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Interpreting the Right to Interpretation under Article 6(3)(e) ECHR: A Cautious Evolution in the Jurisprudence of the European Court of Human Rights?

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ABSTRACT

This article explores how the European Court of Human Rights has interpreted the right to interpretation under Article 6(3)(e) ECHR—a topic which, despite its significance for the rule of law and access to justice, has received, to date, very limited scholarly attention. The key finding is that we are witnessing a 'cautious evolution': the Court has progressively—yet simultaneously cautiously—developed the standards and guarantees of this right, which is one of the rights of defence under Article 6(3) ECHR and a requirement of the fair trial. The analysis focuses, in particular, on (i) how general interpretative techniques that have been developed by the Strasbourg Court were applied by the Court in its jurisprudence concerning the said provision; (ii) on the interplay between the overall fairness of the trial and Article 6(3)(e) ECHR; and (iii) on Article 6(3)(e) ECHR and the relationship between legal assistance/legal aid and the right to interpretation. In addition, the article identifies possible areas of further development of this right.

KEYWORDS: fair trial, right to interpretation, rule of law, access to justice, European Convention on Human Rights, European Court of Human Rights

1. INTRODUCTION

Ensuring fairness in criminal proceedings is a quintessential requirement for legal systems within the Council of Europe and beyond. Article 6 of the European Convention on Human Rights (ECHR) guarantees the right to a fair trial. The present contribution focuses on one of the rights of defence under the said provision, namely the right to an interpreter under Article 6(3)(e) ECHR. It is specified therein that '[e]veryone charged with a criminal offence [should] have the free assistance of an interpreter if

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[they] cannot understand or speak the language used in court'.[1] Several reasons can be provided as to why the right to interpretation merits a separate study. To begin with, it is an area which has received very limited scholarly attention,[2] even when compared with other guarantees of the criminal trial, such as legal assistance. In addition, the right to interpretation, being part of the requirements of the fair trial, is a requirement of the rule of law and access to justice. Moreover, interpretation in criminal proceedings is a fast-developing field: the principles and guarantees that were initially developed by the Strasbourg Court in its case-law were then strengthened in the European Union system of protection; the EU legislation in question influenced, in turn, the approach of the ECtHR to the interpretation of Article 6(3)(e) ECHR. In addition, the structure of Article 6 ECHR prompts inevitable questions as to whether and how the guarantees under its third paragraph (including the right to interpretation, which is the focus of the present study) are connected to the fairness of the trial under its first paragraph.

It should be clarified that the present contribution is not a comparative study[3] between the levels of protection granted by the EU and the Convention (in the EU legal framework, the key reference point is Directive 2010/64/EU[4] and its interpretation by the Court of Justice of the European Union). Instead, the article seeks to cast light on the Strasbourg Court's *interpretation* of the right to interpretation, with a view to understanding and assessing the evolution of the standards and guarantees under this provision, its connection with the fairness of the trial and its link with the right to legal assistance/legal aid. More specifically, it will be argued that we are

1 Although the present contribution focuses on the ECHR, an identical provision can be found in Article 14(3)(f) of the International Covenant on Civil and Political Rights. Article 8(2)(a) of the American Convention on Human Rights provides for 'the right of the accused to be assisted without charge by a translator or interpreter, if [they do] not understand or [do] not speak the language of the tribunal or court'. Regrettably, none of the aforementioned provisions (including the ECHR) are drafted in gender-inclusive language. In addition, while there is no explicit right to interpretation in the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights has interpreted the right to a fair trial in a broad way, including the requirements for interpretation (see 'Principles and Guidelines on the right to a fair trial and legal assistance in Africa' (2003)).

2 In particular, the first paragraph of Article 6 ECHR, which applies to both civil rights and obligations and criminal charges, has been the subject of considerable scholarly work. The same cannot be said about the guarantees in criminal proceedings under the third paragraph of the same article. Notable contributions focusing on Article 6 (either on its civil, criminal or both limbs) include the following: Brems, 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 *Human Rights Quarterly* 294; Gamble and Dias, 'International Fair Trial Protections in Criminal Trials' (2008) 20 *Sri Lanka Journal of International Law* 25; Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (2007); Lemmens, 'The Right to a Fair Trial and Its Multiple Manifestations' in Brems and Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2014) 294; Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (2014).

3 See, in this respect, Brannan, 'Raising the Standard of Language assistance in Criminal Proceedings: From the Rights under Article 6(3) ECHR to Directive 2010/64/EU' (2012) 1 *Cyprus Human Rights Law Review* 128; see also EU Fundamental Rights Agency (FRA), 'Rights of Suspected and Accused Persons across the EU: Translation, Interpretation and Information' (2016), available at: fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf.

4 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1. The Directive was adopted in the context of the EU's Area of Freedom, Security and Justice (Title V of the Treaty on the Functioning of the European Union), which includes judicial cooperation in criminal matters (Chapter 4).

witnessing a *cautious evolution* regarding the standards and guarantees of the right to interpretation. This means that, consistently with its 'living instrument' approach,[5] the Court has progressively departed from a strictly textual interpretation of the said provision. Nevertheless, this approach can also be characterised as cautious, not only because these steps (regarding the development of the guarantees for defendants) have been taken gradually, but also because the Court has not, to date, impermissibly 'stretched' the meaning of Article 6(3)(e) ECHR beyond its object and purpose. Thus, the first judgments involving Article 6(3)(e) were informed, *inter alia*, by *Golder*;[6] more recent judgments were inspired by developments under EU law, and most notably the standards and guarantees under Directive 2010/64.

The analysis of the Court's jurisprudence is based on three (interconnected) lines of investigation. First, the interpretative techniques employed by the Strasbourg Court in its general jurisprudence are applied in the field of Article 6(3)(e) ECHR; second, the connection between Article 6(3)(e) ECHR and the fairness of the proceedings is explored; and third, and with a view to testing the internal consistency of the standards afforded by Article 6(3), a comparative assessment of legal assistance and interpretation is undertaken. Overall, this contribution assesses more favourably than critically the jurisprudence of the Court.

In this context, the article seeks to contribute to the literature on the scope of the rights of defence and, more generally, the guarantees of criminal procedure under Article 6(3) ECHR; the persistent debate on the methods of interpretation of the Convention employed by the Strasbourg Court; and the interplay between the Convention and EU law as regards certain human rights standards. It also seeks to stress the significance of the right to interpretation when viewed as a component of the rule of law and access to justice.

The article proceeds as follows. The next section underlines the significance of the right to interpretation, most notably as being part of the rule of law and access to justice. The next (and main) part of this article explores the jurisprudence of the Court on Article 6(3)(e) on the basis of the aforementioned three lines of enquiry. Beyond arguing that we are witnessing a cautious evolution, the fourth section identifies areas of further possible development of the rights of the defendant under the said provision. The final section concludes.

2. THE SIGNIFICANCE OF THE RIGHT TO INTERPRETATION

It has rightly been observed that an unfair trial 'can be devastating to an individual defendant—removing their liberty, destroying their reputation, even taking away their life. But unfair trials are also damaging to entire societies as they are used to undermine democracy and oppress minorities'.[7] The right to interpretation is one of the guarantees of a fair trial. There is no doubt that in an era of increased mobility within the EU and Europe (for the purposes of study, work or leisure), there is an increased risk that

5 *Tyrer v UK*, Application 5856/72, 25 April 1978, para 31. This matter is returned to in subsequent sections of the article.

6 *Golder v the UK*, Application 4451/70, 21 February 1975.

7 Clooney and Webb, *The Right to a Fair Trial in International Law* (2021) 1.

individuals may face criminal proceedings in a country other than their own.[8] How, then, to explain the limited attention that the right to interpretation has received from constitutional and human rights lawyers?

One explanation might be that much of the discussion on the guarantees under Article 6(3) ECHR has focused on legal aid and the impact of cuts to legal aid on access to justice. However, equally worrying are efforts to reduce resources in the field of interpretation. Another explanation might be that for decades, discussions were dominated by a state-centric version of the rule of law.[9] This discourse implied that individuals would necessarily seek remedies in their domestic legal order and the accused person would have access to a court in their home state, where they speak their mother tongue. Although criminal law used to be a quintessential part of the sovereignty of states, we are increasingly witnessing the constitutionalisation of EU criminal law[10] (which is not to claim, though, that states do not retain significant leeway regarding the organisation of their criminal justice system). And, of course, linguistic aspects of the rule of law are not confined to criminal proceedings: the requirements of the rule of law are not met, for example, when an asylum seeker does not understand in their own language the applicable legal framework or their rights under the domestic proceedings.

This article argues that the right to interpretation (as well as further guarantees under Article 6(3) ECHR) is fundamentally connected to two aspects of the rule of law which, properly understood, are essentially interconnected: access to courts and the fairness of the proceedings. Although this contribution is confined to the Council of Europe, it must be acknowledged that the debate on the rule of law has suffered, to date, from the dominance of Western values.[11] If so, sketching what a rule of law of international (global) relevance might look like becomes an exercise replete with challenges.

