the perspective of criminal procedure, the exclusionary rule is potentially draconic in its consequences. The rule can lead to the exclusion of probatively valuable evidence, leaving the judge no other option - for lack of other evidence - than to acquit. As such, it may not be difficult to understand that the exclusionary rule suffers a struggling existence.

U.S. case law shows that struggle nicely. Entailing extensive reconfiguration of the exclusionary rule by its intellectual author, the U.S. Supreme Court's judgments in *Hudson vs.Michigan*[2] and *Herring v. The United States*[3] seem to have left the rule intact, albeit on more shaky ground

[2] *Hudson v. Michigan*, 126 S.Ct. 2159 (2006), No. 04-1360.

[3] *Herring v. United States*, no. 07-513 (2008), 492 F. 3d 1212

than it formerly stood on. Weakening of the rule, however, does not only follow from these cases, but is in keeping with a broader development. The history of evidence exclusion is namely rife with the formulation of exceptions to and limitations of its application. It is this downwards dynamic which offers an important perspective on the exclusionary rule, namely that *it tends to disintegrate*. It is crucial then to examine if the particular reasons for that necessarily lie in the features of the rule (that is shares with other models of evidence exclusion), or if it is something specific to the American context that relates to the tendency of the rule to shrink rather than grow.

II.2. (Shared) Interpretative Parameters for the Exclusionary Rule

In U.S. case law, the range of the exclusionary rule seems mainly to be set through three sets of parameters. Firstly, the rule is interpreted from the perspective of its goals. Generally - in doctrine - three goals, or '(t)hree principle rationales',[4] are adduced as bases for evidence exclusion. Roberts and Zuckerman delineate these as: '(…) rights protection, deterrence ('disciplining the police') and the legitimacy of the verdict'.[5] *Rights protection*, also known as the ratio of '*vindication*' or the '*remedial theory*',[6] envisages reparation of civil rights violations through exclusion of evidence.[7] The '*deterrent theory*' focuses on the prevention of illegal actions on the part of criminal procedural authorities.[8] Deterrence is accomplished through the message that is sent by evidence exclusion to criminal procedural authorities, namely that illegal investigation is not conducive to the outcome of criminal cases.[9] *Legitimacy of the verdict*

[4] P. Roberts/A. Zuckerman, Criminal Evidence, Oxford University Press, 2004, p. 150.

[5] Ibid.

[6] Ibid., p. 151.

[7] Ibid.

[8] Füsun Sokullu-Akıncı, Polis, Toplumsal Bir Kurum Olarak Gelişmesi, Polis Alt Kültürü ve İnsan Hakları, Gümüş Basımevi, İstanbul, 1990, p. 187.

[9] Füsun Sokullu-Akıncı, "Recent Attempts to Guarantee Human Rights in the Turkish Penal Procedure Law", Annales de la Faculté de Droit d'Istanbul, No: 48, 1998, p. 264-268.

(and '*moral integrity*'[10] thereof) is related to maintaining trust in criminal justice.[11] In that sense, exclusion serves as a means to show that the criminal procedural government – that morally accuses the citizen – does not apply double standards.[12] The government demonstrates this by not making use of illegally obtained evidence.[13]

Secondly, the range of the exclusionary rule is determined by the so-called exceptions that were appended to the rule in case law, gradually reducing its scope of application. Pre-supposing a violation of constitutional rights in the obtaining of evidence, these exceptions have a mitigating effect, allowing for use of evidence in spite of the violation. As such, these exceptions make the exclusionary rule relative: not every violation of a substantive criminal procedural norm must lead to evidence exclusion. The following exceptions are generally recognized in U.S. case law.

(1) The good faith exception allows for use of evidence if the authority violated constitutional rights, yet only did so in (negligible) error.[14]

(2) Evidence that is illegally obtained by a private person need not be excluded, as the rule is concerned with pre-trial misconduct by governmental authorities.[15]

(3) and (4) Evidence need not be excluded furthermore if the violated norm did not serve to protect an interest of the defendant or

[10] P. Roberts/A. Zuckerman, p. 157-160.

[11] Ibid., p. 157.

[12] Ibid.

[13] Ibid. This last goal is broader than that of rights protection, as legitimacy can also require exclusion when illegal investigative activities do not violate constitutional rights. Ibid., p. 158. The first two theories 'have featured prominently in debates surrounding the common law exclusionary rule (…), according to Roberts en Zuckerman' (ibidem, p. 151), and enjoy 'wide currency' in that regard (ibidem, p. 152), 'especially in the United States where the long-running debate over the exclusionary rule is fiercely contested between supporters and critics', ibidem. Roberts and Zuckerman show a preference for the goal of demonstration (as they understand it), as a basis for the exclusionary rule. Ibid., p. 150.

[14] *U.S. v. Leon.,* 468 U.S. 897 (1984).

[15] *Burdeau v. McDowell*, 256 U.S. 465 (1921).

(5) a norm was violated, but it was the interest of a third party that was affected, i.e. the defendant has lack of standing.[16]

(5) Exclusion can only take place within the context of the prosecution of the particular offence, in the context of the investigation of which the illegality took place.

(6) On the basis of the attenuation exception, exclusion need not take place if the causal relationship between the violation and the evidence obtained is sufficiently weak.[17] The fruits of the poisonous tree doctrine – which regards secondary evidence - is connected to this exception.

(7) The independent source doctrine also touches on causality, holding that evidence may be used, if the evidence was actually gained from an independent source.[18]

(8) The inevitable discovery doctrine[19] allows the admission of evidence casually related to illegality, if it can established, to a very high degree of probability, that the evidence would have been found anyway, in the course of a normal – non-illegal – police investigation.

Several further exceptions relate specifically to the norm violations in the context of the privilege against self-incrimination. A so-called 'public safety' exception is particularly attached to *Miranda* violations.[20] *Miranda* violations also need not bar the use of statements given without caution, if that use is only to impeach the defendant's testimony at trial.[21] Generally applicable in the context of the privilege against self-incrimi-

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[16] *Alderman v. U.S. 394 U. S. 165* (1969).

[17] *Nardone v. U.S.*, 308 U.S. 338 (1939).

[18] *Silverthorne Lumber Co., Inc. v. U.S.*, 251 U.S. 385 (1920) ve *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

[19] *Nix v. Williams*, 467 U.S. 431 (1984).

[20] Nathan L. Burrow, Comment. A Patane in the Neck: Should Mississippi Suppress Physical Evidence Discovered Pursuant to Miranda Violations as Fruits of the Poisonous Tree? Heinonline – 77 Miss. L.J. 1141, 2007-2008, p. 1147.

[21] Ibid.

nation is the doctrine that distinguishes between coercion in obtaining testimonial versus real, physical, and disallows only use of the former.[22]

Clearly some logical relationship exists between (aspects) of the first and second sets of parameters. The correlation between the goal of deterrence and the good faith of law enforcement officials and exceptions allowing for the use of evidence obtained illegally by others (such as private parties) may be evident. Rights protection is not encroached upon when the violation is eventually not found to protect an interest of the defendant, the causal chain between the violation and the evidence is found to have been broken. In the same manner, legitimacy need not be demonstrated, if the violation itself is found not to have (causally) affected defendant's rights.

Thirdly, determinative for the scope, or rather 'strength' of the exclusionary rule is the status it is accorded in legal organic sense, i.e. if it is to be seen as strong law or not. In this last sense, the *American* exclusionary rule has a less fortified construction than may be thought at first glance. Hailed generally as a rule of constitutional origin, the exclusionary rule is itself not addressed explicitly as a right in American constitutional law, but is in fact an implicit satellite to other rights. It is thus a judge-crafted rule, invoked to protect other - true - constitutional rights. In fact, there is not one exclusionary rule, but several, most notably those attached to the Fourth and Fifth amendments, whilst differentiation can be made in the strictness with which those distinct rules are applied. Disregarding for the moment reasons for such a distinction, it may be safe to say that the rule is stronger when it comes to the violations of the privilege against self-incrimination (Fifth Amendment) as opposed to search and seizure violations (Fourth amendment).

While this implicit judge-made structure of the rule may in itself detract from constitutional stature, a further qualification in U.S. case law leads to more distinct weakening. That qualification is that the rule is *prophylactic*, i.e. a category of '(…) doctrinal rules established by courts to protect constitutional rights (that) seem to "overprotect" those

[22] Ibid.

rights, in the sense that they give greater protection to individuals than those rights, as abstractly understood, seem to require'.[23] Prophylactic rules are always derived from other rights, are always judge-made and always over-protect because they do so indirectly. For better illustration, a more famously prophylactic rule is that regarding the so-called Miranda-warning, as expounded in *Miranda v. Arizona*[24]. The Miranda-rule protects the constitutional rights to remain silent, to an attorney and so forth. The rule that the suspect must be *mirandized*, or cautioned, from a certain point on, over-protects these rights indirectly, as it calls for a judicial test focused only on the question if the caution was given and not if the underlying rights were actually violated. As such, violations of the prophylactic rule can be much more frequent than of the rights it serves to protect. Logically then, mitigating the effects of violations of prophylactic rules is easier, if the actual constitutional matter protected by the prophylactic rule is not found to have been harmed. The logic behind the over-protective structure prophylactic rule is the following:

> '(...) because courts frequently cannot determine with much certainty whether or not a constitutional violation has occurred in a given case, and yet courts are charged with trying to protect against constitutional violations, it is sometimes entirely appropriate for the Supreme Court to develop prophylactic rules safeguarding constitutional rights. In other words, such rules respond to the inevitability of imperfect judicial detection of constitutional wrongdoing'.[25]

The qualification of the e*xclusionary rule* as prophylactic may not be as explicit as that of the Miranda-rule, its prophylactic nature is however clear, particularly in the recent case law mentioned above. The prophylactic reasoning with regards to the exclusionary rule can be construed in the following manner. In principle, the rule dictates exclusion of evidence that is obtained in violation of constitutional rights. That protection is however too broad, as not every constitutional violation is such as to re-

[23] E. Caminker, Miranda and Some Puzzles of 'Prophylactc' Rules, University of Cincinnati Law Review (2001), p. 1.

[24] *Miranda v. Arizona*, 384 U.S. 436 (1966), see Sokullu-Akıncı (Polis-1990), p. 168.

[25] E. Caminker, Op.cit., p. 2.

quire that drastic remedy. Limited interpretations of the goals of the rule and broad interpretations of applicable exceptions then correspond to the unnecessary protection which can be filtered away in concrete cases.

To some degree, all three sets of parameters feature in the ECHR model for evidence exclusion, in a manner similar to they way they function in U.S. law. All in all, that means that in both systems, the legal format of the concept of evidence exclusion has a highly complex technical and organic structure. Uniquely, this legal concept is mainly characterized by the way in which its range can be limited. Inter-related as they are, the joint effect the three parameters is that the rule is highly unstable, in the sense that it is susceptible to much fluctuation. Its organic status is at once undefined and weak, allowing for much judicial discretion in determination of rationale and limitation through the application of wide-ranging exceptions. Whilst such a structure does not necessarily have to result in a weak rule, its development in U.S. law shows that the developmental trajectory of the rule is not in gradual fortification.

II.3. The (Changed) Environment of the Exclusionary Rule, Shifts in Parameters: Hudson v. Michigan and Herring v. The United States

The recent revision of the exclusionary rule by the U.S. Supreme Court in *Hudson v. Michigan* and *Herring v. The United States* aptly demonstrates how the scope-determining parameters of the rule can function, particularly in unison, to greatly restrict the range of the rule. Importantly, this case law regards the exclusionary rule attached to the fourth amendment, i.e. that protecting against unlawful search and seizure.

In *Hudson v. Michigan,* law enforcement officials had obtained a warrant authorizing the search of the suspect's home for drugs and firearms, but violated the knock-and-announce rule (requiring police officers to first 'announce their presence and provide residents an opportunity to open the door'),[26] by waiting only 'three to five seconds', before entering

[26] *Hudson v. Michigan*, Opinion of the Court.

(as opposed to the required 20 or 30 seconds). The Michigan Court of Appeals had conceded the Fourth Amendment violation, so the only issue for the Supreme Court was whether or not the exclusion of evidence found in the search ('(l)arge quantities of drugs (...), including cocaine rocks in Hudson's pocket (and) (a) loaded gun (...)') was an appropriate remedy. In affirming Michigan's decision that it was not, the Supreme Court applied (a combination of) two separate exceptions. There was no casual relation between the illegal entry and the evidence obtained (even if there were, the casual connection was attenuated (would have been too remote). Furthermore, the interest that was violated is not the interest that the knock-and announce rule serves to preserve.[27] More significantly however, the *Hudson* majority, whose opinion was written by Justice Scalia, for the first time, openly questioned the merits of the exclusionary rule itself, particularly taking into account contextual changes that have taken place since the adoption of the rule.

> 'Suppression of evidence, (...), has always been our last resort, not our first impulse. The exclusionary rule generates "substantial social costs," (...) which sometimes include setting the guilty free and the dangerous at large. We have therefore been "cautio(us) against expanding" it (...) and "have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging (its) application." (...) We have rejected "(i)ndiscriminate application" of the rule, (...) and have held it to be applicable only "where its remedial objectives are thought most efficaciously served," (...) that is, "where its deterrence benefits outweigh its 'substantial social costs,'" (...)'.[28]

Justice Scalia's interpretation of the goals of the rule is thus limited, in fact singular: given its substantial social costs, the only reason for exclusion of evidence can be deterrence. That brings with it that if deterrence cannot, or need not be achieved through exclusion, there is

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[27] Cornell University Law School. Supreme Court Collection, Syllabus, http://www.law.cornell.edu/supct/html/04-1360.ZS.html.

[28] *Hudson v. Michigan*, Opinion of the Court.

no basis for exclusion. Justice Scalia's further argument with regards to the goals of deterrence makes *Hudson* such an important decision. He not only rejects the effectiveness of deterrence *in this particular case*, but rather bases his reasoning on a much broader contextual development. According to the majority opinion, the context in which the exclusionary rule first developed, no longer exists. In the first place, when the rule was first adopted (in *Mapp)*,[29] there was no legal basis for it in American law, which forced the judge to create his own rule ('Dollree Mapp could not turn to 42 U. S. C. §1983 for meaningful relief').[30] In the second place, effective civil remedies now exist for citizens whose fourth amendment rights have been violated by law enforcement officials. These were not in place when the exclusionary rule was adopted. In the third place, police services have been professionalized in the last 5 decades: that enterprise has included accentuation of internal discipline. In the fourth place, different types of 'citizen review' seem to have a beneficial effect on the functioning of the police. Scalia's conclusion is that currently,' extant deterrences'[31] exist against fourth amendment violations, that are '(…) substantial - incomparably greater' than '(…) the factors deterring warrantless entries when Mapp was decided'.[32] Because of that, '(r)esort to the massive remedy of suppressing evidence of guilt (…) unjustified',[33] even archaic.

Given that negative valuation, it may be safe to say that the Supreme Court ruling in *Hudson* in any event led to great anticipation as regards the next step the Supreme Court would take in respect to the exclusionary rule.[34] It would be *Herring v the United States* that provided that next opportunity. As in *Hudson,* this latter case involved a search and seizure,

[29] *Mapp v. Ohio*, 367 U. S. 643 (1961).

[30] *Hudson v. Michigan,* 126 S.Ct. 2159 (2006), No. 04-1360, Opinion of the Court.

[31] Ibid.

[32] Ibid.

[33] Ibid.

[34] See in that regard P. Bal, 'Uitsluiting van de uitsluitingsregel in de Verenigde Staten: de zaak Hudson v. Michigan', DD 2007, 17, p. 264 and his reference to David A. Moran, The End of the Exclusionary Rule, Among Other things: the Roberts Court Takes on the Fourth Amendment', In: Cato Supreme Court Review, 2006, p. 308, Ibid., p. 269. (Both predicted a negative outcome for the rule in the next important case to follow).

already found to constitute a Fourth Amendment violation by the 11th Circuit Court of Appeals. Again, the only question to answer for the Supreme Court was whether or not the violation should lead to evidence exclusion. The search and seizure in *Herring* had been performed by a law enforcement official who, upon learning that Herring, who was not unknown to the police, had gone to the Coffee County Sheriff's Department to retrieve something from his impounded truck, asked the county's warrant clerk if there were any outstanding warrants for his arrest. After contacting another warrant clerk in the neighboring Dale County, an arrest warrant was indeed found. That information was relayed to the law enforcement official, who then arrested Herring and searched his vehicle. Herring was found to be in possession of methamphetamine and an illegal firearm. This all took place within ten to fifteen minutes. In the meantime, the warrant clerk in Dale County, who had been asked to fax a copy of the actual arrest warrant, had not been able to find a corresponding physical warrant in the county files. Further enquiries with a court clerk revealed that there had been a mistake: the warrant had been rescinded five months earlier, but that information had not been processed in the computer database. Upon indictment for illegal possession of drugs and a firearm, Herring moved to suppress the evidence on the basis of an illegal arrest. That motion was denied by the District Court, which decision was later affirmed by the 11th Circuit Court of Appeals. In turn, the Supreme Court affirmed the 11th Circuit's decision.

Confirming its stance in *Hudson*, that the rule's applicability is fixed by a limited designation of purpose, namely to '(…) to safeguard Fourth Amendment rights generally through its deterrent effect', the Supreme Court majority - whose opinion was written in this case by Chief Justice Roberts - detracted further from the rule, by explicitly disavowing its constitutional status. There is no 'individual right' to exclusion, according to the majority, and the rule applies only where it can result in 'appreciable deterrence'. Furthermore, appreciable deterrence is a prerequisite, but is in itself is not enough, as, even if they are substantial, the benefits of exclusion must still 'outweigh (…) (its) ('substantial social') costs'. That can be read as follows: it is not a constitutional right of citizens that

illegally obtained evidence be excluded. Such a rule exists, but is more of a policy instrument, available to the judge not in his capacity as a protector of individual rights, but as a custodian of institutional order. Citizens and their individual cases have little to do with evidence exclusion, the purpose of which is to manage police propriety. In that general function, it is not necessary – as no remedy is necessary in an individual case – to respond to any and all illegality in pre-trial procedure. For the purpose of general management, it is sufficient to limit judicial responses to grave rights violations.

The majority opinion does not leave the matter at an abstract abjuration of the status of the rule as an individual right. The relegation of the rule is made concretely operational, via adjustment of the particular exception pertinent to this case, namely that of good faith. In relation to that particular exception, '(t)he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct'. That in turn means that '(…) an assessment of the flagrancy of the police misconduct constitutes an important step in the "calculus" of applying the exclusionary rule' and that '(…) evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment .' The 'beneficent aim of the exclusionary rule' can thus be accomplished by (only) '(…) outlawing evidence obtained by flagrant or deliberate violation of rights'. In *Herring*, '(t)he error (…) (did) not rise to that level', because the Coffee County officers 'did nothing improper. Indeed, the error was notice so quickly because Coffee County requested a faxed confirmation of the warrant'.

That expansion of the good faith exception may prove to be quite considerable, possibly enough to minimize the application of the rule to the most exceptional of circumstances, in many cases even annex the domain of alternate exceptions, making then redundant. Good faith is no longer an exception, functioning to mitigate the need for exclusion. Bad faith or gross negligence are prerequisites for the rule to be engaged. That in turn would require a showing of bad faith or gross negligence on the

part of law enforcement officials, which in itself may be difficult, making the range of the rule even smaller in practice.

II.4. The exclusionary Rule, in Relation to Changes in Law Enforcement

The Supreme Court's reasoning in *Hudson* and *Herring* may be challenged on several grounds. In the first place, even if it were to be accepted that deterrence is the only rationale behind the exclusionary rule, the premise that, barring exceptional instances of grave impropriety, there is no longer a need for it in U.S. law, is unsubstantiated. That argument is Sklansky's.[35] Sklansky argues that there may indeed have been some transformations 'outside the courtroom'[36] that may justify recalibration of the exclusionary rule. 'The police have changed since the 1960s, and mainly for the better.[37] They have even changed in some promising ways that Hudson ignored'.[38] So, 'it was not crazy for Justice Scalia and four of his colleagues to suggest in Hudson that criminal procedure rules fashioned in the 1960s might be ripe for reexamination—particularly since those rules were themselves a kind of delayed reaction to an earlier transformation of policing'.[39] The reasoning that the exclusionary rule was designed for an altogether different context, in which such strict judicial checks on law enforcement officials were more necessary than is the case in contemporary law enforcement, thus has validity. Nevertheless, his point is that, for the present at least, changes 'in the system of criminal procedure we actually have', have *not* made the exclusionary rule redundant.[40]

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[35] David Alan Sklansky, Is the Exclusionary Rule Obsolete? Ohio State Journal of Criminal Law, Vol. 5, No. 2, 2008, UC Berkeley Public Law Research Paper No. 1138796,
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138796#, 20th of February 2009.

