B

The European Court's Role in Article 6 Cases

If part A considered the tools that the European Court has used, part B considers the tasks for which those tools are used: here the focus is on the Court's view of its own institutional, jurisdictional and procedural role in Article 6 cases. I explore the extent to which the European Court's stated view of its own role matches what seems to happen in reality. The cross-cutting themes in this part are, of course, closely interrelated with the themes of interpretation discussed in part A: the role a court carves out for itself will shape the way it interprets cases, and the interpretative approaches adopted by a court will shape its role. Both parts should thus be read together, and also read together with subsequent parts. By adding the analysis in this part to that in part A, a fuller picture is built of how the European Court operates in Article 6 criminal fair trial cases.

There are two broad arguments in this part. The first is that the European Court's sense of its own role is poorly defined and poorly explained. The second is that there is a disconnect between the Court's stated view of its own role and the way in which the Court seems to operate in practice. This is particularly the case, as will be seen, in the context of the Court's 'fourth instance doctrine'. Indeed, it will be shown that there are real questions as to the extent to which the Court's 'fourth instance doctrine' case law bears out its rhetoric.

The European Court's failure to conceptualise its role clearly, and the gap between its rhetoric and its practice, undermine the predictability and coherence of the Court's case law.[1]

At the outset of any investigation of the European Court's view of its own role, it must be acknowledged that the Court faces an array of political and institutional difficulties.[2] While this book does not explore those political and institutional difficulties in depth, it must be acknowledged that the European Court's caseload generally, and its Article 6 caseload specifically, is immense.[3] Similarly, it

[1] For general discussion of how the European Court conceives of the Strasbourg system, see, eg, JG Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd edn (Manchester University Press, 1995) 44–67.

[2] See, eg, A Lester, 'The European Court of Human Rights after 50 Years' [2009] *EHRLR* 461, 467–70; S Greer and L Wildhaber, 'Reflections of a Former President of the European Court of Human Rights' [2010] *EHRLR* 165.

[3] In January 2014, the President of the Court celebrated the successful impact of Protocol 14 to the European Convention, demonstrated by the fact that the total number of pending cases has been

cannot go unnoticed that the Court is also under a variety of competing political pressures, which are in no small part the product of debate over the appropriate role for a regional human rights court.[4] It might be argued that these pressures provide justification for the proposition that the rule of law values of clarity, coherence and transparency should give way to other values (political expediency, or institutional self-defence, for example) in a particular case.[5] Such arguments may well prove compelling to the political scientist or the diplomat. But for the lawyer working in this field there is an alternative that does not involve any withdrawal from the rule of law principles. Put simply in the words of a former President of the Court, 'a court should always try to look like a court'.[6] If, in a given case, the Court feels obliged to take political factors or institutional difficulties into account, far better for it to articulate those factors or difficulties, so as to avoid distorting the rest of the court's case law through disingenuous interpretative gymnastics, so as to facilitate understanding of those difficulties, and so as to provide guidance to those seeking to understand the reasoning of the court in a given case. As will become clear, however, all too often the European Court has instead elected to employ incoherent and under-explained reasoning in explaining its own role in Article 6.

B.1 The European Court Adopts an Ostensibly Modest and Deferential Approach in Article 6 Cases

From an early stage, the European Court has tended to adopt an approach that is ostensibly deferential in Article 6 cases. Thus, for example, in the 1970 *Delcourt* case, the Court demonstrated an extremely deferential approach to Belgian domestic law.[7] Indeed, in *Delcourt* the Court deferred to established practice because of its

reduced 'below the symbolic figure of 100,000 pending cases' (to 90,900 cases) from a high of 160,000 cases in September 2011: Registrar of the Court, Press Release, 'President Spielmann highlights the Court's very good results in 2013' (Council of Europe, 30 January 2014); note, at 7, that 'Nearly a third of the judgments in which the Court found a violation included a violation of Article 6'. See also Registrar of the Court, Press Release, 'Reform of the Court: filtering of cases successful in reducing backlog' (Council of Europe, 24 October 2013); Paul Mahoney et al, *Statement on Case-Overload at the ECtHR* (European Law Institute, 2012); R Wolfrum and U Deutsch (eds), *The European Court of Human Rights Overwhelmed by Applications: Problems and Possible Solutions* (Springer, 2009).

[4] See, eg, N Watt and Owen Bowcott, 'David Cameron calls for reform of ECtHR', *The Guardian*, 26 January 2012, available at www.theguardian.com/law/2012/jan/25/david-cameron-reform-human-rights; BBC News, 'Human rights row: UK quitting would be disaster – ECHR head', 14 January 2014, available at www.bbc.co.uk/news/uk-politics-25726319; 'ECtHR decisions may become invalid in Russia', *Russia Today*, 24 December 2013, available at http://rt.com/politics/court-constitution-echr-law-726/; M Pinto-Duschinsky, *Bringing Rights Back Home* (Policy Exchange, 2011).

[5] On the idea of institutional self-defence, see NW Barber, *Self-Defence for Institutions*, Oxford Legal Studies Research Paper No 61/2012.

[6] Greer and Wildhaber, 'Reflections of a Former President of the European Court of Human Rights' (n 2 above) 173.

[7] *Delcourt v Belgium* (App 2689/65) (1979–80) 1 EHRR 355, para 36. *Delcourt* was a 1970 independence and impartiality case concerning the role of the Belgian Procureur-Général's department in the Court of Cassation's deliberations.

longevity ('more than a century and a half'), to a democratically-elected national parliament ('a parliament chosen in free elections has deliberately decided to maintain the system'), and to Belgian lawyers and citizens (the system was 'never . . . put in question by the legal profession or public opinion in Belgium').[8]

The European Court's more recent case law provides examples that indicate that the general deferential tone has continued. This will be expanded upon incidentally in various ways in subsequent sections, but one useful example is *Koval v Ukraine*. In *Koval*, the Court gave this view of its own role:

> The Court, having regard to its subsidiary role in relation to the domestic authorities, which are better placed and equipped as fact-finding tribunals, finds that there has accordingly been no violation of Article 6(1) . . . in respect of the failure of the domestic authorities to conduct a thorough and adversarial review of the applicant's submissions as to the allegedly unlawful forfeiture of his bail.[9]

I shall return to specific aspects of *Koval* below; for now, however, it may simply be noted that the Court has here expressly described its position as 'subsidiary'.[10] Ostensible deference of this sort is evident throughout the Court's descriptions of its role in Article 6 cases, perhaps partly so as 'not to alienate the respondent governments'.[11]

The Court also emphasises the modesty of its powers. Thus, for example, in the Article 50 hearing arising out of the Article 6 issues in *LeCompte, Van Leuven and DeMeyere*, the Court recalled

> that it is not empowered under the Convention to direct the Belgian State – even supposing that the latter could itself comply with such a direction – to annul the disciplinary sanctions imposed on the three applicants and the sentences passed . . . in criminal proceedings.[12]

In so doing, the Court emphasises the narrow ambit of its powers. While this book is not about the jurisdiction and powers of the European Court in general, and indeed this section focuses on the European Court's *statements about* its own role, this sort of modesty must be borne in mind.

In a sense, this ostensible modesty and deference is similar to the modesty expressed by the Court through its margin of appreciation case law. This doctrine, described by Lester as 'slippery and . . . elusive',[13] is typically but not exclusively

[8] ibid para 36.

[9] *Koval v Ukraine* (App 65550/01) (2009) 48 EHRR 5, para 118, citing *McShane v United Kingdom* (App 43290/98) (2002) 35 EHRR 23, para 103 (an Art 2 case).

[10] See also *Flueras v Romania* (App 17520/04) (9 April 2013) para 46; *Hogea v Romania* (App 31912/04) (29 October 2013) para 43; H Petzold, 'The Convention and the Principle of Subsidiarity' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993).

[11] Stephanos Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff, 1993) 83.

[12] *LeCompte, Van Leuven and DeMeyere v Belgium* (App 6878/75) (1983) 5 EHRR 183, para 13. See also *Taxquet v Belgium* (Grand Chamber) (App 926/05) (2012) 54 EHRR 26, para 83.

[13] Cited in R Clayton and H Tomlinson (eds), *The Law of Human Rights*, 2nd edn (Oxford University Press, 2009) 320.

used by the European Court when considering the extent to which a government's interference with a right is justifiable under the provisions of Articles 8(2), 9(2), 10(2) and 11(2).[14] Greer notes that 'no simple formula can describe how it works' and 'its most striking characteristic remains its casuistic, uneven, and largely unpredictable nature'.[15] The margin of appreciation jurisprudence and scholarly analysis can thus be quite complex.[16] Although it is very rare for the Court to discuss the margin of appreciation in the Article 6 criminal context,[17] there are isolated occasional references.[18] In this part, however, the focus is on the various much more common ways in which the European Court frequently expresses ostensible modesty and deference in the Article 6 context.

[14] See, eg, D Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights*, 2nd edn (Oxford University Press, 2009) 349–59.

[15] Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, 2nd edn (Cambridge University Press, 2006) 223.

[16] See, eg, ibid 222–26; Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the ECHR* (Martinus Nijhoff, 2009), generally, and 227–357; Ben Emmerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice*, 3rd edn (Sweet & Maxwell, 2012) 130–43; Steve Foster, *Human Rights and Civil Liberties*, 2nd edn (Pearson Education, 2008) 60–63; Clare Ovey and Robin White, *Jacobs and White: The European Convention on Human Rights*, 4th edn (Oxford University Press, 2006) 52–54; N Lavender, 'The Problem of the Margin of Appreciation' [1997] 4 *EHRLR* 380, generally; Merrills, *The Development of International Law by the European Court of Human Rights* (n 1 above) 151–75; Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: a Theoretical Analysis of Strasbourg's Variable Geometry' in A Follesdal, B Peters and G Ulfstein (eds), *Constituting Europe* (Cambridge University Press, 2013); E Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, 2001) 341–422; E Brems, 'The Margin of Appreciation Doctrine in the Case-Law of the ECtHR' (1996) 56 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 240, esp 252–53; MR Hutchinson, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 *International and Comparative Law Quarterly* 638; CS Feingold, 'The Doctrine of Margin of Appreciation and the European Convention on Human Rights' (1977–78) 53 *Notre Dame Lawyer* 90; Franz Matscher, 'Methods of Interpretation of the Convention' in R Macdonald, F Matscher and H Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993) 75–78; Mireille Delmas-Marty, 'The Richness of Underlying Legal Reasoning' in Mireille Delmas-Marty and Christine Chodkiewicz (eds), *The European Convention for the Protection of Human Rights: International Protection Versus National Restrictions* (Martinus Nijhoff, 1992); Paul Mahoney, 'Judicial Activism and Judicial Restraint in the ECHR' (1990) 11 *Human Rights Law Journal* 57, 78–85; J Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights' (1998) 19 *Human Rights Law Journal* 30; J Tobin, 'Seeking to Persuade: a Constructive Approach to Human Rights Treaty Interpretation' (2010) *Harvard HR Journal* 1, 42.