Access to courts is meaningless if the accused person cannot understand or participate in the proceedings. Proponents of both the formal and substantive version[12] of the rule of law list access to courts as one of its elements (or sub-rules).[13] If so, the 'dividing

8 EU Fundamental Rights Agency (n 3) 15.

9 Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (2017) 61 *et seq.*

10 Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (2012); see also Mitsilegas and Vavoula 'European Union Criminal Law' in Hofmann et al. (eds), *Specialized Administrative Law of the European Union: A Sectoral Treatment* (2018) 153.

11 Indeed, claims may be submitted pointing to the imposition of Western values and ideals and lack of acknowledgment of diversity; see, among others, Brooks, 'The New Imperialism: Violence, Norms, and the "Rule of Law"' (2003) 101 *Michigan Law Review* 2275; Peerenboom, 'The Future of Rule of Law: Challenges and Prospects for the Field' (2009) 1 *Hague Journal on the Rule of Law* 5; Tamanaha, *On The Rule of Law: History, Politics, Theory* (2004) 138. In addition, often international organisations are keen to 'disseminate a rule-of-law paradigm to the world which does not tally with their actions, therefore defaulting in their own rule-of-law terms'; Konstadinides (n 9) 62. See also Palombella, 'The Rule of Law beyond the State: Failures, Promises, and Theory' (2009) 7 *International Journal of Constitutional Law* 442.

12 For further discussion on this distinction, see, among others, Young, 'The Rule of Law in the United Kingdom: Formal or Substantive?' (2004) 6 *Vienna Journal on International Constitutional Law* 259; Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467.

13 See, among others, Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67 at 77 (the lecture was then converted into a book with a similar title); Dworkin, 'What is the Rule of Law?' (1970) 30 *The Antioch Review* 151 at 152; O'Donnell, 'Why the Rule of Law Matters' (2004) 15 *Journal of Democracy* 32; Raz, *The Authority of Law: Essays on Law and Morality* (1979) 217; Waldron, 'The Rule of Law and the Importance of Procedure' (2010) NYU School of Law Public Law and Legal Theory Research Paper No

line between the formal and the substantive conception of the rule of law can be difficult to draw, not least because some of the technical elements of the rule of law are regarded as fundamental rights'.[14] Relatedly, Lord Bingham in his account sought to emphasise the fairness of the adjudicative procedures as a sub-rule that is distinct (but related, of course) to access to courts.[15] In addition, the significance of access to courts for the rule of law has been duly emphasised by courts themselves.[16] Moreover, the Statute of the Council of Europe underlines the significance of the rule of law;[17] the same applies to the work of the Venice Commission.[18]

On this basis, access to an interpreter is associated with the rule of law in a dual, dialectic way: as a human right (in accordance with the substantive version) and as forming part of the right of access to court and access to justice more generally (in accordance with the formal and substantive versions). This point will inform the subsequent analysis of the Court's jurisprudence and, in particular, the discussion of how the ECtHR treats the right to interpretation *vis-à-vis* the overall fairness of the proceedings.

A complementary justification to look into the right to interpretation is its link with access to justice.[19] As was observed earlier, frequently the discussion on access to justice centres on legal aid. Commentators admit that 'financial questions' do come into play when determining the extent of states' obligations under Article 6(3)(c) ECHR.[20] Financial considerations were clearly taken into account in the EU, too, when determining the extent of interpretation and translation rights.[21]

10–73 (arguing that the *procedural* dimension of the rule of law, distinct from its substantive and formal dimensions, encompasses access to courts and related guarantees, such as fairness and impartiality).

14 Arnull, 'The Rule of Law in the European Union' in Arnull and Wincott (eds), *Accountability and Legitimacy in the European Union* (2002) 253. These rights include, according to the author, Articles 6, 7 and 13 ECHR.

15 Bingham (n 13) 80. Elaborating on this principle, he touched upon the guarantees of Article 6(3) ECHR, without explicitly mentioning the right to interpretation.

16 In the UK see, for example, the landmark judgments *R (on the application of UNISON) v Lord Chancellor*, [2017] UKSC 51, para 66; *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 (on the so-called 'ouster clauses'). See also the landmark judgment of the ECtHR in *Golder* (n 6)—where, on the basis of the reference to the rule of law in the preamble to the Convention, the Strasbourg Court was able to deduce a right of access to court from the text of Article 6(1) ECHR. More generally, *Golder* was an emblematic case that signified a new, more dynamic, chapter in the ECtHR's history; see Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (2010) ch 7. More recently, and in the context of the rule of law crisis in Poland, the Court found a violation of the right of access to court in *Broda et Bojara v Poland*, Applications 26,691 and 27,367/18, 29 June 2021.

17 The Statute can be accessed at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=001.

18 See, among others, Venice Commission, 'Report on the rule of law' (2011) CDL-AD(2011)003rev, p. 10, where it was underlined that one of the 'necessary elements' of the rule of law is '[a]ccess to justice before independent and impartial courts, including judicial review of administrative acts'.

19 On access to justice more generally see, among others, Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 *Modern Law Review* 282; Storskrubb and Ziller, 'Access to Justice in European Comparative Law' in Francioni (ed), *Access to Justice as a Human Right* (2007) 177; Bondy and Sunkin, 'Accessing Judicial Review' (2008) Public Law 647.

20 Voyatzis, 'The Right to Legal Assistance Free of Charge in the Case-Law of the European Court of Human Rights' (2012) 1 *Cyprus Human Rights Law Review* 42.

21 On this point, the background to the adoption of the EU Directive is insightful; see Cras and De Matteis, 'The Directive on the Right to Interpretation and Translation in Criminal Proceedings: Genesis and Description' (2010) *The European Criminal Law Associations' Forum* 153 at 156.

This article argues that restrictions to the right to interpretation undermine access to justice. There cannot be effective access if the accused person, even if they are assisted with a lawyer, they are unable to understand or participate in the proceedings. Particularly during the last decades, however, accounts assessing the reality on the ground have found that equal justice is an illusion.[22] Significant cuts in legal aid affect the most vulnerable groups, thereby undermining access to justice.[23] In this context, it has rightly been acknowledged that '[c]ourt interpreters play a major role in guaranteeing access to justice for court users'.[24] That is even more so in an era in which people move across countries to find a new home or for other purposes.[25] Yet, evidence from the Council of Europe[26] and the EU[27] suggests that states often fail to meet their obligations. This matter will be returned to below, in the analysis of the interplay between legal assistance/legal aid and interpretation in the jurisprudence of the Strasbourg Court.

3. INTERPRETING THE RIGHT TO INTERPRETATION IN CRIMINAL PROCEEDINGS

Some preliminary remarks on the interpretation of the Convention by the Court are appropriate as they will inform the subsequent analysis of the Court's jurisprudence. The Court has not developed a consistent method of interpretation of the Convention,[28] in the sense that it does not follow a pre-determined number of steps in order to deploy its interpretative techniques. Accordingly, such techniques often interact with each other or are used in a complementary way. Indeed, the Court is provided with (or created for itself) a pool of 'instruments' that can be used, depending on the circumstances of the case, the right in question and broader considerations underpinning the Convention system (such as workload implications, the reform of the Convention and the Court, subsidiarity, legitimacy and so on). For applicants and commentators, the rather fragmented approach to interpretation could create uncertainty or inconsistencies: thus, the Court's reasoning has understandably been subject to criticism.[29] Nevertheless, it should also be remembered that the ECtHR operates

22 Rhode, 'Access to Justice' (2001) 69 *Fordham Law Review* 1785.

23 See the various contributions in Flynn and Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (2017); and also Palmer et al. (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (2016).

24 European Commission for the Efficiency of Justice (CEPEJ) 'Report on European judicial systems—Edition 2014 (2012 data): efficiency and quality of justice' at 452.

25 European Commission Green Paper, 'Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union' COM(2003) 75 final, at 26.

26 CEPEJ Report (n 24) 453 *et seq*.

27 Many states have failed to correctly transpose into their domestic legal systems the Directive on the right to interpretation and translation in criminal proceedings. See Report from the Commission to the European Parliament and the Council on the implementation of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, COM/2018/857 final. The Commission's report was postponed due to delays in transposition in many member states. The delayed report was also the subject of a complaint before the European Ombudsman; see European Ombudsman Case 969/2017/LM.

28 Various commentators have raised this point. See, among others, Rainey, Wicks and Ovey, *The European Convention on Human Rights* (2017) 83; Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (2000) 14.

29 See, for example, Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006) ch 4.

under the subsidiarity principle,[30] which means that occasionally, it has to defer to national authorities (most notably by referring to the well-known and often criticised, too, margin of appreciation doctrine)[31] , while simultaneously stressing that they have the primary responsibility to guarantee the Convention rights and provide redress in the first place.[32] In addition, the near-impossibility of a Court established over 60 years ago to produce a formidably coherent and impeccable body of case-law should also be acknowledged.