[36] Ibid., p.568.

[37] Ibid., p. 570.

[38] Ibid.

[39] Ibid., p. 578.

[40] Ibid., p. 567-584.

Sklanksy's second argument is based on practical experience of the effects of the removal of the exclusionary rule as a remedy. At some point in time, the exclusionary rule became inapplicable in the State of California for warrantless searches of garbage offered for collection.[41] Since then, California police have 'pretty much completely ignored the warrant requirement imposed by state constitutional law for garbage searches. Without the remedy of the exclusionary rule, the rule has evaporated'[42] and police officers are 'in fact (…) now trained to ignore it'.[43] Ultimately, his conclusion is that '(d)espite the genuinely vast changes in law enforcement over the past forty years, the exclusionary rule probably still does a lot of work that no other remedy stands ready to duplicate'.[44]

A second argument countering the Supreme Court's reasoning is that the interpretation of the rationale in both *Hudson* and *Herring* is too restrictive, as deterrence is *not* the only rationale for the exclusionary rule. Bal argues that with *Hudson*, the Supreme Court majority has replaced principle with pragmatics, making the rule an *ultimum remedium*, subjugated to a cost-benefit analysis. In that, the goals of integrity of the criminal justice system and rights reparation seem to have been discharged.[45]

This restrictive approach touches on another interesting point made by Sklansky, who, notwithstanding the focus of his analysis (i.e. on the validity of the Supreme Court's evaluation of the true changes in policing in relation to the exclusionary rule), also expresses some doubt as to the underlying reasoning of the Court in *Hudson*:

> 'It is possible that the rhetoric in Hudson about how much things have changed was just a way to dress up a renewed assault on the exclusionary rule. Changed circumstances were only part of the Court's reasoning in Hudson; the majority also suggested that even if the exclusionary rule

41 Ibid., p. 580.

42 Ibid.

43 Ibid., p. 581.

44 Ibid.

45 P. Bal, Op.cit., p. 268.

> made sense elsewhere, it did not make sense in the context of knock-and-announce violations. And since handing down Hudson, the Supreme Court has not returned to the theme of changes in policing—not even when placing limits on the exclusionary rule. (…) So maybe the bottom line of Hudson is not that policing has changed in ways that have made the exclusionary rule obsolete, but simply that conservatives still hate the exclusionary rule, and there are more of them now on the Supreme Court'.[46]

Herring confirms that observation. The theme on the changes in law enforcement that was so important in *Hudson*, doesn't figure explicitly in the majority opinion in *Herring*. Rather - therewith contradicting Justice Ginsburg's dissent to that effect - Chief Justice Roberts suggests that the restrictive interpretation of the rule in *Herring* is not novel at all, but entirely in keeping with the way the exclusionary rule was read since its inception. 'Justice Ginsburg's dissent champions what she describes as "'a more majestic conception' of (…) the exclusionary rule," (…)', which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception, (…), and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis'.[47]

According to him, the history of evidence exclusion case law shows that evidence exclusion has always been limited to 'abuses' that were 'patently unconsitutional'. In *Weeks*,[48] officers had broken into a home and confiscated incriminating papers, whilst they would not even have been able to obtain a warrant even if they had tried to get one. *Silverthorne Lumber Co. v. United States*,[49] featured a similarly 'outrageous' seizure. In *Mapp v. Ohio*,[50] '(o)fficers forced open a door to Ms. Mapp's house, kept her lawyer from entering, brandished what the court concluded was a

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[46] David Alan Sklansky, Op.cit., p. 569.

[47] *Herring v. United States*, no. 07-513 (2008), 492 F. 3d 1212.

[48] *Weeks v. The United States*, 232 U. S. 383.

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

[50] *Mapp v. Ohio*, 367 U. S. 643 (1961).

false warrant, then forced her into handcuffs and canvassed the house for obscenity'. Unlike such flagrant or deliberate violations,

> '(a)n error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place. And in fact since Leon, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than this'.[51]

If the Supreme Court's restrictive approach to rationale is related to the conservative policy preferences of the majority, it could be that the majority opts for different routes in reaching the desired result, namely a limited exclusionary rule. In *Hudson*, the logic was that the scope of the exclusionary rule may be restricted because altered circumstances have decreased the need for deterrence. In *Herring*, the majority held that nothing has changed and that that the exclusionary rule has always been applied restrictively. If reference to changed circumstances may be qualified as rhetoric, that may also be true for the restriction of rationale to deterrence. That restriction may then just be a useful way to limit the scope of the rule in general. As such, it may not be that (appreciable) deterrent effect must always be part of the equation because exclusion truly has no functional relationship with any other rationale, but more so because the category of violations in which (appreciable) deterrence will be necessary equates nicely with the category of violations that are the most grave.[52]

Furthermore, the contrariness in reasoning in *Hudson* and *Herring* may be only superficial. Taken together, the reasoning of the Supreme Court can be understood as follows. The substantial social cost of exclusion has always been great, so that deterrence has always only justified

[51] *Herring v. The United States*, Opinion of the Court.

[52] In fact, it is possible to envisage deterrence as an over-arching goal, under which the alternate goals of reparation and demonstration are not negated but subsumed (making them, in fact, sub-alternate). If substantive criminal procedural norms are not transgressed, police would not only not have to be deterred. The necessity would also be automatically removed for rights reparation (as they would not be violated), and demonstration of integrity (which would always be in place).

exclusion for the gravest of violations, while the need for deterrence has also diminished because of changes in policing and the development of extant remedies, so that the greater part of constitutional (again, Fourth Amendment), violations (the non-flagrant and non-deliberate), can be resolved through alternative remedies, *outside of criminal procedure*. That indeed can be reduced to the conclusion that the Supreme Court has opted for a restrictive approach in evidence exclusion, reserving that remedy for only grave violations.

Leaving to one side the exact details of current U.S. law in this regard, what is important here is that the rule does indeed seem to be unstable, mainly because of its diffuse legal status and structure. That status and structure allow for the application of exceptions and other limitations (which can themselves be interpreted restrictively or expansively, as circumstances may warrant, as they are also not (strictly) statutorily regulated). Furthermore, *Hudson* and *Herring* show that that all three-scope determining parameters seem to be relative in their application, in two respects. In the first place, legal status, rationale nor exceptions can determine outcomes in and of themselves. If a certain exception is applicable, in itself that will not provide sufficient basis to justify the admission of illegally obtained evidence. The same is true for legal status and - barring structural changes in context - rationale. Thus, the effect of these parameters is not absolute. The outcome of evidentiary evaluations hinges on their aggregate effect. In the second place, looking again at *Hudson* and *Herring*, it is evident that other factors are also operational in evidentiary evaluations, besides legal status, rationale and exceptions, such as the highly important factor of the gravity of the underlying substantive norm violation. The relativity of the three scope-determining parameters ultimately makes the rule even more diffuse and increases its already high sensitivity to extraneous factors such as judicial policy preferences and changes in law enforcement.

The foregoing raises several noteworthy issues in relation to evidence exclusion models that were borrowed from or resemble the U.S. model. The first of these is that, if the objective is to have an exclusionary rule that works in a particular manner and with a particular strictness, it

must be accepted that the legislator has an important task therein. If the legislator does not create a basis that is conducive to that aim, given that the rule will generally be unstable and diffuse when its scope depends strongly on judicial discretion, that would constitute a legislative choice - through not interfering - for a more flexible structure. However, too much flexibility may be undesirable, particularly where the interpretation of fundamental rights is at issue. Furthermore, while broad discretion to determine and fundamentally change criminal procedural policy in the hands of the judiciary may be customary and commonplace in the U.S., the same does not necessarily hold true in continental legal systems, where the judiciary may not even feel compelled to stir life into a legal concept such as the exclusionary rule, without a clear and concise decree from the legislator in that regard.[53]

The conclusion cannot simply be however, that judges are not inclined to exclude if they do not have clear legislative dictates to do so. Otherwise, there would be no explanation for how the exclusionary rule ever came into being. In the U.S., the exclusionary rule after all originated case law. It traveled to numerous other legal systems, not *per se* through legislative transfer, but again through judicial borrowing. In the context of the ETHR, it was the ECHR that introduced the concept, constructing an own implicit basis in the treaty for the concept. So, where weakness of the rule can be explained by the absence of strict law dictating stronger application, its incorporation in a legal system, does not seem to require legislation. In the same sense, the scope of the rule is judicially altered (in various ways), in response to certain factors and developments. Because the rule has a natural sensitivity to change and the (legal) context in which it functions (which persists even if the rule does have a statutory structure), in order to understand rules in distinct systems, or, where that is necessary, to be able to diminish their flexibility, the identification of locally prevalent environmental factors is of crucial importance.

[53] The clear constitutional decree regarding evidence exclusion in Turkish criminal procedural and Constitutional law (reference can be made in particular to articles 147 and 148 of the Turkish Criminal Procedural and art. 38 of the Constitution), may in that sense constitute a crucial difference in the success of the rule in this regard, possibly for that reason leading to much more strict application.

III. Illegally Obtainend Evidence in ECHR Law

While many national models for evidence exclusion can be clearly qualified as transplants from U.S. law, the same cannot be said of the ECHR model. There does not seem to be a particular point in time when the Court consciously decided to adopt the concept of evidence exclusion. Neither is there a particular legal system to which can be pointed as a source of borrowing by the ECHR. Although certain scope-determining parameters that are operational in ETHR law resemble those in U.S. law, there are also important differences between the two models. The ECHR's reasoning is not helpful in this regard. The Court does not clearly disclose underlying rationale for evidence exclusion. Although exceptions are applied in ETHR law, they are also not clearly delineated in decisions as such. Furthermore, following in part from the particular structure of the ECHR model within the treaty, further scope-determining factors exist in ETHR law. Two further important differences exist between the two models. In the first place, unlike in U.S. law, the ECHR model for evidence exclusion is not attached to other rights, but has its own basis in the treaty, namely in art. 6 ETHR. In the second place, if the concept of evidence exclusion indeed has a certain developmental trajectory, whereby scope-determining, or rather, scope-restricting 'appendages' are gradually added to the mechanism, until it reaches a type of equilibrium, stabilizing at a range of applicability that corresponds to the level and extent of response to substantive norm violation the judiciary in a particular system deem to be necessary, while the U.S. model seems to have taken on a downwards dynamic, the ECHR's case law in this regard is still gaining momentum. If such and inevitable turning-point exists, the ETHR model thus has not yet passed the peak beyond which the rule gradually loses strength.

III.1. Characterization of the Treaty Model for Evidence Exclusion

In evaluating the nature and functioning of the concept of evidence exclusion in the ETHR, a first point to accentuate must be that the treaty

is not a criminal procedural, but a human rights manifest. That has - at least - two consequences. In the first place, it makes for an important difference between the treaty model and national models, where the exclusionary rule is regulated at the statutory level, namely that it has high legal status. In that, the ECHR model more closely resembles the U.S. model. However, as was mentioned above, an important distinction between the ECHR and U.S. models is that the ECHR has an autonomous basis in the treaty. That may indicate that the ECHR model has a more fortified construction. A first important point to consider is then how the human rights standing of the ETHR effectively compares to the constitutional stature of the American model, i.e. if features of the ETHR model detract from the status of the type of law it is made up of.

In the second place, the fact that the ETHR model is contained in an international human rights manifest, has implications for its technical content. By its nature, the concept of exclusion of illegally obtained evidence is a (criminal) procedural entity. Crafting a treaty model oriented on this concept thus necessarily involves construction of a criminal procedural mechanism, through the conduit of human rights law. Given the essential characteristics of criminal procedure, that must in itself be a complex endeavor.

Certainly the treaty touches matters of criminal procedural (and substantive) law, but it contains no integral system of criminal and criminal procedural law, addressing such issues (only) from the perspective of human rights. Criminal procedure is most directly touched by art. 6 ETHR, which is the main location where the ECHR was able to incorporate its evidence exclusion model. Looking at art. 6 ETHR, it is immediately apparent what difficulties the fusion of human rights and criminal procedure may bring. Art. 6 ETHR is to be construed as a most summary description of a criminal procedural ideal, delineating only the bare minima for fairness in that regard, certainly not containing the intricate characteristics and dynamics of national criminal procedural models. Even taking into account the expansion of this provision in the vast and complex case law of the ECHR, the treaty 'criminal procedural system', remains diffuse in its summariness. This creates some difficulties in the

interpretation of ECHR case law. As all legal systems have their own (legal cultural) identity, generally depicted in terms of the legal families they belong to, such is also true for autonomous criminal procedural systems, that usually can be described in terms of a specific type of procedural model they belong to (adversarial, non-adversarial, mixed and so forth). Even within such types, each distinct criminal procedural system will have its own unique characteristics, whilst its composite elements will be interrelated.

As criminal procedural entities, legal models that regulate a response to illegally obtained evidence take on different forms in different (national) criminal procedural models. They can be rules of evidence, rules of reasoning, be oriented mainly on trials or on the pre-trial phase, be constitutional or not. Whatever their form however, they are always components of a greater system, in which they are (intricately) embedded. As such, they are intrinsically context-sensitive. Understanding how they function requires awareness of particular implications that format of the models have in the procedural system they pertain to. Some formats may only be suitable in a particular type of criminal procedural system, some may require adjustment or transformation of either the model itself or features of the system in which it is to operate, for it to function properly.

As the ETHR does not pertain to a particular type of (national) legal systems, it is difficult to characterize it in such terms. Clearly, art. 6 ECHR has an adversarial signature, but ECHR case law is also famously 'hybrid'. Taking the ECHR's vast and heterogeneous jurisdiction into account, it is evident that art. 6 ETHR must also align with non-adversarial (continental law) systems. This makes case law difficult to understand, for at least two reasons. In the first place, it is not always entirely clear how concepts the Court deploys, which are multi-interpretable from the perspective of different systems, should be understood. In the second place, choices the Court makes, may raise issues of the general suitability of art. 6 ECHR based models for all (types of) criminal procedural systems. If a witness was not called to testify in court, that may have a different connotation in a legal system wherein the defendant has the opportunity to exercise his

right to examine witnesses in the pre-trial investigation than in a system where witnesses cannot be examined pre-trial. The finding of a violation in the latter case will not justify the finding of a violation in the former. So, in interpreting ECHR case law, there must be awareness that not every format chosen by the Court is necessarily suitable for all types of legal systems. Some formats may even be so unsuitable as to be entirely ineffective from the perspective of the protection they aim to provide.

Keeping the essential nature of the ETHR as a human rights treaty in mind, this section will first describe the ETHR model for evidence exclusion. Following that description, the accent will be on some important characteristics of that model. Where that is pertinent, these features will be set against the parameters described above as generally determinative for the scope of the exclusionary rule.

III.2. The Right to Fair Use of Evidence

The treaty model mechanism for protection against pre-trial impropriety leading to illegally obtained evidence currently[54] takes the form of a particular test of the fairness of the use of (certain types of) evidence, including evidence that is illegally obtained. As a right, this mechanism can be depicted as the right to the fair use of evidence, an implicit right, read by the Court into the notion of fairness in art. 6 subsection (1) ETHR.

Identifying the existence, let alone the nature of this 'right', is – or *was* – however, problematic, the primary reason for that being the Court's

[54] Some instances can be found in early case law in which pre-trial impropriety was tested through other mechanisms. In ECHR 12th of July 1988, *Schenk v. Germany*, Series A, 140, cited generally as the first case in which the exclusionary rule was applied (without the finding of a violation in that regard), the use of illegally obtained evidence was also challenged on the basis of an alleged violation therewith of art. 6 subsection 2 ETHR. The Court has also been willing to find treaty violations of pre-trial violations, in cases where evidence was not used at trial or because no trial ensued (*Heaney and McGuiness v. The United Kingdom* and *Weh v. Austria*). Recently, in *Salduz v. Turkey*, the Court found a violation related to pre-trial impropriety, without basing that violation on evidentirary use, most likely because the Court was unable to determine to what extent the pre-trial violation was causal for the confession that was obtained during police questioning.

own insistent, seeming *denial* of such a rule. To this day, any evaluation of the fairness of the use of evidence by the Court, is preluded by the same formula, namely that it is not a function of the Court '(…) 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' and that:

> '(w)hile Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (…). (…) It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where the violation of another Convention right is concerned, the nature of the violation found (…)'.[55]

That formula generally leads to the conclusion that the treaty does not contain any rules regarding the admissibility - or exclusion - of evidence. Rather, as the case law of the Court in this develops more and more momentum, that *was* the conclusion that was generally reached. In actual fact, it simply can no longer be denied that the treaty certainly does contain such rules and that it is the ECHR that has put them there. The (vastness of the) current body of case law in which the Court has evaluated fairness in relation to evidence, belies the Court's own protestations. Critical reading of the Court's formula of reticence in any event leaves room for a different appraisal of the Court's attitude. Art. 6 does not contain admissibility rules *as such*, such rules are *primarily* a matter for regulation under national law, the Court should not pre-determine general categories of exclusion. That certainly does not exclude a role for the Court, which the Court itself recognizes in the second part of the formula. The manner in which evidence was obtained can affect fairness, and if it does, that falls under the Court's domain. Apparently pre-trial

[55] ECHR 30th of June 2008, *Gäfgen v. Germany*, Appl.no.: 22978/05, §§ 96-97.

impropriety preceding use of evidence frequently does affect fairness, given the sheer quantity and intricacy of that case law that now exists in this regard. That case law rather testifies an active Court policy on evidence law.

III.2.1. A Two-Tiered Protective Model for Judicial Responses to Pre-Trial Impropriety

Following from that case law, the treaty mechanism with regards to pre-trial impropriety can be described as follows. The protective model is two-tiered. Part of the mechanism, thus one tier, consists of the substantive rights that may be violated in pre-trial investigations. Such rights can be found throughout the treaty, in particular in articles 3 and 8 ETHR, both provisions containing substantive norms for criminal procedure. Even more notable in this regard however, are the substantive rights regarding criminal procedure that are encompassed in art. 6 ETHR itself, i.e. fair trial rights that apply in the pre-trial procedure. That art. 6 ETHR even contains such rights is remarkable – as the provision is evidently primarily formulated in terms of *trial* rights – and is due to extensive interpretation of art. 6 ETHR by the Court. Through such interpretation, rights such as the privilege against self-incrimination, its composite right to silence, the right to legal assistance and the prohibition of incitement, apply directly in the pre-trial phase. As such rights are mainly implicit,[56] the addition of this pre-trial protection sphere to art. 6 ETHR, testifies to an active Court policy.

