UNIVERSITATEA LUCIAN BLAGA DIN SIBIU

Doctoral School of SOCIAL SCIENCES

Doctoral field: LAW

PhD THESIS

Fair Trial Standards on the Admissibility of Evidence

SUMMARY

PhD student:
Iulian Balan

Scientific supervisor:
prof. univ. dr. Bianca Guțan

SIBIU2025

The European Court of Human Rights (ECtHR) assesses whether the admission of evidence has undermined the fairness of the proceedings starting from various concrete issues: not only the obtaining of evidence unlawfully, in the broad sense of the term, but also issues concerning the quality of evidence, as well as the difficulties created for the defence by the manner in which the evidence is presented before the domestic courts. In essence, the subject of the research is to determine the conditions under which, in all such situations, the admission of evidence remains compatible with the right to a fair trial guaranteed by the Court.

The thesis addresses a *research gap* that has been insufficiently explored to date. Domestic courts are routinely confronted with issues concerning the admissibility of evidence, and their resolution must comply with Article 6 of the European Convention on Human Rights (the Convention), as interpreted by the ECtHR. Particularly in criminal proceedings, courts increasingly rely on the Court's case-law to understand and apply the newly introduced sanction of excluding unlawfully obtained evidence. Yet in Romanian literature there is no monograph dedicated to this topic. In foreign literature, such monographs are rare and do not address several questions that are of relevance to Romanian law. This state of affairs is explained in part by the Convention's omission to regulate the admissibility of evidence and by the ECtHR's reluctance to intervene directly in this area. Nonetheless, the ECtHR does make certain exceptions to this general approach. And the judgments and decisions that do not directly determine the question of admissibility but take it as their starting point already form a considerable body of case-law.

We have treated this vast and sometimes amorphous body of case law from a unified perspective, starting from the following thesis: the task of the courts is the fair ascertainment of the truth. The opposing view, which is gaining ground in legal scholarship, is that the principle of finding the truth is subordinate to the fundamental values of the rule of law; such values should not be weighed against the principle of truth, but are superior to it and may restrict its very essence. This position, however, is not shared either by the ECtHR or by the majority of judicial practice, which still regard the discovery of the truth as the guiding principle of criminal proceedings. In civil proceedings, priority lies with respect for the principle of party disposition and with ensuring each party's right to a fair trial, and judicial truth may become a relative concept. Nevertheless, where the outcome of the case depends on disputed facts, civil courts tend to establish those facts objectively. Against this background, the overarching aim of the thesis, beyond the analysis of specific standards, is to reaffirm the imperative of ensuring a fair search for truth in both criminal and civil proceedings, in a manner capable of reconciling individual rights with the public interest.

This undertaking is not always facilitated by the ECtHR's principled position that the admissibility of evidence is not governed by rigid rules, but must rather be assessed in the light of the overall fairness of the proceedings. The overall fairness test constitutes a double-edged sword: while it can promote fair outcomes in specific cases, it can also impede the consolidation of a coherent system of clear and foreseeable standards.

A particularly illustrative example is *Knox v. Italy* (2019). The applicant, an American student in Perugia suspected of involvement in the sexual assault and murder of her flat mate, identified a third person as the perpetrator. That individual was arrested and detained for two weeks until he provided an alibi. The applicant argued before the ECtHR that her statements could not form the material element of the offence of false accusation, as they had been made without legal assistance and without her being informed of her right to such assistance. The Italian courts responded that a person cannot be considered charged with an offence that had not yet been committed; therefore, it would be illogical to exclude statements constituting a purely declaratory offence solely because they were obtained without the safeguards attached to the status of an accused.

The Strasbourg Court applied its usual test concerning restrictions on defence rights and rejected this argument. It held that, since the justification relied upon was general and abstract rather than exceptional, it could not warrant such a restriction: as a rule, tainted statements must be excluded. Logically, in the absence of the material element of the offence, the initiation of criminal proceedings becomes impossible. The Court did not, however, go so far as to decriminalise the offence of false accusation made in the absence of legal assistance; instead, it left the State the opportunity to "demonstrate convincingly that the applicant had, as a whole, a fair trial". In the present case, having regard to the applicant's vulnerability and the psychological pressure exerted on her, the Court found that the State had not met this requirement.

This pragmatic solution safeguards the fairness of the case at hand, yet it leaves a major uncertainty: may a suspect deprived of legal assistance lodge a false accusation without incurring liability? And under what conditions could such a person still be convicted?