The Court has referred to the Vienna Convention[33] in its jurisprudence; yet, as commentators have pointed out, while the Vienna Convention is an ongoing source of inspiration, it does not provide a full picture of the 'innovative techniques of interpretation' developed by the ECtHR.[34] It has also been argued that the references to the Vienna Convention in the case-law of the Court are rather limited—which cannot be easily explained since 'Articles 31–32 VCLT neither directly rule out originalism nor prescribe it'.[35]

Despite such fragmented picture, '[t]here would appear to be two core principles of interpretation: that which seeks to effect the object and purpose of the Convention (the teleological approach) and that which seeks to give it a practical and effective application in light of present day conditions (the evolutive approach)'.[36] Others underline that the effectiveness principle points to the 'object and purpose' of the Convention (under Article 31(1) of the Vienna Convention), which is the protection of human rights.[37] It has also been argued that effectiveness is 'an overarching approach to human rights treaty interpretation' that 'animates a range of other more fine-grained, specific interpretive principles', which in the ECHR context include 'the interpretive principles of "autonomous concepts," "living instrument" and "practicality"'.[38]

30 In accordance with Article 1 of Protocol 15 ECHR, which entered into force on 1 August 2021, the preamble to the Convention was amended and a reference to the margin of appreciation and subsidiarity was included therein. See further, among others, Vogiatzis, 'When "reform" meets "judicial restraint": Protocol 15 amending the European Convention on Human Rights' (2015) 66 *Northern Ireland Legal Quarterly* 127.

31 The literature on the margin of appreciation is very broad. From more recent contributions see, among others, Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 *Human Rights Law Review* 495; Arnardóttir, 'Rethinking the Two Margins of Appreciation' (2016) 12 *European Constitutional Law Review* 27.

32 This quintessential requirement of the Convention system was more recently underlined in the Copenhagen Declaration, available at: www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf.

33 The key provisions are Articles 31 (general rule of interpretation), 32 (supplementary means of interpretation) and 33 (interpretation of treaties authenticated in two or more languages) of the Vienna Convention on the Law of Treaties.

34 Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 57 at 59–60 (and references cited therein); see also Ulfstein, 'Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties' (2020) 24 *International Journal of Human Rights* 917.

35 Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 *European Journal of International Law* 509 at 514. The author claims (at 513) that 'what all these techniques [by the ECtHR] have in common is the rejection of originalist ideas about interpretation, according to which the meaning of fundamental rights is somewhat fixed or "frozen in time"'. See further on originalism, among others, Scalia, 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnati Law Review* 849.

36 Rainey et al. (n 28) 83.

37 Ulfstein (n 34) 919.

38 Çalı, 'Specialised Rules of Treaty Interpretation: Human Rights' in Hollis (ed) *The Oxford Guide to Treaties* (2020) 504 at 512.

It is therefore plausible to suggest that these principles are connected—not only in the sense that they are often used in support of each other in the case-law of the Court,[39] but also because they support the proposition that the ECtHR has never wholeheartedly embraced solely a textual approach to the interpretation of the Convention.[40] Ultimately, the Court seeks to achieve a 'balance between development and stability'.[41] In this context, the reference to 'evolution' in the title of the article encompasses all the interpretative techniques of the Strasbourg Court which point to the development of the rights and guarantees for the defendant that stem from Article 6(3)(e) ECHR.

The term 'evolution' does, of course, point to *evolutive interpretation*: the Strasbourg Court has been emphasising that 'the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions'.[42] Evolutive interpretation (which is not particular to this specific regional system[43]) can be contrasted with textualist and originalist interpretations of human rights texts.[44] This is not to suggest, however, that the drafters' intentions, particularly as illustrated in preparatory work, have not been quoted by the Strasbourg Court.[45] Evolutive interpretation is connected with the need to *realise the object and purpose of the Convention.* Following the text of the Vienna Convention, the ECtHR (via what is also termed as teleological interpretation) may be guided by the Convention's preamble (as it did in *Golder*) or may also pronounce, as it did in *Loizidou*,[46] that the Convention is a 'constitutional instrument of European public order'.[47] Often, the Court will link the 'effectiveness of rights' with the 'object and purpose' of the Convention.[48] Indeed, the guaranteed rights under the ECHR should be *practical and effective*. More recent formulations of this doctrine refer to the need, for contracting states, to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[49] This obviously entails that the effectiveness of rights should not be undermined by states, while occasionally, it has been used by the Court to underline states' positive obligations.[50]

39 And, indeed, in the case-law of other regional systems as well. Çalı has observed, for example, that '[t]he regional systems in the Americas, Europe, and Africa have adopted effective interpretation in favour of individuals rather than sovereign states as the central canon of interpreting human rights treaties. A corollary of this is the interpretation of human rights treaties as "living instruments," allowing their interpretation to be responsive to changing social, political, and moral developments in contemporary societies'; see Çalı, 'Regional Protection' in Moeckli et al. (eds), *International Human Rights Law* (2017) 411 at 420.

40 See Letsas (n 35).

41 Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Court of Human Rights' (2011) 12 *German Law Journal* 1730. For that author, European consensus 'mitigates the "surprise effect" of evolutive interpretation' (on p. 1745).

42 *Tyrer v UK*, Application 5856/72, 25 April 1978, para 31.

43 Çalı (n 39).

44 See further Fredman, *Comparative Human Rights Law* (2018) ch 5.

45 It is a matter of debate whether the drafters' intentions and evolutive interpretation are 'antithetical approaches'; for an account stressing that they are not, see Concurring Opinion of Judge Sicilianos, joined by Judge Raimondi in *Magyar Helsinki Bizottság v Hungary*, Application 18,030/11, 8 November 2016.

46 *Loizidou v Turkey (Preliminary Objections)*, Application 15318/89, 23 March 1995, para 75.

47 See further Harris et al., *The Law of the European Convention on Human Rights* (2018) 6–8.

48 See, for example, *Soering v UK*, Application 14038/88, 7 July 1989, para 87; *Magyar Helsinki Bizottság* (n 45) para 155.

49 See, for example, *Matthews v UK*, Application 24833/94, 18 February 1999, para 34; *United Communist Party of Turkey and Others v Turkey*, Application 19392/92, 30 January 1998, para 33.

50 See Mowbray (n 34) 72.

The subsequent examination of the case-law is divided into three parts.[51] The first part will consider the interpretation of the aforementioned article in light of the general interpretative techniques employed by the Strasbourg Court; the next part will focus on the Court's interpretation of Article 6(3)(e) *vis-à-vis* the overall fairness of the proceedings; and the third part will assess the standards of the right to interpretation in connection with the Court's jurisprudence on legal assistance.

A. Article 6(3)(e) ECHR and General Interpretative Techniques

The first judgment of the Court on Article 6(3)(e) ECHR was in *Luedicke, Belkacem and Koc*[52]—delivered a few years after *Golder* (which was also cited in the judgment). The Court found in favour of the individual via relying (primarily) on the 'ordinary meaning of terms'. This follows from Article 31(1) of the Vienna Convention; the Court will have to 'ascertain the ordinary meaning to be given to the words in their context'.[53] Thus, despite developing own methods (and often terminology as well), it may be argued 'that the Court sees no contradiction between the ECHR as a human rights instrument and its interpretation based on accepted canons of interpretation, where the Vienna Convention has a particular role'.[54]

In *Luedicke, Belkacem and Koç*, the Court resorted to this rule of interpretation, as well as to the 'object and purpose' of Article 6(3)(e) ECHR, to confirm that interpretation should be free of charge and reject the respondent's argument that the accused person may need to pay fees if they are convicted.[55] The ECtHR emphasised that the term 'free', as well as the corresponding term in the French version of the Convention ('*gratuitement*') 'denote neither a conditional remission, not a temporary exemption, nor a suspension, but a once and for all exemption or exoneration'.[56] Elsewhere, the Court emphasised the inconsistency of a high domestic court on this matter (an earlier domestic case had exempted the applicant from paying interpretation fees) and underlined that, while the Strasbourg Court cannot substitute itself for the national court, it nevertheless has the responsibility to verify that the effects of the interpretation of domestic law are compatible with the Convention.[57]

The characterisation of the evolution in the Court's jurisprudence as 'cautious' is confirmed in *Protopapa*. Therein, the ECtHR resorted to textual interpretation to underline that Article 6(3)(e) ECHR refers to an 'interpreter', not a 'translator', which

51 The following sources were relied upon in the identification of cases: the searchable HUDOC database, available at: hudoc.echr.coe.int/eng; European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb)' (2019), available at: www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf; European Legal Interpreters and Translators Association, 'Case-Law of the European Court of Human Rights on Language Assistance in Criminal Proceedings' complied by Brannan, available at: eulita.eu/wp/case-law/; EU Fundamental Rights Agency Study (n 3). Thus, a complete picture is provided on the jurisprudential developments concerning Article 6(3)(e) ECHR.

52 *Luedicke, Belkacem and Koc v Germany*, Applications 6210/73, 6877/75 and 7132/75, 28 November 1978.

53 See, among others, *Demir and Baykara v Turkey*, Application 34,503/97, 12 November 2008, para 65.

54 Ulfstein (n 34) 918.

55 *Luedicke, Belkacem and Koc* (n 52) paras 39–40 and 42.

