

Evidentiary standards and remedies for use of illegally or improperly obtained evidence in the case-law of the European Court of Human Rights

Introduction

This paper is prepared to share some preliminary conclusions from the research carried out as a part of Fair Trials' ongoing project on Defence Rights in Evidentiary Procedures. The project aims to understand the extent to which defendants are able to meaningfully participate in and gain access to evidence gathering procedures and to challenge the admissibility of unlawfully gathered evidence. As a part of the project Fair Trials will catalogue the European Court of Human Rights (the Court) judgments on Article 6 of the European Convention of Human Rights (the Convention) between 2009 – 2019. More broadly the research will attempt to highlight the Court's approach in evaluating the impact of admission and use of illegally gathered evidence in criminal trials with a particular focus on instances where the rights protected under the European Convention on Human Rights and Fundamental Freedoms (the Convention) have been violated in the evidence gathering process.

This paper summarizes the preliminary conclusions of the early stages of research. Therefore, the readers of this paper are advised that the number of cases reviewed at this stage¹ is limited and may be added to further on, which may also affect the preliminary conclusions presented in this paper.

A non-exhaustive list of key cases reviewed for the purposes of this research is included in the Annex. The list included in the annex covers key cases where the applicant has invoked a violation of defence rights under Article 6 and right to privacy under Article 8 of the Convention. It also highlights a selected number of dissenting opinions on evidentiary standards currently established by the Court in its case law.

The Court's general approach regarding the admissibility of evidence

Key case-law: *Bykov v. Russia* [GC]; *Prade v. Germany*; *Beuze v. Belgium* [GC].

While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for the regulation under national law. It is not for the Court to determine 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 gathered were fair. This involves an examination of the alleged unlawfulness in question and, where the violation of another convention right is concerned, the nature of the violation found.

The starting point of the Court's analysis of the use of illegally or improperly gathered evidence in a criminal trial is the principle of subsidiarity. With reference to Article 19 of the Convention, the Court has repeatedly stated that its only task is to ensure the observance of the obligations undertaken by the States Parties under the Convention.² The Court will generally not consider itself competent to deal with the errors of law or fact that may have been committed by domestic courts, except where it considers that such errors might have involved possible violation of Convention rights. The Court

stresses that Article 6 of the Convention, while it guarantees the right to a fair trial, does not lay down any rules on admissibility of evidence. Therefore, these rules are primarily a matter of national regulation.³

Based on that conclusion the Court refrains, as a matter of principle, from determining whether particular types of evidence, including evidence obtained unlawfully in terms of domestic law, may be admissible. This means that the Court will regard the use of illegally obtained evidence or evidence gathered as a result of violation of Convention right as permissible if their use is allowed under national law. Instead the Court takes the way in which evidence was collected and used by a national court into account as part of its overall fairness test. This analysis involves an examination of the alleged “unlawfulness” in question, and, where such unlawfulness involves a violation of another Convention right, the nature of the violation found.⁴

The overall fairness test

Key cases: *Beuze v. Belgium* [GC]; *Simeonovi v. Bulgaria* [GC]; *Bykov v. Russia* [GC]

In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of evidence and to oppose its use. In addition, the quality of evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances 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 not risk of its being unreliable, the need for supporting evidence is correspondingly weaker. The Court also attaches weight to whether the evidence in question was or was not decisive for the outcome of the case.

With certain exceptions, which will be looked at in detail below, the Court applies the overall fairness test to determine whether criminal proceedings as a whole were fair. This means that having found a limitation of either defence rights under Article 6 or other Convention rights during evidence gathering, even if such limitation was unjustified, the Court will generally go on to assess whether the use of evidence obtained through (or indirectly from) that violation rendered the proceedings as a whole unfair. In assessing the overall fairness of the criminal trial, the Court will consider a number of aspects, including the way in which evidence was collected and used. A non-exhaustive list of these aspects found in the Court’s case-law was summarized by the Court in *Beuze v. Belgium*:⁵

- the nature of the “unlawfulness” or the violation of the Convention rights
- the opportunity to challenge the authenticity of the evidence and of opposing its use⁶
- the quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion
- importance of the evidence for the outcome of the trial and whether there was other supporting evidence in the case
- the weight of public interest in the investigation and punishment of a particular offence⁷

- the legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with
- whether the assessment of guilt was performed by professional judges or lay magistrates, or by lay jurors, and the content of any directions or guidance given to the latter
- other relevant procedural safeguards afforded by domestic law and practice.