The second tier of the right is focused on the trial phase and dictates certain protocols in dealing with illegally obtained evidence, i.e. evidence obtained in violation of the substantive norms that make up the first tier. In the event that illegally obtained evidence is to be used, the protocols call for careful balancing. The defense must be presented with an adequate opportunity to invoke defense rights in challenging the man-

[56] The right to pre-trial legal assistance has a different construction, in the sense that art. 6 subsection 3 (c) ETHR does enumerate that right explicitly. Its pre-trial application is however based on art. 6 subsection 1 jo. subsection 3 (c) ECHR.

ner in which the evidence was obtained, as well as the use thereof. That generally means that information rights (following from the principle of equality of arms and the explicit information rights subsumed in art. 6 ETHR), must be operational (also with regards to the manner in which the pre-trial investigation was conducted), the defendant has the benefit of legal assistance; in general be able to exercise his fair trial rights with regards to this particular evidentiary challenge. Furthermore, in using the evidence, the judge must give reasoning for that decision and abide by an evidentiary minimum rule: (in principle), a conviction may not be based solely or to a decisive extent on the illegally obtained evidence. Point of departure is that illegally obtained evidence is to be regarded per se as problematic, due to the manner in which it was obtained. Use of that evidence introduces a risk to fairness of the trial. That risk must be recuperated:

> '(i)n determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defense were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker'.[57]

These recuperation protocols are however gradual in nature, i.e. their demands are stricter depending on the underlying (alleged) violation of substantive procedural rights. As such, a close relationship exists between the first and second tier. The less grave the underlying pre-trial violation (from a criminal procedural point of view) and (clearly an important factor in Strasbourg case law in this regard), the greater the reliability of the evidence in a probative sense, the more easily compensation can be

[57] ECHR 21st of January 2009, *Bykov v. Russia*, Appl.nr.: 4378/02 (GC).

achieved. In ECHR case law, a remarkable distinction exists between the valuation of the gravity of art. 8 ETHR violations in the pre-trial phase as opposed to violations of pre-trial norms subsumed in articles 3 and 6 ETHR. While the latter make evidence use highly problematic, compensation in the event of evidence obtained via privacy violations seems easily achieved. So much so in fact that the ECHR has never once found a violation of the right to fair use of evidence for this category, as serious as the privacy violations that have been complained of in this regard have been.[58] On the other hand, violations of other substantive rights can lead to much more far-reaching consequences. In the first place, compensation is less easily achieved, which corresponds with a tightening of the relevant protocols. Unlike privacy violations, violations of rights in articles 3 and 6 can and have led to the finding of violations due to inadequate recuperation of fairness. The most distinct category of substantive rights in this regard - so distinct, in fact, that it may even be correct to delineate this category in terms of a third tier of the model – consists of pre-trial norms that can never be violated, in the sense that the use of evidence so obtained is *absolutely excluded*. Such absolute exclusionary rules exist with regards to evidence obtained through torture, through violation of the right to remain silent and through violation of the Court's own rules regarding incitement. The Court has recently added the pre-trial right to legal assistance to the catalogue of very grave violations. Violations of this right are attached to a near absolute exclusionary rule: if a suspect makes a self-incriminating statement during police interrogation, without having exercised his right to legal assistance, that statement may, in principle not be used in evidence.[59]

[58] See, amongst other cases: ECHR 12th of May 2002, *Khan v. The United Kingdom*, Reports of Judgments and Decisions 2000-V; ECHR 25th of September 2001, *P.G. en J.H. v. The United Kingdom*, Reports of Judgments and Decisions 2001-IX; ECHR 5th of November 2002, *Allan v. The United Kingdom*, Reports of Judgments and Decisions 2002-IX and ECHR 17th of Juli 2003, *Perry v. The United Kingdom*, Reports of Judgments and Decisions 2003-IX (extracts).

[59] Quite uniquely, starting from November 2008, the Court has confirmed the original precedent set in ECrtHR 27th of November 2009, *Salduz v. Turkey*, Appl.nr.: 36391/02 (GC) in this regard, in 46 further judgments. See: ECrtHR 11th of December 2009, *Panovits v. Cyprus*, Appl.nr.: 4268/04.ECrtHR 20th of January 2009, *Güveç v. Turkey*, Appl.nr.: 70337/01; ECrtHR 3rd of February 2009, *Çimen v. Turkey*, Appl.no.: 19582/02; ECrtHR

The right to fair use of evidence is absolute in the sense that fairness always dictates that the use of illegally obtained evidence, never be disregarded. Even the possibility that evidence was obtained illegally must be adequately addressed. Dereliction of that duty to test can result in a violation of art. 6 ETHR, on the basis that it was not ruled out that evidence that was used should have been excluded, or a more far-reaching mode of recuperation was necessary for that use. That is already in case law that is not oriented on the fairness of the use of evidence, but on the

3rd of February 2009, *Yıldız v. Turkey*, Appl.no.: 4661/02; ECrtHR 3rd of February 2009, *Amutgan v. Turkey*, Appl.no.: 5138/04; ECrtHR 17th of February 2009, *Aslan and Demir v. Turkey*, Appl.nrs.: 38940/02 and 5197/03; ECrtHR 17th of February 2009, *Ek and Sıktaş v. Turkey*, Appl.nrs.: 6058/02 and 18074/03; ECrtHR 19th of February 2009, *Shabelnik v. Ukraine*, Appl.no.: 16404/03; ECrtHR 3rd of March 2009, *Taşcıgil v. Turkey*, Appl.nr.: 16943/03; ECrtHR 3rd of March 2009, *Aba v. Turkey*, Appl.nrs.: 7638/02 and 24146/04; ECrtHR 10th of June 2009, *Böke and Kandemir v. Turkey*, Appl.nrs.: 71912/01, 26968/02; ECrtHR 31st of March 2009, *Plonka v. Poland*, Appl.no.: 20310/02; ECrtHR 21st of April, *Soykan v. Turkey*, Appl.nr.: 47368/99; ECrtHR 23rd of June 2009, *Öngün v. Turkey*, Appl. no.: 15737/02; ECrtHR 3rd of February 2009, *Çimen v. Turkey*, Appl.nr.: 19582/02; ECrtHR 7th of July 2009, *Çimen and Mete v. Turkey*, Appl.no.: 19539/02; ECrtHR 7th of July 2009, *Tağaç and others v. Turkey*, Appl.no.: 71864/01; ECrtHR 28th of July 2009, *Gök and Güler v. Turkey*, Appl.no.: 74307/01; ECrtHR 15th of September 2009, *Arzu v. Turkey*, Appl.nr.: 1915/03 and ECrtHR 15th of September 2009, *İhsan Baran v. Turkey (No. 1)*, Appl.nr.: 8180/04; ECrtHR 22nd of September 2009, *Kaya v. Turkey*, Appl.nr.: 22922/03; ECrtHR 22nd of September 2009, *Arslan v. Turkey*, Appl.nr.: 24739/04; ECrtHR 22nd of September 2009, *Çelebi and others v. Turkey*, Appl.nr.: 2910/04; ECrtHR 24th of September 2009, *Pishchalnikov v. Russia*, Appl.nr.; 7880/02; ECrtHR 29th of September 2009, *Gül v. Turkey*, Appl.nr.: 7880/02; ECrtHR 6th of October 2009, *Eraslan e.a. v. Turkey*, Appl.nr.: 59653/00; ECrtHR 6th of October 2009, *Gürova v. Turkey*, Appl.nr.: 22088/03; ECrtHR 6th of October 2009, *Doğan v. Turkey*, Appl.nr.: 38114/03; ECrtHR 6th of October 2009, *Çolak v. Turkey*, Appl.nr.: 30235/03; ECrtHR 6th of October 2009, *Soyhan v. Turkey*, Appl. nr.: 4341/04; ECrtHR 13th of October, *Dayanan v. Turkey*, Appl.nr.: 7377/03; ECHR 20th of October 2009, *Attı and Tedik v. Turkey*, Appl.nr.: 32705/02; ECHR 20th of October 2009, *Çolakoğlu v. Turkey*, Appl. Nr.: 29503/03; ECHR 20th of October 2009, *Ballıktaş v. Turkey*, Appl.nr.: 7070/03; ECHR 20th of October 2009, *Aktaş et.al v. Turkey*, Appl.nr.: 24744/03; ECrtHR 3rd of November 2009, *Ayhan v. Turkey*, Appl.nr.: 20406/05; EcrtHR 10th of November 2009, *Bolukoç v. Turkey,* Appl.nr.: 35392/04 and ECHR 19th of November 2009, *Kolesnik v. Ukraine*, Appl.nr.: 17551/02. See also the Admissibility Decision ECrtHR 2nd of July 2009, *Sharkunov and Mezentsev v. Russia*, Appl.no.: 75330/01 in this regard. See ECrtHR 18th of December 2009, *Lutsenko v. Ukraine*, Appl.nr.: 30663/04 in which the Court found a violation of art. 6 ECHR due to the use in evidence of the testimony of a co-suspect who gave that testimony when he was first heard as a witness, without the benefit of legal counsel.

lack of transparency with regards to pertinent pre-trial information, in particular information as to how the evidence was obtained. If disclosure of information regarding the pre-trial investigation is so deficient that the judge (including the ECHR) cannot even begin to evaluate an alleged violation, or even determine what particular investigative methods were used, let alone if a violation took place, the right to a fair trial will have been violated on those grounds alone.[60] The absolute nature of the rule that illegally obtained evidence must be duly tested is distinct in *Khudobin v. Russia*, in which case the Court found a violation of art. 6 ETHR, not because the undercover operation that was challenged by the defense had been executed in violation of relevant norms in art. 6 ETHR, but because that possibility had not been adequately tested in the national procedure. That case is remarkable in this regard, due to the fact that the underlying violation of the incitement norm was evident: the Court could have easily found a violation on the basis of the use of the evidence so obtained, but chose not to, therewith underlining the importance of the duty to test the evidence in national courts.[61]

III.2.2. Familiarity of the Protective Model, Its Broader Application and the Special Import of its Deployment in the Context of Illegally Obtained Evidence.

This model for the fair use of evidence must be immediately familiar as a mechanism more generally applied by the Court. The second tier of the model is easily recognizable as the same test the Court deploys in evaluations of the fairness of the use of particular types of witness

[60] See, amongst other cases: ECHR 24th of June 2003, *Dowsett v. The United Kingdom*, Reports of Judgments and Decisions 2003-VII and ECHR 22nd of July 2003, *Edwards and Lewis v. The United Kingdom*, Appl.nrs.: 39647/98 and 40461/98.

[61] See in that sense also (with regards to unfair use of evidence obtained in violation of art. 3 ETHR), ECHR 12th of April 2007, *Özen v. Turkey*, Appl.nr.: 46286/99, §103: '(…) not only did the Diyarbakır State Security Court not determine the admissibility of the applicant's statements made in the custody of the gendarmerie before going on to examine the merits of the case, but also used these statements as the main evidence in its judgment convicting the applicant, despite his denial of their accuracy'.

testimony, that the Court regards as inherently dangerous to fairness, on various grounds. Indeed, the fair use of evidence model was applied to illegally obtained evidence *after* it was developed in the context of other problematic evidence types. Where anonymous witness testimony is infamous as a category in that regard[62] - Schalken suggests that the Court has no greater allergy than that against this type of evidence[63] - the fair evidence mechanism is also used in the testing of *de auditu* testimony in general,[64] with regards to testimony of minors,[65] that of victims of vice crimes - according to Schalken another allergy in Strasbourg, albeit for a different reason[66] - and the testimony of co-defendants who give incriminating evidence in exchange for personal benefit, following an arrangement with the public prosecution (hereinafter, though the term is not entirely satisfactory: crown witness).[67] Outside the species of witness testimony,

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[62] See for treaty violations due to the use of anonymous witness testimony against the Netherlands: ECHR 20th of November 1998, *Kostovski v, the Netherlands*, A-166; ECHR 23rd of April 1997, *Van Mechelen e.a. v. the Netherlands*, Reports 1997-III and *Visser v. the Netherlands*, Appl.nr.: 26668/95. The Court has sanctioned the use of anonymous witness testimony in: ECHR 26th of March 1996, *Doorson v. the Netherlands*, ECHR Reports 1996-II and in the Admissibility Decision in ECHR 4th of July 2000, *Kok v. the Netherlands*, Appl. nr.: 43149/98. See for more recent decisions concerning anonymous witness testimony: ECHR 13th of January 2009, *Taxquet v. Belgium*, Appl.nr.: 926/05 (that case has been referred to the Grand Chamber) and ECrtHR 20th of January 2009, *Al-Khawaja and Tahery v. The United Kingdom*, Appl.nrs.: 26766/05 and 22228/06 (Referral of that last case to the Grand Chamber is pending).

[63] See his annotation for ECHR 14 February 2002, *Visser v. Nederlands*, Appl.nr.: 26668/95, NJ 2002, 378, ann. Sch.

[64] Violations in this regard were established, amongst other cases, in: ECHR 24th of November 1986, *Unterpertinger v. Austria*, A Vol. 110; ECHR 27th of February 2001, *Lucà v. Italy*, Appl.nr.: 33354/96; *P.S. v. Germany*, and ECHR 10th of November 2005, *Bocos-Cuesta v. the Netherlands*, Appl.nr.: 54789/00. Cases wherein the use of de auditu testimony were sanctioned are, amongst others: ECHR 26th of April 1991, *Asch v. Austria*, Series A vol. 203; *Doorson v. the Netherlands*, and the Admissibility Decision ECHR 5th of April 2002, *Scheper v. the Netherlands*, Appl.nr.: 39209/02, NJ 2005, 551, (ann. Sch.).

[65] ECHR 10 november 2005, *Bocos-Cuesta v. the Netherlands*, Appl.nr.: 54789/00.

[66] Admissibility Decision *Scheper v. the Netherlands*.

[67] Admissibility Decision ECHR 27th of January 2004, Lorsé v. the Netherlands, Appl.nr.: 44484/98,; Admissibility Decision ECHR 27th of January 2004, Verhoek v. the Netherlands,, Appl.nr.: 54445/00 and Admissibility Decision ECHR 25th of May 2004, Cornelis v. the Netherlands, Appl.nr.: 994/03.

the use as evidence of the fact that the defendant has chosen to remain silent (also known as the drawing of adverse inferences),[68] of the fact that the defendant has given untruthful testimony[69] and circumstantial evidence,[70] are further sensitive evidence forms.[71]

As such, in all its applications, this protective model thus hinges on evidentiary admissibility rules. Notwithstanding its own continuing insistence in case law that the treaty does not contain such rules (in principle), the Court has in actual fact introduced a wide range of them, with regard to a broad assortment of evidence types. The evidentiary orientation of this general protective model was perhaps not immediately noticeable when it was (first) applied in the context of special types of (*de auditu* or anonymous) witness testimony, as case law in that regard necessarily involves limitations of other art. 6 ETHR rights, particularly the right to adequately challenge witness testimony. That is complex matter in itself, and can easily become the focus of attention. However, that case law is also primarily focused on the fairness of evidence use, the difference being that the problematic nature of such types of witness testimony does not follow from pre-trial violations of criminal procedural norms, but from limitations of trial rights. In essence, the issue does not lie in the fact that challenging rights were limited itself, but in the use of the insufficiently challenged testimony.[72] As such, it is not remarkable that the balancing tests used with regards to problematic witness testimony and illegally obtained evidence is highly similar. The application of the same protective model in the evaluation of the fairness of the use of the testimony of crown

[68] ECHR 8th of February 1996, *Murray v. The United Kingdom*, Reports of Judgments and Decisions 1996-I.

[69] Admissibility Decision *Kok v. the Netherlands*.

[70] Admissibility Decision *Scheper v. the Netherlands*.

[71] The complaint in *Panovits v. Cyprus* regarding the use of bad character evidence, a classically problematic category in English common law, was not tested by the Court, as the complaint was not further developed by the applicant.

[72] This category of case law concerning the use of witness testimony as evidence is thus a distinct category to that pertaining to limitation of rights regarding the summoning and (cross-)examination of witnesses which involves evaluation of fairness in the sense of art. 6 subsection (1) jo. Subsection (3) (d) ETHR in light of the fact that certain witness testimony was *not* incorporated at trial.

witnesses already shows that the model is not necessarily linked to rights regarding the testing of witness testimony. Such co-defendant testimony is not problematical because the defense cannot adequately exercise (cross-) examination rights, but (mainly) because of the *per se* probative issue that is involved. That probative issue is that such witnesses necessarily stand to benefit from the testimony they give, which makes the content of their testimony intrinsically problematic from the point of view of reliability. The defense is not handicapped by limitations of trial rights; this type of evidence must be treated with care for an entirely different reason. Thus, other issues can make evidence use problematic; there is no necessary correlation with the possibilities for the defense to hear and challenge witnesses. The application of the model in the context of (allegedly) illegally obtained evidence, which brings risks to fairness again on entirely different grounds, confirms the general character of the protective mechanism. The right to fair use of evidence is thus autonomous, i.e. not necessarily linked to other particular (fair trial) rights. Various types of issues can invoke the protection mechanism.

III.2.3. Procedural Propriety (Versus Probative Issues) as a Dimension of the Notion of Fairness

The application of the evidentiary model to the use of (potentially) illegally obtained evidence is remarkable, in that it adds a certain dimension to the general notion of fairness as meant in art. 6 ETHR. The use of *de auditu* or anonympous witness testimony creates a risk for fairness because it necessarily involves limitations of the right to (cross-)examine witnesses. While such limitations effect fairness in themselves, the real issue here is however not the limitation of another (trial) right, but the consequence that the limitation may have. That possible consequence represents the actual underlying risk to fairness, which ultimately again relates to probative issues. Because of the limitations imposed, the possibility remains that the content of the testimony cannot be sufficiently tested. As has already been mentioned, similar considerations apply in the use of the testimony of co-defendants who have give testimony in exchange for personal gain.

Although the ECHR there leaves open the possibility that other issues may be at stake,[73] the accent is clearly also on the probative dangers:

> '(t)he Court appreciates that the use of statements made by witnesses in exchange for immunity or other advantages forms an important tool in the domestic authorities' fight against serious crime. However, the use of such statements may put in question the fairness of the proceedings against the accused and is capable of raising delicate issues as, by their very nature, such statements are open to manipulation and may be made purely in order to obtain the advantages offered in exchange, or for personal revenge. The sometimes ambiguous nature of such statements and the risk that a person might be accused and tried on the basis of unverified allegations that are not necessarily disinterested must not, therefore, be underestimated (...). However, the use of these kinds of statements does not in itself suffice to render the proceedings unfair (...). This depends on the particular circumstances in each case'.[74]

Alternatively, in the use of illegally obtained evidence, no intrinsic probative issue need be involved. Certainly, that does not mean that illegality necessarily does not affect the reliability of evidence. It is easy to envisage that violations of substantive norms for pre-trial investigations can lead to probatively unsound evidence. Most evident in that sense would be the relation between (physical) coercion and confession evidence. Contrarily however, certain types of norm violations can often lead to very strong evidence from a probative point of view. The fact that the use of the latter form can also irreparably damage fairness, even if its reliability is not at stake at all, shows that the notion of fairness is not only oriented on truth-finding, but also on criminal procedural propriety. Art. 6 ETHR does not only dictate that criminal procedure be fair to maxi-

[73] No violation has ever been found with regards to the use of this type of evidence, and - allowing use even when full immunity from prosecution has been vouchsafed to such witnesses - case law gives no indication as to what type of procedural norm may be challenged by such testimony.

[74] Admissibility Decision ECHR 25th of May 2004, Cornelis v. The Netherlands, Appl.nr.: 994/03.

mize the chance of the outcome of the truth, but also that the outcome be reached propitiously.

That criminal procedural propriety is an intrinsic part of the notion of fairness is hardly remarkable. That it does represent a particular choice however, must be understood from the perspective that a distinction can be made as to rationale underlying fair trials must be fair. One underlying objective of fairness is to optimize truth-finding. The application of the fair use of evidence model in the context of illegally obtained evidence shows that procedural propriety is a further autonomous rationale underlying fairness. Again, as '(…) respect for individual rights lies at the heart of international human rights law,[75] that is not remarkable. `Ideas drawn from dominant streams of Western political and legal philosophy lie at the heart of international human rights law' and `(i)nternational human rights instruments are essentially founded on the doctrine of the rule of law, and on a conception of the individual as an autonomous moral agent who is accorded an entitlement to certain fundamental rights'.[76] That base of respect for individual autonomy becomes manifest when criminal procedural authorities comply with substantive criminal procedural norms. Compliance with such norms `is crucial in securing acceptance of adjudicative decisions as legitimate exercises of official power'.[77] That brings with it that '(t)hese broad principles (...) are important not just instrumentally (because they tend to promote factually correct outcomes of decisions), but normatively, because requirements of due process demonstrate respect for the dignity and rights of individuals'.[78] That makes it hardly surprising that fairness in the sense of art. 6 ETHR should be interpreted from that perspective: the right to a fair trial and its sub-rights have dual functions. They offer

[75] Dennis reads recognition of this foundational basis in the text of art. 6 ETHR, in art. 21 of the ICTY Statuevan het Statuut van de ICTY, and in the case law of the ECHR and the Tribunal. Ibid., p. 526 and 529.

[76] I.H. Dennis, Human Rights and Evidence in Adversarial Criminal Procedure: The Advancement of International Standards, In: J.F. Nijboer/J.M. Reintjes (Red.), Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence, Koninklijke Vermande, Den Haag, 1995, p. 524.

[77] Ibid.

[78] Ibid., referring to: R. Dworkin, Principle, Policy, Procedure, In: Crime, Proof and Punishment (Red. Tapper), 1981.

safeguards from the perspective of the objective of truth-finding as well as from that of criminal procedural propriety.