56 Ibid., para 40.

57 *Işyar v Bulgaria*, Application 391/03, 20 November 2008, paras 47–48. See also *Hovanesian v Bulgaria*, Application 31,814/03, 21 December 2010, paras 49–51.

entails that 'oral linguistic assistance may satisfy the requirements of the Convention'.[58] This obviously pertains to the *quality* of the interpretation that should be provided by states, a matter that is returned to below. In the more recent case of *Bokhonko*, though, the Court—while not finding a violation of Article 6(3)(e) and reiterating that 'the Convention does not require a written translation of all items of official documents and that oral linguistic assistance may satisfy the requirements of the Convention'—did emphasise the need for the accused person to receive such linguistic assistance so as to *participate in the trial* against them.[59]

In *Engel*, one of the leading cases on the scope of Article 6, the Court established that the term 'criminal' has an autonomous meaning,[60] distinct from its understanding in domestic law and then went on to establish criteria to identify whether the charge in question (which could be disciplinary or regulatory in national law) falls within the scope of Article 6, autonomously understood.[61] The same approach was then followed to establish the applicability of Article 6(3)(e) ECHR in *Öztürk*.[62] The case (and the arguments put forward by the respondent) focused on the relevance of Article 6(3)(e) ECHR in an offence classified as 'regulatory' under German law. On the basis of the criteria developed in *Engel*, the Strasbourg Court found, among others, that nothing suggests that 'a certain degree of seriousness' is required in order for the offence to fall under Article 6 ECHR and that the 'general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was ... criminal in nature'.[63] Another consideration (already part of the criteria established in *Engel*) was the classification of the offence in the 'vast majority' of states. Overall, a majority of judges found a violation of Article 6(3)(e) ECHR.

The progressive evolution of the scope and guarantees under the right to interpretation took place also via the 'practical and effective rights' principle. As specified by the Court in *Kamasinski*, in order for the right established under Article 6(3)(e) ECHR to be practical and effective, the domestic authorities have an additional obligation beyond the appointment of an interpreter: 'if they are put on notice in the particular circumstances, [their obligation] may also extend to a degree of subsequent control over the adequacy of the interpretation provided'.[64] A further and particularly important development concerned pre-trial proceedings: according to the Court, the right to interpreter 'applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings'.[65] In order to develop this (no doubt indispensable) requirement under Article 6(3)(e) ECHR, the Court also relied on the fairness of the proceedings (it should be remembered that the text of the said

58 *Protopapa v Turkey*, Application 16,084/90, 24 February 2009, para 80.

59 *Bokhonko v Georgia*, Application 6739/11, 22 October 2020, paras 103–104. The Court observed, in addition, that 'at all the principal stages of the proceedings the applicant was provided with interpreting services'.

60 See further Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 *European Journal of International Law* 279.

61 See *Engel and Others v The Netherlands*, Applications 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976, in particular paras 80–82.

62 *Öztürk v Germany*, Application 8544/79, 21 February 1984.

63 Ibid., para 53.

64 *Kamasinski v Austria*, Application 9783/82, 19 December 1989, para 74.

65 Ibid.

provision refers to the 'language used in court'). This matter is returned to in the next sub-section of this article.

The scope of contracting parties' positive obligations was developed further in *Vizgirda*.[66] In this case, it is submitted that the Court relied heavily on the protection afforded under EU law and, more specifically, Directive 2010/64. Thus, before elaborating on this case, it is useful to provide some introductory remarks on the Court's comparative method. Much has been written over the last years about *consensus and the comparative method* of the Court.[67] European consensus has rightly been described as the bridge between evolutive interpretation and the margin of appreciation[68]—with a crucial disclaimer that the guidance of the comparative exercise often, *but not always*, informs the Court's approach to the margin of appreciation.[69] Yet, the comparative method exceeds 'European consensus': a usual source of inspiration can often be the EU legal order. Thus, although the Court has generally refrained from deploying European consensus in the field of Article 6(3)(e) ECHR,[70] it is submitted that EU law has supported the 'evolution' of the guarantees under the said provision.

Indeed, in *Vizgirda*, the Court initially made a crucial statement about the fairness of the trial, a point that is also linked to the discussion of the next sub-section:

> it is incumbent on the authorities involved in the proceedings, in particular the domestic courts, to ascertain whether the fairness of the trial requires, or has required, the appointment of an interpreter to assist the defendant ... this duty is not confined to situations where the foreign defendant makes an explicit request for interpreting ... it arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings.[71]

The Court went on to solidify states' positive obligations with reference to EU Directive 2010/64.[72] In particular, the Directive 'requires member States to ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter'.[73] Drawing inspiration from another piece of EU legislation

66 *Vizgirda v Slovenia*, Application 59,868/08, 28 August 2018.

67 Different types of consensus have been used by the ECtHR: domestic, international, expert or 'European'; see Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015) 39. 'European consensus' is a comparative analysis of law and practices across the Council of Europe, with a view to identifying a *trend* (ibid., at 45).

68 Ibid., 23–4 (and references cited therein).

69 Vogiatzis, 'The Relationship between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2019) 25 *European Public Law* 445.

70 One exception might be *Öztürk* (n 62, para 53): Following the criteria established in *Engel*, the ECtHR relied inter alia on the comparative method (without explicitly using the term consensus) to find that in the vast majority of contracting parties, the applicant's misconduct would be part of criminal law.

71 *Vizgirda* (n 66) para 81.

72 See n 4 above. As the Commission has underlined, the Directive 'contributes to the general objective of increasing mutual trust by improving the application of the mutual recognition principle, the cornerstone of the EU area of freedom, security and justice'; see Report from the Commission (n 27) 1.

73 Ibid., para 82. The ECtHR paid particular attention to recitals 21 and 22 of the EU Directive. Recital 22 is worded as follows: '[i]nterpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in

seeking to safeguard the defendant's rights, namely Article 3 of Directive 2012/13 EU,[74] an additional crucial finding of the Court in this case was states' obligation to actually *notify* the applicant of the right to interpretation; and, of course, 'to be meaningful', the notification as well should be provided in a language that they understand.

In the present case, the national authorities had not 'expressly verif[ied]' whether the applicant could understand the interpretation and translation that was provided; the 'effective protection' of this right mandated otherwise, however.[75] A violation of Articles 6(1) and 6(3) was found. In a carefully worded opinion, two dissenting judges raised concerns not only about the extent of the verification requirements but also about the fact that EU law was relied upon to set new standards.[76] If anything, such development had to be undertaken by the Grand Chamber, they submitted.[77] But it is also possible to situate this judgment in the context of a progressive evolution of Article 6(3)(e) ECHR as well. This case, in particular, underlines states' positive obligations in this area; and it also signifies, perhaps, that the jurisprudence of the Court is progressively shifting the burden from the individual (for example, by requiring that they duly communicate/explain their linguistic requirements to the national authorities) towards the state.

B. The Fairness of the Proceedings

What is the link between Article 6(3)(e) ECHR and the overall fairness of the proceedings? This article argues that every violation of the right to interpretation undermines the overall fairness of the proceedings. This approach gives further effect to the requirements of the rule of law, as explained in an earlier section. The extent to which the Court follows this approach in its jurisprudence on the right to interpretation will be the focus of this section.

Before exploring this issue further, it is necessary to address in broader terms the link between the 'fairness' of the trial under Article 6(1) and the guarantees under Article 6(3) ECHR in the Court's jurisprudence. For the Court is often relying on the 'overall fairness of the trial' in a different, and indeed very problematic, way: instead of finding that when a violation under Article 6(3) takes place, the trial *is not fair*, occasionally it seeks to establish whether further guarantees under Article 6 which may have been respected by the respondent could effectively compensate for the violation, thereby rendering the 'overall' trial fair. This very problematic approach has been criticised in the literature—and this author subscribes to these critical remarks.

It is noted, of course, that fairness as a notion goes beyond the text of Article 6. A broader theoretical inquiry has revealed that 'key principles' of fairness include 'transparency, consistency, equality and impartiality'.[78] Thus, ascertaining how the Court addresses the link between the guarantees of Article 6(3) and the fairness of the

order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings'.

74 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1.

75 *Vizgirda* (n 66) para 93.

76 Joint Dissenting Opinion of Judges Kucsko-Stadlmayer and Bošnjak in *Vizgirda* (n 66), paras 1–8.

77 Ibid., para 7.

78 McDermott, *Fairness in International Criminal Trials* (2016) 6.

trial becomes even more important in light of these broader principles underpinning the notion.

Lemmens examined the possible implications that could arise when the Strasbourg Court examines the first and third paragraphs of Article 6 together: there is a danger that a more '"result"-oriented' Court will evaluate the 'overall fairness of the proceedings', with the implication that if one of the guarantees is found wanting, but the overall fairness would be deemed satisfactory, there would be no violation of Article 6.[79] The Strasbourg Court in *Salduz* (which is also discussed below) stated that 'the right set out in Article 6 § 3 (c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in Article 6 § 1'.[80] In *Al-Khawaja and Tahery*, the Court cited the above paragraph as authority to claim that 'the Court has always interpreted Article 6 § 3 in the context of an overall examination of the fairness of the proceedings'.[81] As Lemmens noted, the two formulations '[do] not exactly state the same thing'.[82] Indeed, it is an intellectual leap that is neither defensible nor warranted. The 'overall examination' appears to undermine the significance of each of the guarantees listed in the third paragraph of Article 6.