[17] Lavender, 'The Problem of the Margin of Appreciation' (n 16 above) 383; Greer, *The European Convention on Human Rights* (n 15 above) 225, 251. There are some references in the Art 6 civil context: see, eg, *Ashingdane v United Kingdom* (App 8225/78) (28 May 1985) para 57; *Waite and Kennedy v Germany* (App 26083/94) (2000) 30 EHRR 261, para 59; *Stubbings and others v United Kingdom* (App 22083/95) (1996) 23 EHRR 213, para 50; *Tinnelly & Sons Ltd and others and McElduff and others v United Kingdom* (App 20390/92) (1998) 27 EHRR 24, para 72; *Seal v United Kingdom* (App 50330/07) (2012) 54 EHRR 6, para 75; *Boyajyan v Armenia* (App 38003/04) (22 March 2011) para 42. See also Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002); Pieter van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, 4th edn (Intersentia, 2006) 570.

[18] See, eg, *Croissant v Germany* (App 13611/88) (1992) 16 EHRR 135, para 27; *Medenica v Switzerland* (App 20491/92) (14 June 2001) paras 58–59; Stavros, *The Guarantees for Accused Persons* (n 11 above) 354–55; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 600; Arai-Takahashi, *The Margin of Appreciation Doctrine* (n 17 above) 34; Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine (n 16 above) 32.

B.2 The European Court States that Its Role is Not to Enunciate General Doctrines

The European Court's view of its role as limited and modest is evident in its decision-making. This section focuses on the Court's insistence that it is not its role to situate its rulings on particular cases within broader general theories.

Harmsen notes that the 'established jurisprudential practice' of the European Court is to make decisions 'on a strict case-by-case basis, without the enunciation of more general doctrine'.[19] This view is evident in *Golder v United Kingdom*. *Golder* was an Article 6 civil case, but it contained a passage subsequently drawn upon in criminal cases:

> It is not the function of the Court to elaborate a general theory of the limitations admissible in the case of convicted prisoners, nor even to rule *in abstracto* on the compatibility of [certain provisions of the Prison Rules] . . . with the Convention. Seised of a case which has its origin in a petition presented by an individual, the Court is called upon to pronounce itself only on the point whether or not the application of those Rules in the present case violated the Convention to the prejudice of Golder.[20]

In *Golder*, therefore, the European Court outlined two propositions. First, its job was to decide the case in front of it (something which will be returned to in the next section). Second, the first proposition meant it was not appropriate for the Court to attempt to elaborate a general theory. With respect, the second does not flow from the first. Indeed, deciding the dispute before the Court will often require explanation of how that case fits with the other case law of the European Court, and such an explanation will often necessitate a generalised sense of how the case law fits together. Without such explanation and generality, the case law risks becoming incoherent and inconsistent.

The Court's reluctance to pronounce on matters not before the Court has clouded its sense of the extent to which it is able to make general pronouncements. The *Golder* view is repeated in *DeWeer*, where the Court firmly stated what its role is *not*:

> The 'right to a court' . . . is subject to implied limitations, two examples of which are given [in] the Commission's report . . . it is not the Court's function, though, to elaborate a general theory of such limitations.[21]

[19] R Harmsen, 'The European Convention on Human Rights after Enlargement' (2001) 5 *International Journal of Human Rights* 18, 32. See also A McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *Modern Law Review* 671, 673; Matscher, 'Methods of Interpretation of the Convention' (n 16 above) 63–64.

[20] *Golder v United Kingdom* (App 4451/70) (1979–80) 1 EHRR 524, para 39, citing *DeBecker v Belgium* (App 214/56) (27 March 1962) (para 14 of 'As to the Request . . . to Strike the Case Out').

[21] *DeWeer v Belgium* (App 6903/75) (1979–80) 2 EHRR 439, para 49. See also, eg, *Colozza v Italy* (App 9024/80) (1985) 7 EHRR 516, para 29. On implied limitations, see, eg, Christoffersen, *Fair Balance* (n 16 above) 78–81.

Thus in cases like *DeWeer*, the European Court expressly states that its role is not to place isolated implied limitations in the context of a more general theory. In these passages, the Court denies any responsibility for creating a coherent, reasoned, broadly consistent body of law. This raises two concerns.

First, this approach suggests there may be *no* general theory underpinning these limitations. This may not necessarily be a problem, but the Court's reluctance to even engage with the issue hints at a broader uncertainty over the path that the Court is treading. Second, it makes it difficult to gain a sense of the trajectory of the Court's case law. Specifically, it makes it difficult to determine when implied limitations are likely to be recognised, developed or expanded upon, something to which I return in more detail in part D. This difficulty reduces certainty about the state of the law, and decreases the case law's ability to provide guidance. If the European Court's concern is focusing on the case in front of it, that concern can be addressed without abdicating any responsibility for situating its decision in context.[22]

Moreover, as will be seen throughout this book, there are many instances in which the European Court *is* willing to articulate general theories.[23] The unexplained basis on which the European Court will be willing to identify and explain general theories in some cases, but not others, adds to the sense that the Court's case law is marked by incoherence.

B.3 The European Court Makes Incoherent Claims about Avoiding Abstract Challenges

This section considers the European Court's insistence that, as was stated in *Minelli v Switzerland*, the Court

> has to confine itself, as far as possible, to an examination of the concrete case before it . . . Accordingly, it has to give a ruling not on the [domestic] legislation and practice *in abstracto* but solely on the manner in which they were applied to the applicant.[24]

[22] cf Merrills, *The Development of International Law by the European Court of Human Rights* (n 1 above) 38.

[23] See, as one example, the general theory about the presumption of innocence articulated by the Grand Chamber in *Allen v United Kingdom* (App 25424/09) (12 July 2013) para 103 ('the Court would formulate the principle of the presumption of innocence in this context as follows . . .').

[24] *Minelli v Switzerland* (App 8660/79) (1983) 5 EHRR 554, para 35, citing *Adolf v Austria* (App 8269/78) (1982) 4 EHRR 313, para 36. See also *Fruni v Slovakia* (App 8014/07) (21 June 2011) para 133; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 303–6; Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2006) 186–91; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 625; cf Steven Greer, 'Constitutionalising Adjudication under the European Convention on Human Rights' (2003) *Oxford Journal of Legal Studies* 405, 406–7; Andrew C Stumer, *The Presumption of Innocence* (Hart Publishing, 2010) 90–91; and the European Court's pilot judgment process, discussed in, eg, *Broniowski v Poland (Friendly Settlement)* (App 31443/96) (2006) 43 EHRR 1, paras 34–37.

To adapt the American terminology, the concern in *Minelli* could be said to be a reluctance to rule on the application as though the applicant sought a facial challenge rather than an 'as applied' challenge.[25]

In *Minelli* the Court offered no explanation for this approach, apart from referring to its previous decision in *Adolf v Austria*.[26] Neither these decisions, nor the decisions to which they refer, explain *why* the Court purports to abstain from abstract analysis.[27] Thus at no point in this group of cases does the Court offer explanation or doctrinal support for the proposition that focusing on 'the concrete case before it' means that the Court cannot conduct abstract analysis. Passing reference to Article 25 of the Convention does not illuminate the European Court's reasoning.[28] Even if the Court cannot or does not wish to draw on doctrinal support for the propositions on which it relies, the interests of predictability, clarity and consistency call for an explanation of *why* a given approach is justified, what its limits might be, and whether there are circumstances in which the Court might be willing to conduct facial analysis. A similar lack of explanation is evident in cases such as *Hauschildt*, *John Murray*, *Brogan*, *Sahiner*, *Fey*, *Incal*, *Thorgerisson,* and *Valentino Acatrinei*.[29]

And there are cases in which the Court purports to disclaim abstract analysis before going on to do precisely that. Thus in *Malige v France* the Court stated that it:

> 30. . . . considers that it is not its task to rule on the French system of deductible-point driving licences as such, but to determine whether, in the circumstances of the case, Mr Malige's right of access to a tribunal, within the meaning of Article 6(1) of the Convention, was respected . . .
>
> 31. In the first place, the Court must determine whether the sanction of deducting points from driving licences is a punishment, and accordingly whether it is 'criminal' within the meaning of Article 6(1).[30]

[25] In a facial challenge, 'the challenger must establish that no set of circumstances exists under which the Act would be valid': *United States v Salerno* 481 US 739, 745 (1987). See Harmsen, 'The European Convention on Human Rights after Enlargement' (n 19 above) 33.

[26] *Adolf v Austria* (n 24 above) para 36. See Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 159–60; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 580.

[27] More than that, at least two of the decisions cited in fact countenance the possibility of abstract challenges: see *X v United Kingdom* (App 7215/75) (1982) 4 EHRR 188, paras 41–42; *Marckx v Belgium* (App 6833/74) (1979–80) 2 EHRR 330, para 27. See also *Guzzardi v Italy* (App 7367/76) (1981) 3 EHRR 333, para 88.

[28] As in *Schiesser v Switzerland* (App 7710/76) (1979–80) 2 EHRR 417, para 32.