This approach suggests that the right to a fair trial contains somewhat lower standard of protection of other Convention rights than the substantive articles in the Convention. Under Article 6 an established violation of defence rights and other rights protected under the Convention⁸ can be remedied by mere adherence to other rights found in the criminal procedure codes such as the right to challenge the legality, authenticity and use of the evidence in question. In other words, unlawfully collected evidence is not treated by the Court on its own as a violation of Article 6 but only a factor to be taken into account when assessing the fairness of the criminal proceedings as a whole. As will be shown by the examples below, the overall fairness test is a relatively difficult one to fail, which raises questions about the coherence of the degree of protection afforded to the same rights under different articles of the Convention, especially their effectiveness in disincentivising resort to illegal investigative practices.

Evidence obtained in violation of Article 3 and exclusionary rule

Key cases: Gäfgen v. Germany [GC]; Jalloh v. Germany [GC]; Othman (Abu Qatada) v. the United Kingdom; El Haski v. Belgium.

The use of evidence obtained in breach of Article 3, secured as a result of a violation of one of the core and absolute rights guaranteed by the Convention, always raises serious issues as to the fairness of the proceedings, even if the admission of such evidence was not decisive in securing a conviction. In respect of confessions, as such, that the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 as evidence to establish the relevant facts in criminal proceedings rendered the proceedings as a whole unfair. This finding applies irrespective of the probative value of the statements and irrespective of whether their use was decisive in securing the defendant's conviction.

As to the use at the trial of real evidence obtained as a direct result of ill-treatment in breach of Article 3, the Court has considered that incriminating real evidence obtained as a result of acts of violence, at least if those acts had to be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. The admission of real evidence obtained as a result of an act qualified as inhuman treatment in breach of Article 3, but falling short of torture, will only breach Article 6, however, if it has been shown that the breach of Article 3 had a bearing on the outcome of the proceedings against the defendant, that is, had an impact on his or her conviction or sentence.

The only situation in which the Court will consider use of evidence an automatic breach of the right to a fair trial is the case of use of evidence obtained through breaches of Article 3. The prohibition of torture and inhuman or degrading treatment enshrined in Article 3 of the Convention is an absolute right in its entirety under the Convention. However, where evidence is obtained in violation of Article 3 is used in

criminal proceedings, the Court adopts a different approach and creates what appears to be a hierarchy between types of breaches of Article 3.

When assessing the evidence obtained as a result of a violation of Article 3, the Court makes a distinction between torture on the one hand, and inhuman or degrading treatment on the other. Division is also created between statements such as confessions and real evidence⁹ (physical evidence) obtained as a result of such violation. A clear exclusionary rule applies to the former, meaning that all evidence – whether in the form of a statement or physical evidence - obtained as a direct result of torture, must be excluded from the criminal trial otherwise the trial will not be fair. This applies irrespective of its probative value or other considerations under the overall fairness test in the context of Article 6. In case of use of any evidence obtained as a result of torture, the Court will not proceed to the overall fairness test at all. Failure to exclude such evidence, in the Court's view, would "serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe".¹⁰ The same considerations, namely, a finding of flagrant denial of justice, will apply also to extradition cases where torture evidence may be used in trial in the requesting state.¹¹

Different considerations, however, apply to the evidence obtained as a result of ill-treatment in violation of Article 3 of the Convention, but falling short of torture. While the use of confessions or other self-incriminating statements obtained as a result of ill-treatment in breach of Article 3, whether amounting to torture or not, will render the proceedings as a whole unfair,¹² different conclusion applies to physical (real) evidence. In *Gäfgen v. Germany* real evidence – including the body of a murder victim - was obtained by the police on the basis of a confession which was made under threats of causing considerable physical pain if the applicant does not reveal the location of the victim (who as still believed to be alive at the time of the interrogation). As a result the defendant made a confession and directed the police to the location of the body. While the original confession itself was excluded from the criminal trial, the physical evidence obtained as a direct result of that confession and accordingly through inhuman treatment were admitted into the case file. The Court stated in principle that "*the effective protection of individuals from the use of investigation methods that breach Article 3 may require, as a rule, the exclusion from the use at trial of real evidence which has been obtained as the result of any violation of Article 3, even though that evidence is more remote from the breach of Article 3 than the evidence extracted immediately as a consequence of that violation.*"¹³ It was, however, of the opinion that the fairness of the criminal trial and the effective protection of the absolute rights under Article 3 only come into question if that breach has a bearing on defendant's conviction or sentence. Thus the Court will tolerate the admission of physical evidence obtained as a direct result of inhuman treatment into case file, but it should have no bearing on finding of guilt and sentencing.