Along similar lines, and having explored some of the inconsistencies in the Court's approach, Treschel argued convincingly as follows:

> There are . . . a number of cases in which the ECtHR first found that one of the specific guarantees had not been complied with but that the trial, when examined as a whole, had nevertheless been fair. This is certainly not an interpretation which can be reconciled with the English text – 'minimum rights'; the French 'notamment' is slightly less compelling. Still, the accused has a right to a fair trial; in particular, he or she has certain *minimum* rights. How can a trial be fair if a minimum right was disregarded? This is only possible if fairness is not understood as a clear-cut right, but rather as some sort of an ideal or 'non-epistemic' consideration. I am not aware of any rule of interpretation which would permit such flagrant disregard of the unambiguous text of a treaty.[83]

In a thorough study of the ECtHR's jurisprudence on the criminal limb of Article 6, Goss drew upon 'formalist accounts of the rule of law', including by Raz and Fuller (i.e. the law should be clear, predictable, transparent, etc.) to assess whether the ECtHR's case-law on Article 6 meets this objective;[84] he was strongly of the view that it does not. Among others, the 'internal structure' of that article was explored.[85] This matters

79 Lemmens (n 2) 311–313.

80 *Salduz v Turkey*, Application 36,391/02, 27 November 2008, para 50.

81 *Al-Khawaja and Tahery v the United Kingdom*, Application Nos. 26,766/05 and 22,228/06, 15 December 2011, para 143.

82 Lemmens (n 2) 312 (fn 95).

83 Treschel, 'The Character of the Right to a Fair Trial' in Jackson and Summers (eds), *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms* (2018) 19 at 25 (emphasis in the original, footnotes have been omitted).

84 Goss (n 2) 5–6; as the author explained, this formalist understanding of the rule of law was his 'measuring stick'.

85 Goss (n 2) chapter C.

because 'an understanding of the way that the European Court approaches the internal structure of Article 6 is crucial to understanding the way that the Court deals with the question of when Article 6 has been violated'.[86] Having identified a plethora of inconsistencies in the Court's reasoning, he proposed a more focused approach to the specific requirements of Article 6(3) ECHR, while noting that, if a violation of these provisions is not found, it would still be possible for the 'broader Article 6 guarantee of a fair trial' to have been violated.[87] Elsewhere, and with reference to *Ibrahim*,[88] he provided a critique as to why the evaluation of the fairness of the proceedings 'as a whole' 'relegate[s] the Article 6(3) rights to subsidiary status', contrary to the text of the ECHR.[89]

It should also be noted that, beyond the confines of the ECHR, McDermott observed that an 'approach of full respect for each of the rights of the accused is preferable to some of the limited jurisprudence that seeks to refer to the fairness "as a whole" of proceedings'.[90]

There appears to be scholarly agreement, then, that the *overall evaluation* of the fairness of the trial in the way that it is often used *by the Strasbourg Court* could in essence undermine the rights under Article 6(3). Simultaneously, the imperfect wording of Article 6 should be acknowledged,[91] and therefore it may not be straightforward for the Court to deal with an imperfect provision. It appears, however, that it would be preferable (or at least plausible) for every finding of a violation under Article 6(3), or even 6(2) and 6(1) ECHR, to be accompanied with a violation of Article 6 *as a whole*. That would probably underline the importance of the fairness of the trial as a whole and would also signify that every violation of a 'component fair trial right'[92] undermines the fairness of the trial. It would also serve legal certainty and facilitate applicants' submissions as well: for example, in the below cases in which a violation of the right to interpretation was alleged, certain applicants claimed a violation of Article 6; others a combination of 6(1) and 6(3)(e); or a combination of 6(1) and 6(3); or a violation of 6(3)(e) only.

It is now appropriate to return to the earlier question: how has the Strasbourg Court dealt with the right to interpretation *vis-à-vis* the fairness of the trial? In its first judgment on Article 6(3)(e) ECHR, delivered shortly after *Golder*, the Court found that paying for interpretation costs 'may have repercussions for [the accused person's] exercise of the right to a fair trial as safeguarded by Article 6'.[93] But it was in *Kamasinski* where the link between interpretation rights and fairness was solidified: the 'guarantees in paragraphs 2 and 3 of Article 6 ... represent constituent elements of the general concept of a fair trial embodied in paragraph 1'.[94] Placing the guarantee

86 Ibid., 66.
87 Ibid., 87.
88 *Ibrahim and Others v the United Kingdom*, Applications 50,541/08, 50,571/08, 50,573/08 and 40,351/09, 13 September 2016.
89 Goss, 'Out of Many, One? Strasbourg's *Ibrahim* Decision on Article 6' (2017) 80 *Modern Law Review* 1137 at 1146.
90 McDermott (n 78) 39.
91 See also on this point Summers (n 2) 102–3.
92 With reference to Article 14 ICCPR, Clooney and Webb (n 7, at 7) identified 13 component rights.
93 *Luedicke, Belkacem and Koc* (n 52) para 42.
94 *Kamasinki* (n 64) para 62.

in the context of fair trial under Article 6(1) (and taking also into account the earlier *Luedicke, Belkacem and Koc* judgment) enabled the ECtHR to deduce the principle that the right to interpretation applies not only to oral statements at the trial hearing but also to 'documentary material and pre-trial proceedings'.[95] The Strasbourg Court clarified, however, that the said provision does not go as far as requiring translation of all evidence or official documents in the procedure; the 'interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events'.[96] In *Amer*, the Strasbourg Court reiterated that the interpretation right at the pre-trial stage *ensures a fair trial*, and key considerations for the interpretation of this right are the defendant's linguistic knowledge and the nature of the offence.[97] The absence of an interpreter during questioning by the police (and the lack of appropriate steps taken by domestic authorities, including courts, to redress this) constituted a violation of Article 6(1) taken in conjunction with Article 6(3)(e) ECHR.[98]

When the Court decides to examine a complaint under these provisions taken together, occasionally, it might also emphasise the link between the concept of fair trial and the guarantees under Article 6(3) ECHR.[99] In *Cuscani*, despite assurances by counsel that the applicant could understand the language used in court, the ECtHR found a violation of Articles 6(1) and 6(3)(e) ECHR, given that, once the judge—as the 'ultimate guardian of the fairness of the proceedings'—is put on notice, they have the responsibility to ensure that the absence of an interpreter 'would not prejudice the applicant's full involvement in a matter of crucial importance' for them.[100]

A further powerful manifestation of the impact of the absence of appropriate interpretation on the fairness of the trial can be found in *Baytar*. Therein, the ECtHR examined the complaint under Articles 6(1) and 6(3)(e) taken together; it underlined that, 'like the assistance of a lawyer, that of an interpreter should be provided *from the investigation stage*, unless it is demonstrated that there are compelling reasons to restrict this right'; this 'defect' at the initial stage, despite the presence of an interpreter when the applicant was questioned before a judge, was sufficient to impair the fairness of the proceedings as a whole and led to a violation of the aforementioned provisions taken together.[101] Likewise, in *Şaman*, the Court found a violation of both the right to legal assistance and the right to an interpreter, in conjunction with Article 6(1) of the Convention (the fairness of the trial), since the applicant's defence rights were 'irretrievably affected'.[102]

95 Ibid., para 74.

96 Ibid.

97 *Amer v Turkey*, Application 25,720/02, 13 January 2009, paras 77–78.

98 Ibid., paras 83–84.

99 See, for example, *Mariani v France*, Application 43, 640/98, 31 March 2005, para 39.

100 *Cuscani v UK*, Application 32,771/96, 24 September 2002, paras 38–9.

101 *Baytar v Turkey*, Application 45,440/04, 14 October 2014, paras 48–59 (emphasis added). The Court also referred to the leading *Salduz* judgment, which is discussed further below.

102 *Şaman v Turkey*, Application 35,292/05, 5 April 2011, in particular paras 34–37. The Court emphasised that 'without the help of an interpreter, [the applicant] could not reasonably have appreciated the consequences of accepting to be questioned without the assistance of a lawyer in a criminal case concerning the investigation of particularly grave criminal offences' and that 'additional protection should be provided for

Importantly, in *Vizgirda*, the Court developed further states' positive obligations with regard to the right to interpretation, also on the basis of the 'prominent place held in a democratic society by the right to a fair trial'; the domestic authorities, and notably courts, have a duty to 'ascertain whether the fairness of the trial requires, or has required, the appointment of an interpreter to assist the defendant'.[103] The Court's conclusion is also noteworthy: 'it has not been established . . . that the applicant received language assistance such as to allow him to participate actively in the trial against him. This, in the Court's view, *is sufficient to render the trial as a whole unfair*'.[104]

One should therefore deduce from the above cases that not only has the Court acknowledged the link between the right to interpretation and the fairness of the trial in more general terms, but also that it has found that violations of the right to interpretation *undermine* fairness, thereby constituting also *violations of the right to a fair trial*. By doing so, the Court has taken further steps towards the 'cautious evolution' of Article 6(3)(e) ECHR. This approach does, of course, entail a higher degree of scrutiny over domestic laws and practice. This is, however, desirable, if not indispensable: the requirements of Article 6(3) ECHR, including the right to interpretation, are quintessential aspects of the rule of law and access to justice, as explained in earlier sections.