[29] See *Hauschildt v Denmark* (App 10486/83) (1990) 12 EHRR 266, para 45; *John Murray v United Kingdom* (App 18731/91) (1996) 22 EHRR 29, para 44; *Brogan and others v United Kingdom* (App 11209/84) (1989) 11 EHRR 117, para 53; *Sahiner v Turkey* (App 29279/95) (25 September 2001) para 43; *Fey v Austria* (App 14396/88) (1993) 16 EHRR 387, para 27; *Incal v Turkey* (App 22678/93) (2000) 29 EHRR 449, para 70; *Thorgeir Thorgeirson v Iceland* (App 13778/88) (1992) 14 EHRR 843, para 48; *Valentino Acatrinei v Romania* (App 18540/04) (25 June 2013) para 68.

[30] *Malige v France* (App 27812/95) (1999) 28 EHRR 578, paras 30–31. See van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 553.

In one paragraph, the Court dismisses the idea of abstract analysis; in the following paragraph the Court commences facial *Engel*-style analysis of the sanction in the abstract.[31] There is no indication that the Court has a clear understanding of when, if ever, facial abstract analysis is appropriate. The articulation of a reasoned, explained theory of why and when facial or abstract review was inappropriate would enhance the extent to which future decisions could be predicted, and past decisions understood.[32]

A final point should be made in this analysis of the Court's ostensible reluctance to engage in abstract analysis. This reluctance is difficult to reconcile with the repeated occasions on which the European Court *mandates* abstract analysis in one form or another. Two Article 6 examples will suffice for now. When the Court ruled, as it did in *Jalloh*, that evidence obtained through a breach of the Article 3 prohibition on torture is inadmissible,[33] it ruled in the abstract, insofar as any future case involving that issue will theoretically be governed by the rule in *Jalloh* regardless of the facts of that individual case. When the Court ruled, as it did in *Benham*, that 'where deprivation of liberty is at stake, the interests of justice in principle call for legal representation', it was ruling in the abstract.[34] Neither of these statements is normatively undesirable or incapable of justification. What is troubling is that the Court can vehemently distance itself from abstract analysis in some cases, while enthusiastically embracing it in others, without offering any explanation for the disparity in either class of case. Unless the Court articulates a clear vision of its role with respect to facial challenges and as-applied challenges, and articulates and explains deviations from that vision where necessary, it will be difficult to rationalise past decisions and predict future decisions.

B.4 The European Court Describes Its Role as Limited by the 'Fourth Instance' Doctrine

The European Court frequently describes its role in Article 6 cases in contradistinction to the role of domestic appellate courts: the Court emphasises that it is not a court of fourth instance.[35] It is not for the Court, according to many judg-

[31] A similarly odd combination of passages is evident in *Bouamar*, an Art 5 case cited directly or indirectly in this context in Art 6 cases such as *Pham Hoang v France* (App 13191/87) (1993) 16 EHRR 53, para 33 and *Salabiaku v France* (App 10519/83) (1991) 13 EHRR 379, paras 25 and 30. The *Bouamar* Court explained that its role was not to conduct general abstract analysis but then followed this with several examples of detailed abstract analysis. See *Bouamar v Belgium* (App 9106/80) (1989) 11 EHRR 1, paras 48–53, citing *Lithgow and others v United Kingdom* (App 9006/80) (1986) 8 EHRR 329.

[32] See Harmsen, 'The European Convention on Human Rights after Enlargement' (n 19 above) 33–34.

[33] *Jalloh v Germany* (App 54810/00) (2007) 44 EHRR 32, para 105. See B.6 below.

[34] *Benham v United Kingdom* (App 19380/92) (1996) 22 EHRR 293, para 61.

[35] See, eg, Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 202; Ovey and White, *Jacobs and White* (n 16 above) 159; Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 83–84, 257; Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* (n 16 above) 129–30; Andrew Legg, *The Margin of Appreciation in International Human*

ments, to review the factual or legal analysis of domestic courts in the way that such analysis is performed by domestic appellate courts. An example of this sentiment is evident in *Schenk v Switzerland*, in which the Court made this statement about the intensity of its review powers:

> According to Article 19 . . . of the Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.[36]

In so doing, the European Court emphasised that it is not a supranational appellate court with free-ranging jurisdiction. Greer states that the doctrine means the Court is not to act as 'final court of appeal or fourth instance'.[37] Stavros argued that this doctrine 'has limited quite drastically [the European Court's] competence to review the merits of a criminal charge'.[38] Indeed, in 2009, the President of the Court stated that:

> Although we must not set ourselves up as a fourth instance rehearing what has already been heard in the domestic courts, we do have a duty to oversee the requirements of fair trial as guaranteed by Article 6 of the Convention.[39]

This section and the next section examine the tension inherent in this statement: the tension between the Court purporting not to be a fourth instance court but simultaneously attempting to 'oversee the requirements of fair trial'. In so doing I explore the fourth instance doctrine, the extent to which it has been explained and applied by the European Court, and the extent to which it actually prevents the European Court reviewing the merits of a domestic court decision. Two broad arguments run through this section.

First, it will be shown that the fourth instance doctrine is often invoked but poorly explained and under-theorised. Second, I will demonstrate that the fourth

Rights Law (Oxford University Press, 2012) 167–74; Petzold, 'The Convention and the Principle of Subsidiarity' (n 10 above) 50; Christoffersen, *Fair Balance* (n 16 above) 238–39; S Wallace, 'The Empire Strikes Back: Hearsay Rules in Common Law Legal Systems and the Jurisprudence of the ECtHR' [2010] *EHRLR* 408, 409; L Hoyano, 'What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' [2014] Crim LR 4, 7–8; Bill O'Brian, *Confrontation: the Defiance of the English Courts*, University of Warwick School of Law Legal Studies Research Paper 2010-09 (2010) 1, 24.

[36] *Schenk v Switzerland* (App 10862/84) (1991) 13 EHRR 242, para 45. See also *Khametshin v Russia* (App 18487/03) (4 March 2010) para 29; *Gafgen v Germany* (Grand Chamber) (App 22978/05) (2010) 52 EHRR 1, para 163; *Oao Neftyanaya Kompaniya Yukos v Russia* (App 14902//04) (20 September 2011) para 534; *Aigner v Austria* (App 28328/03) (10 May 2012) para 33; *Yefimenko v Russia* (App 152/04) (12 February 2013) para 118; *CB v Austria* (App 30465/06) (4 April 2013) paras 35, 39; *Erkapic v Croatia* (App 51198/08) (25 April 2013) para 70; *Botea v Romania* (App 40872/04) (10 December 2013) para 31.

[37] Greer, *The European Convention on Human Rights* (n 15 above) 216. See also Legg, *The Margin of Appreciation in International Human Rights Law* (n 35 above) 167.

[38] Stavros, *The Guarantees for Accused Persons* (n 11 above) 45.

[39] Jean-Paul Costa, 'The Authority of the Jurisprudence of the ECtHR' in Steering Committee for Human Rights (ed), *Reforming the European Convention on Human Rights: A Work in Progress* (Council of Europe Publishing, 2009) 292.

instance doctrine is, in fact, riddled with a series of exceptions that render the doctrine incoherent and internally inconsistent. Ultimately, I argue that the fourth instance doctrine is not as straightforward as is commonly assumed, and that the exceptions to the doctrine are of sufficient number and breadth to raise the possibility that the exceptions may, in fact, have become the rule. But, to begin, a basic account of the European Court's fourth instance doctrine.

A version of the fourth instance doctrine appears to have been commonly accepted in the Convention's *travaux*.[40] One of the earliest statements of this doctrine by the European Court may be in *Ringeisen v Austria (Merits)*, which stated, without referring to any doctrinal support:

> It is not the function of the European Court to pronounce itself on the interpretation of Austrian law on which the said judgment is based or to express an opinion on the manner in which it was substantiated; on the other hand, it is the Court's duty to examine the grounds relied upon by Ringeisen and to determine whether or not the Regional Commission respected the rule of impartiality laid down in [Article 6(1)].[41]

Much more recently, in *Karpenko v Russia* the Court stated that

> it is not its task to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts. It is the role of the domestic courts to interpret and apply the relevant rules of procedural or substantive law.[42]

Similar sentiments were frequently expressed in the four decades between *Ringeisen* and *Karpenko*. In cases such as *Bernard v France* we see the Court's general reluctance to engage in appellate-style analysis:

> It is admittedly not the Court's task to substitute its own assessment of the facts and the evidence for that of the domestic courts and, as a general rule, it is for these courts to assess the evidence before them. The Court's task is to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair.[43]

Later, in *Miragall Escolano and others v Spain*, the European Court expressed the same idea in a slightly different way:

[40] See discussion in A.1.

[41] *Ringeisen v Austria (Merits)* (App 2614/65) (1979–80) 1 EHRR 504, para 97. On *Ringeisen*, see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 293; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 613. *Ringeisen* was applied in, eg, *Winterwerp v Netherlands* (App 6301/73) (1979–80) 2 EHRR 387, para 46; *Vaudelle v France* (App 35683/97) (2003) 37 EHRR 16, para 55; *Jakub v Slovakia* (App 2015/02) (28 February 2006) para 48. See also *Kemmache v France (No 3)* (App 17621/91) (1995) 19 EHRR 349, para 44, which was applied in, eg, *Perlala v Greece* (App 17721/04) (22 February 2007) para 25; *Melich and Beck v Czech Republic* (App 35450/04) (24 July 2008) para 48; *Paraponiaris v Greece* (App 42132/06) (25 September 2008) para 24.

[42] *Karpenko v Russia* (App 5605/04) (13 March 2012) para 80. See also *Ghirea v Moldova* (App 15778/05) (26 June 2012) para 30.

[43] *Bernard v France* (App 22885/93) (2000) 30 EHRR 808, para 37, citing *Edwards v United Kingdom* (App 13071/87) (1993) 15 EHRR 417, para 34 and *Mantovanelli v France* (App 21497/93) (1997) 24 EHRR 370, para 34. cf van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 587; Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 176.

> The Court reiterates . . . that *it is not its task to take the place of the domestic courts*. It is primarily for the national authorities, notably the courts of appeal and of first instance, to resolve problems of interpretation of domestic legislation. The role of the Court is limited to verifying whether the effects of such interpretation are compatible with the Convention.[44]

At first glance, therefore, the European Court's approach is clear.[45] It is not the role of the Court to act as an appellate court – a term effectively defined as engaging in review of the national courts' legal and factual analysis. But the reality of the case law is more complex, as is evident in the caveat expressed in *Schenk* above: 'unless and in so far as they may have infringed rights and freedoms protected by the Convention'.[46] The general rule, therefore, is that review of legal and factual analysis is not within the Court's purview. The caveat, in turn, creates a class of exceptions to the general rule. Such a caveat may be thought logical in isolation. Difficulties arise, however, when this caveat is applied.