In *Gäfgen* the Court concluded that the applicant's conviction was based on a 'new' confession which was made at the trial after the applicant had been properly informed about the right to remain silent. The impugned evidence (the body, autopsy report, tyre track prints etc.) was used as accessory evidence and only to test the veracity of untainted evidence obtained independently of the inhuman treatment. Therefore, the Court considered the causal link leading from the prohibited methods of investigation (inhuman and degrading treatment in violation of Article 3) to the applicant's conviction and sentence was broken, allowing the Court to come to a finding of no violation of Article 6(1) in that respect.¹⁴

The same considerations apply also if there is a "real risk" that the evidence gathered abroad was obtained as a result of inhuman or degrading treatment. The case *El Haski v. Belgium* concerned a Moroccan national who was convicted by Belgian courts of, among others, being involved with a terrorist organization. The convictions were based *inter alia* on two statements made by a witness

alleged to have been subject to ill-treatment prohibited under Article 3 from the authorities in Morocco. The Court reiterated its previous conclusions that the use of statements (confessions) obtained as a result of a violation of Article 3 – irrespective of the classification of the treatment as torture, inhuman or degrading treatment – renders the proceedings as a whole automatically unfair, in breach of Article 6.¹⁵ It stated that “*in order to seek the application of the exclusionary rule as regards statements taken [in abroad by the authorities of another state], it was sufficient for the applicant to demonstrate before the domestic court that there was a “real risk” that they had been obtained using torture or inhuman or degrading treatment.*” These principles apply not only where the victim of the treatment contrary to Article 3 is the actual defendant but also where inhuman treatment of third parties are concerned.

The line of reasoning developed by the majority in *Gäfgen v. Germany*, however, was strongly criticised by judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power in their joint partly dissenting opinion. While the judges agreed with the general principle that exclusionary rule should apply to all evidence obtained by torture, they disagreed to the distinction between statements and physical evidence when it came to other forms of ill-treatment prohibited under Article 3. The dissenting judges found that allowing evidence tainted by inhuman and degrading treatment to be admitted into trial at the same time prohibiting the national courts to rely on it for conviction and sentence, lacked logic. They also noted that the Court’s compartmentalized way at looking and analysing the different stages of criminal proceedings separately fails to take into account the practical context in which criminal trials are conducted. In the opinion of dissenting judges for a criminal trial to be fair, the adverse effects that flow from a breach of Article 3 must be eradicated from the proceedings entirely. Accordingly, a criminal trial which has evidence tainted by any type of violation of Article 3 included in the case file, must be regarded as unfair. All violations of absolute rights under Article 3 are serious and the most effective way of guaranteeing that absolute prohibition in the view of minority judges is a strict application of the exclusionary rule when it comes to Article 6.¹⁶

Evidence obtained in violation of Article 8

Key cases: *Bykov v. Russia* [GC]; *Prade v. Germany*; *Khorodovskiy and Lebedev v. Russia*, *Dragojević v. Croatia*

It is 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 or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where a violation of another Convention right is concerned, the nature of the violation found.

In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence 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.

An examination of the implications of the use of evidence obtained in breach of Article 8 rights on the fairness of a criminal trial essentially follows the general principles established by the Court in *Bykov v. Russia*. In that case the Russian authorities intercepted and recorded applicant's private conversation without proper judicial authorisation. In fact, the Court found made this finding about the national law governing the contested investigative act: "[T]he legal discretion of the authorities to order interception was not subject to any conditions, and the scope and the manner of its exercise were not defined; no other specific remedies were provided for." Nevertheless, the admission of the recording of conversation into evidence and its subsequent use for conviction was found not to violate the right to a fair trial under Article 6. The Court therefore reaffirmed its approach regarding evidence obtained through breach of Article 8, namely that violations of the right to privacy in evidence gathering process, do not in themselves conflict with the requirements of fairness guaranteed by Article 6(1). In case evidence gathered through a breach of right to privacy, the Court will therefore make a separate assessment of the overall fairness of the proceedings in order to determine whether there has also been a violation of Article 6.

Analysis of a number of recent cases¹⁷ shows that in cases where evidence obtained in breach of Article 8 is used in criminal trial, the Court is likely to find that there has been no violation of Article 6(1) based on the overall fairness test. Therefore, it also does not require the evidence to be excluded.