That art. 6 ETHR rights do not function exclusively to guarantee fair outcomes with regards to content, but also dictate proper procedural forms, notwithstanding implications for truth-finding, is evident not only in the recognition of fairness issues in the use of (potentially) illegally obtained evidence, but also in interpretations of (other) art. 6 ETHR rights. Many explicit and implicit rights in art. 6 ETHR have dual functions: they aim to guarantee probative quality (and therewith: truth-finding) *and* procedural propriety. The right to examine and challenge witnesses can serve truth-finding, but may also be invoked for the purpose of the testing of the legality of evidence procurement. The same holds true for the right to legal assistance, the right to be present at an adversarial hearing, but also for rights that already apply in the pre-trial phase, such as the privilege against self-incrimination. Strasbourg pre-trial norms concerning incitement provide an interesting exception in this regard, therewith representing the cutting-edge of the propriety notion in art. 6 ETHR. Those rules seem to be completely disassociated from truth-finding. In incitement cases, that the offence was committed is a given, yet the use of evidence obtained via violations of treaty incitement norms remains highly problematical.

It is not a great leap then that the fairness of the use of evidence may also be tested with regards to non-probative issues of propriety. The Court fortifies that latter aspect of fairness in doing so. Nevertheless, the Court's choice to do so remains remarkable, for several reasons. In the first place, therewith, the ECHR recognizes that art. 6 ETHR dictates that potentially illegally obtained evidence requires testing and an adequate response. With that, the Court has accorded this duty the status of a human right. That stature must be essential, not only in legal systems where testing and responses to evidence obtained through pre-trial illegality do not exist as legal concepts, but also in systems in which the concept does exist, but is not strictly applied, because the concept is not firmly harbored in strong law. The incorporation of this right in art. 6 ETHR alters the situation in both types of legal systems (in as far as they

are Council of Europe member states), as this duty to test and respond is a treaty obligation, not allowing for non-committal application. (Disregarding the strictness with which the Court applies its own model).

However, it must be pointed out that the recognition of the dual function of fair trial rights does not say anything about the relative weight they are accorded. The fact remains that the probative value of evidence (and therewith the truth-finding function) plays an important role in evaluations of the fairness of the use of evidence. That effect can be strong that it was suggested, on the basis of early ECHR case law, that the use of illegally obtained evidence is in fact only problematical, if that evidence is also probatively unsafe (because of the underlying norm violation).[79] However, such a conclusion could only be reached on the basis of a very particular type of ECHR case law regarding illegally obtained evidence, namely, case law featuring privacy violations. Reviewing the entire body of ECHR case law in this regard, that solution is not feasible. The ECHR also finds violations in cases in which the probative value of illegally obtained evidence is very high. The 1998 decision in *Teixeira de Casto v. Portugal*,[80] wherein the content of the evidence (obtained via an undercover operation in which the Court found treaty incitement rules to have been violated), was not challenged (if it was challengeable at all), in itself disproves that probative value must be an issue. Furthermore, in case involving use of evidence obtained through violation of art. 8 ETHR, the Court never disregards the fact that underlying violation could effect fairness, always applying the fair evidence test. It is simply that - to date - the outcome of that test has always been fairness was sufficiently recuperated. The ECHR is thus not indifferent to privacy violations in criminal procedure, just not overly awed by their implications for the fairness of the use of evidence.[81]

The more evident explanation, is that the Court not only values certain human rights differently in a hierarchical sense, but also deploys a

[79] Annotation Schalken for ECHR 12 mei 2002, *Khan v. The United Kingdom*, NJ 2002, 180, (ann. Sch).

[80] ECHR 9th of June 1998, *Teixeira de Castro v. Portugal*, Appl.nr. : 44/1997.

[81] See recently in this regard: ECHR 21st of January 2009, *Bykov v. Russia*, Appl.nr.: 4378/02 (GC).

hierarchic-type order for rights in terms of their valuation from a *criminal procedural perspective*. That last hierarchical structure would explain the weak effects of art. 8 ETHR pre-trial violations on the fairness of the use of evidence versus those of art. 6 ETHR pre-trial rights violations. Violations of art. 6 ETHR rights that already apply in the pre-trial phase, such as the right to remain silent or 'non-incitement' rights, are composites of the notion of fairness itself, so that, logically, the use of evidence so obtained affects the fairness of the use of evidence more profoundly. Privacy violations that do not have that effect, remain grave in themselves - they are, after all, violations of human rights - but require no remedy *within* criminal procedure. *De facto*, privacy violations in pre-trial procedure thus stand somewhat isolated from the sphere of art. 6 ETHR. It is sufficient that they are resolved through alternative remedies, such as possibilities for civil actions.[82]

Later case law concerning the use of evidence obtained through violations of art. 3 ETHR supports that conclusion. Pre-trial violations of art. 3 ETHR can give rise to as far-reaching, if not further reaching consequences for the use of evidence as do violations of art. 6 ETHR pre-trial nom violations, again without there being any probative issued involved.[83] Two explanations may be offered in that regard. In the first place, the non-derogable art. 3 ETHR hierarchically outranks art. 8 and

[82] Although no violation has ever been found of art. 6 ETHR because of the use evidence obtained in violation of privacy rights, in every case, the Court also found a violation of art. 13 ETHR, the right to an effective remedy, because there was no alternative redress for the privacy rights violations, *outside* criminal procedure. Furthermore, the Court is quite clearly in favor of strong privacy protection, as is apparent from ever-increasing range of protection of art. 8 ETHR in the sphere of criminal procedural investigations, in the sense that the Court readily finds violations of privacy rights themselves. The issue is thus not that the ECHR does not believe in strong privacy protection in criminal procedure, but simply that privacy violations do not correspond to the category of norms that are apt to (strongly) disturb the fairness of a criminal procedure.

[83] In *Gäfgen v. Germany*, evidence had been obtained following (though, according to the ECHR, only chronologically and not causally), a violation of art. 3 ETHR (in the sense of inhuman treatment, concretely through threats of infliction of physical pain), during police interrogation. Nowhere did the (strong) probative value of the used evidence play a role in the Court's finding of no violation of fairness of the use of that evidence, as the issue was resolved through entirely different means.

art. 6 ETHR in the general treaty structure. In that sense alone, it is not remarkable that evidence obtained in violation of art. 3 ETHR has profound implications. In the second place however, there is a logical and close relationship between the substance of art. 3 ETHR and the substance of criminal procedure. `Because legal process is a civilised replacement of the resolution of conflicts by uncivilised physical prevalence, the abandonment of violence is its foremost purpose. Indeed, it is its constitutive component'.[84] That does not mean that every violation of art. 3 ETHR will lead to issues of fairness. Poor pre-trial detention circumstances that violate art. 3 ETHR would have no effect on the fairness of criminal procedure (unless those circumstances somehow deterred the exercise of fair trial rights). The very nature of art. 3 ETHR however almost automatically touches procedural fairness when this right is violation in the course of the obtaining of evidence. To a great extent, art. 3 and art. 6 ETHR then overlap, most evidently within the context of the privilege against self-incrimination and the right to remain silent:[85]

> `(…) historically, both rights (the *nemo tenetur* principle and the right to silence: FPÖ) must be seen as the very negation of the old, inquisitorial notion that a *confession* is an indispensable condition for conviction and therefore must, if need be, be extorted. These immunities thus served the purpose of preventing suspects from being subjected to improper physical or psychological pressure. (…) (B)oth rights – and more especially the right to remain silent – still serve this purpose. Also today it remains necessary to protect suspects under custodial police questioning against such pressure'.

That the ECHR is mainly concerned with particular types of norm violations that correspond to the substance of procedural propriety is further lucidly demonstrated in the admissibility decision in *Shannon v. The United Kingdom*. That case involved evidence obtained via a *private* undercover operation, which had been relayed after the fact to criminal procedural authorities. Unlike the *Teixeira de Castro* case, according to the Court, this case did not involve 'an entrapment operation undertaken

[84] Concurring opinion of Judge Zupančič, *Jalloh v. Germany.*

[85] Dissenting opinion of Judge Martens, *Saunders v. The United Kingdom.*

by police officers' but 'entrapment by individuals other than agents of the State'. Although the Court did not exclude that 'the admission of evidence so obtained might under certain circumstances render the proceedings unfair for the purposes of Article 6 of the Convention', but the difference is crucial to the Court:

> '(t)he operation which was there (in Teixeira de Casto: FPÖ) being examined constituted a misuse of State power, the police officers having gone beyond their legitimate role as undercover agents obtaining evidence against a suspected offender to incite the commission of the offence itself. The Court considers that the principles set out in the Teixeira judgment are to be viewed in this context and to be seen as principally directed to the use in a criminal trial of evidence gained by means of an entrapment operation carried out by or on behalf of the State or its agents'.[86]

Here, it is possible to see an analogy between pre-trial privacy violations and horizontal violations (even of substantive norms that are generally more grave from a criminal procedural perspective, such as incitement), by private individuals. In both cases, the violations are too far removed from the notion of criminal procedural propriety. In the first case, that is because that notion does not subsume privacy as a core norm. In the second case, the actions of private agents do not touch criminal procedural propriety because that notion is oriented on the actions of public authorities. Following that reasoning, it may be fair to conclude that privacy violations create an issue under the fair use of evidence model not because of the privacy violation itself, but because criminal procedural authorities did not comply with rules of criminal procedure. The privacy violation then plays a rather marginal role: any privacy violation creates a risk in the use of evidence so obtained, but the need for recuperation there mainly stems from the necessity to exclude the possibility that another (criminal procedurally more pertinent) norm was also violated and the fact that any violations of criminal procedural norms by

[86] Admissibility Decision, ECHR 6th of April 2004, *Shannon v. The United Kingdom*, Appl. nr.: 67537/01.

authorities must be addressed. If that is the only issue involved, balancing protocols must still be executed, but recuperation is hardly difficult.

The foregoing may explain why the probative value of evidence plays such an important role in the evaluations of the fairness of the use of evidence in cases relating to privacy violations. The distinctions that the Court makes in the valuations of substantive norms with regards to their gravity from the perspective of criminal procedural propriety create a further gradual mechanism within the over-arching balancing test. The more grave norm violations are in that sense, the less weight probative value has in evaluations of fairness. The more far-removed a norm violation is from the sphere of criminal procedural propriety, the greater will be the effect of (high) probative value in recuperative balancing.

Turning to the question as to the relative weight of the propriety rationale versus the probativity rationale underlying the fair use of evidence model, the following conclusion can be reached with regards to these two functions (optimizing truth-finding and guaranteeing procedural propriety). In relation to violations of art. 8 ECHR, the probativity function is stronger than the propriety function. With that determination, two questions remain unanswered. In the first place, it remains unclear what the respective weight is of the two functions in relation to other types of norm violations and if further distinctions can be made within that category in this regard. That requires examination of case law with regards to different types of norm violations, with an eye on identifying the effect of probative value. In the second place - this question relates more to principle – it is also unclear why the ECHR makes such a low valuation of privacy violations from the perspective of procedural propriety. As no violations have ever been found in cases where evidence was obtained through privacy violations, it is difficult to answer that question. One explanation may be that the Court's valuation is related to the broadness of the right to privacy (which in part follows from the expansive interpretation of the ECHR of this provision). The right to privacy touches many spheres, also outside of the domain of criminal procedural investigations. Within that broad scope, it may be that the Court has not yet been able to identify a criminal procedural core within art. 8 ETHR (which may equate with the scope of

the U.S. Fourth Amendment rights). The ECHR's recent Grand Chamber decision in Bykov. Russia, or rather, the separate opinions attached to that judgment, show that there is support within the Court, for the identification of such a criminal procedural core in art. 8 ETHR.[87]

III.3. The Valuation of Norm Violations and Probative Issues from the Perspective of Fairness: Rationale Underlying the ETHR Model

It has already been mentioned that the ECHR does not disclose specific rationale in that regard, certainly not in so clear a manner as the U.S. Supreme Court. References to the deterrence rationale are to be found in ECHR case law. In *Gäfgen*, the Court considered that the '(...) exclusion that this exclusion of statements made under threat or in view of incriminating statements extracted previously is an effective method of redressing disadvantages the defendant suffered on that account in the criminal proceedings against him. By restoring him to the *status quo ante* in this respect, it serves to discourage the extraction of statements by methods prohibited by Article 3'.[88] The deterrence rationale is explicitly named as a concern by dissenting judges in both *Khan* and *Bykov*, in the sense that these judges express anxiousness as to the realization of that rationale, given the stance of the ECHR with regards to the weak effects of art. 8 violations on the fairness of the use of evidence. A clear proclamation that the goal of deterrence, that is so important in U.S. case law, is the rationale underlying evidence exclusion, is however absent in ECHR case law. Certainly, appreciable deterrence is not a prerequisite of evidence exclusion; deterrence is simply sometimes mentioned as a factor of importance. Discussion of alternate rationale is even less visible. In a sense, that the Court would not refer explicitly at all to the alternate rationale of rights reparation, is entirely to be expected: as protection of human rights is the *raison d'être* of the Court, it would go without saying that any and all of its decision are based in that notion.

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[87] ECHR 21st of January 2009, *Bykov v. Russia*, Appl.nr.: 4378/02.

[88] *Gäfgen,§* 90.

Otherwise, there are simply no clear indications that the ECHR has a preference for a particular rationale for the evidence exclusion model and grounds its reasoning on it. That does not mean however that it is impossible to decipher reasons underlying and driving the ETHR fair evidence model. In the first place, given that there is a certain affinity or correlation between specific rationales and exceptions that can be applied to the rule (i.e. the limitations described above in terms of a third parameter), instances in which the Court applies certain exceptions (which the Court does do), may in fact reveal the effect of related rationale. So, if the Court were to apply the good faith exception, allowing for evidence use, in whole or in part because of good faith on the part of the criminal procedural authorities, it could be argued that the decision is, at to some extent, based on the deterrence rationale. Where the Court categorically denies art. 8 ETHR violations effect on the fairness of evidence, it could be argued that the rights reparation ratio is concretely at work behind that stance, delineating art. 8 ETHR as a norm not pertinent to criminal procedural interests of the defendant.

In the second place, the suggestion has already been made that the sensitivity to environmental factors that the exclusionary shows in U.S. case law (such as changes in law enforcement logistics, the availability of alternate remedies and policy preferences of the judiciary, coupled with an organic structure and status that allows for much fluctuation), gives reason to be alert to other environmental factors that may determine the scope of the rule. I.e., there may be an alternate rationale for evidence exclusion. The issue as to the foundational import of probativity versus propriety as rationales behind interpretations of fairness (in general, but particularly with regards to the fair evidence model), would be in an important point to consider in this regard.

That issue has to do with the question as to the origin of the ECHR model. Although it is easy to assume that most models of evidence exclusion were to a degree borrowed or inspired by U.S. law, there is a possible alternative source for ECHR law, namely English common law.

If it is taken as a given that common law admissibility rules are mainly related to probative issues, excluding relevant evidence only for reasons of intrinsic unreliability of its content, the argument could then be that, if the ECHR is also mainly concerned with the probative value of evidence, its model would show more affinity with the common law concept than the U.S. model. Certainly there is something to be said for such reasoning. In the first place, even though the Court does apply the same fairness test to evidence obtained in violation of norms that are otherwise not problematic from the perspective of reliability of content, there can be no denying that the quality of the content of evidence is crucial to the Court. That is apparent in the case law regarding other categories of evidence, the use of which the Court has marked as intrinsically unsafe for fairness (without sufficient recuperation). In all cases, the risk to fairness those alternate categories carry with them, lies in reliability of content. Even within the context of evidence obtained through norm violations however, the fact remains that the Court quite clearly attaches importance to the reliability of content, which it makes apparent in its frequently used formula, that regard must also be had to 'the quality of the evidence, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy' and that '(w)hile no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker'.[89]

If it could be argued further that the norm violations the Court does rate highly in terms of effect on fairness in evidence use (those contained in art. 6 ETHR and 3 ETHR) somehow also relate – ultimately – to probative issues, that would suggest that the Court's model is indeed more akin to common law evidence rules. Looking at those norm violations, which mainly touch the privilege against self-incrimination, it is true that at their base, they are (also) sensitive in a probative sense. It could be

[89] *Allan v. The United Kingdom*, § 43. See in that regard also the Court's decision in *Bykov*, in which the Court even seems almost to have viewed unreliability of evidence as an autonomously problematic issue in relation to the fairness of its use, not even mentioning the underlying privacy violation in that regard.

that the Court actually focuses more on that dimension. That then could explain why art. 8 ETHR norm violations – which do not per se result in probatively unsound evidence – have such a weak effect on the fairness of the use of evidence.

However, contrary arguments are also to made. In the first place, as said, even though common law admissibility rules mainly relate to probativity, they are not entirely indifferent to coerced confession evidence, regardless of its reliability of content. The absence of common law admissibility and exclusionary rules with regards to privacy violations, on the other hand, is not so odd. Privacy rights are namely not a feature of English common law. In criminal procedure, if privacy is not an issue, there is no need for enforcement via exclusion. In the second place, there is no denying that the ETHR model is also operational, even if evidence obtained via norm violations is entirely reliable as to its content. The manner and extent in which a norm violation affects the fairness of the use of evidence is simply not exclusively determined by the reliability of the content of that evidence, but rather hinges on the criminal procedural import of the violated substantive norm. It is only the order in which the treaty protective model was applied, mainly first to modalities of *eo ipso* probatively problematic witness testimony, then to evidence obtained through privacy violations, that suggested that procedural impropriety was not in itself determinative in the evaluation of the fairness of the use of evidence. That the Court simply attaches different valuations to different types of norm violations from the perspective of criminal procedure explains the entire gamut of the varying outcomes in the Court's case law concerning the use of illegally obtained evidence, in a way that the (un) reliabilty solution cannot.[90]

It may even be safe to say that when it comes to evaluating the fairness of the use of evidence, the Court is *more* engaged in issues relating to propriety than reliability. Two arguments support that suggestion. In the first place, the Court tests fairness in the latter sense only if there is a pre-

[90] Indeed, as the Court further developed its case law on the fairness of the use of illegally obtained evidence and that case law structurally branched outside of the domain of pre-trial privacy violations, Schalken recalled his own explanation for diverging outcomes in case law.

determined and/or blatant indication that intrinsic reliability issues exist. Such blatant indications do not pertain to the content of such evidence in specific cases, but to the general category to which they belong. The Court finds anonymous witness testimony and the testimony of witnesses who have made arrangements with the authorities for personal gain problematic, not because the Court tests the content of such testimony in individual cases and finds them to be acrimonious or untruthful. Evaluation of the content of evidence is exactly the type of fact-related testing the Court does *not* indulge in. Indeed, the content of such testimony, if it is discussed at all, is mainly only pertinent to ECHR analysis with an eye on the weighing of the extent in which a conviction was based on that testimony and the extent in which the defense was able to challenge it. Thus, even though the particular risk to fairness these latter two types of evidence carry with them is (ultimately) related to probative issues, they are regarded as problematic because they belong to an intrinsically problematic *species* of evidence. There is no reason to assume that the ECHR, eager in general not to supplant the factual valuations by national courts in individual cases (even if they are in error), with its own, would contrarily to do so for the category of illegally obtained evidence. In the second place, an important difference exists between evidence that is deemed probatively 'unsafe' by the Court and illegally obtained evidence. Whilst the fairness of use is tested in (*grosso modo*) the same manner for both categories, there are no types of the first category of which the use is absolutely excluded. I.e. all the probatively unsafe categories can be used in principle, as long as the risk to fairness they bring with them is resolved through due care and compensation. That is not true for all categories of illegally obtained evidence: some norm violations are such that evidence so obtained may never be used. Surely then, from the treaty perspective, impropriety vis-à-vis such norms must carry more weight than reliability of content.

The resolution then lies in the following. The ETHR model, entrenched as it is in the famously hybrid (in the sense of carrying traits of distinct legal families) art. 6 ETHR, in itself represents a collage of procedural notions, borrowed not one from one, but from multiple

sources. The (older) reliability rationale may likely be of common law origin (as it also must be in the U.S.), while the propriety rationale is an innovation indeed transplanted from U.S. case law. Both rationale lay ate the base of the ETHR model, and a combination of risks introduced by impropriety and unreliability of content *aggravates* the issues of fairness of the use of evidence. Detracting any problems of unreliability, even in art. 8 ETHR violations, the Court never says that the use of illegally obtained evidence is not issue at all and can never affect fairness. The Court has simply always been willing to accept any type or extent of testing that national courts have provided in that regard as sufficient. The only conclusion to be drawn from that is that the Court values the gravity of privacy violations so weakly as to make it almost impossible for the use evidence so obtained to be unfair, *unless* there is an additional problem with the reliability of the content of the evidence. Therein may lie influence of English common law, namely in its historical indifference to privacy rights. The question that then remains is how conscious the ECHR is of this mixed diffusion and to what extent the ECHR should clearly reflect its hybrid rationale (including distinctions in the weight the Court may attach to probativity versus propriety), in its reasoning.