The reality is that in order for the caveat to be effective, the Court must recognise that the caveat implicitly requires that *every* Article 6 criminal fair trial case coming before it be scrutinised to determine whether there have been any errors infringing rights and freedoms protected by the Convention. That scrutiny may be strong or weak, but it *is* scrutiny. Moreover, the interests of transparency and accountability call for an explanation of how that initial scrutiny should be conducted, and the level of intensity appropriate to such a review. Put another way, the Court cannot conclude that a national court's legal and factual analysis does not 'infringe rights and freedoms' *unless* it engages with and assesses the national court's analysis in some preliminary way. Of course, as soon as that preliminary assessment has been conducted, the trap has been sprung, and the Court has engaged with the national courts' factual and legal analysis.

There is, however, no indication of what test the Court applies, nor of a realisation on its part that the caveat necessarily involves some level of engagement with the legal and factual analysis of every case it considers. An example of this tension is evident in *Walchli v France*, where the Court stated that

[44] *Miragall Escolano and others v Spain* (App 28366/97) (2002) 34 EHRR 24, para 33 (emphasis added), citing *Brualla Gomez de la Torre v Spain* (App 26737/95) (2001) 33 EHRR 57, para 31 and *Edificaciones March Gallego SA v Spain* (App 28028/95) (2001) 33 EHRR 46, para 33; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 572–73. See also *Gruais and Bosquet v France* (App 67881/01) (10 January 2006) para 27; *Vitan v Romania* (App 42084/02) (25 March 2008) para 55.

[45] For a non-critical explanation and acceptance of the fourth instance rule, see the discussion of *Rowe and Davis v United Kingdom* (App 28901/95) (2000) 30 EHRR 1 in Legg, *The Margin of Appreciation in International Human Rights Law* (n 35 above) 168–69.

[46] *Schenk v Switzerland* (n 36 above) para 45; Petzold, 'The Convention and the Principle of Subsidiarity' (n 10 above) 50. See also, eg, *Bernard v France* (n 43 above) para 37; *Miragall Escolano and others v Spain* (n 44 above) para 33; *Ringeisen v Austria (Merits)* (n 41 above) para 97; *Orlov v Russia* (App 29652/04) (21 June 2011) para 98; *Niculescu v Romania* (App 25333/03) (25 June 2013) para 113.

> [it is] the primary responsibility of national authorities, including courts . . . to *interpret the legislation*. The Courts role is limited to *ensuring compatibility with the Convention of the effects of such an interpretation*.[47]

In the absence of further guidance from the Court on how to distinguish between analysis of the *interpretation* of legislation and analysis of the *effects* of the interpretation of legislation, the Court's stance is opaque. There is no attempt, for example, to differentiate the nature of an appeal from the nature of a review. In these ways the Court sets itself to walk an interpretative high-wire without acknowledging that the high-wire even exists.

The European Court thus repeatedly frames its role as different from that of the appellate courts, *except* to the extent that the proceedings have engaged Article 6's fair trial protections. But the Court does not provide the formula for approaching the question of how, and at what level of intensity, it reviews a national court's factual and legal analysis in order to determine whether that analysis has triggered Article 6 engagement. In *Goktepe v Belgium*, the Court stated

> in principle it is for national courts to assess the evidence gathered by them. The task of the Court is to determine whether the procedure as a whole, including the presentation of evidence, has been fair.[48]

Versions of this formulation have been used frequently.[49] It is noteworthy that the European Court does not, in any of these cases, provide guidance as to how it determines which cases demand that the European Court itself engage with the national court's factual and legal analysis in order to determine whether a breach of the Convention has occurred.[50]

As the analysis above has shown, at no stage has the Court recognised that the caveat may implicitly require that *every* Article 6 criminal fair trial case coming before it be scrutinised to determine whether there have been any errors infringing rights and freedoms protected by the Convention. Such preliminary scrutiny is a logical precursor to the more thorough scrutiny that the caveat envisages.

[47] *Walchli v France* (App 35787/03) (26 July 2007) para 27 (translated) (emphasis added).

[48] *Goktepe v Belgium* (App 50372/99) (2 June 2005) para 25 (translated), citing *Van Mechelen and others v Netherlands* (App 21363/93) (1998) 25 EHRR 647, para 50.

[49] See, eg, *Garcia Ruiz v Spain* (App 30544/96) (2001) 31 EHRR 22, para 28; *Mostacciuolo Giuseppe v Italy (No 2)* (App 65102/01) (29 March 2006) para 80 (civil); *Jakumas v Lithuania* (App 6924/02) (18 July 2006) para 54; *Mamidakis v Greece* (App 35533/04) (11 January 2007) para 29; *Perlala v Greece* (n 41 above) para 25; *Gorgievski v FYROM* (App 18002/02) (16 July 2009) pars 46–47; *Gladyshev v Russia* (App 2807/04) (30 July 2009) paras 74–75; *Khametshin v Russia* (n 36 above) para 29; *Nicoleta Gheorghe v Romania* (App 23470/05) (3 April 2012) para 34.

[50] The European Court's lack of explanation for the fourth instance doctrine, and of the way in which that doctrine works, is compounded by the lack of any jurisprudential or case authority for the doctrine. See, eg, *Bernard v France* (n 43 above) para 37; *Gocmen v Turkey* (App 72000/01) (17 October 2006) para 70; *Edwards v United Kingdom* (n 43 above) para 34; *Vidal v Belgium* (App 12351/86) (22 April 1992) para 33; *Barbera, Messegue and Jabardo v Spain* (App 10588/83) (1989) 11 EHRR 360, para 68. The cases are also marked by curious contradictions. In *Unterpertinger*, eg, referred to in many fourth instance doctrine cases, the European Court makes no express statement whatsoever about the European Court's role and in fact conducts analysis consisting of an assessment of the evidence before the national court, something the doctrine purports to prohibit: see *Unterpertinger v Austria* (App 9120/80) (1991) 13 EHRR 175, para 33.

Moreover, the European Court provided no guidance on how that initial scrutiny should be conducted, or on the level of intensity appropriate to such review. We thus have considerable evidence in support of the first broad argument, namely that the fourth instance doctrine is often invoked but poorly explained and under-theorised.

In the 2007 decision of *Dumitru Popescu v Romania*, the European Court appeared to express regret that it could not function as an appellate court:

> [H]owever regrettable it may be, it should be noted that it is not generally for the Court to deal with errors fact or law allegedly committed by a domestic court.[51]

The next section considers the extent to which the Court does, in reality, conduct appellate-style analysis.

B.5 The Fourth Instance Doctrine is Riddled with Exceptions to the Point of Incoherence

In this section, the focus is less on the question of how the caveat is *triggered*, and instead on how the caveat is *applied*. Here, I argue that the range of exceptions applied via the caveat is so great that it may be more accurate to frame the exceptions as the rule, and to describe the ostensible reluctance to conduct appellate-style review as the exception. In this section, as in the last, the term 'appellate-style review' is used in the way that the European Court uses that concept: conducting review of factual or legal analysis or conclusions of domestic courts.

The first subsection (B.5.1) considers the way in which the European Court's jurisprudence on the right to a reasoned judgment constitutes an exception to the general rule prohibiting interference with factual and legal analysis. In the following subsection (B.5.2), I consider other ways in which the Court has identified exceptions in a range of areas of Article 6 case law. Finally, I draw conclusions about how best to accurately summarise the fourth instance doctrine in subsection B.5.3. Overall, this section challenges the notion that the Court has 'studiously and properly followed' the fourth instance doctrine.[52]

The distinction between an analysis of the fairness of 'the proceedings as a whole', and an appellate-style factual and legal analysis, is a slippery one. This book accepts that an assessment of the fairness of proceedings as a whole will often involve review of the factual and legal conclusions reached by a domestic court. Indeed, that was the conclusion reached by the analysis of 'the caveat' above. But the focus of my criticism is that the Court fails to acknowledge this reality; as will be seen in this section, its rhetoric about not engaging in appellate-style review is not matched by its practice. Indeed, what will be demonstrated in the following sections is that the Court has repeatedly engaged in extensive review

[51] *Dumitru Popescu v Romania (No 2)* (App 71525/01) (26 April 2007) para 102 (translated).
[52] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 202.

of domestic courts' factual and legal analysis. This is not to say that the Court in these cases was *not also* involved in a review of the fairness of the proceedings as a whole, but it is to emphasise that the Court *was* involved in appellate-style review.[53]

B.5.1 The Right to Reasons Provides a Major Exception to the Fourth Instance Doctrine

The right to a reasoned judgment is one of the component elements of Article 6.[54] The argument here is that, in many cases, consideration of the adequacy of a national court's reasons blurs into what reads like appellate review. Of course, the Court's ability to engage in such consideration is enlivened by the caveat: it can engage in this sort of analysis only where the fairness of the trial is in question. I argue here that right to reasons analysis has the potential to be appellate-style review in the clothing of the caveat. If all it takes to enliven the caveat is an argument alleging inadequate reasons, then virtually every case has the potential to trigger appellate-style review. Moreover, I argue that the Court provides little guidance to indicate how it determines the adequacy of reasons, and, in particular, the intensity of review it applies to a given set of reasons when considering their adequacy. In the absence of such guidelines, the risk is that the Court's decisions on the right to reasons may appear arbitrary, and that the fourth instance doctrine may not be as secure as the Court's rhetoric suggests.

Of course, as was stated in *Salov v Ukraine*, 'the question whether a court has failed to fulfil its obligation to state reasons can only be determined in the light of the circumstances of the particular case'.[55] Nevertheless, determining a case on the facts of that particular case should not disguise the need for the Court to identify a general standard against which it measures the adequacy of reasons.

In *Hadjianastassiou*, for example, there is reasons review that appears to come close to appellate review:

> 33. . . . The national courts must . . . indicate with sufficient clarity the grounds on which they based their decision. It is this, inter alia, which makes it possible for the

[53] See E.2 for detailed consideration, and critique, of the European Court's references to the 'proceedings as a whole'.