Such solutions naturally give rise to further questions: what does the ECtHR seek to achieve through such outcomes, and what are its underlying reasons and vision? Is this vision worth defending? The thesis argues that the Strasbourg Court currently finds itself in a difficult historical moment, in which it is making several fundamental bets. The Court believes that it can impose upon the 46 member States of the Council of Europe a uniform system of standards, because those States have undertaken to respect those standards; that it can speak seriously and effectively, that is, neither ironically nor lyrically, about legal values such as

fairness, human dignity, and human rights, because these legal values form part of the European legal culture. Finally, it believes that it can assert its vision both vis-à-vis the 46 States and their populations, in the absence of any direct coercive means, relying solely upon the force of argument and the justness of the solutions it provides. Of course, the Strasbourg Court may lose these bets. Yet it is our view that it must be assisted in winning them. This research has therefore sought to defend the Court's vision, concretely by systematising its case-law into a coherent corpus of standards, without distorting the balancing function of the overall fairness test

Achieving this objective encounters two types of difficulties. These difficulties are specific to the standards examined and have determined the *choice of research methods*:

First, all relevant standards derive from various cases decided by the ECtHR, since the Convention does not regulate the admissibility of evidence. The Court does not formulate its solutions apodictically, but rather by balancing the legal values at stake, based on a meticulous analysis of the concrete circumstances of each case. In a legal system still attached to the positivist-textualist tradition, such as the Romanian legal system, this leads to the Court's standards being little known and poorly understood. Consequently, part of the research required an intensive effort to analyse hundreds of ECtHR judgments in order to group different cases into categories and to clarify the applicable rules. In this endeavour, the thesis has treated ECtHR standards in a positivist manner, as precedents from which departure is not permissible absent a significant distinction in the factual situation under examination.

Second, the existence of difficult cases cannot be ignored, cases in which it is necessary to apply a different methodology, which we have termed the evolutionary interpretation of the Court's case-law. Some of these cases arise from unusual ECtHR judgments, which fit only with difficulty into the broader body of its jurisprudence. We proceeded from the premise that atypical judgments justify a re-examination of the Court's solutions in typical cases and of its general reasoning, so as to determine whether the meaning of those solutions and principles requires refinement. This process of adjustment is guided by the values inherent in the Convention, which ensure that the development of the Court's standards remains faithful to its system of values. Where, following this process, an isolated Strasbourg judgment ultimately proved incompatible with that system, we excluded it. This outcome is permitted by the nature of the Court's case-law, which is not underpinned by the principle of *stare decisis*, but by the broader and more flexible concept of *jurisprudential authority*. A similar approach was required in novel situations which have not yet been adjudicated by the Court, but which have arisen domestically or represent plausible developments of the Court's case-law. In such instances, we did not infer ideal solutions on

the basis of an exuberant interpretation of the ECtHR's reasoning; rather, we assessed, on the basis of a cumulative analysis of the relevant factors, the solution most compatible with the Court's jurisprudence.

The combination of these two methodologies generated several key concepts, which have been used throughout the research:

- The notion of *standards* has a broad meaning, encompassing both rules (that is, norms sufficiently precise to be applied without any balancing exercise) and principles.

- *The admissibility of evidence* refers to the possibility of using such evidence for the purpose of establishing the truth in the case. Although some authors consider that the Strasbourg Court distinguishes between the level of admissibility of evidence and the level of its use for determining the merits or for other procedural outcomes, we have shown that the European Court uses these terms, as well as others of similar meaning, to refer to one and the same issue. The relevant question is whether, through its effects on the guarantees of a fair trial, the judicial decision regarding the possibility of using a piece of evidence has violated Article 6 of the Convention.

- A *restriction* of a fair-trial guarantee at a particular procedural moment must be viewed as a latent violation, which materialises into an actual violation of Article 6 of the Convention only if it remains unremedied by the end of the proceedings. By contrast, a breach of domestic law or of other Convention provisions may be found at any point during the proceedings.

- The status of a person "charged with a criminal offence", from which point the individual is treated as an *accused* and may invoke the guarantees of a fair trial in criminal matters, may be acquired in two ways. First, insofar as this status is formally conferred by the domestic authorities pursuant to procedural rules, it is recognised by the ECtHR, which in turn requires that a person formally charged be afforded the rights guaranteed under Article 6 of the Convention. Second, prior to its formal conferral, this status may be recognised on the basis of a substantive test, namely whether there are significant repercussions of procedural acts on the situation of the person concerned. Two cumulative conditions must be satisfied for a person to acquire the substantive status of being charged: the acts carried out by the authorities must have significant repercussions for that person, and they must be carried out on the basis of suspicions against him or her. The assessment of suspicion requires a comprehensive appraisal, taking into account both the evidence regarding the person, and the intention of the authorities to prosecute that person, as reflected in the procedural acts undertaken.

The thesis devotes one chapter to each principle applied by the ECtHR in the field of the admissibility of evidence: 1. subsidiarity; 2. overall fairness; 3. respect for the specific rights of the accused; 4. the prohibition of ill-treatment. It begins with the general principles (1–2) and continues with those applicable to more clearly defined situations (3–4).