Nevertheless, there have been few occasions in which the Court decided to use the 'overall fairness' test in the abovementioned problematic way. These instances should be highlighted and criticised. The key judgment in this respect is *Hovanesian*, where the Strasbourg Court, although accepting that the accused person did not have access to a lawyer and interpretation during the first hours of police custody, was nonetheless satisfied that the overall impact on the fairness of the trial was not such to merit a finding of violation.[105] The fact that a separate violation of the right to interpretation was found because the applicant had been ordered to cover the interpretation fees[106] should not distract attention from the earlier problematic finding. Questions could also be raised regarding the Court's approach in *Panasenko*:[107] the reasoning of the Court appeared to unduly focus on the conduct of the accused person at the trial, as opposed to thoroughly scrutinising states for failing to fully meet their positive obligations. The Court admitted that there were problems with the interpretation at the hearing, but the applicant did not specify the extent to which such problems impaired his broader right to a fair trial. The applicant was also able to understand the essence of the debates and provide his version of the facts; thus, the claim was 'manifestly ill-founded' and was therefore rejected.[108] These judgments were delivered before the more recent judgment in *Vizgirda* which, as was explained earlier, duly accentuates states' positive obligations, particularly with regard to the steps that they need to take to verify the linguistic needs of the accused person. How Vizgirda may impact the Court's approach to Article 6(3)(e) in future cases is a question that will need to be addressed in due course.

illiterate detainees with a view to ensuring that the voluntary nature of a waiver is reliably established and recorded' (ibid., para 35).

103 *Vizgirda* (n 66) para 81.

104 Ibid., para 102.

105 *Hovanesian* (n 57), in particular para 43.

106 Ibid., paras 49–51.

107 *Panasenko v Portugal*, Application 10,418/03, 22 July 2008.

108 Ibid., paras 60–64.

C. The Right to an Interpreter and Legal Assistance/Legal Aid

As was explained in an earlier section, legal assistance/legal aid and interpretation are quintessential requirements of access to justice. 'Legal aid' denotes *free* legal assistance to those who cannot afford it.[109] Moreover, both rights (and 'components' of the fairness of the trial) imply that states have certain positive obligations that need to be fulfilled, which also touches upon the appropriate resource provision for the effective guarantee of these rights. In addition, there have been many cases in which both the right to interpretation and legal assistance were invoked by the applicant and examined (sometimes together) by the Strasbourg Court.[110] Nevertheless, there is an additional reason to undertake a comparative examination of the Court's approach to Articles 6(3)(c) and 6(3)(e) ECHR.

More specifically, another principle developed by the Strasbourg Court (which has not received extensive scholarly attention) is the *internal consistency between the Convention's provisions*. The Court has rightly pointed out that the Convention 'must ... be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions';[111] elsewhere, it has re-phrased this principle as follows: 'the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols'.[112] Thus, the consistency between the jurisprudence on legal aid and the right to interpretation (both featuring in Article 6(3) ECHR) is certainly a matter worth considering in an account that seeks to understand how the right to interpretation has been interpreted. Of course, it may be observed that there are links between the right to interpretation and further rights of defence under Article 6(3) ECHR. The right to interpretation benefits from a close affinity with Article 6(3)(a) ECHR;[113] yet, this right has not given rise to substantial jurisprudence. Arguably, there is also a link with Article 5(2) ECHR;[114] but this path of enquiry will not be pursued further here.[115]

109 See, relatedly, Article 3 of Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1, which is worded as follows: '"[L]egal aid" means funding by a Member State of the assistance of a lawyer, enabling the exercise of the right of access to a lawyer'.

110 See, among others, *Mariani* (n 99); *Panasenko* (n 107); *Cuscani* (n 100); *Hermi v Italy*, Application 18,114/02, 18 October 2006; *Lagerblom v Sweden*, Application 26,891/95, 14 January 2003; *Şaman* (n 102); *Knox v Italy*, Application 76,577/13, 24 January 2019.

111 *Stec and Others v UK (Decision)*, Applications 65,731/01 and 65,900/01, 6 July 2005, para 48.

112 *Maaouia v France*, Application 39,652/98, 5 October 2000, para 36.

113 Article 6(3)(a) ECHR provides that everyone charged with a criminal offence has the right 'to be informed promptly, in a language which [they understand] and in detail, of the nature and cause of the accusation against [them]'.

114 Article 5(2) ECHR provides that '[e]veryone who is arrested shall be informed promptly, in a language which [they understand], of the reasons for [their] arrest and of any charge against [them].

115 It should be noted that Article 5, including its second paragraph, applies to *any conditions of deprivation of liberty and detention*, thereby going beyond the field of application of Article 6(3) ECHR, which is confined to criminal procedures. Simultaneously, Article 5 is narrower, in the sense that it cannot apply to 'unarrested persons concerning whom a preliminary investigation has commenced, provided they are "substantially affected"'. See further Harris et al (n 47) 468. More generally, as Harris and colleagues point out, Articles 5(2) and 6(3) arguably serve different purposes: the former 'seeks to assist the arrested person in challenging' their detention, while the later guarantees are rights of defence granted to the accused person (ibid.). On language rights more generally, see also Schmalz, 'Beyond an Anxiety Logic: A Critical

The requirement of *internal consistency between the Convention's provisions* that was underlined in the earlier paragraph necessitates an enquiry concerning the interplay, consistency and respective standards between the various guarantees under Article 6(3) ECHR. In addition, the ECtHR has specified that the requirements of Article 6(3) ECHR enable the accused person to *participate effectively in the proceedings*; 'effective participation' includes the assistance of a lawyer or interpreter and the faculty to duly prepare one's defence and follow statements by the prosecution witnesses[116]—which indicates, again, that such guarantees cannot be viewed and evaluated in isolation. For the Strasbourg Court, the right to *participate in the trial* may not be mentioned explicitly in Article 6(1) ECHR, but its existence can be inferred from the 'object and purpose of [Article 6] taken as a whole'.[117] The significance of the guarantees under Article 6(3), taken together with Article 6(1) ECHR, was also emphasised in *Hermi*, where the ECtHR reiterated how the rights under the third paragraph reinforce the right of the accused person to *participate in the hearing*.[118]

In this context, interesting questions have arisen in the case-law of the Court regarding the relationship between the lawyer (and legal assistance, more generally) and the interpreter. In *Cuscani*, the lawyer appointed by the state had advised the court that they should be able to 'make do and mend'; the ECtHR found a violation of Articles 6(1) and 6(3)(e) ECHR, while reiterating that, generally, 'the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme as in the applicant's case or be privately financed'.[119] In *Hermi*, a case involving the applicant's linguistic capacity in Italian, as well as his participation in the appeal hearing, the Court regretted the lack of communication between the applicant and his lawyers (who were appointed by the former) but stressed that a state cannot be held responsible for every shortcoming and is only required to intervene when the requirements of a fair trial are not met (which was not the case here).[120] In *Vizgirda*, and citing also *Hermi*, the ECtHR specified that 'the failure by the applicant's legal representative to raise the issue of interpretation did not ... relieve the domestic court of its responsibility under Article 6 of the Convention, given that national courts are the 'ultimate guardians of the fairness of the proceedings'.[121]

The above discussion has already revealed points of convergence between the rights to legal assistance and interpretation: both legal assistance (unless 'compelling reasons' are presented, as the Court explained in *Salduz*) and interpretation should apply at the

Examination of Language Rights Cases before the European Court of Human Rights' (2020) 20 *Human Rights Law Review* 101.

116 See further Lemmens (n 2) 308, with reference to *Güveç v Turkey*, Application 70,337/01, 20 January 2009, para 124.

117 *Brozicek v Italy*, Application 10,964/84, 19 December 1989, para 45 (in this case finding a violation of Article 6(1), alongside a violation of Article 6(3)(a) ECHR).

118 *Hermi* (n 110) paras 58–9. See further *V. v UK*, Application 24,888/94, 16 December 1999, paras 85–7; *Ibrahimov and Others v Azerbaijan*, Applications 69,234/11, 69,252/11 and 69,335/11, 11 February 2016, para 109; *Yaroslav Belousov v Russia*, Applications 2653/13 and 60,980/14, 4 October 2016, paras 146–9.

119 *Cuscani* (n 100) para 39.

120 *Hermi* (n 110) paras 94–5. In particular, the national authorities under Article 6(3)(c) ECHR are required to intervene 'only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way' (para 96).