[54] See, eg, van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 595–96; Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 102–10; Ovey and White, *Jacobs and White* (n 16 above) 179; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 268–69; *Taxquet v Belgium* (Grand Chamber) (n 12 above); Paul Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) *Human Rights Law Review* 1. See also *Taxquet v Belgium* (Grand Chamber) (n 12 above) paras 90–92. See also D.1.

[55] *Salov v Ukraine* (App 65518/01) (2007) 45 EHRR 51, para 89, citing *Ruiz Torija v Spain* (App 18390/91) (1995) 19 EHRR 553, para 29. See also *Backes v Luxembourg* (App 24261/05) (8 July 2008) para 65 and *Taxquet v Belgium* (App 926/05) (13 January 2009) para 40; *Taxquet v Belgium* (Grand Chamber) (n 12 above); and Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 268.

> accused to exercise usefully the rights of appeal available to him. The [European] Court's task is to consider whether the method adopted in this respect has led in a given case to results which are compatible with the Convention.
>
> 34. In this instance the judgment read out . . . contained no mention of the questions as they appeared in the record of the hearing . . . Admittedly it referred to . . . the Military Criminal Code . . . and described the information communicated as of minor importance, but it was not based on the same grounds as the decision of the Permanent Air Force Court.[56]

In this passage, the excerpted section of paragraph 34 constitutes appellate-style review as the Court explains that term, insofar as it involves reviewing the national court's conclusions of fact and law. The right to reasons affords the Court the opportunity to act in a thoroughly appellate-style manner. Moreover, significantly, there is no indication in this judgment of what constitutes 'sufficient clarity' of reasons, or of how intensively to conduct the review that reaches a conclusion on the question of clarity.

The adequacy of a domestic court's reasons was also considered in *Khudobin v Russia*, in which the Court stated bluntly:

> [A]lthough . . . the domestic court had reason to suspect that there was an entrapment, it did not analyse the relevant factual and legal elements which would have helped it to distinguish entrapment from a legitimate form of investigative activity. It follows that the proceedings which led to the applicant's conviction were not 'fair'.[57]

In this way the Court directly challenges the 'factual and legal' analysis of the domestic court, and does so without identifying the standard or intensity of review that is appropriate in such cases.[58] Similarly, in *Kuznetsov*, the Court cited the importance of reasons,[59] and then engaged in lengthy legal and factual analysis, including this passage:

> The Court is struck by the inconsistent approach of the Russian courts, on the one hand finding it established that the Commissioner and her aides had come to the applicants' religious meeting and that it had been terminated ahead of time, and on the other hand refusing to see a link between these two elements without furnishing an alternative explanation for the early termination of the meeting. Their findings of fact appear to suggest that the Commissioner's arrival and the applicants' decision to interrupt their religious service had simply happened to coincide. That approach permitted the domestic courts to avoid addressing the applicants' main complaint, namely that neither the Commissioner nor the police officers had had any legal basis for interfering with the conduct of the applicants' religious event. The crux of the applicants' grievances – a

[56] *Hadjianastassiou v Greece* (App 12945/87) (1993) 16 EHRR 219, paras 33–34. See also van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 635; Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 108–9.

[57] *Khudobin v Russia* (App 59696/00) (2009) 48 EHRR 22, para 137.

[58] See also Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 106–7.

[59] *Kuznetsov and others v Russia* (App 184/02) (2009) 49 EHRR 15, para 83.

> violation of their right to freedom of religion – was thus left outside the scope of review by the domestic courts.[60]

This lengthy extract demonstrates the extent to which the European Court engages in rigorous factual and legal analysis of the national court's reasons.[61] This book readily recognises that such analysis may be essential to determining whether the applicant's right to reasons was infringed. The interests of predictability and consistency demand, however, that the Court make clear the appropriate standard of review to apply in reviewing reasons cases. Moreover, and perhaps more importantly for present purposes, the Court needs to indicate why this sort of reasons analysis could not be invoked in virtually *every* Article 6 criminal case, thus rendering every case subject to appellate-style review and neutralising the fourth instance doctrine.

It is important to emphasise, therefore, that despite the Court's definition of its own role as not acting like an appellate court, its case law provides it with the opportunity to be precisely that.[62] The right to reasons case law provides a gaping exception to the general rule. Moreover, it does so in an understructured way. In *Nechiporuk and Yonalko v Ukraine*, for example, the Court engaged in extensive factual and legal review of the national courts' reasons. This passage is an excerpt from that analysis:

> 277. The [European Court] finds the responses of both the first-instance court and the Supreme Court to those arguments to be *strikingly scant and inadequate*. While dismissing as unfounded the first applicant's allegations about pressure on the witness and noting that 'there [was] no information from which it could be discerned [otherwise]', the courts *failed to comment on* the undisputed fact of the administrative detention of Mr K. and *ignored* the existence of the audiotape referred to by the applicant even though it had been included in the case-file materials. . . .
>
> 279. Turning to the present case, the Court notes that: firstly, the courts decided to attach weight to the accusatory statements of Mr K. *in disregard of specific and pertinent facts* with a potential to undermine their reliability and accuracy; secondly, it was *never established in a convincing manner* that Mr K. had made those statements of his own free will – the fact that he had pursued that approach in the court might merely have resulted from continuing intimidation; and, lastly, the statements of Mr K. became consistently unfavourable for the first applicant from the time of his questioning, coinciding with his own detention.

[60] ibid para 84.

[61] This passage has been cited in support of this sort of review: see *Haxhia v Albania* (App 29861/03) (8 October 2013) para 3 of Partly Dissenting Opinion of Judge De Gaetano.

[62] For examples of the many similar reasons cases in which the fourth instance doctrine has been invoked and then circumvented, see *Gradinar v Moldova* (App 7170/02) (8 April 2008) paras 112–115; *Vanjak v Croatia* (App 29889/04) (14 January 2010) paras 60–61; *Mamikonyan v Armenia* (App 25083/05) (16 March 2010) paras 35–37; *Vetrenko v Moldova* (App 36552/02) (18 May 2010) paras 55–59; *Bulfinsky v Romania* (App 28823/04) (1 June 2010) paras 44–48; *Nechiporuk and Yonalko v Ukraine* (App 42310/04) (21 April 2011) paras 268–281; *Mitrofan v Moldova* (App 50054/07) (15 January 2013) paras 50–55; cf Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 104–6 and *Segame SA v France* (App 4837/06) (7 June 2012) para 64.

> 280. The Court has held, in the context of its examination of the fairness of civil proceedings, that by ignoring a specific, pertinent and important point of the applicant, the domestic courts fall short of their obligations under [Article 6(1)] of the Convention. It observes a similar issue in the present case, where that requirement, although being even more stringent in the context of criminal proceedings, was not met.
>
> 281. . . . there has been a violation of [Article 6(1)] of the Convention.[63]

This sort of reasoning gives the European Court the opportunity to review the factual and legal analysis of national courts in virtually any Article 6 criminal fair trial case. An applicant who feels unsatisfied by their domestic appellate system may be well advised to allege violations of the right to reasons in order to allow the Court to trigger thorough review of the domestic system's factual and legal analysis. As a dissenting opinion in *Vetrenko v Modlova* stated, in these cases the Court has assumed 'the role of a court of appeal and seeks to substitute its own view for that of the national courts'.[64] This book takes no position on whether or not such intrusive appellate-style review is desirable; the crucial point for my argument is that this situation gives rise to incongruence between the law as stated and the law as applied, and significantly undermines the coherence of the Court's case law.

B.5.2 The European Court's Case Law Discloses Numerous Additional 'Exceptions' to the Fourth Instance Doctrine

This subsection considers seven further classes of exception through which the Court is able to conduct appellate-style review of domestic courts' factual and legal analysis. Together with the right to reasons exception above, these loopholes combine to provide the Court with an array of ways to conduct appellate-style analysis, notwithstanding its protestations that such analysis is beyond its ambit. Additionally, these loopholes constitute further examples of incongruence between the law as stated and the law as applied.

The first exception arises in the context of presumptions of fact and law of the kind considered in *Salabiaku*.[65] *Salabiaku* warned that contracting states must 'confine [presumptions of fact or of law] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[66]

[63] *Nechiporuk and Yonalko v Ukraine* (n 62 above) paras 277–281 (emphasis added), applied in *Vyerentsov v Ukraine* (App 20372/11) (11 April 2013) para 88.

[64] *Vetrenko v Moldova* (n 62 above) paras 2–5 of Joint Dissenting Opinion of Judges Bratza, Garlicki and David Thor Bjorgvinsson.

[65] *Salabiaku v France* (n 31 above). For more on *Salabiaku*, see Stumer, *The Presumption of Innocence* (n 24 above) 98–102; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 628–29; Ovey and White, *Jacobs and White* (n 16 above) 199–200; Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 168–70; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 301–2; Alan Norrie, 'Criminal Justice, Judicial Interpretation, Legal Right' in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 265.

[66] *Salabiaku v France* (n 31 above) para 28. cf Lord Hoffmann in *R v G* [2008] UKHL 37, [2009] 1 AC 92, para 5.

In *Pham Hoang*, therefore, the Court considered several such presumptions in order to determine whether they had been confined within reasonable limits. This analysis led the Court to review directly the factual and legal analysis of the domestic courts:

> Furthermore, in its judgment . . . the Court of Appeal did not cite in the reasons for its decision any of the impugned provisions of the Customs Code when it ruled on the accused's guilt, even if it in substance took Articles 399 and 409 as its basis for holding that he had had 'an interest in customs evasion' and that he was guilty of an attempted customs offence . . . The court set out the circumstances of the applicant's arrest and took account of a cumulation of facts. It noted that during the afternoon of 3 January 1984 he had, in his own car, driven an important drug trafficker to several shops in order to buy hydrochloric acid; a little earlier, it added, he had been present in the flat where the head of the trafficking network had brought 5kg of caffeine and he had agreed to take Tran and Ngo to where the heroin was to be delivered. Lastly, it noted that although he had 'not physically come into possession' of the heroin, this was due only to the intervention of the police and was thus for reasons beyond his control . . .
>
> It therefore appears that the Court of Appeal duly weighed the evidence before it, assessed it carefully and based its finding of guilt on it. It refrained from any automatic reliance on the presumptions created in the relevant provisions of the Customs Code and did not apply them in a manner incompatible with [Article 6(1) and (2)] of the Convention.[67]

The lengthy quote is necessary to demonstrate the level of detail that the Court's analysis includes. My argument is not that this detail and depth is normatively undesirable for the purposes of *Salabiaku* analysis. But it must be noted that such analysis falls squarely within the appellate-style analysis that the Court states it does not conduct as a general rule; this is concrete detailed analysis of the domestic court's reasoning.