The *general structure* of the chapters reflects the *objectives* of the research and comprises:

- an explanation of the application of the principle under examination in the field of the admissibility of evidence;
- an illustration of the application of the principle in typical cases;
- a critical analysis of the ECtHR's case-law;
- an examination of the application of the principle in domestic law.

One advantage of this structure is that it has made it possible to address seemingly disparate ECtHR judgments on the basis of fundamental legal values. This approach facilitates an understanding of the Court's solutions and eases their application in domestic law. Moreover, this structure has enabled a critical analysis of the ECtHR standards according to clear criteria derived from the legal values constituting the subject of each chapter

Grouped according to the chapters of the thesis, the most important *results of the research* are as follows.

First, the Convention mechanism for safeguarding procedural fairness has a subsidiary character.

The ECtHR does not formulate proper standards concerning the admissibility of evidence; rather, it assesses, *ex post* and as a whole, the fairness of the proceedings. Nevertheless, it sets out a series of fair-trial guarantees which, if applied in domestic proceedings, constitute the functional equivalent of such standards. These standards have a particular nature: apart from entrapment cases and the automatic exclusion of evidence obtained through ill-treatment, no actual rules requiring the exclusion of evidence in certain cases can be honestly inferred from the ECHR's case law. Instead, all standards formulated by the Court can be understood as presumptions, and all relevant cases can be viewed as examples of how those presumptions are applied. Their character as presumptions, rather than strict rules of exclusion, does not deprive them of effectiveness. They allow the effect of the admission of evidence on the overall fairness of the trial to be assessed even before the trial is completed.

This anticipatory assessment is the key to complying with the ECtHR standards on the admissibility of evidence in criminal proceedings. The Court's standards must be interpreted neither literally, so that they can only be applied at the end of the proceedings, nor radically, by equating any restriction of fair-trial guarantees with a violation of a fundamental right that

automatically entails the exclusion of evidence obtained as a result of that restriction. Such interpretations distort the standards invoked, fail to secure the purpose for which they were formulated (the fairness of the proceedings), and run counter to the principle of subsidiarity. According to this principle, domestic authorities must apply fair-trial standards effectively in domestic proceedings, but may adjust them, within a margin of appreciation, to accommodate domestic needs and the procedural framework in force. As a result, in Romanian criminal procedure, in order to determine whether evidence obtained through a restriction of procedural guarantees is admissible, the preliminary chamber judge must take into account the proceedings as a whole, in other words all guarantees capable of compensating for the restriction. However, the judge must take into account only the procedural guarantees secured up to the moment of the decision, since these are practical and effective. Guarantees that may be afforded later, during the trial stage, cannot be taken into account, since those are theoretical and illusory. By its very nature, the preliminary chamber judge's assessment can only constitute an approximation of the overall assessment that can be made at the end of the proceedings. Yet if it is the best possible approximation, reached through a considered judgement that takes into account the relevant ECtHR standards and the domestic procedural requirements on the exclusion of evidence, then the overall fairness test applied by the Court must be adjusted so as to encompass, within its definition, the holistic assessment carried out by the preliminary chamber judge.

Second, the admissibility of evidence must be assessed in light of all the specific circumstances of the case, and not on the basis of an isolated consideration or a particular incident.

Inherent in this overall assessment is the balancing of the rights and interests in conflict. The procedural rights that guarantee the fairness of the proceedings at various stages of the evidentiary process are not absolute and may be restricted in specific contexts; however, any such restriction must be evaluated according to strict criteria, which cannot be reduced to a simple proportionality test. The ECtHR takes into account the specific context of the restriction in order to determine whether it is justified and to ensure that, having regard to the entirety of the safeguards afforded throughout the proceedings, the very essence of the restricted right has been respected.

This mechanism is particularly relevant in cases concerning the exclusion of unlawfully obtained evidence. The Court examines, first, whether the restriction of defence rights at the stage of *obtaining* the evidence was justified, and, second, whether the *admission* of that evidence impaired the very essence of the restricted rights.

The meticulous and nuanced nature of the Court's analysis contributes, paradoxically, to the difficulty of understanding its case-law and to criticism that it is unpredictable and instrumental. In light of these concerns, some authors have proposed that the European Court abandon the overall-fairness test, or at least that it not be applied at the domestic level. We considered that such a solution is unnecessary and sought instead, within the ECtHR's case-law, the criteria for a structured test for assessing the problem of unlawful evidence. The central idea that allows for an understanding of the Court's jurisprudence is that not every breach of the law affects the guarantees of a fair trial. A serious breach of the law is required in order to affect those guarantees. This distinction follows from the Court's consistent case-law, according to which the interpretation and application of domestic law are matters that fall primarily within the competence of national authorities. By contrast, serious violations of domestic law amount to a failure to respect the rule of law. As a value inherent in the Convention, observance of the rule of law is also a safeguard of the right to a fair trial. Accordingly, the seriousness of the alleged violation constitutes one of the criteria for allocating responsibility between the ECtHR and national authorities under Article 6 of the Convention, alongside the effects of the violation on the guarantees relating to the quality of the evidence and the rights of the defence.