121 *Vizgirda* (n 66) para 101.

pre-trial stage; otherwise, the guaranteed rights will not be practical and effective.[122] It has been shown that *Salduz* has had significant effects on the legal systems of many contracting parties and that it signified a departure from earlier jurisprudence whereby legal assistance during police interrogation would be assessed in the context of the overall fairness of the trial[123] (a point linked to earlier remarks). In addition, the right to *free* interpretation goes further than legal aid, because it is not subject to restrictions, including when the accused person is convicted; by contrast, legal assistance might be confined if this is required in the 'interests of justice'.[124]

On the basis of the existing literature and the case-law of the Court, the following matters will also be comparatively examined in this section: the choice of legal assistance[125] and interpretation; and the quality of legal assistance[126]/interpretation and states' positive obligations, in this respect. On the choice of legal assistance, a distinction has to be made between situations in which the costs of representation are paid by the applicant,[127] and those funded by the state via legal aid schemes. In the latter case, the state's discretion is broader.[128] As the Strasbourg Court has put it, '[w]hen appointing defence counsel the courts must certainly have regard to the accused's wishes but these can be overridden when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice'.[129] This also applies when the accused person is opposed to the appointment of defence counsel.[130]

In this respect, a positive element in the jurisprudence of the Court on Article 6(3)(e) ECHR is the dissociation of interpretation from legal assistance: in other words, the lawyer cannot assume the role of the interpreter if the accused person cannot understand and/or participate in the proceedings.[131] Likewise, it is the obligation of the state (the domestic courts) and not of the accused person or counsel to verify the need for interpretation.[132] Thus, while legal aid and interpretation are connected as guarantees of Article 6(3) and fundamental elements of access to justice, they are also distinct rights: this means that the state cannot fulfil its obligations under Article 6(3)(e) when appointing a lawyer who would also assume the role of the interpreter, while at the same time the accused person cannot understand or speak the language

122 *Salduz* (n 80) para 55.

123 Giannoulopoulos, 'Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries' (2016) 16 *Human Rights Law Review* 103. Nevertheless, developments in the post-*Salduz* case-law have been criticised in the literature: see Goss (n 89); Celiksoy, 'Overruling "the *Salduz* Doctrine" in *Beuze v Belgium*: The ECtHR's further retreat from the *Salduz* principles on the right to access to lawyer' (2019) 10 *New Journal of European Criminal Law* 342.

124 Voyatzis (n 20) 48–50.

125 Harris et al. (n 47) 476–9.

126 Guide on Article 6 (n 51) 80–1.

127 For a case concerning a restriction on the free choice of defence which resulted in a violation of Articles 6(1) and 6(3) ECHR, see *Zagorodniy v Ukraine*, Application 27,004/06, 24 November 2011.

128 Harris et al. (n 47) 479.

129 *Lagerblom* (n 110) para 54.

130 *Croissant v Germany*, Application 13,611/88, 25 September 1992, paras 27–32.

131 See *Cuscani* (n 100) paras 38–9.

132 See *Vizgirda* (n 66) para 101.

used in court. Evidence for this is also provided by the position that the right to waive interpretation should be a decision of the accused person and not of the lawyer.[133]

As the text of Article 6(3)(e) (or 6(3) more generally) does not clearly specify the relationship between the lawyer and the interpreter, the clarification by the Court that the two rights are separate represents a further (and welcome) step in the 'cautious evolution' of the right to interpretation. Accordingly, *Cuscani* confirms one of the earlier remarks in *Vizgirda* (a later case): namely, that the Court is progressively shifting the burden from the individual to the state. As the Court put it, the 'onus was . . . on the judge to reassure himself that the absence of an interpreter . . . would not prejudice the applicant's full involvement in a matter of crucial importance to him; and the judge should not have been 'persuaded by the applicant's counsel's confidence'.[134]

The choice of interpretation rests with the state. This, however, inevitably brings to the fore the qualifications of the persons who will undertake this role (the quality of interpretation as such is examined below). The jurisprudence of the Strasbourg Court is rather lenient on states on this matter. The inadmissibility decision in *Ucak* provides further clarity.[135] Therein, the Court specified that:

> The Court considers that it is not appropriate under Article 6 § 3(e) to lay down any detailed conditions concerning the method by which interpreters may be provided to assist accused persons. An interpreter is not part of the court or tribunal within the meaning of Article 6 § 1 and there is no formal requirement of independence or impartiality as such. The services of the interpreter must provide the accused with effective assistance in conducting his defence and the interpreter's conduct must not be of such a nature as to impinge on the fairness of the proceedings.[136]

There may be situations in which the Court's position on the independence and impartiality (or lack thereof) of the interpreters cannot be substantiated. In *Ucak*, an—admittedly insufficiently substantiated—claim was submitted by the applicant that the interpreter was listed as a witness by the prosecution; yet, it emerges from the case that this was done to confirm that the interpretation at the police interview was accurate. Nevertheless, in a future hypothetical case, the domestic courts should not, of course, be satisfied with the appointment of an interpreter who is a witness proper of the prosecution. It is hoped that the Strasbourg Court would have to conclude that the fairness of the proceedings would be undermined. Granted, the Convention text does not appear to go as far as providing for a register of interpreters; by contrast, Article 5(2) of Directive 2010/64 provides that '[i]n order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified'. This could be a possible area of further development of the Strasbourg Court's

133 Guide on Article 6 (n 51) 93, with reference to *Kamasinski* (n 64) para 80. The author fully shares this view but notes that the principle was not established so clearly in *Kamasinski*.

134 *Cuscani* (n 100) para 38.

135 *Ucak v the United Kingdom*, Application 44,234/98, 24 January 2002 (Decision on admissibility).

136 Ibid.

case-law.[137] It also noted that the Court's position is that there is no 'formal' requirement of independence and impartiality, while the EU Directive expects states to at least try to ensure, via this register, that translators and interpreters should be independent.

Moving on to the quality of legal assistance and interpretation, in both rights, the rationale to the Court's case-law is the need to ensure that these rights of defence are *practical and effective*. Thus, the contracting parties have obligations that exceed the appointment of a lawyer or an interpreter, and pertain also to the quality of the service provided.[138] In *Lagerblom*, the ECtHR specified that the accused person does not have a right to request the *replacement* of the defence counsel and reiterated that states do have to intervene 'if a failure by public defence counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way' but 'cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes'.[139]

The principle that states have certain responsibilities after the appointment of the interpreter was confirmed in *Kamasinksi*, *Hermi* and—more recently—in *Vizgirda*. In *Knox*, where in addition to Article 6(3)(e) the Court also found a violation of Article 6(3)(c) as well (given that the applicant had not been granted legal assistance during a police interview), the Court pointed out that the police interpreter undertook a role exceeding the functions of an interpreter: she 'sought to build up a personal and emotional relationship with Ms Knox, seeing herself as a mediator and taking on a motherly attitude which was not called for in the circumstances'.[140] The national authorities had failed to take steps to identify this issue.[141]

The above case aptly illustrates that the appointment process and/or the choice of interpreter pertains also to the quality of interpretation. The earlier remark concerning the qualifications of the persons undertaking this service (including, perhaps, a registration process for interpreters) is of relevance. In *Knox*, the Court reiterated[142] the *Ucak* jurisprudence on the non-desirability of concrete guidelines for the appointment of interpreters; clearly, states have a margin of appreciation, in this respect. However, since the appointment/choice of interpreter could also have an impact on the quality of interpretation, this is an area in which we might see further developments in the jurisprudence of the Court. And, of course, *Knox* is not the only case where issues about the quality of interpretation emerged—*Cuscani* is another relevant example,[143] among other cases.

137 On this point, Brannan pointed out that, while the Directive 'goes much further than any Convention requirements . . . it merely requires states to "endeavour to establish" such registers', while also observing further unclear provisions under Article 5 of the Directive; see Brannan (n 3) 147–8.

138 Regarding legal assistance see, to this effect, Guide on Article 6 (n 51) 80–1. There are aspects of the quality of legal assistance that do not appear to be applicable to interpretation, such as confidential (in private) communication between the lawyer and the accused person.

139 *Lagerblom* (n 110) paras 55–6.

140 *Knox* (n 110) para 185. The translation of the French text in this paragraph is quoted from the press release by the Strasbourg Court in English.

141 Ibid., para 186.

142 Ibid., para 184.

143 See above n 119.

4. FURTHER EVOLUTION OF ARTICLE 6(3)(e) ECHR?

The earlier analysis demonstrated that the standards and guarantees of the right to interpretation have 'evolved cautiously'. The Court has relied on established interpretative techniques to interpret this provision and the scope of this right. Of course, it was acknowledged that there can always be questions or concerns about the Court's fragmented approach to interpretation: it can be queried, for example, why a particular principle was applied in one judgment but ignored in another. In addition, proponents of a strictly originalist interpretation will no doubt reject developments that do not 'match' the precise treaty text, regardless of the time that has elapsed between the case under review and the adoption of the provision in question. These disclaimers aside, the progressive development of the right to interpretation is positively assessed in this contribution. The Court took several necessary steps in order to strengthen the fairness of the trial and the effective exercise of this right. Simultaneously, the degree of 'caution' that was identified in the earlier discussion should not automatically be criticised, given that, as a jurisdiction of last resort, the Strasbourg Court was perhaps eager to avoid excessive criticism regarding alleged activism.

It should also be remembered that, as the text of Article 6(3) ECHR indicates, the rights of defence mentioned therein are *minimum* procedural guarantees, and also 'non-exhaustive' aspects of the 'general requirement of fair trial':[144] this means that states can obviously go further but also, perhaps, that there is scope for the Court to progressively develop the scope of these rights,[145] including the right to interpretation that is the focus of the present contribution.