A similar presumptions case was *Telfner v Austria.* In that case, the Court warned that

> as a general rule, it is for the national courts to assess the evidence before them, while it is for the [European] Court to ascertain that the proceedings considered as a whole were fair.[68]

Nevertheless, several paragraphs after this warning, the Court's analysis engaged directly with the way in which the national court had assessed the evidence:

> In addition, the Court notes that both the District Court and the Regional Court speculated about the possibility of the applicant having been under the influence of alcohol which was, as they admitted themselves, not supported by any evidence. Although such speculation was not directly relevant to establishing the elements of the offence with

[67] *Pham Hoang v France* (n 31 above) paras 35–36; Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 170.

[68] *Telfner v Austria* (App 33501/96) (2002) 34 EHRR 7, para 15. See also Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 301; Ovey and White, *Jacobs and White* (n 16 above) 198–99; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 626–27.

> which the applicant had been charged, it contributes to the impression that the courts had a preconceived view of the applicant's guilt.[69]

Here, the Court found that certain speculation was 'not supported by any evidence'. This plainly involves 'assess[ing] the evidence'. While the national courts here 'admitted' their evidentiary flaw, there is nothing in the Court's logic that would prevent it from reviewing the evidence in a case where the national courts made no such admission. Once again, the Court demonstrated a willingness to engage in review of factual and legal analysis in cases involving presumptions of law or of fact.

The second of the exceptions in this section is drawn from *CG v United Kingdom*. In *CG*, the central question was 'whether the nature and frequency of the trial judge's interventions, combined with the deficiencies . . . in his summing-up' violated Article 6.[70] In the course of determining whether the judge's actions infringed Article 6(1), the Court engaged in intensive review of the trial transcript:

> The next interruptions came in the course of the applicant's own examination-in-chief by her counsel. The Court notes that these were again frequent in number, appearing on twenty-two of the thirty-one pages of the transcript, and that they commenced very early in the course of the examination. The judge effectively took over the examination for a short time (between pages 2 and 4 of the transcript), and his interruptions led the applicant's counsel to seek a short adjournment, which the judge granted (at page 6).[71]

Indeed, the Court went so far as to say:

> While the Court accepts the assessment of the Court of Appeal that the applicant's counsel found himself incommoded and disconcerted by these interruptions, it also agrees with the Court of Appeal, from its own examination of the transcript of the evidence, that the applicant's counsel was never prevented from continuing with the line of defence that he was attempting to develop either in cross-examination or through his own witness.[72]

These passages demonstrate that the Court engaged in close review of the domestic courts' factual and legal analysis. It may be that this is the normatively desirable course for the Court to take in resolving an Article 6(1) complaint, but it does not sit well with the Court's frequent protestations that it does not conduct appellate-style review.

The third exception arises out of *Walchli v France*, in which the European Court considered whether certain procedural rules infringed the applicant's Article 6 rights. The Court warned that national courts

> must, in applying the rules of procedure, avoid both excessive formalism which would impair the fairness of the procedure, and an excessive flexibility that would remove the procedural requirements established by law.[73]

[69] *Telfner v Austria* (n 68 above) para 19.

[70] *CG v United Kingdom* (App 43373/98) (2002) 34 EHRR 31, para 35. See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 270.

[71] *CG v United Kingdom* (n 70 above) para 38.

[72] ibid para 41.

[73] *Walchli v France* (n 47 above) para 29 (translated).

The Court thus effectively stated that any Article 6 case involving procedural rules could trigger a review of the national court's application of those rules, in order to ensure that the national courts had avoided excessive formalism and excessive flexibility. Such a requirement gives the Court considerable scope for review in cases involving procedural rules, and runs against the ostensibly general approach.

The fourth exception arises out of some of the cases concerning evidence and witnesses. The applicant in *Koval v Ukraine* complained that a witness (his wife) had not been examined, contrary to Article 6(3). The Court first 'note[d]'

> that the applicant's wife was not examined by the domestic courts in connection with the issue of forfeiture of bail, despite being present throughout the court proceedings. However, the applicant initially did not request to have evidence taken from her in court. Furthermore, he has failed to explain what he intended to prove with the witness evidence that would have been produced and how this evidence could have been relevant to the determination of the charge of interfering with a witness.[74]

Thus the Court considered, in some detail, the course of evidence in the domestic courts and how that course may have been different if the applicant's wife had been examined. Similar analysis was conducted in *Bricmont*, *Maresti*, *Vanjak,* and *Tseber*.[75] In so doing, the Court engages with and reviews the domestic courts' factual and legal conclusions.

Another case concerning witnesses was *Vladimir Romanov*. The applicant complained that he had been denied 'adequate opportunity to put questions to witnesses against him'.[76] The Court engaged in extensive review of the national courts' factual and legal analysis:

> 101. Turning to the facts of the present case . . . It is also true that the applicant admitted to having been present at the crime scene with the intention of beating Mr I. up and that the courts relied on that admission, but under Russian law a conviction cannot rest solely on the admission of the accused . . . *The Court is not convinced that the applicant's avowal that he had intended to beat the victim up amounted to an admission that he had wanted to rob him too . . .*
>
> 102. As to the three witnesses, they had made no observations on the alleged acts and gave evidence only on the fact that they had seen some four men running from the crime scene. Furthermore, the witnesses were unable to identify those men . . . As regards the confessions, the Court notes that the co-defendants retracted them at the trial, alleging coercion on the part of the investigator. Leaving aside the investigation techniques and the alleged interrogation of the co-defendants in a state of drug intoxication, *the Court reiterates that a higher degree of scrutiny should be applied to assessment of statements by co-defendants, because the position in which the accomplices find them-*

[74] *Koval v Ukraine* (n 9 above) para 116.

[75] *Bricmont v Belgium* (App 10857/84) (1990) 12 EHRR 217, para 89 (considered in Ovey and White, *Jacobs and White* (n 16 above) 207; Petzold, 'The Convention and the Principle of Subsidiarity' (n 10 above) 50; Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 103; *Maresti v Croatia* (App 55759/07) (25 June 2009) paras 36–41; *Vanjak v Croatia* (n 62 above) paras 47–56; *Tseber v Czech Republic* (App 46203/08) (22 November 2012) paras 67–69.

[76] *Vladimir Romanov v Russia* (App 41461/02) (24 July 2008) para 92.

> *selves while testifying is different from that of ordinary witnesses* . . . For the guarantees of Article 6 of the Convention to be respected on account of the admissibility of a guilty plea from a co-accused, such a plea should only be admitted to establish the fact of a commission of a crime by a pleading person, and not the applicant, and a judge should make it clear to the jury that the guilty plea by itself did not prove that the applicant was involved in that crime.[77]

The italicised excerpts, in particular, constitute direct engagement with the national courts' factual and legal analysis. This form of analysis undermines the Court's frequent insistence that, in general, it is not its role to review national courts' factual and legal conclusions.

Similarly, in the self-incrimination case of *Condron*, the Court engaged in detailed factual-legal review of the proceedings in the national courts:

> 63. . . . the Court of Appeal had no means of ascertaining whether or not the applicants' silence played a significant role in the jury's decision to convict. The Court of Appeal had regard to the weight of the evidence against the applicants. However it was in no position to assess properly whether the jury considered this to be conclusive of their guilt.
>
> 64. The Court is not persuaded either that the fact that the co-accused, Mr Curtis, who also remained silent during police interview . . . was acquitted indicates that the jury attached little weight to the applicants' silence in finding them guilty. It cannot be excluded that the jury accepted Mr Curtis' explanation for his silence and did not therefore draw an adverse inference against him; it cannot be excluded either that the jury may have accepted the applicants' defence to the charges, for example their claim that the police had planted incriminating evidence in their flat . . . and that the evidence against them was not as overwhelming as the Court of Appeal considered. In any event, it is a speculative exercise which only reinforces the crucial nature of the defect in the trial judge's direction and its implications for review of the case on appeal.[78]

Once again, the European Court's frequent insistence that it is not its role to review national courts' factual-legal analysis is rendered more incoherent whenever it engages in this sort of review of the national court's factual-legal analysis.

A fifth exception, one related to those above, is evident in *Brennan v United Kingdom*, where the Court states that, 'as a general rule', it would not

> substitute its own assessment of the evidence made by a domestic court, *save in circumstances where* the domestic court's assessment was arbitrary or capricious, or the system of guarantees or safeguards which applied in the assessment of the reliability of confession evidence was manifestly inadequate.[79]

[77] ibid paras 101–102 (emphasis added).

[78] *Condron v United Kingdom* (App 35718/97) (2001) 31 EHRR 1, paras 63–64.

[79] *Brennan v United Kingdom* (App 39846/98) (2002) 34 EHRR 18, para 51 (emphasis added), citing *Edwards v United Kingdom* (n 43 above) para 34 (note that *Edwards* makes no reference whatsoever to 'arbitrary or capricious', nor to the 'system of guarantees or safeguards' standard). See extensive appellate-style analysis under the guise of the review of 'arbitrary' decision-making in *Ajdaric v Croatia* (App 20883/09) (13 December 2011) paras 29–53. For reference to the European Court's willingness to intervene in cases of arbitrary interpretation of legal provisions, see *Sahin and Sahin v Turkey* (App 13279/05) (2012) 54 EHRR 20, paras 84–90.

One may note that this passage allows the Court a sizeable loophole to engage in appellate-style review of the domestic court's assessment of the evidence. Further, it is also plain that the *Brennan* judgment does not provide guidance on whether the Court should test *every* domestic court's factual assessments against the 'arbitrary or capricious' standard before deciding to review them, or if there is another appropriate 'gatekeeper' standard. In any event, granting the Court the power to review 'arbitrary or capricious' domestic court rulings sounds very close indeed to the appellate-style review from which the Court has distanced itself.