III.3.1. A Commonality in the Case Law in which the Protective Model First Gained Momentum

Convention organs were first called upon to determine what implications pre-trial impropriety could have in terms of the treaty, as early on as 1989. *Kostovski*[91] (1989) involved the use of police informers in the pre-trial investigation,[92] whilst *Radermacher en Pferreer v. The Federal Republic of Germany*[93] (1990)[94] confronted the Court with the issue of an

[91] EHRM 20 november 1989, *Kostovski v.The Netherlands*, Series A, 166.

[92] Though that was not the issue to be tested by the Court, as the complaint in that case was that anonymous witness testimony had been used in evidence, the Court did comment on the implications of the treaty for the use of police informers in the pre-trial phase.

[93] Rapport van de ECOmmRM, 11 oktober 1990, *Radermacher en Pferreer, V. Federale Republiek van Duistland,* Appl.nr.: 12811/87.

[94] See for earlier cases that were submitted to the European Commission Nrs. 9165/80, December 6.7.81 and 10747/84, December 7.10.85 (both unpublished). `In neither of

undercover operation possibly involving incitement.[95] The 1998 decision in *Teixeira de Castro v. Portugal*, which was the first case of its kind, not only to be declared admissible by the Commission, but also in which a violation was found of art. 6 ETHR due to the use of illegally obtained evidence, also involved incitement by undercover agents. From 2000 on, the Court was faced with the series of complaints against the United Kingdom referred to above, concerning the use of evidence obtained through pre-trial privacy violations. In *Khan (2000)*, evidence had been obtained through the use of covert listening devices placed in the home of a co-defendant. In *P.G. and J.H.* (2001), which also involved a *pro-active* criminal investigation (i.e. of offences yet to be committed), covert listening devices had been used, again to record conversations in a home, but also (in order to obtain comparative voice samples), at the place of pre-trial detention. Also, British Telecommunications PLC had been requested to provide itemized billing information for the telephone number of a co-defendant. That request was originally made to identify an unknown co-defendant, but the data so procured was also used to corroborate the times and dates recorded through the covert listening device in the home. In *Allan* (2002), a covert listening device had been used to listen to and record the conversations of the applicant at the police station where he was held in pre-trial custody. In *Perry* (2003), covert visual recordings had been made of the applicant with a hidden camera, again at a police station, after he had refused (several times), to participate in a line-up. These recordings were later used in a video line-up, during which the images (that had been combined with images of persons imitating the actions of the Perry in the recordings), were shown to witnesses, for identification purposes. In *Allan v. The United Kingdom*, a further complaint concerned the use of a undercover agent, who posing as a cellmate, had induced Allan, under instruction from police authorities, into a confession, after he had consistently invoked his right to remain silent during formal interrogation. A further series of cases, including *Eurofinacom v. France* (2000), *Shannon v. The United Kingdom* (2004), *Vanyan*

these cases did the Commission find a violation of Article 6 para. 1 (...), and the circumstances in these cases were such that the Commission was not called upon to take a general position on the issue of undercover agents'. *Radermacher en Pferreer,* § 76.

95 Ibid., § 70.

v. Russia (2005) and *Khudobin v. Russia (2006)*, all concerned undercover operations, in which it was alleged that incitement had taken place.

The commonality here is that all these cases involve pre-trial violations allegedly brought about through the application of so-called Special Investigative Techniques (SIT). Those techniques are described by the Committee of Ministers of the Council of Europe, (in Recommendation (Rec(2005)10)[96] (adopted on the 20th of April 2005), as `techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons.'[97] They include, amongst other methods:

> `(...) undercover operations (including covert investigations); front store operations (e.g. undercover company); informants; controlled delivery, observation, including cross-border observation); electronic surveillance; interception of communications (telephone, fax, email, mail); searches (including of premises and objects, such as computers, cars, etc); cross-border (hot) pursuits; pseudo-purchases or other `pseudo-offences' as they are defined in national laws'.[98]

Recommendation (Rec(2005)10) calls on member states to make 'effective use of SIT', Importantly, that does *not* mean that member states should introduce such techniques in their national legal systems. Point of departure of the Recommendation is namely that the main varieties

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[96] Recommendation (Rec(2005)10) of the Committee of Ministers to member states on `special investigative techniques' in relation to serious crimes including acts of terroris (verder: Recommendation (REC(2005)10)).

[97] Appendix to Recommendation Rec(2005)10, Chapter I – Definitions and scope.

[98] Explanatory report adjoined to Rec(2005)10, § 27. See also the Recommendations on Special Investigative Techniques and other critical measures for combating organized crime and terrorism of the G8 countries, following the Meeting of G8 Justice and Home Affairs Ministers, in Washington, on the 11th of May 2004: `G8 (s)tates recommend that legal systems allow, in the manner set forth below, for the use of special investigative techniques such as use of undercover agents, use of covert filming and listening devices, and covert interception of all forms of electronic communications, as well as for the use of other critical measures which by their effectiveness facilitate the investigation and prosecution of serious and organized crime and terrorism'.

of SIT are already applied in all member states[99] (in a quite uniform manner),[100] particularly in the fight against organised crime.[101] Although the Recommendation does encourage that SIT also be used in the fight against terrorism, its main object is to promote that '*some common principles'* be laid down for national regulations and applications of already existing SIT, for all criminal procedural use thereof.[102] More concretely, the Recommendation calls governments of member states to:

> i. 'be guided, when formulating their internal legislation and reviewing their criminal policy and practice, and when using special investigation techniques, by the principles and measures appended to this Recommendation;
>
> ii. ensure that all the necessary publicity for these principles and measures is distributed to competent authorities involved in the use of special investigation techniques'.[103]

Why the Committee of Ministers is concerned with the formation of a communal framework for a phenomenon that has long been incorporated

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[99] PC-TI (2003) 11, Final Report, p.7. See also the conclusion of the PC-TI, PC-TI (2003) Conclusions.

[100] Committee of Experts on Special Investigation Techniques in relation to acts of terrorism, (PC-TI), Final Report on Special Investigation Techniques in relation to acts of terrorism, 06/10/03 PC-TI (2003) 11 (further: PC-TI (2003), Final Report), p. 7. Shortly after the attacks on the 11th of September in New York, the Committee of Ministers decided, at the 109th session op the 8th if November 2001, to take speedy measures: '(...) to increase the effectiveness of the existing international instruments within the Council of Europe on the fight against terrorism, by inter alia, setting up a Multidisciplinary Group on International Action against Terrorism (GMT)'. Explanatory report bij Rec(2005)10, § 1. De GMT indicated that SIT were a priority in that regard. For that reason, a Committee of Experts on Special Investigation Techniques in relation to Acts of Terrorism (PC-TI) was installed. PC-TI was charged with examining `(...) the use of special investigative techniques respective of European criminal justice and human rights standards, with a view to facilitating the prosecution of terrorist offences and increasing the effectiveness of law enforcement, and to make proposals as to the feasibility of preparing an appropriate instrument in this field'. Ibid., § 3 and §§ 6-7.

[101] Ibid.

[102] Explanatory report bij Rec(2005)10, §15. De Recommendation further contains suggestions as to measures to improve co-operation between member states with regards to SIT.

[103] Recommendation (Rec(2005)10).

in European legal systems, becomes apparent from the texts accompanying the Recommendation. Three, mutually related characteristics of SIT seem to be determinative in that respect. According to the Recommendation, SIT are `(...) numerous, varied and constantly evolving'. Furthermore, a commanality is `(...) their secret nature and the fact that their application could interfere with fundamental rights and freedoms'. SIT are special 'because of their secret nature (...).'[104] Their covert application, which has everything to do with the type of crime they intend to fight,[105] is essential: `(i)t is because of their secret nature that they are considered a vital tool in the fight against serious crimes, including acts of terrorism.[106] `The use of SIT would be superfluous, and might even be counterproductive, if the target persons were aware about the fact that such techniques are being used with used with a view to collecting information on their actions or activities'.[107] A further crucial characteristic of SIT is their special position vis-a-vis human rights and freedoms. The application of SIT may be necessary, it is also `(...) essential to ensure that human rights guarantees, as enshrined in relevant international legal instruments, (...) (are) fully respected'.[108] The `common standards governing their proper use'[109] indeed mainly relate to the human rights standards that must be respected in the application of SIT.[110] A third feature of SIT is the far-reaching vagueness that surrounds the phenomenon. The concept of SIT is `(...) not easy to

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[104] Explanatory report bij Rec(2005)10, § 17.

[105] See the Explanatory report with regards to problems involved in fighting terrorism: `(t)he GMT considered that, owing to its complex and secret nature, as well as the technical nature of the area concerned, the investigation of terrorist activities raised serious difficulties. It recalled that these difficulties were accentuated by the frequent links between terrorism and other forms of crime (e.g. money laundering, drug trafficking, illegal arms sales, organized crime etc.) and by the difficult distinction between legal and illegal activities. The often complex nature of important terrorist actions and therefore of investigations has led to the awareness that these matters can only effectively and rapidly addressed by making use of special working methods (e.g. undercover agents, electronic surveillance, multidisciplinary approaches and inter-service co-operation)'. Ibidem, § 4.

[106] Explanatory report bij Rec(2005)10, § 17.

[107] Ibidem, § 27.

[108] Ibidem, § 4.

[109] Recommendation (Rec(2005)10).

[110] Explanatory report bij Rec(2005)10, § 24.

pin down since it is one that is constantly changing, as it has in the past and will certainly continue to do in the future'.[111] It is because of the undetermined nature of SIT that it is difficult to define SIT further in terms of the first two characteristics named above.[112] The covert application of SIT make them intrinsically problematic in terms of the relevant human rights framework, the full connotation of the problematic nature of SIT – outside of issues relating to covert application – is still obscure and changeable. The relationship between these features may be apparent: in applying SIT, member states embark on a journey into unchartered territories of human rights and freedoms, with no certainty as to the implications SIT may have.

III.3.2. Human Rights Sensitivities to SIT and Other Innovations in Criminal Procedural Investigations

Pre-trial (custodial) impropriety involving coercion of suspects or arrestees by police to give self-incriminating testimony only became an issue when police officers actually became qualified to interrogate.[113] Interferences in private life through the collection and analysis of biometric, DNA and cell material became problematical because the technology to collect and analyze such material became available. Complex humans rights issues arose regarding public use of private information due to the development of information technologies that allow for large-scale automated collection and processing of such personal data. It became possible to monitor cell phone conversations because cell phones were invented, unusual amounts of heat radiation (an indication of a marijuana plants nursery), can be monitored because thermal imaging devices can now see through walls. A list of illustrations could be lengthy, but the point must already be clear. SIT give rise to new human rights sensitivities,

[111] PC-TI (2003) 11, Final Report, p. 7.

[112] Committee of Experts on Special Investigation Techniques in relation to acts of terrorism, (PC-TI), PC-TI (2003) Conclusions.

[113] Thomas Y. Davies, Op.cit., p. 1003-1004. That was not always the case, as in America in the framing-era, when '(…) only magistrates, usually justices of the peace, had the authority to conduct examinations'. Ibid.

because SIT did not exist before and they affect human rights in a novel fashion, sometimes revealing dimensions of human rights that were not before apparent.

If art. 6 ETHR was already summary in nature, and the Court was bound to extend its reach to accommodate for the needs of modern criminal procedural - not in the least through broadening its reach to pre-trial procedure - the confrontation with SIT certainly posed the ECHR with new challenges. Developed for a concept of criminal procedure as prevalent in post-war Europe, the text of art. 6 ETHR does not foresee in a blue-print for the relation between human rights and SIT. These investigative methods first began to be applied - somewhat strangely, almost simultaneously, without any discernible communal agreement to that end - in the legal systems of member states of the Council of Europe, *grosso modo* in the late eighties to the early nineties of the last century.

Difficulties that are attached to SIT may be apparent. Because they are applied covertly, monitoring 'proper use' is more complex: the suspect is not aware of the investigation while it is conducted, afterwards, all parties are reliant on the investigative authorities for information as to the manner in which SIT were applied. Certain features of SIT can raise intricate issues in the evaluation. Given the scope and complexity of such investigations, it may be practically difficult to provide integral information, whilst in some instances, certain interests (such as that of informants, whose identity must not be revealed, or the particularities of the application of SIT, with an eye on their future effectivity), could resist disclosure. Pro-active application can bring with it that SIT can be applied not on the basis of probable cause that offences have been committed, but will be in the future. That would make the informational bases for investigations more diffuse and therewith more difficult to evaluate. SIT can also be applied via the assistance of civilians, assisting governmental authorities in undercover operations, raising more issues as to modes of monitoring propriety.

The greatest difficulty however lies in the undefined relationship between SIT and human rights boundaries. SIT are not only to be po-

sitioned in terms of human rights as they stand, but call for extension of human rights boundaries themselves. Classically, privacy rights protect the home and correspondence, not explicitly addressing modern forms of communications. The availability of new communication technologies then necessitates a broader privacy conception, inclusive of those new forms. In the same sense, while criminal procedure clearly defines norms relating to physical coercion of suspects to give testimony, no answers are readily available for new posed questions such as the implications for the privilege against self-incrimination of covert manipulation of suspects, inducing them to self-incriminate or the own implications of covert participation by undercover operatives in offences for which the defendant is later prosecuted. The *Explanatory report* for Rec(2005)10 holds that's SIT are `*secret'* in order to `to conceal what is being done'. The purpose in that is not however to `(…) to alter the behaviour of the presumed offender but to deprive him or her of information'.[114] That distinction can be highly subtle however and difficult to evaluate in concrete cases. Nevertheless, it is a crucial distinction, as altering behavior could overstep a human rights boundary. As for regulation of SIT, as they are undefined in themselves (and, because of the scope of such investigations, necessarily require broader discretion), it is difficult lay down clear legislation, making them also problematic in terms of the principe of legality. The strict requirements for the application of SIT laid down in the *Recommendation* testifies to these difficulties. Aiming `to strike a balance between the need to enhance the efficiency of the fight against serious crimes (…) by promoting the use of SIT, and the need to ensure the protection of the fundamental rights and freedoms',[115] the *Recommendation* underlines the need for communal respect for human rights (including) strict standards of legality, proporitonality and subsidiarity, as well as judicial supervision, where and when that is needed.[116] The implication seems to be that SIT must be regarded as more problematic in terms of human rights than other criminal procedural investigative measures. That implication is plausible. SIT may not necessarily encroach more gravely on human rights then other measures such as

[114] *Explanatory report* bij Rec(2005)10, § 27.

[115] Ibid., § 17.

[116] Ibid., §§ 28-46.

search and seizures, but they do effect human rights in a different manner. The relationship between SIT and human rights is precarious and instable, mainly because it is not exhaustively or thoruoghly defined.

III.3.3. The Dynamics of Contemporary Substantive Criminal Procedure as an Underlying Rationale, Delineation of Substantive Procedure by the ECHR

It has been suggested that because the ETHR evidence exclusion model visibly gained its main momentum in the context of the evaluation of complaints that began to reach the Court regarding the application of SIT, that context may relate to underlying rationale of the Court, in its choice to apply its fair evidence model (that was then oriented on probatively problematic evidence types), to the use of (possibly) illegally obtained evidence. The reasoning in that sense may be apparent: in doing so, the Court would seem to have responded to a practical need. The logic of the Supreme Court – in restricting the range of the exclusionary rule – resonates here. If the need for such a remedy becomes dissipated because there is a significant evolution in law enforcement and alternate remedies are available, the destabilization of substantive pre-trial norms could again invoke the need for stricter enforcement. Pre-trial propriety cannot only become an issue because law enforcement officials do not abide by rules, but also because the norms they should abide by are unclear. So, if SIT have created unclarity in substantive pre-trial norms, the Court's deployment of the fair evidence model would correspond to a particular need, namely that for definition of boundaries. Interestingly, that in turn corresponds to a fourth doctrinally recognized ratio, next to the goals of deterrence, rights reparation and demonstration, namely that of judicial regulation of substantive norms.[117] That ratio is not to be realized in individual cases, but in the aggregate of the entire body of case law on evidence exclusion, (or, more generally that regarding any type of judicial response to pre-trial impropriety). As such, the evidence

[117] A.M. van Woensel, Op.cit., p 148-149.

exclusion model represents the means by which the judiciary delineate substantive pre-trial norms. In that, evidence exclusion is a instrument, oriented on the selection of investigative activity that is and is not acceptable, which may be particularly important in a context wherein there is pre-trial evolution and a clear legislative framework is absent.

If that is – in part – the rationale underlying the Court's policy to become active in the field of illegally obtained evidence, it certainly does correspond to a true need. Pre-trial substantive criminal procedural norms have become more diffuse and Europe certainly needs guidelines in that respect, not in the last place with an eye on steadily developing legal co-operation in criminal law enforcement, which definitively requires proper definition of communal boundaries.[118] Defining SIT is no sinecure, that also holds true more generally. Evolution in pre-trial norms is indeed not limited to SIT, which is aptly demonstrated by the case law of the Court, which involves decision-making with regards to different sorts of innovations, sometimes related to the development of new technologies, modern criminality and new modes of pseudo-criminal (administrative) law enforcement.

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[118] Reference must be made in that regard to the European Council Framework Decision, 2008/978/JHA of the 18th of December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. The European Evidence Warrant (EEW) will be the next mode of co-operation, after the European Arrest Warrant (EAW), to be based on the principle of mutual recognition, allowing for easier exchange of evidence, namely through summary procedures. The presumption underlying European co-operation on the basis of the principle of mutual recognition is trust in eachother's legal systems: that trust is importantly derived from the fact that all EU states are signatories of the ECHR. Interestingly, as it stands, the EEW will introduce streamlined procedures for requests for the application of, *grosso modo,* already well-defined criminal procedural investigative measures such as search and seizure, but will not allow for requests to procure evidence via other investigative means. Such other methods are thus as of yet not sufficiently clearly defined in terms of human rights, and/or there is inadeqaute community consensus surrounding them. The framework decision does however foresee in requests for already existing evidence, procured by such means, prior to requests. See the Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters (presented by the Commission), Brussels, of the 14th of November 2003, COM(2003) 688 final 2003/0270 (CNS), p. 7-8.

Such decision-making processes are rife with complexities. It is one thing to devise common standards, it is another to formulate such standards that may be suitable (in the sense that they can be effective), in the legal systems of all 47 signatory states. The Court is faced with difficult challenges in that regard. In the terrain of pre-trial substantive law, the Court has not shunned an active policy. The Court has extended the range of art. 6 ETHR, so that it has pre-trial application, has introduced implicit norms that apply in that phase (the privilege against self-incrimination, the right to silence, rules regarding incitement and entrapment, the right to legal assistance), and – through its valuations of the effect of violations thereof – ranks such norms in terms of import and pertinence to fairness. The Court's reasoning is not as extensive as to include detailed postulation of grounds or sources for choices made in that regard. The Court is only limited therein considerations of credibility and retaining the commitment of treaty signatories. Where the Court indeed borrows from a shared pool of common human rights law, extensive treaty interpretation may be less precarious than in situations were those the Court must come to decision making in legal vacuums, yet arrive at standards suitable for the highly heterogeneous context of its jurisdiction. In such situations, the Court must determine the acceptable extent of undercover participation in offences, not resulting in entrapment. The Court must differentiate between forms of manipulation (*Allan, Heglas, Bykov*) or direct compulsion (*Jalloh, O' Halloran and Francis*) that does and does not encroach on the privilege against self-incrimination. In setting standards for one legal system, the Court may inadvertently create difficulties for another. If supervision by an examining magistrate or at least a prosecutor is required for one system, what is the effect of such a decision for other legal systems wherein no such supervision is structurally foreseen? If the right to silence can only be effectively guaranteed if legal assistance is available before or during police interrogation, what must signatory states do if their national bars cannot supply that assistance in all instances? In placing pertinent norms in hierarchical order (by determining the effect of their violation of the fairness of the use of evidence), the Court is again challenged with a difficult task. If a particular system (as is the Netherlands) strongly oriented on legality, how

must the Court's structural message that violations of privacy rights that correspond to violations of national law do not have far-reaching effects on fairness of the use of evidence, be received? Why are some norm violations more grave for fairness then others, why particularly, are privacy violations so weak in that regard? That torture is subjected to an absolute exclusionary rule may be evident, but to what extent (and why) is inhuman or degrading treatment relative in the fair evidence scheme?

