Human Rights Law Review, 2025, **25**, ngaf031
https://doi.org/10.1093/hrlr/ngaf031
Article

The *Engel* criteria in the 21st century: irrational flexibility and deference in recent European Court of Human Rights jurisprudence

Ryan Goss*

Associate Professor, Australian National University
*Corresponding author. ANU Law School, Australian National University, Canberra ACT 2600, Australia.
E-mail: ryan.goss@anu.edu.au

ABSTRACT

What does it mean for someone to be charged with a criminal offence? This is a question of considerable significance for multiple heavily-litigated European Convention on Human Rights (ECHR) guarantees. For decades the approach to the criminal charge threshold has been to recite the Engel 'autonomous meaning' criteria. This article is focused squarely on the last decade of the European Court of Human Rights (ECtHR) case law on the Engel criteria, not only on the Grand Chamber decisions in *Gestur Jónsson and Ragnar Halldór Hall v Iceland* (2020) and *Grosam v Czech Republic* (2023), but also dozens of other recent decisions, most of which have received no detailed scholarly attention. Based on this analysis, this article argues, first, that the recent jurisprudence is characterized by a degree of incoherence and inconsistency that manifests as 'irrational flexibility'. Second, and contrary to much existing literature, the last decade of case law shows that the Engel criteria can provide cover for decisions facilitating State sovereignty or facilitating State arguments justifying restrictions on the basis of broader public interests. Thus the article contributes to much broader conversations about recent trends in the ECtHR's oscillating approach to European supervision and State sovereignty: the article draws together some of the most heavily-litigated ECHR guarantees and some of the more prominent themes in current commentary on ECtHR case law more generally.

KEYWORDS: Article 6 European Convention on Human Rights; criminal justice; autonomous meaning; criminal fair trial rights; margin of appreciation; deference.

Received: October 23, 2024. **Revised:** May 4, 2025. **Accepted:** July 25, 2025

1. INTRODUCTION

What does it mean for someone to be charged with a criminal offence? In the context of the European Convention on Human Rights (ECHR), it is a question of considerable significance. Article 6 of the ECHR, for example, guarantees a number of fair trial rights: in addition to a general fair hearing right in Article 6(1), Article 6(2), and Article 6(3) ECHR provide specific additional enumerated rights for those 'charged with a criminal offence'. In the case of Article 6(3), these rights are described as 'minimum rights'. Article 6 is a heavily-litigated provision,[1] protecting rights that hold a 'prominent . . . place in a democratic society'.[2] But other aspects of the ECHR system—for example, Article 7 ECHR and Articles 2–4 of Protocol 7—also attach particular guarantees or significance to those determined to be subject to criminal proceedings. It is therefore important that courts, officials, and litigants be able to determine whether or not particular legal circumstances meet the threshold test of 'charged with a criminal offence'. The jurisprudence on that threshold tests also provides a specific lens with which to examine broader trends in the case law of the European Court of Human Rights (the ECtHR).

For decades the standard ECtHR approach to the criminal charge threshold has been to recite and apply 'the *Engel* criteria,' a tripartite test articulated in the 1976 decision in *Engel v The Netherlands*.[3] Initially developed in the Article 6 context, we will see that the use of the *Engel* criteria has since expanded into other criminal justice-related areas of the ECHR. The *Engel* criteria are thus now almost half a century old, and have hence withstood 'a near-complete transformation' of the ECHR system.[4]

In thinking generally about what makes a criminal offence, or what makes a crime, there are rich doctrinal, criminological and theoretical literatures.[5] This article is, however, focused squarely on the last decade of ECtHR case law on the *Engel* criteria, and is prompted in part by the ECtHR Grand Chamber's decisions in *Gestur Jónsson and Ragnar Halldór Hall v Iceland* (2020)[6] and *Grosam v Czech Republic* (2023).[7] Both decisions have received only limited scholarly attention.[8] These Grand Chamber decisions are of interest in themselves, but just as importantly serve as a prompt to examine the broader recent case law on this crucial aspect of the ECtHR's jurisprudence: hence this article also draws on more than 30 Chamber decisions from the last decade. The threshold determined by the *Engel* criteria is significant, as Judges Sicilianos, Ravarani and Serghides remind us in their Joint Dissenting Opinion in *Gestur Jónsson*:

> One should never forget what it means not to fall under the umbrella of Article 6: nothing other than being deprived of the guarantees of fair proceedings. This can be seen in particular,

[1] Decisions are Chamber Merits decisions unless otherwise indicated. Law current to 1 August 2024. See eg European Court of Human Rights, *Violations by Article and by State 2023* (Council of Europe 2023).

[2] See eg *Yuksel Yalcinkaya v Turkiye* (26 September 2023) (App 15669/20) at para 344.