The use of the seriousness of the violation as a test distinct from the mere finding of a violation is not an idea encountered in Romanian scholarship, nor is it employed in foreign literature for a systematic analysis of the ECtHR's case-law. Nevertheless, it is consistent with an understanding of fair-trial guarantees as principles (which have a weight dimension), rather than as rigid rules (which do not). I have shown that differentiating violations along the dimension of seriousness is not a novel method in the Court's jurisprudence, where it can be observed in various contexts. Applied to unlawfully obtained evidence, this differentiation mechanism suggests that evidence obtained through manifest or arbitrary, abusive, bad-faith, or substantial violations must, in principle, be excluded.

Of course, in the field of evidence, the idea of distinguishing between serious and attenuated violations must be complemented by an additional criterion. The seriousness of the violation accompanying the obtaining of evidence is irrelevant if the violation did not have a significant impact on the obtaining of that evidence. This criterion is relevant not only for so-called derivative evidence, but in all cases where it is debatable whether the alleged unlawfulness is relevant to the obtaining of the evidence. In all such cases, it must be determined whether the evidence should be treated as "fruit of the poisonous tree".

Through comparative analysis, the thesis highlights the specific nature of the ECtHR's perspective on unlawfully obtained evidence: exclusion is applied by the Court in an

adversarial manner, that is, to counteract the effects that the informational content of intrinsically tainted evidence might have on the verdict, and with the consequence that excluded evidence cannot be readministered. Under the influence of continental theories, the Court considers that exclusion applies to unlawfully obtained evidence, but only where a serious breach of the law has been exploited. In such cases, exclusion must be applied in order to sever the causal link between the violation of the law and the verdict.

After clarifying this difficult point in the ECtHR's case-law, the thesis examines the application of the Court's standards in domestic law. In criminal matters, we analysed several anomalies in the functioning of nullity in the field of evidence as indications that the exclusion of evidence is, by its very nature and notwithstanding the contrary view of the Constitutional Court, a sanction autonomous from nullity. The first sentence of Article 102(3) of the Code of Criminal Procedure, which states that the nullity of the evidentiary act entails the exclusion of the evidence, should not be interpreted as meaning that the exclusion of evidence is always applied through nullity. Its rationale is to prevent the application of the principle *male captum, bene retentum* in respect of evidentiary acts affected by nullity.

Given the binding nature of the Constitutional Court's case-law, the exclusion of unlawfully obtained evidence must be regarded as a special case of nullity, to be applied in light of its specific nature. Accordingly, courts must automatically exclude evidence where domestic norms impose such exclusion imperatively – that is, in cases of express exclusion and in cases of absolute nullity provided for by the Code of Criminal Procedure or resulting from the case-law of the Constitutional Court. Failure to exclude such evidence not only breaches domestic law but also triggers a presumption of prejudice to the fairness of the proceedings as a whole. In all other situations, courts have the obligation to ensure the overall fairness of the proceedings through the manner in which they examine the exclusion of unlawfully obtained evidence. They must take account of the domestic rules on nullity only insofar as they do not hinder the achievement of this objective.

Despite an unfavourable procedural framework, numerous judicial decisions approximate the ECtHR's mechanism of differentiating violations according to their seriousness. For example, the case-law infers the exclusion of evidence from breaches of the conditions for authorising special surveillance or investigative methods, searches, and other intrusive investigative measures, without separately reasoning on the prejudice caused. This line of case-law is not confined to evidence obtained through interferences with private life; it also concerns other situations. Notably, it applies to breaches of procedural provisions that directly guarantee defence rights during the obtention of evidence in the investigative stage. In such cases, prejudice is intrinsic to the violation.

If, however, the violation does not have a serious character, courts tend to focus more on the prejudice to procedural rights and on the existence of alternative remedies than on the violation itself. This tendency, widespread in judicial practice, has been criticised in the literature on the ground that it dispenses courts from the obligation to establish the existence of a violation and its prejudicial nature. On the contrary, the thesis argues that this jurisprudential approach constitutes a correct application of fair-trial standards. The application of these standards does not require a formal finding of a violation. It is sufficient that the claims regarding the existence of a violation be arguable. From the moment this condition is met, except where courts are convinced that no violation occurred, they must safeguard the accused's right to challenge evidence obtained under questionable conditions and verify whether the exclusion of that evidence is necessary.