The point to be made here is to what extent it should be the ECHR that redefines and elaborates pre-trial substantive law. If the driving force behind the Court's ETHR fair evidence mode is delineation of norms, for the purpose of the establishment of common standards, certainly no other judicial organ seems better equipped for that task. Nevertheless, the Court's task is not to design and implement a criminal procedural framework, but to ensure treaty rights and freedoms through case by case evaluation of national law and application thereof. Certainly the Court, already laboring under great quantitative pressure, is not equipped for formulation of over-arching criminal law enforcement policies and standards. Given the complexities involved, signatory states may prefer to re-develop substantive criminal procedural law, through legislative processes, departing from the (minimum) standards laid down by the Court. In any event, whilst treaty must endeavor not to fall short of the Court's standards, the responsibility of transforming those standards, where they may not suit national systems in the sense that they cannot function there in the format described by the Court, into formats that may realize the same standards of protection, lies with national authorities. Both duties require careful following and appraisal of the Court's case law in this sense.

III.4. Understanding the Fair Use of Evidence Model as a Composite of The Right to a Fair Trial: Exceptions and Further Limitations, Specific to the ETHR Context

Having addressed rationale, it is useful to turn to the second parameter that generally determines the scope of evidence exclusion models,

namely the limitations that are imposed in its application in concrete cases. Such limitations carry much weight, as they represent important means by which the range of the rule is practically determined. It is here that the ETHR model deviates most from the U.S. model. Certainly the Court applies similar exceptions to its own exclusionary rule, but in the ETHR model, there is a greater mechanism delineating the outcome of evidence evaluations. That mechanism is present in the ETHR model due to the (main) location of that model in the treaty, namely in art. 6 ETHR.

A crucial distinguishing characteristic of the treaty model for evidence exclusion is thus that a good part of it is firmly embedded in the general structure of art. 6 ETHR.[119] That necessarily means that that the model is influenced by the framework of that provision, in the sense that its structure and nature is pre-determined by that of art. 6 ETHR itself. That influence is easily discernable in the basic design and functioning of the ECHR evidence exclusion model, which clearly echoes that of art. 6 ETHR in general. The right to fair use of evidence is indeed a (condensed) collective of rights, a projection of certain fairness rights on the particular question as to overall fairness, in light of the use of illegally obtained evidence. In that, the model functions in a similar manner to almost all evaluations of fairness by the ECHR, which generally involve an overarching balancing test, oriented on the question if overall fairness was achieved, in spite of limitations of certain sub-rights in art. 6 ETHR.

Understanding the particular mechanism in art. 6 ETHR that is concerned with the fairness of the use of illegally obtained evidence in any event requires understanding of certain features of the right to a fair trial in general. Those features in part determine the manner in which the mechanism regarding illegally obtained evidence provides protection. i.e., they determine the scope of the rule. A such, these features correspond

[119] Components of the model that are not entrenched in art. 6 ETHR itself, are the substantive criminal norms contained in other treaty provisions, such as art. 3 and 8 ETHR, which may constitute the underlying violation that invokes the question of fair use of evidence.

to the second scope-determining parameter for evidence exclusion in general, representing limitations that may be imposed to restrict its range of application.

III.4.1. The General Structure of Art. 6 ETHR, Understanding How Fairness Works

Indisputably the most complex human right in the Convention, the (textual) structure and working of art. 6 ETHR is unique. The catalogue of fair trial rights adduced by the Court in art. 6 subsection 1 ETHR is not only sizeable; in adding so much the Court has provided for an extensive and varied range for this right.[120] Partly due to the Court's willingness to extend art. 6 ECHR, the content of this provision is, to a degree, always undetermined or variable. The Court expands and recalibrates the content of the provision, as necessity requires and must do so due to the overarching and summary character of art. 6 ETHR. The Court has demonstrated avid willingness to expound on the right: chances are thus that it will continue to do so.

As it stands now, the composition of art. 6 ETHR - as it is applicable to criminal procedure - is already highly intricate. Constructed as an assortment of trial rights envisaged to be minimally necessary for fairness, a first expansion of the right involves the application of certain of its components in the pre-trial phase. A second expansion regards the addition

[120] The following sub-rights (and principles) are read implicitly in the notion of fairness in art. 6 subsection 1 ETHR by the Court: (1) the right to access to courts; (2) the right to be present at an adversarial hearing; (3) the right to defense and of cross-examination; (3) equality of arms, including the right to trial information; (4) the right to a reasoned judgment; (5) the *nemo tenetur* principle and the right to remain silent; (6) the right not be incited to commit crimes for which prosecution later takes place; (6) an implicit presumption of innocence (as opposed to the explicit right in art. 6 subsection 2 ETHR), to be read as the right to a particular division of evidentiary burden and standards of proof in special procedures (confiscation of criminal proceeds, see: ECHR 5th of July 2001 (final: 12 December 2001) Phillips v. The United Kingdom, Reports of Judgments and Decisions 2001-VII.). The catalogue of implicit rights is partly derived from R. Clayton/H. Tomlinson, Fair Trial Rights, Reprinted from The Law of Human Rights, Oxford University Press, 2001, with own additions.

of a wide range of implicit rights, read by the Court into the notion of fairness in art. 6 subsection 1 ETHR. That already creates several distinct types of rights in art. 6 ETHR, namely (1) trial rights versus (2) rights that may also be (or are exclusively) applicable in the pre-trial phase; (3) explicit rights versus (4) implicit rights. Within those rights, it is possible to distinguish further between: (5) rights that impose a duty on the (judicial) authorities (such as the right to a reasoned judgment and evidence minimum rules) versus (6) rights that are assigned to the defense for the purpose of substantiating procedural positions (defense rights). Fair trial rights may also be categorized in terms of those that create (7) (more) positive (allowing the exercise of defense rights in a manner that is effective and not illusory), than (8) negative obligations, or prohibitions (disallowing coercion in self-incrimination). Further complexity is created by the fact that the various rights are inter-related, often pertain to overlapping categories, are ordered in some type of hierarchical scheme and, as art. 6 ETHR has no explicit limitation mechanism, are subject limitation grounds attached to the rights by the ECHR, which also vary according to the particular right involved. Taken together, those three aspects allow the Court to deploy art. 6 ETHR as a holistic system, allowing for limitations of certain rights, under certain conditions.

The main mechanism for limitation of fair trial rights deployed by the Court, has much to do with the general structure of art. 6 ETHR. In as much as it can be said that the ECHR orders Convention rights hierarchically,[121] the right to a fair trial is valued highly in such a scheme. Where that valuation is not on a par with that of the absolute rights in articles 2 and 3 ETHR,[122] the importance of art. 6 ETHR for the Court, is

[121] See in that regard Lawson, who denies that the ETHR orders treaty rights hierarchically. R.A. Lawson, Hoe exclusief dient de 'exclusionary rule' te zijn?, In: P.D. Duyx/P.D.J. van Zeben (Red.), Via Straatsburg, Libero Amicorum Egbert Myjer, Wolf Legal Publishers, Nijmegen, 2004, p. 189-190.

[122] The Court describes art. 3 ETHR as follows: '(a)rticle 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even

evident: '(i)n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision'.[123] Point of departure in the 'object and purpose' interpretation of art. 6 ECHR is thus that member states are to strive for the realization of the (mainly) positive obligation of fairness in art. 6 ETHR. In that, they enjoy little if any margin of appreciation regarding own policy choices. Trials must ultimately be fair, there is no national discretion to deviate from that ideal.[124] That art. 6 ETHR is itself valued so highly, does not however bring with it that all the specific rights it encompasses enjoy the same status: '(w)hile the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case'.[125] The right to a fair trial may thus be absolute, how fairness is to be achieved can vary. Sub-rights in art. 6 ETHR can be the subject of limitations (though not all of them, and not all to the same extent), as long as overall fairness is achieved.

III.4.2. Balancing, Implicit Limitations and Delineations of Rights

That construction of art. 6 ETHR is indeed unique and is possible because art. 6 ECHR indeed has no explicit limitation clause, similar to those included in the test of articles 8-11 ETHR. Not bound by pre-fixed limitation grounds, the ECHR has generally (though, as said, specific mechanisms are also attached to specific rights), opted for a broad and flexible umbrella test: limitations of sub-rights are possible in principle,

in the event of a public emergency threatening the life of the nation (…)'. ECHR 11th of July 2006, *Jalloh v. Germany*, Appl.no. 54810/00 (GC), NJ 2007, 226; Relatieve ondergrens van artikel 3 EVRM en verruiming van het nemo tenetur- beginsel, NJCM-Bulletin, 32, nr. 3, May 2007, p. 354- 370, ann. P.H.P.H.M.C. van Kempen. § 99.

[123] ECHR 17th of January 1970, *Delcourt v. België*, Series A-11, § 25.

[124] ECHR 29th of June 2007, *O'Halloran en Francis v. The United Kingdom*, Appl. nrs. 15809/02 and 25634/02 (GC). NJ 2008, 25, ann. E.A. Alkema en in EHRC 2007, 104, ann. K. Albers.

[125] Ibid,, § 51.

as long as '*the proceedings as a whole were fair*'. As such, the test allows for limitations of sub-rights, under the condition that a balance of fairness is regained by alternative means, i.e. through compensation for the limitation. Compensation in this sense can be achieved in various manners. If defense rights have been limited at the trial in first instance, compensation may be possible in appeal.[126] More importantly, a limitation may be acceptable, if it is grounded in a legitimate necessity, be kept to a minimum, whilst compensation takes places though the effectuation of another right. Compensation in that sense is beholden to a certain logical relationship between limited and compensating rights. The effectuation of one right must correspond with the limitation imposed: the exercise of sub-rights is not always interchangeable.[127] That the trial judge was partial cannot be compensated by the fact that certain requests of the defense were honored.[128] If certain evidence is found to be problematic – because of an underlying norm violation – compensation through greater care in its use through sound testing, *would* seem feasible and logical.

Adding to complexity, there also seems to be a difference in hierarchical status between the various sub-rights in art. 6 ETHR[129] as well between type and in the different limitation grounds affixed to them. The *nemo tenetur* principle and the right to remain silent are described by the Court as '(...) generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6'.[130] Therefore, 'public interest concerns cannot justify measures which extinguish

[126] See: ECHR 26th of October 1984, De Cubber v. Belgium, A, 86; ECHR 27th of January 2004, Kyprianou v. Cyprus, Appl.nr.: 73797/01.

[127] See also: A. den Hartog, Artikel 6 EVRM: grenzen aan het streven de straf eerder op de daad te doen volgen, Diss. RuG, Antwerpen, Apeldoorn, MAKLU, 1992, p. 127 and further.

[128] See: ECHR 12 april 2007, *Özen v. Turkey*, Appl.nr.: 46286/99: § 97: '(t)he Court notes at the outset that it has already held in previous cases that a court whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial to the persons under its jurisdiction and that, accordingly, it is not necessary to examine complaints regarding the fairness of the proceedings before that court (...)'.

[129] See in that regard M. Kuijer, The blindfold of Lady Justice, Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR, Disseration Leiden, 2004, p. 81.

[130] *Jalloh v. Germany*, § 100.

the very essence'[131] of those rights. In cases concerning alleged incitement or entrapment, the Court is clear in its view that '(w)hile the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place (…) that it cannot be sacrificed for the sake of expedience'.[132] That means for 'the concept of entrapment in breach of Article 6 § 1 of the Convention, as distinguished from the use of legitimate undercover techniques in criminal investigations' that 'there must be adequate safeguards against abuse, as the public interest cannot justify the use of evidence obtained as a result of police incitement'.[133] Regarding the right to (equal) access to pertinent information (generally in the form of documents), which is to be read into the principle of the equality of arms, the Court one the one hand states that:

> '(i)t is (…)a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defense. The right to an adversarial trial means, in a criminal case, that both prosecution and defense 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 defense all material evidence in their possession for or against the accused (…)'.

That right is not absolute however, whilst limitations of it are evaluated in a different manner, allowing more room for the balancing of interests: '(i)n 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 defense so as to preserve the fundamental rights of another individual or to safeguard

[131] Ibid.

[132] ECHR 9 juni 1998, *Teixeira de Castro v. Portugal*, Appl.nr. : 44/1997, § 36.

[133] ECHR 1st of October 2008, *Malininas v. Lithuania*, Appl.nr.: 10071/04, § 34.

an important public interest. Nonetheless, only such measures restricting the rights of the defense which are strictly necessary are permissible under Article 6 § 1 (...)'.[134] The 'right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be', is described by the Court as 'one of the fundamental features of fair trial'.[135] That right is also not absolute, but whilst the reasons for national leeway in this regard do not seem to be related to public interests concerns: 'Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial'.[136] I.e., here it is not conflicting interests that justify limitation, but the fact that margin that is afforded to member states, departing from the logic that the same degree of protection can be guaranteed through various means. In relation to pre-trial legal assistance, *Salduz*-case law does seem to have shrunk that margin substantially, [137] therewith also delineating a clear and strict core with the right to legal assistance in general.

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[134] ECHR 22 juli 2003, *Edwards en Lewis v. The United Kingdom*, Appl.nrs.: 39647/98 and 40461/98, § 53.

[135] *Salduz v. Turkey* , § 51, with reference to: *Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A, and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008

[136] Ibid. Though 'it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (…). Ibid.

[137] The new test introduced in *Salduz* with regards to the right to pre-trial legal assiatnce contains three separate rules. In the first place, the standard for restrictions has been raised from 'good cause' to 'compelling reasons', which may only 'exceptionally' justify limitation. In the second place, even if compelling reasons are to be given, that does not mean that the rights of the accused will automatically not be prejudiced. That leaves open a range of situations in which the right to a fair trial may still be violated due to a restriction, regardless of a justification for it. Those situations are as of yet mainly undefined, except for one: the *use as evidence (in convictions) of incriminating statements* made during police interrogation without access to a lawyer will almost certainly always violate art. 6 ECHR. That third rule is a (near) absolute rule of exclusion.

Some rights are thus (9) more susceptible to limitation than others (and on differing grounds), some even designated an (almost) absolute aura in the Court's case law, whilst others (10) seem rather more relative, their range highly dependent on competing extraneous interests. Though it would be difficult to collate categories exactly, the more a certain right seems to call for positive obligations, the more of a margin for limitation would seem to exist. In the same sense, trial rights seem generally to disclose positive obligations, which would explain their more relative nature. That reasoning cannot however be held to be constantly true, as trial rights can be gradual, which means that they also consist of a core, or a very essence, that cannot be encroached upon. Taking the right to legal assistance as good multi-facetted illustration: that right consists of several aspects. It can apply in the pre-trial phase, where it is not absolute, but would seem to gain importance in the particular context of police interrogation.[138] Where the right consists of the right to confidential communication, it seems not to tolerate limitation, also in the context of custodial detention.[139] In both cases, any limitations may only be 'compelling reasons', in the latter situation possibly only for 'very weighty reasons'. [140] In general, thus also in the trial phase, the right subsists of several aspects, amongst others, involving (1) the right to defense through (free) legal assistance[141] (2) the right to legal assistance of the defendant's own choosing[142] and (3) the right, in the event of manifest failings of legal assistance (or failings that have been brought to the attention of the authorities), to have another lawyer assigned.[143] The strength of those

[138] That has been recently stipulated by the ECHR in the remarkable series of decisions, starting from ECHR 11th of December 2008, *Salduz v. Turkey*, Appl. nr.: 4268/04.

[139] ECHR 13 of March 2007, *Castravet v. Moldavia*, Appl.nr.: 23393/05 and ECHR 27th of March 2007, *Istratii e.a. v. Moldavia*, Appl.nrs. 8721/05, 8705/05 and 8742/05.

[140] P.van Dijk/F. van Hoof/A. van Rijn/L. Zwaak (Eds.), Theory and Practice of the European Convention on Human Rights, Intersentia, Antwerpen - Oxford, 2006, 4th Edition, p. 638-639.

[141] ECHR 12th of April 2005, *Whitfield e.a. v. The United Kingdom*, Appl.nrs.: 46387/99, 48906/99, 57410/00 and 57419/00; ECHR 6th of July 2005, *Lloyd e.a. v. The United Kingdom*, Appl.nrs.: 29798/96 (...) and ECHR 15th of June 2004, *Thompson v. The United Kingdom*, Appl.nr.: 36256/97.

[142] ECHR 6th of July 2005, *Mayzit v. Russia*, Appl.nr.: 63378/00.

[143] ECHR 10th of Januari 2003, *Czekalla v. Portugal*, Appl.nr.: 38830/97.

rights vary. The first two aspects allowing for limitation in the interests of justice[144] (or rather: the exercise of the rights is first operational if the interests of justice (or the general interest[145] (in itself a vague notion[146]), so require. The last aspect on the other hand, seems less apt to allow for deviation.

Evidently, the Court is also free to add new general restrictions. In recent case law, the Court has seemingly added a new criterion. Holding that: '(t)he general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence at issue', the Court nevertheless now does seem to have regard for the type of offence involved: '(n)evertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence at issue may be taken into consideration and be weighed against the individual interest that the evidence against him be gathered lawfully'. In *Jalloh*, the measure involved in that case (forced administration of sedatives and laxatives), 'targeted a street dealer selling drugs on a relatively small scale who was finally given a six months' suspended prison sentence and probation'. Therefore, 'the the public interest *in securing the applicant's conviction* (emphasis added: FPÖ) cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial'.[147] Furthermore, it is not only the *gravity* of the offence that may influence the weight of the public interest involved. *O'Halloran and Francis v. The United Kingdom* also con-

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[144] P.van Dijk/F. van Hoof/A. van Rijn/L. Zwaak (Eds.), Op.cit., p. 641-644.

[145] Ibid, p. 643.

[146] See ibid., p. 642-643: 'The concept of 'interests of justice" as yet lacks clarity. In many cases the Court has applied two criteria to establish whether free legal aid is required: the seriousness of the alleged offence in conjunction with the severity of the penalty that the accused risks and, secondly the complexity of the case. The personal circumstances and development of the accused seem to fall within the framework of the latter criterion. In R.D. v. Poland the Court referred to these criteria but also formulated a more general test: "There is, however, a primary, indispensable requirement of the 'interests of justice' that must be satisfied in each case. That is the requirement of a fair procedure before courts, which, amongst other things, imposes on the State authorities an obligation to offer an accused a realistic chance to defend himself throughout the entire trial'.

[147] Ibid.

cerned non-grave offences (speeding violations), but no violation was found in that case. There, it was the *nature* of the offence that seemed to play a role, this time within the context of the evaluation of the nature and degree of the compulsion involved:

> '(t)he Court notes that although both the compulsion and the underlying offences were "criminal" in nature, the compulsion flowed from the fact (...) that "All who own or drive motor cars know that by doing so they subject themselves to a regulatory regime. This regime is imposed not because owning or driving cars is a privilege or indulgence granted by the State but because the possession and use of cars (like, for example, shotguns ...) are recognised to have the potential to cause grave injury". Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom, these responsibilities include the obligation, in the event of suspected commission of road traffic offences, to inform the authorities of the identity of the driver on that occasion'.

Thus, it was in part 'the special nature of the regulatory regime at issue', that determined the finding that there was no violation.[148] In *Gäfgen*, where a highly grave offence was involved – as well as a determined violation of art. 3 ETHR through threats of infliction of pain during police interrogation – in finding no violation as regards the use of evidence, the Court did not even mention the seriousness of the offence.