This section, therefore, will briefly address the question of the possible further evolution of Article 6(3)(e) ECHR. If one considers the Court's reasoning in more recent and landmark cases, such as *Vizgirda*, one may assume that the EU legal order will continue to exercise 'pressure' on the Convention system in the foreseeable future. In this respect, it should be remembered that, although the ECtHR has drawn inspiration from EU law, it has not gone as far as duplicating the provisions/standards prescribed by Directive 2010/64/EU. Thus, and among other areas, the Strasbourg case-law at present does not mirror translation rights under Article 3 of the Directive[146] (including its interpretation by the Court of Justice of the European Union).[147] The same applies to the quality of interpretation: if one considers Article 5 of the Directive, one will observe that this provision clearly refers to appropriate qualifications.[148] It is not unreasonable to expect

144 Gamble and Dias (n 2) 33, 52.

145 Nevertheless, as the authors observed (ibid., 52), the Court, as well as the Human Rights Committee, with reference to Article 14 ICCPR, have not 'act[ed] expansively on due process issues'. The present account and the 'cautious evolution' argument that it advances regarding the right to interpretation appear to confirm as much.

146 See further Brannan (n 3) 136; Clooney and Webb (n 7) 582–3, who draw a distinction between 'necessary' documents (under ECtHR case-law) and 'translation of all documents which are essential to ensure that [suspected or accused persons] are able to exercise their right of defence and to safeguard the fairness of the proceedings' under Article 3(1) of the EU Directive.

147 See, in particular, on the definition of 'essential documents', Case C-278/16, *Frank Sleutjes*, EU:C:2017:757.

148 Article 5 also refers to Articles 2(8) (interpretation) and 3(9) (translation) of the Directive. The former is worded as follows: 'Interpretation ... shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.' The quality of interpretation remains, however, a challenge for EU member states; see further Hertog, 'Directive 2010/64/EU of the European Parliament

developments in the jurisprudence of the Strasbourg Court, in this respect, with a view to further strengthening interpreters' independence and impartiality.[149] A comparison with legal assistance as an additional component of access to justice could provide further justification for this: despite divergent practice across contracting parties, surely not every person can be appointed as lawyer (including under legal aid schemes).

Lastly, the Court has not considered that it was necessary to rely on the rule of law in cases involving the right to interpretation.[150] That could also be a possible development that would solidify the link between Article 6(3)(e) ECHR and the fairness of the proceedings and would signify to states that the guarantees under Article 6(3) ECHR should be respected. For that reason, this article argues that it is also a *necessary* development in the jurisprudence of the Court.

5. CONCLUDING REMARKS

This article presented the first comprehensive study on how the ECtHR has interpreted the right to interpretation. The brief answer to this path of enquiry can be summarised as follows: evolutively, yet simultaneously cautiously. More specifically, it was shown that the landmark *Golder* judgment was relied upon to underline the link between the right to interpretation and the fairness of the trial. Interpretation under all circumstances should be free of charge. The fairness of the trial requires that interpretation should extend to pre-trial proceedings and the investigation stage. And of course, the 'autonomous concepts' doctrine applies here as well: it was relied upon by the Court to scrutinise states' obligation to provide interpretation, regardless of the categorisation of the offence in the domestic legal order.

Moreover, the Strasbourg Court has emphasised that the right to interpretation should be *practical and effective*: this means that states have positive obligations beyond the time of the appointment of an interpreter. In particular, they should exercise a *degree of control* over the proceedings, with a view to ensuring that the interpretation meets the appropriate standards. More recently, and drawing inspiration from EU law, the Strasbourg Court has departed from the position that states should be put on notice and has clarified that states should act proactively with a view to *verifying* whether the accused person requires the assistance of an interpreter. Crucially, states have also an obligation to *notify* the accused person of their right to interpretation. The aforementioned developments signify a jurisprudence which progressively shifts the burden from the individual to the domestic authorities. Like other guarantees of Article 6(3) ECHR, appropriate interpretation also enables the individual to *participate effectively* in the proceedings.

Considering the internal consistency between the Convention's provisions, and the requirements of legal assistance/legal aid and interpretation, more specifically, it was argued that the Court has rightly dissociated the role of the lawyer from that of the

and of the Council on the Right to Interpretation and Translation in Criminal Proceedings: Transposition Strategies with regard to Interpretation and Translation' (2015) 7 *Monografías de Traducción e Interpretación* 73 at 89–97.

149 See also Brannan (n 3) 147.

150 As it did in *Golder* or in other cases involving Article 6(1) ECHR. For example, concerning the independence of the judiciary see, among others, *Baka v Hungary*, Application 20,261/12, 23 June 2016, and more recently, *Kövesi v Romania*, Application 3594/19, 5 May 2020, para 145.

interpreter. This entails that states will not fulfil their obligations by appointing a lawyer who might undertake the role of the interpreter as well. Further jurisprudence hints at qualifications and the need for interpreters to be independent and stay within the remit of their functions.

Simultaneously, the Court has also been cautious at places: a textual reading of Article 6(3)(e) suggests that it refers to interpretation, not translation; and regarding translation, states are not obliged to provide a translation of *all* evidence or official documents in the procedure. What matters for the Court appears to be that the accused person should be able to understand the case against them, to defend themself and, in particular, to be able to explain before the court their version of events. The Court has also appeared to adopt a deferential approach to the method of appointment of interpreters—not least because the text of Article 6(3)(e) does not prescribe any particular standards or requirements for states. The penultimate section of the article also underlined that, however 'evolutive', the jurisprudence of the Strasbourg Court cannot be deemed to mirror the rights, guarantees and requirements for states under the EU Directive 2010/64.

It has rightly been acknowledged that defendants who do not speak the language of the proceedings are 'especially vulnerable'.[151] Simultaneously, cuts in legal aid and delays in the implementation of states' obligations under secondary EU law render access to justice even more challenging for individuals.[152] And, of course, the present global pandemic has raised and will raise new challenges for access to justice across several areas within the domestic criminal justice system.[153] It could also mean that the right to interpreter should be ensured in online or hybrid hearings, free of charge.[154] This article concedes that costs related to interpretation are not negligible.[155] Yet, there can be no trial that is fair if the accused person cannot understand and participate in the proceedings. This is an essential requirement of the rule of law—both as part of access to courts, but also as part of the fairness of the proceedings.[156]

In its jurisprudence on Article 6(3)(e) ECHR, the Strasbourg Court has not relied on the rule of law; this is different to its approach concerning Article 6(1). This indeed reflects a broader tendency regarding Article 6(3) ECHR, with few rare exceptions.[157] Such reluctance is a shortcoming: not because it would have been necessary to rely on the rule of law to substantiate violations of guarantees under Article 6, but rather

151 Green Paper (n 25) at 27.

152 See also, in this respect, EU Fundamental Rights Agency and European Court of Human Rights, 'Handbook on European law relating to access to justice' (2016), available at: https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf.

153 See the contributions on access to justice by Fisher Frank, Hansen, Harwood, Lindsey, Tallodi, Nicolson and Russell in Ferstman and Fagan (eds), *Covid-19, Law and Human Rights: Essex Dialogues* (2020), available at: http://repository.essex.ac.uk/28002/1/COVID-19%5ELJ%20LAW%20%5EL0%20HUMAN%20RIGHTS%20-%20ESSEX%20DIALOGUES%20%201%20July%202020.pdf.

154 OSCE, 'Fair Trial Rights and Public Health Emergencies' (2021), available at: www.osce.org/odihr/487471, 8.

155 See also, in this respect, Hertog (n 148) 77.

156 Bingham (n 13).

157 One notable exception is the case *Poitrimol v France*, Application 14,032/88, 23 November 1993, para 38, where the Court pointed to the 'the signal importance of the rights of the defence and of the principle of the rule of law in a democratic society'. The case concerned a violation of Articles 6(1) and 6(3)(c) ECHR. See also *Moiseyev v Russia*, Application 62,936/00, 9 October 2008, para 216.

because the reliance on the rule of law primarily with regard to Article 6(1) (insofar as Article 6 is concerned)[158] may send a message that the requirements of Article 6(3) should be granted less prominence and attention.

Evolutive interpretation often appears to have no clearly visible limits; thus, anticipating the next steps in the development of Article 6(3)(e) is a challenging exercise. Nevertheless, the text of EU Directive 2010/64, which goes in a number of areas further than the Convention standards, could become a useful reference point for the Court's future work. But it is unlikely that its provisions, to the extent that they go further than the Convention, will be 'mirrored' by the Strasbourg jurisprudence any time soon. There are no signs that the Court will proceed otherwise than cautiously. And it should not be forgotten, of course, that the corrective function of the Court has to be complemented with the determination of the Committee of Ministers (a political organ responsible for monitoring the implementation of the Court's judgments[159]) to push states in the right direction.[160]

Overall, therefore, unless someone (unlike the present author) is a proponent of textualism or originalism, there is less room to criticise the Court for its approach and more room to acknowledge that, with the exception of few unfortunate judgments, it has progressively developed a jurisprudence that seeks to strengthen a quintessential guarantee of the criminal process and, accordingly, the defence rights of the accused person, taking also into account the textual limitations of Article 6(3)(e) ECHR.

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158 The Court has, of course, referred to the rule of law in the context of alleged violations of further ECHR provisions. However, this study is focused on Article 6.

159 See Article 46 ECHR.

160 See further Çalı and Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14 *Human Rights Law Review* 301.