The exclusion of unlawfully obtained evidence, which falls within the jurisdiction of the preliminary chamber judge, should not be confused with a distinct fair-trial guarantee according to which the trial court may not use certain evidence for a conviction if it cannot guarantee its reliability and the accused's right to challenge it. The difficulty in applying this guarantee domestically arises from the fact that, except in certain expressly regulated cases, criminal procedural law does not distinguish between prejudice to defence rights and the legality of the procedure. Prejudice may be examined only after a breach of the law has been established. If evidence has been lawfully obtained, its doubtful quality may only be considered at the stage of assessing its probative value. If the court considers that the evidence reflects the truth, it cannot exclude it on the ground that the procedure for obtaining it did not guarantee its quality and the accused's right to challenge it. In order to circumvent this limitation, judicial practice interprets the notion of the legality of evidence broadly, in the sense that the legality of obtaining the evidence is understood to include guaranteeing its reliability and the accused's right to challenge it. The conflation of these two issues leads to solutions lacking a basis in domestic law and unable to guarantee procedural fairness in a predictable manner.

Civil procedural law raises distinct issues, as it does not recognise a principled link between the admissibility of evidence and procedural fairness. When it provides for the exclusion of evidence, civil procedural law tends to do so automatically, disregarding both the seriousness of any possible violation and the possibility of guaranteeing in practice the procedural rights of the interested party. The automatic nature of exclusion is appealing due to its apparent simplicity and does not encounter principled opposition in doctrine or case-law. However, it has the consequence that, in order to ensure procedural fairness without departing from the narrowly framed domestic rules, courts are compelled to resort to debatable legal

artifices, such as a restrictive interpretation of the right to private life, which does not correspond to the standard of protection afforded by the ECtHR. This leads to recurrent potential conflicts between the domestic standard and the European one, and avoiding such conflicts requires ever more aberrant developments of the former.

Third, the procedure for obtaining evidence in criminal proceedings must respect the specific rights of the accused.

In the current state of the ECtHR's case-law, the rule is that all restrictions on the rights of the accused occurring during questioning or when obtaining other evidence from him are analysed through the *Ibrahim* test. The essence of this test is the presumption that evidence obtained through restrictions of defence rights which are not justified by compelling reasons must be excluded. The ECtHR formulates detailed standards regarding the mechanism for applying this presumption and the indicative factors that calibrate it. The test is circumscribed by the limits within which the Court recognises the rights of the accused. For example, the Court holds that access to a lawyer must be ensured for any accused person, including one who is not in custody. However, in practice, the Court grounds the application of the presumption in favour of exclusion in the concrete circumstances showing that the accused was placed in a situation of vulnerability or structural asymmetry vis-à-vis the investigative authorities. Being questioned at a police station places the accused in such a structurally asymmetrical position.

By way of exception, attenuated restrictions are examined on the basis of an alternative, less stringent test. Under this alternative test, compelling reasons are no longer required to justify the restriction; relevant and sufficient reasons are enough. Moreover, the absence of relevant and sufficient reasons does not trigger the presumption in favour of exclusion. The accused must demonstrate that he has actually suffered prejudice..

The ECtHR also formulates specific standards concerning the rights to remain silent and not to incriminate oneself. Based on a critical analysis of the Court's case-law, the thesis demonstrates that any individual has, under certain conditions, both the right to refuse specific requests for information and the possibility to lie when responding to such requests. These prerogatives are recognised even outside formal proceedings, by way of exception to the general obligation of individuals to provide truthful information when requested by the authorities. In other words, they have the nature of a privilege, in the sense attributed to this notion in common law. The privilege operates as anticipatory protection for persons compelled to provide information, before they have acquired the status of an accused, formally or substantively.

However, where the privilege is invoked by individuals who have not yet acquired the status of an accused, even in the substantive sense, its application is contingent upon the existence of a concrete risk of criminal liability. The risk of incrimination must relate to past offences, not to an offence that would be committed through the statement given or through the refusal to make a statement, and it must be concrete. If the risk of criminal liability is excluded, because the person cannot obviously be convicted for the offence, or has already been definitively convicted (in which case the presumption of innocence, one of the rationales underlying the privilege, no longer applies), the privilege against self-incrimination does not apply. The link between the information requested and the concrete risk of self-incrimination must be capable of verification by the authority requesting the information, on the basis of the data available and the explanations provided by the person concerned. A request for information addressed to a person with respect to whom there is no suspicion and no intention to pursue criminal liability does not engage the privilege against self-incrimination.