In *Dragoş Ioan Rusu v. Romania* applicant's correspondence was intercepted for the purposes of drug investigation. The procedure for authorisation of this investigative measure was found by the Court not to afford sufficient safeguards: the prosecutor authorising the surveillance was not independent of the executive, the prosecutor's decision to intercept communications was not subject to judge's prior approval, a person under surveillance could not challenge the merits of the interception before a court and there was no mention in the law as to the conditions under which transcripts should be destroyed. The Court noted that the applicant did challenge the lawfulness of surveillance in the main criminal proceedings, but concluded that the length of proceedings – more than five years – in itself cast doubt on the effectiveness of this remedy. Nevertheless, the Court did not find a violation of Article 6 on account of reliance on the confiscated letters for the conviction. The Court observed that the applicant had an opportunity to question the validity of the evidence and also took into account the reliability or accuracy (probative value) of the evidence was not in question. Although the intercepted letters were decisive for the conviction, they were not the sole evidence on which conviction was based, there was therefore no violation of the right to a fair trial.¹⁸

Similar problems with the legal framework authorising secret surveillance measures were found in *Dragojević v. Croatia*. There the Court found that the domestic courts' interpretation of national law left too wide discretion for law-enforcement to use surveillance measures and could not provide adequate and sufficient safeguards against potential abuse. However, having observed that the reliability of information obtained was not in question, that there was a possibility to challenge the authenticity of the evidence and to oppose its use before domestic courts and that the conviction was also based on other evidence, the Court found no violation of the right to a fair trial under Article 6(1).¹⁹

A finding of no violation of the right to fair trial was made in *Kalneniene v. Belgium*, *Prade v. Germany* and *Lee Davies v. Belgium* in connection with evidence obtained from illegal police searches. In these cases, the Court relied on the fact that the reliability and accuracy of the impugned evidence was not at doubt, that the applicant had an opportunity to oppose its use before domestic courts and that there was also other evidence forming the basis of conviction. In *Prade v. Germany* although the evidence gathered in violation of the terms of search warrant was the sole evidence against the applicant, special

attention in the assessment of the overall fairness of the proceedings was drawn to the gravity of the crime and the ensuing public interest in prosecuting the crime.²⁰

Conversely in *Lisica v. Croatia* the Court found a violation on account of use of evidence obtained during an illegal police search. In this case the available information on the circumstances in which the evidence was gathered could not eliminate doubts on the reliability of the sole direct evidence linking the applicant to the crime. Therefore, the Court concluded that the manner in which the evidence was used in the proceedings against the applicant had an effect on the proceeding as a whole and caused them to fall short of the requirements of a fair trial.²¹

It can be concluded from the above recent cases that the overall fairness test in case of use of evidence obtained in violation of the right to privacy is a difficult one to fail in an individual case. As long as the evidence is accurate and reliable, i.e., there is no doubt of it being planted, the alleged crime is of sufficient gravity and the defence has had an opportunity to challenge the use of illegally gathered evidence, the Court will not find the procedural fairness compromised. The importance and relevance of different aspects of overall fairness test listed in *Beuze* depend on the circumstances of each individual case, however as observed by judges Pinto de Albuquerque and Bošnjak in their joint partly concurring opinion in *Dragoş Ioan Rusu v. Romania*, some criteria in the overall fairness assessment seem to be more decisive where there has been a violation of Article 8. These include whether the applicant was given the opportunity to challenge the authenticity of the evidence and its use during the trial,²² whether there exists any doubt regarding the reliability and accuracy of the evidence and whether there is untainted supporting evidence.²³ However, even in cases where the impugned evidence is decisive for a conviction,²⁴ the use of such evidence does not automatically entail a breach of the principle of fairness of the proceedings. As long as the evidence is strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker.²⁵

This line of argumentation developed in the Court's case law has a series of strong dissenting opinions among the minority judges. For example, in their joint partly concurring opinion in *Dragoş Ioan Rusu v. Romania*, judges Pinto de Albuquerque and Bošnjak noted that the Court's case law on the use of illegally obtained evidence in criminal proceedings lacks persuasiveness, coherence and clarity and needs to be revisited. In the judges' opinion no court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means, but above all, unlawfully. "Fairness" in the context of the Convention "implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention."²⁶ A comprehensive partly dissenting opinion was attached also to the majority judgment in *Bykov v. Russia* by judge Spielmann joined by judges Rozakis, Tulkens, Casadevall and Mijović. In the opinion of the dissenting judges, evidence obtained in breach of Article 8 cannot be used without undermining the protection of that article and more generally the respect for rule of law. The dissenting judges argued that the evidence obtained in breach of Article 8 in *Bykov* caused the proceedings to be fatally flawed since it decisively influenced the guilty verdict against the applicant.