The sixth exception is evident in *DeWeer*. In that case, the Court considered the validity of the applicant's purported waiver of 'his right to have his case dealt with by a tribunal'.[80] The Court stated:

> [I]n a democratic society too great an importance attaches to the 'right to a court' . . . for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (*ordre public*) of the member States . . . any measure or decision alleged to be in breach of Article 6 calls for particularly careful review.[81]

It is unclear whether the force of this statement is that 'particularly careful review' will be conducted of any waiver case,[82] or whether 'particularly careful review' is called for in any case in which a contracting state asserts a public order interest. Regardless of whether these statements are directed at waiver or at public order, this exception imposes on the Court an obligation to conduct 'particularly careful review', which would conceivably include review of the domestic court's legal and factual conclusions with respect to a waiver or public order.

Our seventh exception involves the European Court simply stating that it is unable to endorse the factual or legal analysis of a national court and, as such, that analysis is questioned or overturned by the Court. Thus, for example, in *Hanzevacki*, the Court considered the arguments of an applicant whose lawyer had fallen ill during the hearing. The national court had 'concluded that the counsel's presence was not necessary in view of the evidence . . . and the features of the crime'.[83] The Court, however, stated:

> 25. The Court *cannot endorse the views of the appellate court* for the following reasons. The Court notes that one of the most important aspects of a concluding hearing in criminal trials is an opportunity for the defence, as well as for the prosecution, to present their closing arguments, and it is the only opportunity for both parties to orally present their view of the entire case and all the evidence presented at trial and give their assessment of the result of the trial. The Court considers that the choice made by the

[80] *DeWeer v Belgium* (n 21 above) para 49.

[81] ibid para 49, citing *De Wilde and others v Belgium* (App 2832/66) (1979–80) 1 EHRR 373, para 65. See, analogously, van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 601.

[82] See Clayton and Tomlinson, *The Law of Human Rights* (n 13 above) 859; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 245; C Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2004) 192.

[83] *Hanzevacki v Croatia* (App 17182/07) (16 April 2009) para 24.

> prosecution not to attend the concluding hearing in the case against the applicant cannot have any effect on the right of the accused to be represented by a lawyer of his own choosing.[84]

Virtually identical language appeared in *Maresti*.[85] Similarly, in *Sebalj*, the European Court restated the fourth instance doctrine and then, three paragraphs later, openly indicated that it was unwilling to accept the analysis of the national courts:

> The national courts based their conclusion that the applicant was questioned in a lawyer's presence on the fact that a statement to this effect had been given by State officials who had a duty to act in accordance with the laws well known to them. However, *the Court cannot endorse such a conclusion* in the light of the fact that the national courts failed to examine the obvious discrepancy between the alleged time of the presence of lawyer . . . and the time of the applicant's actual questioning.[86]

In such cases, the European Court does not don even the thinnest of veils in questioning the analysis of the national courts.

B.5.3 Have the 'Exceptions' Become the Rule?

In the two preceding subsections, therefore, eight groups of examples point to ways in which the European Court routinely engages in review of domestic courts' factual and legal analysis. If one accepts this case law on its face, then the state of the law could be summarised in the following way. In the course of an Article 6 criminal application, the Court's role is not to review domestic courts' factual or legal analysis, unless the application:

- concerns the right to reasons;
- concerns *Salabiaku* presumptions;
- is an Article 6(1) application considering the role of the trial judge;
- concerns rules of procedure;
- concerns witnesses;
- arises out of an arbitrary or capricious assessment by a domestic court or out of a confession for which there were inadequate reliability-assessment safeguards;
- involves either a waiver of the right of access to a court or involves *ordre public* considerations; or
- involves domestic courts' reasoning that the European Court 'cannot endorse'.

Taken together, these exceptions provide the European Court with an array of ways in which it can review domestic courts' factual and legal analysis.[87] An applicant in any Article 6 criminal application, if unsatisfied with domestic appellate

[84] ibid para 25 (emphasis added).

[85] *Maresti v Croatia* (n 75 above) para 41.

[86] *Sebalj v Croatia* (App 4429/09) (28 June 2011) para 262 (emphasis added). The fourth instance doctrine is outlined at para 259.

[87] cf van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 572–73.

processes, would be well advised to raise one or more of the categories identified above in order to provide the Court with the trigger to review domestic proceedings. The right to reasons could be invoked in many Article 6 criminal applications; rules of procedure and witnesses would similarly be able to be invoked on a regular basis. Thus, the two broad arguments with respect to the fourth instance doctrine – the first about internal coherence and the second about the incongruence between rhetoric and practice – combine to undermine the Court's approach in this area.

If the European Court is willing to review factual and legal analysis in so many situations, it risks giving the appearance that the default position is, in fact, that the Court regards itself as *empowered* to engage in appellate-style analysis *unless* the application is a rare one that is incapable of being brought within one of the categories above. This may well be a desirable outcome, insofar as it can be interpreted as reflecting judicial expertise about legal procedures and legal interpretation.[88] If that were to be the case, however, the interests of transparency, congruence and predictability demand that the Court reformulate its approach to appellate-style review to reflect the reality that is plainly evident in the case law.[89] Alternatively, the European Court might choose to reduce the extent to which it engages in appellate-style review, and in doing so recognise that some instances of what would have previously been regarded as unfair trials would thenceforth go unremarked upon by the Court. Either course would reduce the incongruence between the law as stated and the law as applied.

The Court may wish, instead, to preserve the unarticulated fiction of the fourth instance rule in an attempt to consolidate its own institutional or geopolitical position within Europe. As was outlined above, this book will leave such suggestions to the political scientists and diplomats, and focus instead on the doctrinal detail of the case law. Nonetheless, it may be noted that if the European Court elects to perpetuate the uncertainty in the existing case law in pursuit of unarticulated political objectives, it will only serve to inhibit the Court's ability to provide the people, judges, and officials of Europe with guidance as to the Court's role in Article 6 cases. Better, surely, for the Court to 'always try to look like a court'.[90]

B.6 The European Court's Approach to the Law of Evidence is Marked by Incoherence

In defining its role in Article 6 criminal cases, the European Court is frequently called upon to engage with issues related to the law of evidence. This section looks

[88] See, more generally on these rationales, Legg, *The Margin of Appreciation in International Human Rights Law* (n 35 above) 167–74.

[89] There may also be institutional or logistical implications, of the sort discussed by Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 84.

[90] Greer and Wildhaber, 'Reflections of a former President of the European Court of Human Rights' (n 2 above) 173.

at the Court's approach to rules of admissibility. This section is not an exhaustive survey of the Court's approach to issues related to the law of evidence, or even of its approach to rules of admissibility. Some particular aspects of those general issues have been touched on above, and others are dealt with in subsequent parts.[91] For now, however, a brief overview of the Court's approach is appropriate insofar as it constitutes part of the way that the Court generally defines its role in Article 6 criminal cases. Here I argue that the Court's approach is incoherent, poorly explained, and that it fails to appreciate the complexity of the framework outlined in its own case law.

The starting point is *Schenk*, where the Court outlined its inability to consider rules of admissibility:

> While Article 6 . . . guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. The Court therefore cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible. It has only to ascertain whether Mr Schenk's trial as a whole was fair.[92]

It may be worthwhile to disaggregate the way in which the European Court has considered several ideas in this passage. First, the Court states that because Article 6 does not lay down any rules on evidence, *therefore* it is primarily a matter for national law (one wonders whether this logic would defeat most of the Article 6 implied rights).[93] Second, the Court states that the logical consequence of this being primarily a matter for national law is that the Court cannot rule that such evidence will never be admissible (it is unclear why the Court's inability to rule in the abstract follows from something being primarily a matter of national law). Notwithstanding these tensions, *Schenk* has proven extremely influential, and has repeatedly been referred to directly or indirectly.[94]

[91] For analysis of how the European Court's jurisprudence interacts with the domestic law of evidence of, eg, the United Kingdom, see I Dennis, *The Law of Evidence*, 3rd edn (Sweet & Maxwell, 2007); P Murphy, *Murphy on Evidence*, 10th edn (Oxford University Press, 2008); Colin Tapper, *Cross and Tapper on Evidence*, 12th edn (Oxford University Press, 2010).

[92] *Schenk v Switzerland* (n 36 above) para 46. See Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 293–94; Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 14 above) 202, 256; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (n 17 above) 585–86; Petzold, 'The Convention and the Principle of Subsidiarity' (n 10 above) 54; Arai-Takahashi, *The Margin of Appreciation Doctrine* (n 17 above) 49.

[93] See also *Foldes and Foldesne Hajlik v Hungary* (App 41463/02) (2008) 47 EHRR 11, para 28; cf *Jalloh v Germany* (n 33 above) para 94. See also Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 293–94; see part D.

[94] *Garcia Ruiz v Spain* (n 49 above) para 28; *Allan v United Kingdom* (App 48539/99) (2003) 36 EHRR 12, para 42; *Diamantides v Greece (No 2)* (App 71563/01) (19 May 2005) para 46; *Foldes and Foldesne Hajlik v Hungary* (n 93 above) para 28; *Jalloh v Germany* (n 33 above) para 94; *Soylemez v Turkey* (App 46661/99) (21 September 2006) para 121; *Shabelnik v Ukraine* (App 16404/03) (19 February 2009) para 54; *Pelissier and Sassi v France* (App 25444/94) (2000) 30 EHRR 715, para 45; *PG and JH v United Kingdom* (App 44787/98) (2008) 46 EHRR 51, paras 76–78; *Solakov v FYROM* (App 47023/99) (31 October 2001) para 57; *AM v Italy* (App 37019/97) (14 December 1999) para 24; *Van Mechelen and others v Netherlands* (n 48 above) para 50; *Doorson v Netherlands* (App 20524/92) (1996) 22 EHRR 330, para 67; *Kostovski v Netherlands* (App 11454/85) (1990) 12 EHRR 434, para 39; *Bracci v Italy* (App 36822/02) (13 October 2005) para 51; *Luca v Italy* (App 33354/96) (2003) 36 EHRR 46, para

Crucially, however, *Schenk* sets up a false dichotomy: the Court's job is *not* to rule on admissibility, especially in the abstract, but its job *is* to ascertain whether the trial as a whole was fair.[95] But the two are not mutually exclusive. *Schenk* failed to establish a mechanism for how to deal with cases where an admissibility issue may render the 'trial as a whole' unfair. If one accepts the premise of *Schenk*, then to determine whether a 'trial as a whole' is fair, the logical course may well be to examine the evidence admitted by the national court and to consider whether or not it should have been admitted. On the other hand, if *Schenk* warns against ruling on admissibility and urges that it be the province of domestic courts, then perhaps the Court should not engage with issues of admissibility at all, even in considering the fairness of the 'trial as a whole'. The Court's role in such cases is left radically unclear by *Schenk*. For example, in order to determine whether the admission of certain evidence rendered any particular trial unfair, the Court may potentially need to review the admission of evidence in *every* Article 6 criminal fair trial case to ensure that the trial under consideration was fair at first glance. What standard should be used on such a review? Should the standard on any such preliminary review be different to that which might be used on a subsequent closer look?