All in all, at least three types of limitation can be pertinent to the exercise of rights, two of which have already been explored in some detail above. In the first place, certain general categories of limitation grounds seem to exist, which are affixed to different rights. Sometimes the Court delineates rights in terms of a scale, allowing for limitations as long as the

[148] See Judge Myjer's dissenting opinion in this case, in which he argues against the making of a differentiation as to procedural rights in accordance with the type of offence involved, in that regard, and rather for a reversal of the *Öztürk* case law, allowing for mitigated criminal procedural standards for delineated and decriminalized administrative offences.

very essence of a right is not extinguished. Mechanisms such as 'public interest', 'the interests of justice', 'weighty reasons' can also be regarded as general limitation categories, which can apply to (certain aspects of) different rights. Such grounds lose strength where the Court determines that restrictive measures are only permissible if they are strictly necessary. Margins also exist where the Court recognizes that required standards of protection can be achieved in different ways, although such discretion must be regarded not so much as room to limit, but room to maneuver more freely in the manner in which rights are to be guaranteed.

In the second place, whether or not certain rights can be limited is also dependant on the specific criteria the Court applies with regards to concrete rights themselves. Such criteria can be particularly complex in regards to rights that correspond to substantive criminal procedural norms that apply in the pre-trial phase. In evaluating whether or not incitement in contravention of ETHR law took place, the Court employs the following general criterion. 'Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution'. In that test, the Court has regard to the degree of suspicion as to prior similar offences committed or a pre-disposal to do so and the question to who initiated or instigated the offence and how active any inducement was.[149] While that type of evaluation rather involves the question if the right was limited (or violated), there is a sphere in which that question and the question if a limitation was justified, can be intertwined and therefore difficult to distinguish. With regards to the right to silence and the privilege against self-incrimination, the Court delineates those rights first through their rationale, which lies '(…) inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfill-

[149] ECHR 1st of October 2008, *Malininas v. Lithuania*, Appl.nr.: 10071/04, §§ 35-37.

ment of the aims of Article 6'.[150] The further content of these norms is depicted by the Court as follows:

> 'The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (...)'. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the Court will have regard, in particular, to the following elements: the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained is put (...). The Court has consistently held, however, that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples and bodily tissue for the purpose of DNA testing (...). (...) However, the Court has on occasion given the principle of self-incrimination as protected under Article 6 § 1 a broader meaning so as to encompass cases in which coercion to hand over real evidence to the authorities was at issue'.[151]

Needless to say, the Court in time also adapts and changes the criteria for the testing of violations of substantive norms. The criteria pertinent to the privilege against self-incrimination and the right to silence illustrate that well, as they have been the subject of - not always entirely clear – fluctuation in that regard in recent case law.

[150] *Jalloh v. Germany*, § 100.

[151] Ibidem, §§ 96-111.

The third mode of limitation then lies in the overall balancing test which may, under certain circumstances, still lead to the outcome that fairness was ultimately achieved, in part notwithstanding the outcome of the other two tests. When the Court combines these different 'limitation types', alternates them and/or disposes of them unclearly in its reasoning, that makes for further complexity.[152] I.e. the question may remain open - if not be answered in the negative - if a particular limitation was justified or if the criteria for the substantive violation were met, as long as the Court can determine that overall fairness was achieved.[153] As such, the general balancing test is greater than the parts subsumed under the two other types of limitation criteria, allowing the Court much leeway in determining outcome.

III.4.3. Special Limitations in the Context of the Fair Evidence Use Model, as Oriented on Illegally Obtained Evidence

Understanding how balancing generally works in art. 6 ETHR is difficult in itself. That is particularly so in the case of the fair evidence use model, which *per se* involves testing of a plurality of often highly complex rights, against the backdrop of as many different (sets of) limitations mechanisms pertaining to those rights. Before reflecting on some specific difficulties this construction of the ETHR model brings with it, it is important to make clear what the composite elements of the model are, seen from the perspective of limitation mechanisms are described above. The different rights contained in the model may be subsumed in two general categories, namely (1) the substantive norms, the alleged violation of which resulted in illegally obtained evidence and (2) the compensating norms, which are mainly trial rights, that may function

[152] See notably in that sense Judge Borrego Borrego's concurring opinion in *O'Halloran and Francis v. The United Kingdom*, in which he criticizes the, in his view, unclear reasoning of the Court in that case.

[153] It may thus sometimes be unclear if a substantive criminal procedural norm was violated, but overall fairness was achieved, or if the substantive norm was not violated, because overall fairness was achieved.

to recuperate the risk to fairness introduced by the use of the illegally obtained evidence. The aggregate of those rights and their own particular limitations mechanisms can be subject to further general limitation through the overarching balancing test. In testing the fairness of the use of evidence, the following steps are then involved.

Firstly, it must be determined if a substantive violation took place. Limitation is possible here through restrictive interpretation of the substantive right. Rights involved here – in this first tier of the model – do not have to be contained in art. 6 ETHR. The evaluation of the fairness of the use of evidence obtained via violations of art. 3 or art. 8 ETHR involves the same type of testing that is applied in substantive norms that are incorporated in art. 6 ETHR, i.e. the Court determines if a violation has taken place through the application of the particular criteria that apply for the right in question.

A second instance of limitation is related to the first. In the context of the fair evidence use model, the Court not only determines if a substantive norm has been violated, but also qualifies the gravity of that violation, from the perspective of the effects it may have on the fairness of the use of evidence, or, more generally, from the perspective of criminal procedural pertinence. At this level, the Court thus distinguishes between types of violations. As a category, the Court finds that art. 8 ETHR violations do not have the same effect on fairness as do other types of norm violations. In doing so, the Court limits the criminal procedural effect of the substantive norm violation. In the same sense, within more grave categories, the Court can distinguish between more or less serious concrete violations (i.e. the degree of compulsion in one case involving coercive interrogation can be greater and thus graver than in another). The gravest of violations can lead to the determination of a violation at this point. The violation in question must then be such as to lead *to irremediable* fairness or, '*ab initio* unfairness', which means that the use of evidence so obtained is absolutely prohibited and thus should have been excluded. In such cases, there is no room for limitation or mitigation of protection through recuperation of fairness loss or justification through other means.

The third method of limitation lies in the application of the balancing test, oriented on the question if, notwithstanding the substantive violation that has been determined, the trial was nevertheless ultimately fair. Obviously this test applies for only those cases in which the Court does not deem the substantive violation as to be so grave (from a criminal procedural perspective), as to absolutely dictate exclusion. The evidence can thus in principle be used in this situation, but only if standards are elevated. Standards of fairness are heightened, so that the unfairness that is introduced by the use of illegally obtained evidence can be dissipated. As said, the test here is gradual: the graver the underlying violation, the more heightened balancing standards will be. In effect, this test involves evaluation of the possibilities the defense had in challenging the evidence, as well as the care taken on the part of the judge in using it. As for the concrete rights involved in this balancing mechanism, generally the focus seems to be on opportunities allocated to the defense to exercise normal trial rights in this regard. That would most generally mean that challenge of the evidence is possible in adversarial proceedings, wherein there is equality of arms. That in turn brings with it that the defense must have access to relevant information, relevance in this instance pertaining to the manner in which the evidence was obtained (with an eye on arguments that a grave substantive violation was involved therein). There is no reason however to exclude the applicability of other trial rights in this regard: balancing or recuperation may be shortcoming because the defendant was not able to exercise his right to access, right to be present, right to legal assistance and so forth, specifically with regards to uses related to illegally obtained evidence. It would be evident that the ability to call and (cross-)examine witnesses in this regard could also lead to compensation, the inability to do so to failure in that sense.[154] A further

[154] See for a recent illustration of successful balancing, *Bykov v. Russia*, §§ 95-97, in which the Court had regard, amongst other things, to the following compensatory factors: '(i) n the present case, the applicant was able to challenge the covert operation, and every piece of evidence obtained thereby, in the adversarial procedure before the first-instance court and in his grounds of appeal. The grounds for the challenge were the alleged unlawfulness and trickery in obtaining evidence and the alleged misinterpretation of the conversation recorded on the tape. Each of these points was addressed by the courts and dismissed in reasoned decisions (…). While it is true that V. was not cross-examined at the trial, the failure to do so was not imputable to the authorities, who took all necessary

trial right (though its violation can only be apparent after a judgment is given), is the right to reasoned judgment, which functions not only to give insight as to the reasoning of the judge in using the evidence, but also forces him to adequately address that issue.

More difficult to define as a type of limitation mechanism, is the rule regarding the extent in which a conviction may be based on illegally obtained evidence, particularly in relation to its probative value. As has already been discussed, this rule forms a crucial part of the balancing mechanism in all evaluations of the fairness of the use of problematic evidence categories, thus also the types of problematic witness testimony alluded to above. In the case of illegally obtained evidence, the rule is even more complex, as its strength in that regard, vis-à-vis it strength when it is attached to the problematic testimony categories, is not entirely clear. It would seem that the rule varies here, in accordance with the gravity of the violated norm at stake. At one end of the scale, the evidence minimum rule can be much stronger than its counterpart regulating the use of problematic witness testimony. That would be the case where violations are concerned that dictate absolute exclusion. The evidence minimum rule there is namely no less than that a conviction cannot be based on the evidence – regardless of the weight of the evidence in the conviction – at all. With other types of norm violations, the rule seems to be weaker, the Court not dictating that convictions not be based solely or to a decisive extent on the illegally obtained evidence, but rather evaluating the weight of the evidence in the conviction without using an explicit framework. In that sense, the reliability of the illegally obtained evidence can tip the scale. This particular rule is then difficult to define, as it is unclear if the evidence minimum rules actually form a composite of the right to a fair trial,[155] or if the weight of the evidence

steps to establish his whereabouts and have him attend the trial, including by seeking the assistance of Interpol. The trial court thoroughly examined the circumstances of V.'s withdrawal of his incriminating statements and came to a reasoned conclusion that the repudiation was not trustworthy. Moreover, the applicant was given an opportunity to question V. on the substance of his incriminating statements when they were confronted during the questioning on 10 October 2000'.

[155] So, it is unclear if the evidence rule *unus testis nullus testis* is even part of art. 6 ETHR under normal circumstances, wherein evidence used does not belong to a problematical category.

must be seen as an factor extraneous to the substance of art. 6 ETHR, allowing for limitation, much like competing public interest concerns. Nevertheless, what the exact qualification of the evidence minimum rule is, it does function to limit protection, in the sense that the availability of other evidence allows for mitigation of the effects of the underlying norm violation. Another difficult to define limitation ground is then the issue of reliability itself. Reliability issues can also function to limit protection, in that strong probative value can mitigate or dispel the effects of a norm violation. This particular limitation mechanism is difficult to define in the sense that is seems to form part of the substance of art. 6 ETHR: as argued above, fairness dictates that the outcome of criminal procedure is reached in a propitious manner, but also in a manner that is conducive to truth-finding. The reliability of the evidence is thus not an extraneous competing interest, but rather part of the organic matter of fairness itself. As for the manner in which the mechanism works, here also, a scale is involved: as the evidence is probatively more reliable, the effect of the violation becomes weaker. The same holds true for the limitation mechanism that has to do with the gravity of the offence, which *may* be identified as a competing interest that does not follow form the notion of fairness itself: it is then in essence the public interest that influence the response to pre-trial impropriety. All three limitation purposes can however be construed as *general* limitations mechanisms. They are smaller than the overall balancing test, but are not affixed to any particular right, influencing the outcome within the balancing test where they are relevant.

A fifth mode of limitation the ECHR applies has been mentioned above, yet not discussed in detail. Herein, the ETHR model shows similarity to the American exclusionary rule (as indeed the Dutch version of the concept). The limitation mechanism alluded to here regards the so-called exceptions to the exclusionary such as those that are applied in U.S. (and in Dutch) case law. The ECHR's application of such exceptions would either indicate that the U.S. model has influenced the European version, or that these exceptions are an integral part of and logically ensue from the concept of judicial response to pre-trial impropriety (regardless of the format of that response, i.e. as exclusion of evidence or bars

on prosecution) itself. Although the case law has not taken on clear and solid form in this regard, applications of all these exceptions is visible in ECHR case law, at least in the sense that the Court makes some reference to similar conceptions, allowing them to influence overall balancing.

An integral overview of the Court's case law cannot be given here; in any event, some illustrations may suffice. In *Parris v. Cyprus,*[156] the Court found that the violation of national law (due to an illegal second autopsy, performed at the request of the bereaved of the victim), had no effect on the fairness of the use of evidence because the violated norm did not serve to protect an interest of the defendant. This exception involves identification of the *Schutznorm*, or the legal interest that the rule seeks to protect, of the violated rule, with an eye on the determination if that interest was violated, along with the rule. Or, using ECHR terminology, the question is then if the *very essence* of a rule was violated. In that sense, any and all applications of the very essence doctrine in Strasbourg case law would seem to divulge a *Schutznorm* application. In terms of the privilege against self-incrimination and the right to remain silent – in which context the Court structurally applies the very essence test – the evaluation would centre on such as issues as if pressure in interrogation was such to violate that which is actually protected or if the absence of the caution (warning the defendant that he does have the right to remain silent) actually violated the *Schutznorm*. In that, the *Schutznorm* doctrine somehow echoes the logic behind prophylactic protection: rules that protect rights and interests are drawn broadly around those rights and interests, allowing the judge to filter away instances of rule violation that do not actually touch the truly protected matter.

Perhaps even more interestingly, the ECHR does not apply the *Schutznorm* doctrine in its second form, namely where this exception involves exclusion of third parties from protection. In that application, there is a violation of the *Schutznorm*, but exclusion is not necessary because it is not the right or the interest *of the defendant* that was encroached upon. The defendant is then a third party, and cannot claim redress. I.e., illegal search and seizure took place in a residence, but it was not the

[156] Admissibility Decision, ECHR 4th of July 2002, *Parris v. Cyprus*, Appl.nr.: 56354/00.

residence of the defendant. Though the resident (who may or may not be prosecuted himself), is protected, the defendant is not. Or, the telecommunications were illegally tapped, but the tap was not on a number registered to the defendant, that again excluding him from protection. In both cases, privacy rights were violated, but not those of the defendant. This exception is recognized in U.S. case law but as said, – remarkably – *not applied at all* by the ETHR. In both *Khan* and *P.G. and J.H.*, communications were recorded inside a residence, not that of the applicants. Under the *Schutznorm* exception, the illegality could have been mitigated by that fact. In Strasbourg, the ECHR did not even mention that issue at all. In *Lutsenko v. Ukraine*, a – later – co-defendant of the applicant, who had initially been interviewed as a witness, had given incriminating testimony, without having been able to consult with a lawyer. The use in evidence of that statement in the case of the applicant was found to be unfair. Again, the reasoning of the judge may well have been that it was not any right of the applicant that was violated during police interrogation and that the illegality should therefore have no effect in his case. Such would indicate that the national judges, who apply this exception, err when doing so.[157]

Beyond the *Schutznorm* exceptions, ECHR case law also shows the application of more context specific forms. In *Eurofinancom v. France*, the ECHR allowed the use of evidence because, although there was illegality (incitement) in the general context of the investigation, that illegality was not concretely related to the specific offence for which the applicant had been prosecuted. In *Shannon*, as has already been mentioned, the Court seems to have invoked the exception related to good faith, that exclusion is not required when private parties procured the evidence. In *Bykov*, the Court found that 'the key evidence for the prosecution' was an initial statement made by a private individual to the police 'was made (…) before, and independently from, the covert operation, in his capacity as a private individual and not as a police informant'. In *Saunders*, the Court resolved the issue as to admissibility via the limitation of the privilege against self-incrimination through the distinction between real and tes-

[157] Bu yönden bkz. T. Prakken: De strafprocessuele schutznormleer gerelativeerd, NJB 1999, nr. 6, s. 245.

timonial evidence (though more recently, in *Jalloh* and *O'Halloran and Francis*, the Court has created some unclarity as to the pertinence of that distinction). In *Schenk v. Germany,*[158] one of the Court's considerations in finding no violation of art. 6 ETHR due to the use of illegally obtained evidence was that the some information could have been introduced at trial through other means, thereby applying the independent source doctrine. The Court's decision in *Gäfgen* seems to hinge importantly on exceptions. In the reasoning in that case, attenuation of causality, inevitable discovery and – importantly, an own exception, uniquely applied in this context by the ETHR, namely the concept of waiver, seem to play and important role. Furthermore, the decision may also suggest that the distinction between testimonial and real evidence was re-invoked by the Court. After German courts had excluded the testimonial evidence in the form of several pre-trial statements, including an initial self-incriminating statement found to have been obtained through violation if art. 3 ETHR, the applicant in that case had been convicted partly on the basis of real evidence that he had pointed out to police officers (the corpse of the victim, as well as his belongings and a typewriter used in the writing of a ransom note), and his confession at trial, in which he (after receiving qualified legal instruction), expressed regret (as well as other items of real evidence found independently by law enforcement officials). Whilst even without the testimony and further participation of the applicant, the evidence against him with regards to kidnapping of the victim was very strong, evidence of his murder was *de facto* procured by the applicant. In Strasbourg, he complained that all evidence that had been obtained through his participation should have been excluded, as fruits of the initial violation of art. 3 ETHR during police interrogation. Amongst other considerations, the Court held that while the initial statement made by the applicant to the police was procured via threats of infliction of pain, 'there is nothing to indicate that the applicant was again directly threatened by any of the officers present on the journey to and from Birstein with a view to making him disclose items of real evidence', whilst '(t)he Court is convinced that the investigation authorities were able to secure the impugned items of evidence only as an indirect

[158] ECHR 12 juli 1988, Schenk v. Duitsland, Series A, 140.

result of – or as the "fruit" of – statements which were made as a result of the continuous effect of the use of methods of interrogation in breach of Article 3'. So, the causal connection between the norm violation and the evidence obtained subsequently was broken, or either too remote to have further effect. The applicant could have chosen to not participate after the threat had been removed, but continued to participate, voluntarily. That reasoning is followed through with regards to 'the applicant's fresh confession at the trial'. Furthermore, the Court attached importance to the fact that:

> '(...) in the proceedings before the domestic courts, the applicant always confirmed that he had volunteered his confession out of remorse and in order to apologise. In any event, having regard to the Regional Court's reasoning stressing the crucial importance of the applicant's confession for its findings concerning the execution of his offence (...), which might otherwise have led to only a less serious offence being proved, and the fact that the applicant was assisted by his defense counsel, it is not persuaded that he could not have remained silent and no longer had any defense option but to confess at the trial. He indeed confessed at the outset of the trial and at its end in different terms, whereby he could be said to have varied his defense strategy. His confession cannot, therefore, be regarded as the result of measures that extinguished the essence of his defense rights at his trial'.

Therein lies the suggestion of the further particular exception applied by the ECHR, designated above as the concept of waiver. Waiver is understood here as the loss of a procedural right through dereliction of the duty to operationalise a particular right, or to actively default with regards to that right. Two manifestations of waiver can be distinguished in ECHR case law. The first is explicitly deployed by the Court. In this sense, the concept is attached to certain delineated rights, whilst the issue to evaluate for the Court is if waiver actually took place. General criteria in that regard are that (1) some rights cannot be waived; (2) waiver should be explicit or unambiguous and (3) where waiver regards proce-

dural rights, it should be accompanied by sufficient safeguards.[159] Waiver case law mainly regards the right to be present at adversarial hearings, the right to access and the right to legal assistance. In that, a differentiation seems to exist between the strictness with which the ECHR evaluates waiver: the Court seems to set highest standards where the right to legal assistance is concerned.[160] The second manifestation of waiver in ECHR case law is more pertinent here. In this format, the mechanism is more subtle, as it is not coupled to any particular right (or, loss thereof), but influences general evaluations of fairness as a factor, sometimes of enough weight to determine outcome. The Court does not explicitly reason in terms of waiver, but incorporates in reasoning the fact that the defense either chose a particular position (from which it cannot deviate later, if that decision proves not to be advantageous) or neglected to take action where it should have, thereby losing certain claims and hampering the exercise of its own rights. The defense did not ask for information and thus cannot complain that it was not given, the defendant freely chose to give testimony and thus cannot complain of deception or coercion. This type of waiver can have particular weight, if the defendant actually enjoyed qualified legal decision while making such decisions.

In *Schenk v. Germany,*[161] the Court attached importance to the fact that the defense had initially allowed for the presentation of illegally obtained evidence, the use of which was later challenged, and that the defense had asked that a certain witness be summoned, but had not examined that witness, whilst the summoning of another witness who could have given

[159] ECHR 25 februari 1992, *Pfeifer en Plankl. V. Oostenrijk*, Appl.nr.: 10802/84 (waiver van recht rechters te wraken).