Where the privilege is engaged through the obtaining of evidence, its admissibility is subject to a complex test. The Court incorporates the principle of proportionality, or balancing, into the first of the three criteria of the test, namely the criterion concerning the nature and degree of compulsion. The second criterion, the availability of relevant procedural safeguards, reflects the correlation between two values inherent in the Convention: the fair balance and the rule of law. The third criterion, concerning the use made of the evidence, operates at several levels of complexity, as it refers not only to the Court's general concerns (such as the importance of the evidence in question), but also to the inherent limits of the privilege against self-incrimination. That privilege is, in principle, not affected where the content of the statements is not used, because the person's utterances were elicited solely for the purpose of obtaining a voice sample, or to establish the manner of speaking of the declarant, or the factual context of the case. The Court's distinction appears justified insofar as such evidence either does not depend on the will of the person compelled to provide it, or is not properly self-incriminating.

Romanian law protects the privilege against self-incrimination in conditions seemingly more favourable than those required by the ECtHR. For example, it does not allow any adverse inference to be drawn from the accused's silence, not even within the narrow limits in which the ECtHR allows such assessment. However, the domestic regulation is incomplete and must therefore be carefully aligned with the Court's standards. Once aligned, the following conclusions emerge:

- Pursuant to Article 118 paragraph 3 of the Code of Criminal Procedure, a witness's statements cannot be used against him or her in the same case. Given its rationale (namely the

incompatibility between the status of witness and that of accused), the limitation on the evidential value of the witness statement is mandatory and applies even where the privilege against self-incrimination has not in fact been restricted, because the witness gives a statement after being informed of the right to refuse to do so. Yet, since this inopposability derogates from the principle of establishing the truth despite the fact that the risk of self-incrimination is not attributable to the authorities but to the witness, it applies only in the same case. According to the Constitutional Court, the notion of "case" covers all judicial proceedings concerning the same offence. In other words, the inopposability of a witness's statement operates in indivisible cases, but not in connected ones.

- Any person benefits from anticipatory protection of the privilege against self-incrimination, in accordance with fair trial standards – *i.e*. on the basis of an *ex ante* verifiable link between the evidence requested and a concrete risk of self-incrimination. In the case of a witness heard in criminal proceedings, domestic law provides additional safeguards, in particular informing the witness of this right. Where a witness is heard despite a justified refusal to testify, or where these additional domestic safeguards are breached, the general sanction of exclusion of unlawfully obtained evidence applies. Unlike the limitation of evidential value under Article 118 paragraph 3 of the Code of Criminal Procedure, the exclusion of a statement as illegally obtained is not automatic; it must be applied having regard to the overall fairness of the proceedings. However, it entails the physical removal of the statement from the file, operates *erga omnes*, triggers the exclusion of derivative evidence, and may be applied in any case, not only the one in which the future accused gave the witness statement.

- A suspected witness must be questioned in accordance with the defensive guarantees pertaining to the status of accused. But this status must be precisely defined, based on the relevant standards of the ECtHR. Where such defensive safeguards are not ensured, the witness statement is inadmissible *contra se* under the *Ibrahim* test and may also be inadmissible *erga alios* under the general test of overall fairness. Conversely, where the suspected witness has been heard with those safeguards in place, the statement constitutes lawfully obtained evidence. It may be used even against the suspected witness, because the premise for limiting its evidential value under Article 118 paragraph 3 of the Code of Criminal Procedure is absent; the declarant is not in fact a witness but a suspect or defendant in the case.

The ECtHR also examines the obtaining of evidence through unfair means through the prism of the privilege against self-incrimination. In *Allan v. the United Kingdom* (2002), the Court demonstrated that manipulating an accused person into incriminating himself may reach the level of compulsion. If unfairness does not result in coercion contrary to the privilege

against self-incrimination, the special rights of the accused remain applicable. For example, according to the Court, an accused person subjected to a polygraph examination has the right to legal assistance and must be informed in advance of the charge and of his rights. Where the accused or other persons are manipulated into providing evidence through unfair means that involve neither coercion contrary to the privilege against self-incrimination nor a restriction of the accused's special rights, the general test of overall fairness remains applicable. However, unfairness is a specific pathology of evidence which affects the rule of law and calls for a specific response. In these circumstances, the thesis argues that the Court's reasoning in *Allan v. the United Kingdom* (2002) ought to be generalised, and that it, in principle, requires the exclusion of evidence obtained under the following conditions:

- a State agent employs forms of coercion, stratagems or other means capable of affecting the person's freedom of will;

- as a result of these methods, the interaction between them is the functional equivalent of an interrogation or another evidentiary measure (such as a search);

- which is carried out without respect for the procedural safeguards surrounding that evidentiary measure under the law.