There is an additional problem. *Schenk* exhibits the European Court's general reluctance to make abstract rulings, stating that it could not 'exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible'.[96] But, as will be seen, the European Court has repeatedly taken decisions contrary to this general statement. Often, these decisions take precisely the form of 'exclud[ing] as a matter of principle and in the abstract that' certain kinds of evidence 'may be admissible'.

A useful case study to illustrate these criticisms is provided by those cases relating to the admissibility of evidence obtained in breach of a Convention right. A forceful statement of the European Court's view of its role with respect to evidence was made in *Jalloh* (similar statements were made in cases such as *Khan*, *Allan, PG and JH,* and *Gafgen*[97]):

38; *Khan v United Kingdom* (App 35394/97) (2001) 31 EHRR 45, para 34; *Teixeira de Castro v Portugal* (App 25829/94) (1999) 28 EHRR 101, para 34; *Gafgen v Germany* (Grand Chamber) (n 36 above) para 162; *Orlov v Russia* (n 46 above) para 99; *Tseber v Czech Republic* (n 75 above) para 42; *CB v Austria* (n 36 above) para 35; *Erkapic v Croatia* (n 36 above) para 70; *Sica v Romania* (App 12036/05) (9 July 2013) para 56; *Botea v Romania* (n 36 above) paras 31–32; see Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 294.

[95] See E.2 for more on the 'proceedings as a whole'.

[96] *Schenk v Switzerland* (n 36 above) para 46. We have met this general reluctance before: see B.3 above.

[97] *Khan v United Kingdom* (n 94 above) para 34; *Allan v United Kingdom* (n 94 above) para 42; *PG and JH v United Kingdom* (n 94 above) para 76; *Gafgen v Germany* (App 22978/05) (2009) 48 EHRR 13, para 97; *Gafgen v Germany* (Grand Chamber) (n 36 above) para 163. See Andrew Ashworth, 'The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism before Principle in the Strasbourg Jurisprudence' in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights* (Hart Publishing, 2012); M Spurrier, '*Gafgen v Germany*: Fruit of the Poisonous Tree' [2010] *EHRLR* 513; Steven Greer, 'Should Police Threats to Torture Suspects Always be Severely Punished? Reflections on the *Gafgen* Case' (2011) 11(1) *Human Rights Law Review* 67; H Sauer and M Trilsch, '*Gafgen v Germany*

> 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 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.[98]

Thus *Jalloh* repeats the dichotomy that determining whether certain types of evidence are admissible is *not* the role of the Court, but determining the fairness of the proceedings as a whole *is* the role of the Court. This dichotomy obscures the possibility that a ruling on the fairness of proceedings might, implicitly or explicitly, involve ruling on admissibility.

The difficulties with this dichotomy were evident, in fact, in *Jalloh*. In a passage worth excerpting at length, the Court ruled on the admissibility of certain evidence in the course of determining the fairness of the proceedings as a whole:

> 105. . . . the use of evidence obtained in violation of Article 3 in criminal proceedings raises serious issues as to the fairness of such proceedings . . . *In [the European Court's] view, incriminating evidence – whether in the form of a confession or real evidence, obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture – should never be relied on as proof of the victim's guilt, irrespective of its probative value.* Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe . . .
>
> 106. Although the treatment to which the applicant was subjected did not attract the special stigma reserved to acts of torture, it did attain in the circumstances the minimum level of severity covered by the ambit of the Article 3 prohibition. *It cannot be excluded that on the facts of a particular case the use of evidence obtained by intentional acts of ill-treatment not amounting to torture will render the trial against the victim unfair* irrespective of the seriousness of the offence allegedly committed, the weight attached to the evidence and the opportunities which the victim had to challenge its admission and use at his trial.[99]

The logical result of this passage is that if contracting states wish to comply with the European Court's case law, certain types of evidence *must* become inadmissible regardless of the individual circumstances of a particular case. A plainer demonstration of the flaws of the *Schenk* dichotomy is difficult to imagine.

The question then becomes why the Court's role with respect to evidence changes when evidence was obtained in breach of Article 3. The Court's explanation is that

(Case Comment)' (2011) 105 *American Journal of International Law* 313; S Ast, 'The *Gafgen* Judgment of the ECtHR: On the Consequences of the Threat of Torture for Criminal Proceedings' (2010) 11(12) *German Law Journal* 1393; Ovey and White, *Jacobs and White* (n 16 above) 193–96.

[98] *Jalloh v Germany* (n 33 above) para 95, citing *Khan v United Kingdom* (n 94 above) para 34, *PG and JH v United Kingdom* (n 94 above) para 76, and *Allan v United Kingdom* (n 94 above) para 42.

[99] *Jalloh v Germany* (n 33 above) paras 105–106 (emphasis added), citing *Rochin v California* 342 US 165 (1952). See also *Grigoryev v Ukraine* (App 51671/07) (15 May 2012) para 84; Trechsel, *Human Rights in Criminal Proceedings* (n 24 above) 88; cp *Alchagin v Russia* (App 20212/05) (17 January 2012) paras 69–74.

> Article 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.[100]

Several points should be made with respect to this series of justifications and the extent to which they justify unique treatment for Article 3. First, there is at least an argument that *every* Convention right enshrines fundamental values of democratic societies.[101] Second, there are other Articles not providing for exceptions (Article 5, for example).[102] Third, there are other non-derogable Articles (Articles 2, 4(1) and 7).[103] These three factors indicate the potential for incoherence in the European Court's case law: if these factors justify interfering with admissibility rules in certain cases, why not in others? This area of the law is also rendered more complex by rulings on the inadmissibility of, for example, evidence obtained 'as a result of incitement by state agents'.[104] I return to *Jalloh* in later parts.[105] But of course neither this section, nor this book, is concerned directly with the admissibility of evidence obtained in breach of a Convention right. The broader concern is that the Court's stated position may not always be reflected in the substance of its decisions.

B.7 Building the Foundations for a New Approach to How the European Court Describes Its Own Role

Part B demonstrated that although the Court often describes its role in forceful and unequivocal terms, those terms are often undermined by a series of undertheorised exceptions. The Court's sense of its own role is poorly defined and poorly explained, and there is a disconnect between the Court's stated view of its own role and the way in which the Court operates in practice.

Given these criticisms, therefore, how ought the European Court to define and explain its role in Article 6 cases? In addition to this book's broader normative arguments with respect to consistency and coherence, the criticism in this part also gives rise to several more specific normative arguments. Indeed, the critical

[100] *Jalloh v Germany* (n 33 above) para 99; cf Spurrier, '*Gafgen v Germany*: Fruit of the Poisonous Tree' (n 97 above).

[101] Indeed, see the Preamble to the European Convention.

[102] Although cf *Austin v United Kingdom* (App 39692/09) (2012) 55 EHRR 14.

[103] See Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in B Goold and L Lazarus (eds), *Security and Human Rights*, 2nd edn (Hart Publishing, 2007).

[104] *Khudobin v Russia* (n 57 above) para 133.

[105] Relevant passages of *Jalloh* have also been drawn upon in a number of cases, eg, *Soylemez v Turkey*at (n 94 above) paras 122–125; *Haci Ozen v Turkey* (App 46286/99) (12 April 2007) paras 99–101; *Sacettin Yildiz v Turkey* (App 38419/02) (5 June 2007) paras 46–48; *Gafgen v Germany* (n 97 above) paras 98–99; *Levinta v Moldova* (App 17332/03) (16 December 2008) paras 99–100.

arguments above form the foundation for a normative argument that the Court ought to articulate its role more honestly and openly: to acknowledge that considering whether or not Article 6 has been violated will often involve conducting appellate-style analysis, and may well require the enunciation of general doctrines or the consideration of abstract challenges. Such an acknowledgment would provide helpful guidance to would-be applicants, and to contracting states, about how the European Court views its own role in Article 6 cases.[106] Any such acknowledgment ought to be framed as a necessary corollary of the assessment of whether or not there has been a violation of Article 6, which need not constitute a vast intrusion into the domestic affairs of contracting states. It is best, surely, to reduce the extent to which the European Court is disingenuous about its own role.

Those who study the institutional and political difficulties faced by the European Court, however, may suggest that those difficulties make it impossible for the Court to admit squarely to the reality of its role in Article 6 cases. This book's focus, of course, is on enhancing the ability of the Court to provide guidance, and the above criticisms proceed from that starting point. But even if some believe that political reality would win out over the need for clearer guidance in this area of law, and the Court therefore wishes to maintain the fourth instance doctrine, I suggest that the interests of clarity and predictability demand that the European Court honestly situate the exceptions to the fourth instance doctrine *as exceptions* and explain why those exceptions might apply to one class of case but not another. Explanation of this sort would help foster a greater degree of certainty about the current state, and likely future direction, of the Court's Article 6 case law.

[106] This acknowledgment need not generate fears of widespread interventionism by the European Court across the Convention's various rights: there are good reasons for a less deferential approach by the Court when it comes to matters, such as criminal procedure, about which its judges may have particular expertise. See, eg, Legg, *The Margin of Appreciation in International Human Rights Law* (n 35 above) 167–74.