Evidence obtained in violation of Article 6(2) and (3)

Key cases: *Salduz v. Turkey* [GC]; *Ibrahim and others v. the United Kingdom* [GC]; *Beuze v. Belgium* [GC]; *Doyle v. Ireland*; *Murtazaliyeva v. Russia* [GC]; *Dvorski v. Croatia* [GC]; *Simeonovi v. Bulgaria* [GC], *Baytar v. Turkey*.

Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be ruled out that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings. In evaluating the overall fairness of the proceedings, the Court will take into account, if appropriate, the minimum rights listed in Article 6(3) which exemplify the requirements of a fair trial in respect of typical procedural situations which arise in criminal cases. They can be viewed, therefore, as specific aspects of the concept of a fair trial in criminal proceedings in Article 6(1). Those minimum rights guaranteed by Article 6(3) are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole.

Test for assessing whether a restriction on [access to a lawyer] is compatible with the right to a fair trial is composed of two stages: in the first stage the Court must assess whether there were compelling reasons for the restriction. In the second stage, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair.

In determining whether undue restrictions of procedural rights prescribed under Article 6(2) and (3) lead to a violation of the right to a fair trial, the Court will use the overall fairness test. This approach suggests that, for example, defence rights such as right to access to a lawyer under Article 6(3) are not seen as separate guarantees and rights on their own merit. The Court sees most defence rights under Article 6(1) to (3) as tools to ensure the fairness of the trial as a whole, rather than separate rights the violation of which, especially if not justified by an important competing public interest, would also result in violation of the right to a fair trial. The Court is generally reluctant to find a violation of the right to a fair trial on account of a restriction of one of the defendant's procedural rights alone, even if such restriction has not been justified by any "compelling" reasons.

For example, in *Knox v. Italy* the Court found a violation of the right to a fair trial due to denial of access to a lawyer during the police questioning and due to the lack of impartial interpretation. In its analysis the Court could find no compelling reasons for restricting the access to lawyer, however it went on to assess the overall fairness of the proceedings. The Court emphasized the vulnerability of the applicant being a young woman in a foreign country questioned under pressure and unable to speak fluently the language of the proceedings.²⁷ In *Zaichenko v. Russia*, the Court found the applicant was not adequately notified of his right to remain silent and not to incriminate himself and made statements that could be used against him as a result. The Court stated in this regard that "*the applicant's pre-trial admission, whether directly self-incriminating or not, was used in the proceedings in a manner which sought to incriminate him. In the Court's view, statements obtained in the absence of procedural guarantees, should be treated with caution.*"²⁸ The Court found that the domestic courts failed to give adequate reasons to applicant's challenge of admissibility of those statements and relied on them for a conviction.

Conversely in *Dvorski v. Croatia* the Court concluded that the right to be represented by a lawyer the applicant's own choosing prejudiced the overall fairness of the proceedings even though the applicant was represented by an assigned lawyer during the police questioning. The Court found that the circumstances in which the initial admission of guilt was obtained, prejudiced the fairness of the proceedings as a whole. The Court found that in abstract if a suspect receives the assistance of a

qualified lawyer, who is bound by professional ethics, rather than another lawyer whom he or she might have preferred to appoint, this is not in itself sufficient to show that the whole trial was unfair provided that there is no evidence of manifest incompetence. However the Court reached a different conclusion on the facts of the case. The Court concluded: “[I]n the instant case, it can be presumed that the consequence of the police’s conduct was that in his very first statement to the police, instead of remaining silent, as he could have done, the applicant made a confession, which was subsequently admitted in evidence against him. It is also significant that during the investigation and ensuing trial the applicant did not subsequently rely on his confession, save by way of mitigation in relation to the sentence, but took the first opportunity, before the investigating judge, to contest the manner in which the confession had been obtained from him by the police. Although there was other evidence against him, the significant likely impact of his initial confession on the further development of the criminal proceedings against him cannot be ignored by the Court. In sum, in the Court’s view, the objective consequence of the police’s conduct in preventing the lawyer chosen by the applicant’s family from having access to him was such as to undermine the fairness of the subsequent criminal proceedings in so far as the applicant’s incriminating initial statement was admitted in evidence [references omitted].”²⁹

In *Baytar v. Turkey* the Turkish authorities failed to provide an interpreter during a police questioning which resulted in the applicant making statements that were subsequently used to question the consistency of her statements during the trial. The Court considered that since the questions put to the applicant were not translated and she was not made aware as precisely as possible of the charges against her, she was not in a position where she could fully assess the consequences of her alleged waiver of the right to remain silent or right to be assisted by a lawyer and thus to benefit from the comprehensive range of services that can be performed by counsel. This initial defect thus had repercussions for other rights which, while distinct from the right alleged to have been breached (the right to interpreter), were closely related and undermined the fairness of the proceedings as a whole.³⁰