[160] 'In the instant case it is sufficient to note that Judge Kaiser on his own initiative approached Mr Pfeifer in the absence of his lawyer, the latter not having been summoned despite his having previously taken part in the proceedings (see paragraphs 12-13 above). He put to him a question which was essentially one of law, whose implications Mr Pfeifer as a layman was not in a position to appreciate completely. A waiver of rights expressed there and then in such circumstances appears questionable, to say the least. The fact that the applicant stated that he did not think it necessary for his lawyer to be present makes no difference (…).Thus even supposing that the rights in question can be waived by a defendant, the circumstances surrounding the applicant's decision deprived it of any validity from the point of view of the Convention'. Ibidem.

[161] ECHR 12 juli 1988, *Schenk v. Duitsland*, Series A, 140.

pertinent testimony, had been neglected. The Court held that the use of that evidence was fair, in part on the basis of those considerations. In *Perry v.The United Kingdom*, the Court included in its reasoning the fact' that the applicant had already been afforded a number of opportunities to participate in a conventional identification parade and failed to make use of them', as a facto mitgating norm violations in the subsequent video Oslo-confrontation, held without the applicants knowledge. In *Bykov v. Russia*, the Court quite explicitly referred to the procedural position taken by the defense, noting, in its evaluation of the fairness of the use of evidence obtained in violation of art. 8 ETHR that: '(s)ome importance is also to be attached to the fact that the applicant's counsel expressly agreed to having V.'s pre-trial testimonies read out in open court'. Similar reasoning is to be found then in Gäfgen. After the threat during police interrogation had been dissipated, the applicant continued to participate of his own volition. Furthermore: '(…) the Regional Court considered it to have been proved that the applicant had carried out the offence on the sole basis of the new and complete confession he had made, after being given qualified instruction, at the trial, in particular in his final statement'.[162] The reference to applicant's defense strategy follows that reasoning: the applicant chose his own procedural position at trial, and thereby defaults on the right to complain of the outcome.

III.4.4. Some Problematic Aspects of Balancing and Limitations and Balancing in the Context of Art. 6 ETHR

As exclusion of evidence is reserved for only particular norm violations, the functioning of the balancing, or recuperation model takes on great significance. *Per saldo*, ETHR rules regarding judicial response to pre-trial impropriety is for the large part addressed through the recuperation model. Thus, in the model as a whole, the compensation mechanism therein, must - at least in a quantitative sense - be seen as dominant. It is important then to accentuate certain problematic aspects of that recuperation model, particularly the limitation mechanisms contained therein.

[162] Ibidem, § 106.

For the most part, evaluations of the fairness of the use of illegally obtained evidence will revolve around the question if due regard was paid to that issue at trial. Whilst the judge certainly has his own task in that respect, much of recuperation depends on the manner in which the defense was able to challenge the evidence and its use. Thus, whilst the ETHR model designates defense rights in challenging evidence, at the same time it burdens the defense with the responsibility to use those rights, thereby accentuating the role of the defense in the compensation model.

Two separate issues can be raised in that regard. The first relates to the suitability of the compensation model for all legal systems under the Court's jurisdiction. Mention has already been made of the hybrid character of art. 6 ETHR. That qualification stems from the fact that the Court sometimes interprets (aspects of) art. 6 ETHR in a manner more consistent with an adversarial criminal procedural concept, whilst other interpretations more so echo non-adversarial models. On the one hand, that makes the ECHR's perception of the procedural concept underlying (the whole of) art. 6 EHTR somewhat unclear. On the other however, it does seem evident that the adversarial signature of art. 6 ETHR is dominant. The right to a fair trial is not only historically connected to common law notions of due process, more often than not, the ECHR explicitly chooses an adversarial perspective for art. 6 ETHR. That is certainly true for the fair evidence model, which – regardless of the question as to the prevalence of influences from English common versus U.S. law on it – clearly is a concept that in any event pertains to adversarial procedure.[163] Given the strong adversarial influences on the fair evidence model, the question is then if that has implications for the effectiveness of (aspects of) that model for non-adversarial systems.

One implication may be that, in departing from an adversarial perspective, the Court makes certain suppositions that cannot be held to be necessarily true for treaty signatories that do not have a (predominantly) adversarial system. Such a supposition may be that defense rights such

[163] That has much to do with the close relation between admissibility rules and adjudication by jury.

as those that represent the greater part of the compensation structure of the fair evidence model, work just as strongly in such systems as they do in true adversarial ones. Granted, all the defense rights formulated in art. 6 ETHR will be (and have to be) present in all the legal systems of treaty signatories. That such rights exist however, does not say much about the manner in which they operate in practice. Defense in a certain system can be legally competent to invoke all the defense rights required in art. 6 ETHR in the context of evidentiary challenges, whether they be grounded in probative issues or focus on illegal procurement. *Prima facie*, that would suggest that national law conforms to treaty obligations. The actual state of affairs may however be that although such rights exist, they do not fortify the defense in the manner or to the extent envisaged by the Court. The question then is not if such rights exist, but if the import the ECHR places in qualified instruction, the right to summon and cross-examine witness and so forth correspond to the actual standards reached in systems where the defense is not characterized by an overtly active procedural stance or strength of its competencies. If not, the weight the ECHR attaches the fact that the defense was (legally technically) able to invoke defense rights for the purpose of challenging the fairness of the use of illegally obtained evidence, may be somewhat misplaced. The same holds true for applications within that model of the concept of waiver, which may also not be easily reconcilable with character of defense in particular legal systems.

If discrepancies exist in that sense, they seem easily resolvable. If the *de facto* strength of defense rights does not meet the standards envisaged by the Court for adversarial procedure conducted under equality of arms, that would mean that adaptations are necessary so that those standards *are* met. That however, may not be easy to accomplish, as the Courts' case law does not clearly define what the envisaged standards are. Two types of case law can be pertinent in that regard. What the pertinent standards are can be distilled, in the first place, from case law directly concerned with the fair evidence model in relation to illegally obtained evidence. That case law provides guidelines in this regard, in the sense that the Court distinguishes between forms of recuperation that are and

are not held to be sufficient. In the second place, insights as to standards to be met for the effective realization of defense rights are to be found in case law that pertains to those distinct rights, i.e. in case law concerning the right to summon and (cross-)examine witnesses, information, legal assistance and so forth. That second category is problematic however, in the sense that it does not necessarily provide good yardsticks for how those rights should be deployed in the context of the fair evidence model. ECHR decisions that are oriented on those distinct defense rights namely do not describe ideal situations. If a complaint has been declared admissible, that means that the Court has already found indications that there may have been a violation, thus that required standards were not reached. If a violation is then found, the only information such a decision provides is that, in that case, the right was not effectively realized. If no violation is found, because the Court finds minima to have been reached, that again provides no good measure for what the standard should actually be in the context of the fair evidence model, where the gist of recuperation is that defense rights should rather be elevated, in order to provide required compensation. The same is true for case law oriented on other compensating rights in the fair evidence model, that address particular judicial responsibilities, namely that regarding evidence minimum rules and standards of reasoning.

A second issue relates to the far-reaching discretion of the Court in affixing limitation mechanisms to the fair evidence model. The 'greater' limitation mechanism of the general balancing and recuperation test almost necessarily follows from the structure of art. 6 ETHR as that provision has been expounded by the Court. Applied limitation grounds that are oriented on conflicting rights and interests (such as those of a public nature, of witnesses and victims), would seem to constitute issues that fall under the particular competence of the Court. The same does not have to hold true for other limitation mechanisms however, such as exceptions borrowed from U.S. case law. The application of such exceptions, including the concept of waiver as a limitation mechanism (both manifestations thereof), can have far-reaching, if not decisive effect on the outcome of evaluations of recuperation. In applying such imitation grounds, the Court acts with

great autonomy, as the treaty offers no textual basis for such limitations. On the other hand, the text of the treaty also offers no basis for the concept of protection through evidence exclusion itself, so that the Court, even if its does detract from that protection through the application of limitation mechanisms, still provides extensive protection. The question then may be why the ECHR should not be free to apply exceptions, if other courts are. In that, a distinction must be made between types of exceptions and rationale they are affiliated with. Particularly where certain exceptions relate more to delineation of substantive rights, an active ECHR policy in that regard may be entirely justified, as such limitations again correspond well to the Court's jurisdiction. Other exceptions however, that relate more strongly to certain types of rationale (such as deterrence), regarding which it is unclear if they are to be regarded as foundational for the ETHR model, are more precarious in nature. Deterrence goals and related exceptions are highly dependent on the particular environment in which they function. If the particular structure and range of an exception has been determined by the particular deterrence needs of a specific legal system, that can mean that it is not easily transferable to another, where pertinent environmental factors differ. If the ECHR were now to borrow the revised version of the good faith exception, and thereby re-diffuse that standard in the legal systems of its signatory states, there may be a bad fit, because the logistic situation that gave rise to the new version of good faith in U.S. law, certainly does not have to be present elsewhere. The same holds true for exceptions that are strongly related to policy preferences. The Court must take care in distinguishing between (interpretations of) limitations that relate more naturally to the concept of evidence exclusion, and those have a great deal to with topical circumstances in distinct legal systems.

If the delineation of evolving substantive norms for Europe is to be regarded as an important rationale, certainly there is no room for anything less than carefully weighed applications of (versions of) exceptions that may have less to do with the actual boundaries of human rights, than with extraneous factors not pertinent to the Court's task or be unsuitable as a general standard, in light of the heterogeneous jurisdiction of the

Court. Certainly advantages are to be gained in clear reasoning by the Court in this regard.

III.5. Legal Organic Structure of the ETHR Fair Evidence Model

A remaining point to address is then the legal organic structure and strength of the ETHR model, as opposed to that of the U.S. exclusionary rule. As has been mentioned, both models have a high legal status, pertaining respectively to human rights and constitutional law. The more pertinent question is however, how the effective strength of the models compare, i.e. if in their application, more or less limitations are imposed in one or the other. Turning to structural differences, one remarkable distinction is that, unlike the U.S. version, the ETHR model is not affixed as a satellite to substantive rights, but has its own autonomous basis in art. 6 ETHR. That may suggest a more fortified construction of the ETHR model. However, strength of the models, the strictness of their application lies mainly in their underlying rationale and the actual limitations that are imposed. Such elements are difficult to compare. The U.S. Supreme Court is clear in the rationale it adheres to, making its model limited. The ETHR does not disclose rationale, which means that it is unclear what restrictions exist in that regard. Certain themes in the Court's case law would however seem to limit the range of the model in that sense. Accentuation of probativity issues as goals behind the testing of the fairness of the use of illegally obtained evidence, would importantly limit the range of the model. That does not however seem to be the basis for the application of the model in the context of illegally obtained evidence, but a further factor to be taken into account in weighing overall fairness. Nonetheless, here again, clearer reasoning on the part of the Court in this regard, would be beneficial.

As for limitations imposed in the two models, again unlike in U.S. case law, the outcome of evaluations in the ETHR model does not hinge exclusively on the underlying norm violation and pertinent exceptions, but also on the manner in which the trial was conducted. That is due to

the general limitation mechanism in art. 6 ETHR, which also applies to the fair evidence model. That difference in structure makes it difficult to evaluate if one or the other model *per saldo* provides more protection. It could be so that in the ETHR context, the particular norm violations that are attached to absolute exclusionary rules, can still be mitigated in the U.S. through the application of exceptions. On the other hand, the greater limitation mechanism in art. 6 ETHR, by which other violations can be recuperated by processing through the recuperation mechanism, could represent more far-reaching limitations in that context. To make a true comparison, more detailed analysis would be required of the outcomes of evaluations with regarding to specific types of norm violations. Certainly in Strasbourg, no violation would have been found in *Hudson*[164] or *Herring*, though for divergent reasons, namely because those case involve privacy violations, which would have been adequately addressed by due regard given to the issue by national courts.

Of great import is nonetheless, that the U.S. Supreme Court has now greatly detracted from the strength of the exclusionary rule, by determining that it is not an individual right, but more of a judicial supervisory instrument, not pertinent to the relationship between individuals and the State, but to that between the judiciary and the executive. In ETHR law, the fair evidence model does represent an individual right, and that is not only an individual right to exclusion, but also to adequate testing of the effects pre-trial impropriety may have. Signatory states must be fully aware of this treaty obligation. Furthermore, signatories must also be aware of the entire range of implications of the ETHR model: its strength and strictness, but also those that introduce particular elements (such as those attached to adversarial procedural concepts) into intricate criminal procedural structures. On the part of treaty signatories, that creates a responsibility to carefully follow ETHR case law in this regard and to understand and transform elements of that model that may not be reconcilable with national systems of criminal procedure into mechanisms that are workable *and* provide the same standards of protection. Awareness is also necessary of the fact that the ETHR is deeply engaged

[164] See also in that regard: P. Bal, Op.cit., p. 272.

in the formulation of substantive norms of criminal procedure, and that a great dynamic is now prevalent in that regard in Europe. It must also be evident that in ETHR law, the evidence exclusion model behaves quite in the same similar manner as it does in the U.S., namely that, due to its open structure, its range and strength is highly dependent on judicial interpretation. Treaty signatories that wish to chose for strict application and bind the judge, must then create a sufficiently clear legal framework.

IV. Some Concluding Remarks

The notion that evidence must sometimes be excluded because it was obtained illegally has a strong foothold in many national and international legal systems. For its various legal and conceptual manifestations, a commonality seems to be that the scope of the duty to exclude is subject to persistent debate. If any consensus exists in that regard, it would seem to be that there is *a* category of norm transgressions that are so offensive to criminal procedure, that evidence so obtained cannot be used, regardless of its probative content. Beyond that, national and international variants of the concept of evidence exclusion seem to be characterized by both subtle and fundamental differences. That is not only true for the exact format of the pertinent legal models applied in different systems, but also for the identification and substantive norm transgressions that are to have strong (exclusionary) evidentiary effects. Such differences seem to have much to do with the senstivity of this particular legal concept to its local and temporal enivorment. The fact that evidence exclusion – even if it partly collocates with human rights - is by nature a criminal procedural entity means that its legal manisfestations must be embedded in and congruent with the general functioning of the larger criminal procedural systems that they are contained in. That results in technically disparate formats, the particularities of which are influenced by the institutional degisn and specific requirements and constraints of the legal systems in which they function. Different times furthermore bring with them their own challenges, needs and perspectives. Many of such developments will be apt to resonate in the concept of evidence exclusion and legal manis-

festations thereof, affecting not only its operative functioning, but even the prevalent valuations of substantive standards contained therein.[165]

The ECHR's incorporation of the notion of evidence exlcusion in its criminal procedural human rights programme constitutes an important contribution to the existing range of evidence exclusion models. In doing so, the Court demonstrates well its increasing willingness develop general human rights principles even in areas of law - such as criminal procedure- that are firmly entwined with national legal institutional structures and logistics. As the treaty offers no explicit basis for (most aspects of) the fair use of evidence model and that there is no pre-determined, integral system of criminal procedure from which the Court's choices can be understood, the Court's policy in this regard must be characterized as highly active and highly autonomous. That surely presents the Court with a highly challenging task. The Court's model must be over-arching and effective, workable for all pertinent local circumstances. In the context of highly heterogenous ETHR adjudication, that means that the Court's model must be able to function effectively in the diverse criminal procedural legal systems of 47 member states. Given the context-senstivity of evidence exclusion models, it may be self-evident that such an endeavour will be rife with difficulties, on the one hand due to the intrinsic complexities of the concept of evidence exclusion, on the other because of the *sui generis* nature of adjucation by this international human rights court.

Currently a well-recognized authoity as a purveyor of human rights law, the ECHR's case law not only binds the 47 member states that fall under its compulsory jurisdiction, but is frequently referenced inter- and

[165] In that last regard, even erstwhile absolute standards regarding evidence obtained through torture seem to have acquired some fuzzy edges: '(t)he stark challenges to the rule of law posed by counter-terrorism have dislodged North American, European, Australian and New Zealand judges from the more comfortable task of refining existing rights protection regimes within their respective constitutional frameworks. Issues that would have scarcely been debatable two decades ago – including freedom from torture, (…) – have moved from the margins to the centre of legal debate'. A. Macklin, Transnational Judicial Conversations about Security and Human Rights, CEPS Special Report, March 2009, Brussels: Centre for European Policy Studies [CEPS], March 2009. - 21 p. (CE4601), p. 1.

transnationally, according to some, even displacing the traditionally strong international influence of the case law of the United States Supreme Court.166 The Court aims to provide common standards where they are necessary, to that end constructs hybrid mechanisms, eclectic legal concepts fit to guarantee protection in distinct types of legal systems. In doing so, as a strong 'transjudicial communicator',167 it feeds feeds from a huge base of legal sources (not necessarily contained in the legal systems of Council of Europe member states), often availing itself of innovative comparative methodology, not only borrowing, re-borrowing and diffusing law, but also 'reverse referencing back to national laws'.168

166 See Antenor Hallo de Wolf/Donald H. Wallace, The Overseas Exchange of Humanr Rights Jurisprudence: The U.S. Supreme Court in the European Court of Human Rights. International Criminal Justice Review, Volume 19, Number 3, September 2009, p. 287-288: 'The use by the ECtHR of human rights jurisprudence from other jurisdictions is now relatively commonplace. Such use has become so prevalent that it seems obvious to the ECtHR that the views of other jurisdictions may be used to inform its opinions. By contrast, a recent study by Liptak (2008) in the New York Times indicated a contrary trend for international use of U.S. Supreme Court (USSC) opinions. Even though courts around the world have long looked to the decisions of the USSC for guidance, citing and often following them in hundreds of their own rulings since World War II, today American legal influence is waning. A diminishing number of foreign courts are citing the writings of American justices. Furthermore, foreign courts in developed democracies often cite the rulings of the ECtHR in cases concerning equality, liberty, and prohibitions against cruel treatment but do not look to the rulings of the USSC (Liptak, 2008)'.

167 The concept of transjudicialism, or 'transjudicial communication' refers to the process whereby '(n)ational and international judges (…) communicate with each other and influence each other's interpretations of legal issues'. E. Voeten, Borrowing and Non-Borrowing among International Courts (May 11, 2009). Available at SSRN: http://ssrn.com/abstract=1402927, p. 1. See his reference to Slaughter in his this regard: '(a)ccording to Anne-Marie Slaughter, (…) "transjudicial communication" has become an integral part of a "new world order" (…) leading to an emerging "global jurisprudence" created by a "global community of courts" (…)'. Ibid.

168 E. Örücü, The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century, Martinus Nijhoff Publishers (April 2004), Leiden and Boston, p. 89: '(…) the European Court of Human Rights also makes comparative references to national laws, that is there is 'reverse reference back to national laws'. This type of reference is the expression of a coherent doctrine, part of an interpretative process and is not piecemeal, the European Court of Human Rights having established a bridge with the two-way traffic between international and national law. The contracting states are under an international obligation to make their national legal orders compatible with specific common

As such, as part of the 'global community of Courts',169 the ECHR's 'transnational conversations',170 particularly where they are not made explicit in the Court's reasoning, must be scrutinized with an eye on '(…) caution against judicial borrowings that tend to be unreflective, haphazard, self-serving and insufficiently attentive to legal context and culture'.171 Certainly if the ECHR model for evidence exclusion is based on (a mixture of) English common law and U.S. admissibility and exclusionary rules, its sustainability will depend greatly on the manner in which borrowing from such sources is accompanied by consciousness of the contextual connotations and complexity thereof. It has been underlined more than once above that, clear reasoning on the part of the Court as to sources and context is crucial. For signatory states, there must be awareness of the complexity and innovative character of interpretative methodology deployed by the Court. Understanding and critical appraisal of the ECHR case law is not possible without it.

standards. The European Convention on Human Rights, as the inspiration and continuing source of those standards, derives from principles already recognized recognized under the domestic law of all democratic countries'. See Örücü's reference in this regard to P. Mahoney, 'The Comparative method in the Jurisprudence of the European Court of Human Rights: Reference back to National Law', paper delivered at the BIICL Conference 'Comparative law before National and International Courts', 21st of February 2003 (unpublished), an updated version of P. Mahoney, 'The Role of Comparative Law in the Emergence of European Law', 2000, Swizz Institute of Comparative Law. See for that reference, ibid.

169 A. Slaughter, A Global Community of Courts, 44 Harvard International Law Journal, Volume 44, Number 1, 191, (2003), p. 191-219.

170 A. Macklin, Transnational Judicial Conversations about Security and Human Rights, CEPS Special report, March 2009, www.ceps.eu.

171 Ibid, p. 1.