[3] *Engel v Netherlands* (8 June 1976) (App 5100/71) at para 82.

[4] Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court' (2021) 2 *European Convention on Human Rights Law Review* 180 at 181. See also Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 *Human Rights Law Review* 473 at 474.

[5] Lamond, 'What is a Crime?' (2007) 27(4) *OJLS* 609 at 609–611.

[6] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* (22 December 2020) (App 68,273/14).

[7] *Grosam v Czech Republic (GC)* (1 June 2023)(App 19750/13).

[8] See Harris and others, *Law of the European Convention on Human Rights* (5th edn, 2023)at 382; Andrijauskaitė, 'The case of Gestur Jónsson and Ragnar Halldór Hall v Iceland: Between Two Paradigms Of Punishment' *Strasbourg Observers Blog* (19 February 2021) < https://strasbourgobservers.com/2021/02/19/the-case-of-gestur-jonsson-and-ragnar-halldor-hall-v-iceland-between-two-paradigms-of-punishment/>; Bobek and Kosař, 'The Strasbourg Court Goes Astray: On Grosam v. Czech Republic' *VerfBlog* (16 August 2023) < https://verfassungsblog.de/the-strasbourg-court-goes-astray/>; Herregodts, 'Grosam v The Czech Republic: Being The Master Of Characterisation, Not The Master Of Transformation' *Strasbourg Observers Blog* (1 August 2023) < https://strasbourgobservers.com/2023/08/01/grosam-v-the-czech-republic-being-the-master-of-characterisation-not-the-master-of-transformation/>.

> in the field of disciplinary proceedings, but not only there. Huge interests can be at stake, and such proceedings can lead to extremely heavy sanctions.[9]

Indeed, the ECHR's 'most stringent . . . due process guarantees are reserved for those charged with a criminal offence.'[10] It is thus important that the *Engel* threshold test be as clear, predictable and coherently-applied as possible. Almost two decades ago, Stefan Trechsel argued that the *Engel* jurisprudence 'does not excel in clarity and simplicity'.[11] This article's analysis of the recent jurisprudence offers two overlapping threads of argument that build on and add to the existing criticism of the *Engel* oeuvre.

The first of the two major overlapping arguments is this: the recent jurisprudence is characterized by a degree of incoherence and inconsistency. The article will sketch out various ways in which that incoherence and inconsistency manifests. It is important to acknowledge that perhaps such incoherence could be seen as a product of the ECtHR's case-by-case approach, or as the ECtHR doing its best with the ECHR's open-textured drafting. But a central theme to many of those manifestations is what has been described in a different Article 6 context as 'irrational flexibility': the ECtHR affording itself 'the ability to apply different tests or approaches' in ostensibly similar situations 'without explaining why one test or approach is appropriate in one situation but not in another'.[12] If the ECtHR chooses to adopt different approaches in similar situations (as this article will seek to establish it has indeed done), then in future the ECtHR ought to explain more clearly and explicitly why those choices have been made. At the very least, such explanation would serve the interests of 'legal certainty, foreseeability and equality before the law' that are furthered when the ECtHR does 'not depart, without cogent reason,' from approaches taken in previous cases.[13] Put another way, asking the ECtHR to simply explain why it has taken a particular approach in a particular case would serve 'the inherent (pre-judicial) rationality of treating like cases alike, and different cases differently'.[14] As will be demonstrated, this 'irrational flexibility' is evident in the ECtHR's treatment of individual aspects of the *Engel* criteria but also its treatment of the relationships between the various criteria. The article will thus amplify and expand on the observation in the Joint Dissenting Opinion of Judges Sicilianos, Ravarani, and Serghides in *Gestur Jónsson* that '[t]he application of the *Engel* criteria is not an exact science; much depends on where the emphasis is placed'.[15] The difficulty in much of the case law, as will be set out below, is that the ECtHR rarely offers meaningful guidance or explanation as to why and how 'the emphasis' has been placed differently.

The second major argument situates my critique of the *Engel* criteria within a broader ECHR context, and thus offers a contribution to much broader debates. To step back for a moment: as we will see, the ECtHR has interpreted 'charged with a criminal offence' as one of a number of ECHR terms having an 'autonomous meaning,' that is, a supranational meaning not determined by domestic categorisations.[16] This is also sometimes described as 'independent classification

[9] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 22 of JDO. As a contemporary example of this point, see also, Moiseienko, 'The Sins of the Fathers: Targeted Sanctions against Family Members of Primary Targets' (2024) 87 *Modern Law Review* 926 at 955.

[10] Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* (3rd edn, 2012) at 209.

[11] Trechsel, *Human Rights in Criminal Proceedings* (2006) at 29; see also van Dijk and others, *Theory and practice of the European Convention on Human Rights (5th edn)* (5th edn, 2018) at 538.

[12] Goss, *Criminal Fair Trial Rights* (2014) at 10.