In the specific case of a restriction of access to a lawyer, the Court will first determine whether the access to lawyer has indeed been restricted and then proceed to analyse whether there were compelling reasons for such restriction and whether the proceedings as a whole were fair regardless of that restriction.³¹ The level of the Court’s tolerance towards restrictions of access to a lawyer, even unjustified, and the use of evidence obtained as a result of that restriction has, however, gradually grown. This can be observed through the landmark judgements in *Salduz v. Turkey, Ibrahim and others v. the United Kingdom, Beuze v. Belgium* and *Doyle v. Ireland*.³² In *Salduz v. Turkey* the Court took a principled approach to denial of access to lawyer in the early stages of criminal proceedings stating: “The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.”³³

However more recently in *Farrugia v. Malta*, the restrictions on the access to lawyer were particularly extensive covering the whole pre-trial stage of the proceedings during which the applicant gave several statements which were later used to question his credibility. The Court admitted that the “applicant’s conduct during the police interviews was capable of having such consequences for the prospects of his defence that there was no guarantee that either the assistance provided subsequently by a lawyer or the adversarial nature of the ensuing proceedings could cure the defects which had occurred during the period of police custody”.³⁴ Regardless of these extensive deficiencies, the Court did not find that proceedings as a whole were unfair.

Remedies

The Court is reluctant to take a particular stance on the appropriate means to remedy a violation of the right to a fair trial resulting in illegally or improperly obtained evidence (e.g. a confession obtained during an interview without a lawyer present). In most cases where the Court has found a violation of the right to a fair trial on account of use of illegally obtained evidence, it has limited its ruling on a finding of violation. This leaves States Parties broad discretion to find the appropriate remedy in each individual case, including, if criminal proceedings are reopened, the question of admissibility of evidence in the new trial.

The remedies envisaged by the Court in a number of cases are:

- exclusion of the impugned evidence³⁵
- reopening of proceedings³⁶
- compensation.

In *Dvorski v. Croatia*, the Court found a violation of Article 6(1) and 6(3)(c) of the Convention due to denial of access to a lawyer of applicant's choice during which time the applicant made a confession. In assessing the applicant's claim for damages the Court noted that it "*cannot speculate as to the outcome of the proceedings against the applicant. The finding of a violation of article 6(1) and 3(c) in the present case does not imply that the applicant was wrongly convicted. The Court considers that the finding of a violation constitutes sufficient just satisfaction. It notes that Article 502 of the Code of Criminal Procedure allows for the possibility of the reopening of proceedings.*"³⁷ Similar suggestion was made in *Pandjikidze and others v. Georgia*.³⁸ The limits of this possibility in civil law systems was, however, highlighted by judge Zupančič in his concurring opinion. He noted that the majority judgment places and emphasis on the retrial, but it does not specify the procedural parameters within which the new procedure is to be attempted. In civil law systems even if the "contaminated" evidence is excluded in the new proceedings, in cases such as *Dvorski*, that have drawn considerable public attention, it is practically impossible to conduct a new trial without a judge being aware of the applicant's previous confession.

In some cases, in finding a violation of the right to a fair trial the Court indicated that the appropriate remedy during the national proceedings would have been excluding the evidence from the trial.³⁹ This observation, however, is usually made as a part of the analysis of the overall fairness of the trial and not suggested as a specific remedy that should be taken as a part of the implementation of the Court's judgment. In other words, the exclusion of evidence obtained in the context of a violation of defence rights may be an appropriate remedy, but the Court does not impose such a remedy on national courts.

The application of exclusionary rule is most notably required in cases involving evidence obtained through a violation of Article 3 (all evidence obtained through torture and statements obtained through other types of ill-treatment prohibited under Article 3), although the same argument has convincingly been made for evidence obtained as a result of violations of Article 8. In the partly concurring opinion in *Dragoş Ioan Rusu v. Romania*, judges Pinto de Albuquerque and Bošnjak elaborated on why the exclusionary rule should be extended to cover evidence gathered as a result of violation of Article 8 and no other remedy such as a civil action in damages or disciplinary proceedings against state agents would suffice for three reasons. Firstly, the exclusionary rule of evidence obtained in breach of a Convention right not only serves the purpose of deterrence but is also and imperative of judicial integrity. Secondly, a procedural sanction, such as the exclusionary rule, renders rules on evidence collection a *lex perfecta*. Otherwise procedural rules are merely ancillary to the substantive ones protecting physical integrity, freedom of movement, privacy and other substantive rights and freedoms. Thirdly, a breach of the rules

on evidence collection in criminal proceedings does not necessarily constitute a disciplinary offence or a civil tort in several domestic legal systems.⁴⁰