The tendency toward methodological uniformity observable in cases where the accused is the source of the contested evidence also manifests itself in relation to prosecution witnesses. Under the *Al-Khawaja* test, refined in *Schatschaschwili v. Germany* (2015), the prosecution bears the burden of demonstrating a good reason for any significant restrictions imposed on the right to examine prosecution witnesses, guaranteed by Article 6 § 3 (d) of the Convention, whether those restrictions arise from the manner of examining witnesses present in court, from witness anonymity, or from the use of statements by absent witnesses. As in the *Ibrahim* test, unjustified restrictions do not automatically entail exclusion, but they trigger a strong presumption in favour of exclusion. That presumption may be rebutted if there were sufficient counterbalancing factors to ensure the overall fairness of the proceedings. The *Al-Khawaja* test applies not only where the evidence at issue constitutes the sole or decisive evidence for the prosecution, but in all situations where it has had significant weight. However, the extent of the counterbalancing safeguards required is proportionate to the weight of the evidence. Predictably, the test is shaped by the inherent limits to the right to examine prosecution witnesses:

According to a distinction originating in the common-law tradition, where the accused is tried together with a co-defendant, the co-defendant's confession is admissible even if the accused had no opportunity to examine him, but only to prove the existence of the offence, not the accused's participation in it.

The special protection afforded to vulnerable victims justifies certain less intrusive interferences with the accused's right to examine them, such as preventing direct eye contact between victim and accused, indirect examination of minor victims of sexual offences, or dispensing with re-hearing the victim at trial where the defence has had an adequate opportunity to examine him or her during the investigation. Where such an opportunity has not been afforded, the omission of direct re-examination of a vulnerable victim cannot be justified by the nature of the case alone. The risk of secondary victimisation must be demonstrated concretely, for instance through expert evidence.

Fourth, the admission of testimonial evidence obtained through torture or other ill-treatment necessarily undermines the fairness of the proceedings, provided that the evidence is relied upon by the court in its judgment of conviction. Such evidence must therefore be excluded automatically. With respect to real evidence, the distinction drawn by the ECtHR between torture and inhuman or degrading treatment is decisive. Where real evidence has been obtained as a direct result of torture, automatic exclusion likewise applies. By contrast, where real evidence has been obtained through inhuman or degrading treatment falling short of torture, exclusion is not automatic: such evidence must generally be excluded, although the fairness of the proceedings may exceptionally be preserved if it is shown that the use of the evidence had no bearing on the conviction or sentence.

The Romanian Code of Criminal Procedure provides for automatic exclusion only where evidence has been obtained through torture. While this legislative choice is understandable, as it transposes the analogous rule in the 1984 United Nations Convention against Torture, the provision should be supplemented to encompass testimonial evidence obtained through inhuman or degrading treatment. Conversely, it does not appear advisable to codify the automatic exclusion of real evidence obtained through inhuman or degrading treatment. In typical cases, courts automatically exclude such evidence through various routes, such as the principle of loyalty. And in borderline cases, for instance where the evidence is indispensable for the defence, automatic exclusion would be contrary to the right to a fair trial and should not be ordered.

The distinction drawn between real and testimonial evidence is a vulnerable point in the Court's standards. It requires complex and sometimes difficult-to-grasp criteria for differentiating testimonial from real evidence and torture from inhuman or degrading treatment. For example, in *Zličić v. Serbia* (2021), the ECtHR held that a written document (a certificate recording the seizure of drugs) signed by the accused following inhuman and degrading treatment, in other words, a document that did not pre-exist and whose creation was not independent of his will, constituted real evidence and was not subject to automatic

exclusion! I explained that the scope of the automatic exclusion does not invariably depend on the intrinsic nature of the evidence. Testimonial evidence obtained through inhuman or degrading treatment need not be automatically excluded where it is purely ancillary to real evidence.

Furthermore, the legal classification of ill-treatment depends not only on its severity but also on its purpose. Consequently, brutal conduct that would amount to torture when used to compel a person to provide testimonial evidence may be classified as inhuman or degrading treatment, or even as conduct not engaging Article 3 of the Convention, when applied for the purpose of overcoming resistance to legitimate actions, such as those necessary to apprehend individuals or secure real evidence.

Although the standard of proof "beyond reasonable doubt" typically employed by the Strasbourg Court to establish ill-treatment is controversial, we emphasised that it is reliable, provided its underlying logic and inherent limits are understood. According to the ECtHR, the applicant has the formal burden of proof, a point omitted in continental procedural systems. At the same time, facts must be convincingly established before they may be retained, a requirement not necessarily imposed within common-law evidentiary methodology. Within the Convention system, uncertainty has legal significance and may justify admitting an application, but it is rigorously confined by evidentiary mechanisms. Uncertainty may be relied upon in one of the following situations:

- where the conditions for factual or legal presumptions that reverse the burden of proof are met; or

- under Article 6 of the Convention, where the persistence of a real risk that statements were obtained through ill-treatment is attributable to the ineffectiveness of the authorities' investigation. In other words, the thesis we defended in the paper is that, in order to automatically exclude evidence obtained through ill-treatment, a lower standard of proof than that typically used to prove ill-treatment should be applied.

Although Romanian jurisprudence, inspired by the continental tradition, instinctively applies what may be described as an approximation of ECtHR standards, we demonstrated, through striking examples drawn from case-law, the necessity for courts to adopt explicitly certain key concepts from the Court's jurisprudence. Establishing ill-treatment as an incidental fact is distinct from proving the criminal accusation, since the automatic exclusion of evidence obtained through ill-treatment applies even where the evidence is, in fact, credible. Arguable claims that evidence was obtained through ill-treatment must trigger an effective and autonomous investigation. If the investigation is inadequate and a real risk persists that the evidence was obtained in that manner, the sanction of automatic exclusion must be applied

With respect to *the implications of ECtHR standards for the domestic law*, the thesis shows that several sources of tension with Strasbourg case-law must be removed from Romanian positive law. For this purpose, numerous *de lege ferenda* proposals were formulated. Among these, the reform with the most favourable cost-benefit ratio would consist in reconfiguring the exclusion of evidence in criminal proceedings along the following lines:

1. Must be excluded:

a) any evidence obtained through torture and testimonial evidence obtained through inhuman or degrading treatment. Exclusion should be ordered not only where the obtaining of such evidence has been proved beyond reasonable doubt, but also where there is a real risk that it was obtained in this manner and the circumstances of its obtaining have not been effectively investigated;

b) evidence obtained in flagrant breach of express prohibitions on obtaining evidence or of provisions whose infringement is sanctioned by absolute nullity;

c) evidence obtained through other serious breaches of legal provisions, unless its use does not impair the accused's right to a fair trial.

2. The seriousness of the breach should be assessed on the basis of the following criteria:

a) the arbitrary or manifest nature of the breach;

b) the exercise of investigative or prosecutorial powers for a purpose contrary to that for which they were conferred;

c) the good or bad faith of the authority committing the breach;

d) the substantive or merely technical nature of the breach.

3. The causal link between illegality and the obtaining of evidence must be retained if the evidence would not have been obtained in the absence of the violation and resulted from its exploitation.

4. Separate from the exclusion of unlawfully obtained evidence, which falls within the competence of the preliminary chamber judge, the law should regulate the prohibition, addressed to the trial court, on using against the accused evidence whose reliability and the accused's right to challenge it are not effectively guaranteed.

5. Finally, in order to respect the principle of subsidiarity, any breach of the right to a fair trial must be assessed having regard to the overall fairness of the proceedings. For this purpose, not only the trial court but also the preliminary chamber judge must assess the impact that the admission of a piece of evidence would have on the overall fairness of the proceedings.

Legislative changes alone cannot guarantee the effective application of fair trial standards in civil and criminal proceedings. It is necessary to focus *the continuing training* of

judges and lawyers on understanding and correctly interpreting ECHR standards. The frequency and flagrant nature of the shortcomings we noted in the first chapter regarding the practical application of the Court's case law are undoubtedly linked to the summary nature of continuing training programs for magistrates on ECHR standards. We have shown that the existence of seminars with general objectives concerning the application of the Convention is insufficient, given that the continuing training of magistrates should be geared towards the practical application of the knowledge taught.

To this end, special emphasis must be placed on the application in domestic proceedings of the standards expressly formulated by the ECtHR, including those on the admissibility of evidence. Priority should be given to mastering the basic positivist methodology for interpreting these standards:

- identifying the ECtHR judgment in which a particular standard was formulated;
- analysing the context in which the standard was articulated;
- assessing whether the standard may be applied in different but essentially similar contexts, or whether its application is inappropriate in situations that differ significantly from the one in which it was developed.

Only after these fundamental methods have been mastered should attention turn to the evolutionary interpretation of the standards expressly formulated by the Court, on the basis of a methodology formulated rigorously and prudently.

Finally, *we encouraged Romanian scholars* to devote greater attention to the careful analysis of the Strasbourg Court’s case-law in light of the legal values that underpin it, so that its development can be correctly understood and, where possible, anticipated. It is true that such research often demands a largely unglamorous effort aimed at resolving a multitude of cases that matter chiefly to practitioners. Yet it may sometimes yield unexpected results, since the fair-trial standards have the capacity to offer elegant solutions to some of the most heated doctrinal disputes concerning the interpretation of domestic law.

The present research focused on the admissibility of evidence. Certain adjacent issues, such as the presumption of innocence, the right to obtain evidence, and evidentiary relevance, did not form the direct object of the study. Nor did the problem of entrapment, given its *sui generis* nature and the difficulty of fitting it neatly into the paradigm of the exclusion of unlawfully obtained evidence. These matters require separate examination of ECtHR jurisprudence. If such research is undertaken on methodological grounds similar to those employed here, we consider that its results can be integrated with our own into a coherent system.