In the view of minority judges in *Gäfgen v. Germany*, the exclusionary rule should apply not only to the evidence obtained as a direct result of any breach of Article 3, but also any evidence that is obtained indirectly from that breach.⁴¹ In other words national courts should apply the doctrine of the “fruit of the poisonous tree” to eradicate all adverse effects the ill-treatment from the criminal trial. It is worth noting in this regard that the Court in *Gäfgen* accepted that the physical evidence obtained on the basis of statements given while the applicant was subject inhumane treatment are admitted in the trial as long as they have no bearing on the conviction or sentence. In other words, such evidence can be admitted in the case file, but cannot be relied on for conviction and sentencing. This approach severely undermines the effectiveness of the exclusionary rule. As observed by judge Župančič in his concurring opinion in *Dvorski v. Croatia*, “once the evidence has been presented, there is no way to exclude it from the cognitive range of the sitting judges. (...) the rule to the effect that the judge cannot rely on such evidence in his or her reasoning and motivation of his or her judgment is, to say the least, naïve to the extent that it presupposes the ability of judges to ignore the contaminated or otherwise inadmissible evidence.”⁴²

¹ First draft of this paper is prepared in Spring 2020.

² *Bykov v. Russia*, application no. 4378/02, Grand Chamber Judgment of 10 March 2009, para. 88.

³ *Prade v. Germany*, application no. 7215/10, Fifth Section Judgment of 3 March 2016, para. 32.

⁴ *Bykov v. Russia*, application no. 4378/02, Grand Chamber Judgment of 10 March 2009, para. 89.

⁵ *Bykov v. Russia*, application no. 4378/02, Grand Chamber Judgment of 10 March 2009, para. 89-93; *Beuze v. Belgium*, application no. 71409/10, Grand Chamber judgment of 8 November 2018, para. 150.

⁶ In some cases, the Court will also look at the reasoning of the national courts and whether it appears to be arbitrary, see. e.g., *Dragojević v. Croatia*, application no. 68955/11, First Section Judgment of 15 January 2015, para. 134.

⁷ *Prade v. Germany*, application no. 7215/10, Fifth Section Judgment of 3 March 2016, para. 35.

⁸ Except for torture prohibited under Article 3, see. *Gäfgen v. Germany*, application no. 22978/05, Grand Chamber Judgment of 1 June 2010, para.167.

⁹ The Court uses the term ‘real evidence’ to refer to evidence such as human body, autopsy report, car tyre prints, see e.g., *Gäfgen v. Germany*, application no. 22978/05, Grand Chamber Judgment of 1 June 2010.

¹⁰ *Jalloh v. Germany*, application no. 54810/00, Grand Chamber Judgment of 11 July 2006, para. 105.

¹¹ *Othman v. the United Kingdom*, application no. 8139/09, Fourth Section Judgment of 17 January 2012, para. 282.

¹² *Gäfgen v. Germany*, application no. 22978/05, Grand Chamber Judgment of 1 June 2010, para.180.

¹³ *Gäfgen v. Germany*, application no. 22978/05, Grand Chamber Judgment of 1 June 2010, para.178

¹⁴ *Gäfgen v. Germany*, application no. 22978/05, Grand Chamber Judgment of 1 June 2010, para.178.

¹⁵ *El Haski v. Belgium*, application no. 649/08, Second Section Judgment of 25 September 2012, para. 85.

¹⁶ Joint partly dissenting opinion of judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power in *Gäfgen v. Germany*, paras. 3-10.

¹⁷ The list of cases analyzed for the purpose attached in Annex of this short overview is not comprehensive and for a more accurate overall picture may be in need of further analysis.

¹⁸ *Dragoş Ioan Rusu v. Romania*, application no. 22767/08, Fourth Section Judgment of 31 October 2017, paras. 51-55.

¹⁹ *Dragojević v. Croatia*, application no. 68955/11, First Section Judgment of 15 January 2015, paras. 131-135.

²⁰ *Prade v. Germany*, application no. 7215/10, Fifth Section Judgment of 3 March 2016, paras. 35 and 41.

²¹ *Lisica v. Croatia*, application no. 20100/06, First Section Judgment of 25 February 2010, paras. 60-61.

²² It is worth noting that the Court does not always carry out detailed analysis of the quality of arguments given by the national courts in favour of admitting illegally obtained evidence, see. e.g., *Prade v. Germany*, application no. 7215/10, Fifth Section Judgment of 3 March 2016, para. 38.

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- ²³ Joint partly concurring opinion of judges Pinto de Albuquerque and Bošnjak in *Dragoş Ioan Rusu v. Romania*, para. 7; see also *El Haski v. Belgium*, application no. 649/08, Second Section Judgment of 25 September 2012, para. 84.
- ²⁴ *Dragoş Ioan Rusu v. Romania*, application no. 22767/08, Fourth Section Judgment of 31 October 2017, para. 51.
- ²⁵ *Dragoş Ioan Rusu v. Romania*, application no. 22767/08, Fourth Section Judgment of 31 October 2017, para. 54; *Bykov v. Russia*, application no. 4378/02, Grand Chamber Judgment of 10 March 2009, para. 90.
- ²⁶ Joint partly concurring opinion of judges Pinto de Albuquerque and Bošnjak in *Dragoş Ioan Rusu v. Romania*, para. 3.
- ²⁷ *Knox v. Italy*, application no. 76577/13, First Section Judgment of 24 January 2019, para. 158-160.
- ²⁸ *Aleksandr Zaichenko v. Russia*, application no. 39660/02, First Section Judgment of 18 February 2010, para. 56.
- ²⁹ *Dvorski v. Croatia*, application no. 25703/11, Grand Chamber Judgment of 20 October 2015, para. 111.
- ³⁰ *Baytar v. Turkey*, application no. 45440/04, Second Section Judgment of 14 October 2014, paras. 53-56.
- ³¹ See, e.g., *Beuze v. Belgium*, application no. 71409/10, Grand Chamber judgment of 8 November 2018, paras. 154-166.
- ³² *Salduz v. Turkey*, application no. 36391/02, Grand Chamber Judgment of 27 November 2008; *Ibrahim and others v. The United Kingdom*, application nos. 50541/08, 50571/08, 50573/08 and 40351/09, Grand Chamber Judgment of 13 September 2016; *Beuze v. Belgium*, application no. 71409/10, Grand Chamber judgment of 8 November 2018; *Doyle v. Ireland*, application no. 51979/17, Fifth Section Judgment of 23 May 2017.
- ³³ *Salduz v. Turkey*, application no. 36391/02, Grand Chamber Judgment of 27 November 2008, para. 55.
- ³⁴ *Farrugia v. Malta*, application no. 63041/13, Third Section Judgment of 4 June 2019, paras. 108-119.
- ³⁵ *Razvozhayev v. Russia and Udaltsov v. Ukraine*, applications nos. 75734/12, 2695/15 and 55325, Third Section judgment of 19 November 2019, para. 256; *Titarenko v. Ukraine*, application No. 31720/02, Fifth Section Judgment of 20 September 2012, para. 87.
- ³⁶ *Dvorski v. Croatia*, application no. 25703/11, Grand Chamber Judgment of 20 October 2015, para. 117; *Şiray v. Turkey*, application no. 29724/08, Second Section judgment of 11 February 2014, para. 29; *Pandjigidze and others v. Georgia*, application no. 30323/02, Second Section judgment of 27 October 2009, para. 128.
- ³⁷ *Dvorski v. Croatia*, application no. 25703/11, Grand Chamber Judgment of 20 October 2015, para. 117; see also *Şiray v. Turkey*, application no. 29724/08, Second Section Judgment of 11 February 2014, para. 29.
- ³⁸ *Pandjigidze and others v. Georgia*, application no. 30323/02, Second Section Judgment of 27 October 2009, para. 128.
- ³⁹ *Titarenko v. Ukraine*, application no. 31720/02, Fifth Section Judgment of 20 September 2012, para. 86; *Baytar v. Turkey*, application no. 45440/04, Second Section Judgment of 14 October 2014, para. 58.
- ⁴⁰ Joint partly concurring opinion of judges Pinto de Albuquerque and Bošnjak in *Dragoş Ioan Rusu v. Romania*, para. 4.
- ⁴¹ Joint partly dissenting opinion of judges Rozakis, Tulkens, Jebens, Ziemele, Bianku and Power in *Gäfgen v. Germany*, para. 7.
- ⁴² Concurring opinion of judge Župančič in *Dvorski v. Croatia*, application no. 25703/11, Grand Chamber Judgment of 20 October 2015, paras. 11-12.