[13] *Stafford v United Kingdom* (App 46295/99) (2002) 35 EHRR 32 at para 68. See also ibid at 7–8.

[14] Roberts, 'Does Article 6 of the ECHR Require Reasoned Verdicts in Criminal Trials?' (2011)*Human Rights Law Review* 1 at 10–11.

[15] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 6 of JDO.

[16] See, eg Harris and others, *Law of the European Convention on Human Rights* at 380; Trechsel, *Human Rights in Criminal Proceedings* at 14–16; van Dijk and others, *Theory practice of the European Convention on Human Rights (5th edn)* at 523–539; Amos, *Human Rights Law* (Hart 2014) at 335–339; Ovey and White, *Jacobs and White: The European Convention on Human*

of terms'.[17] The orthodox position is to say that whether any given set of proceedings is classified as 'criminal' will not be determined by the *domestic status* of those proceedings, but will be subject to a form of *overriding European supervision*. This approach is said to be justified by the need 'to prevent contracting states from undermining the [ECHR]'s due process guarantees by reclassifying . . . as a disciplinary, administrative, regulatory, or civil penalty' rather than as criminal.[18] (The autonomous meaning assigned to 'criminal' or 'criminal charge' in Article 6 also carries over to the ECtHR's interpretation of Article 7 ECHR and Articles 2, 3, and 4 of the Seventh Protocol to the ECHR; this article's scope also includes *Engel* criteria cases with respect to those provisions).[19]

The literature on autonomous meaning thus emphasizes the importance of European supervision: for example, an advantage of the autonomous meaning approach is said to be that it helps avoid 'an unacceptably uneven application of the [ECHR] from one state to another'.[20] Moreover, without a notion of autonomous meaning, the 'effect of the [ECHR] in national law could potentially be reduced to vanishing point.'[21] As Trechsel put it, the ECtHR's articulation of autonomous meaning aspires:

> to achieve the uniform application of the [ECHR] in Europe. In fact, if states were free themselves to determine what matters were to be regarded as criminal, the scope of the protection offered by Article 6 would differ substantially from one country to the other . . . .the Strasbourg authorities have succeeded in creating an impressive number of autonomous notions . . . [22].

Of course, within this framework, the literature acknowledges space for some degree of deference to domestic law. Trechsel even refers to 'a certain margin of appreciation'.[23] But the emphasis is always on supranational consistency and supervision. Writing a decade ago, Legg argued it was thus 'hardly surprising that the ECtHR defers very little to the state' in the criminal autonomous meaning context.[24]

And yet, one of the themes that this article will go on to draw out is this: in reality, the last decade of case law shows that the *Engel* criteria can provide cover for decisions that facilitate Contracting State sovereignty, for Contracting State arguments justifying restrictions on the basis of broader public interests, and for facilitating those States to avoid the application of the full range of ECHR guarantees. This is a narrow but significant point: statements about European supervision and consistency should not distract from the State-facilitating substance of the recent jurisprudence. In this way, this article contributes an under-appreciated case study to much broader conversations about recent trends in the ECtHR's oscillating approach to European supervision and Contracting State sovereignty. Those conversations include discussion of the ECtHR's approach to the margin of appreciation,[25] its 'procedural turn'[26] or 'turn to

Rights (5th edn, OUP 2010) at243–247; Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* at 210–211; Clayton and Tomlinson (eds), *The Law of Human Rights* (2nd edn, 2009) at632. Note that 'civil rights and obligations' is also said to bear an autonomous meaning: see, eg van Dijk and others, *Theory and practice of the European Convention on Human Rights (5th edn)* at 500–523.

17 Bjorge, *Domestic Application of the ECHR* (2015) at 202.

18 Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* at 210; cf Steven Greer, *The European Convention on Human Rights: achievements, problems and prospects* (2nd edn, 2006) at 213; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007) at 41–43.

19 Harris and others, *Law of the European Convention on Human Rights* at 380.

20 Ibid at 380.

21 Bjorge, *Domestic Application of the ECHR* at 203.

22 Trechsel, *Human Rights in Criminal Proceedings* at 15–16.

23 Ibid at 30.

24 Legg, *The Margin of Appreciation in International Human Rights Law* (2012) at 111.

25 See eg Jackson, 'Judicial avoidance at the European Court of Human Rights: Institutional authority, the procedural turn, and docket control' (2022) 20 *International Journal of Constitutional Law* 112.

subsidiarity'[27], and the appeal of 'prudent self-restraint'.[28] Typically these conversations take place in the context of the qualified rights in Articles 8–11 rather than the specific criminal justice rights context;[29] this is perhaps related to the ECtHR's prominent declarations that Article 6 'cannot be sacrificed for the sake of expedience' and is immune from public interest balancing or justification arguments.[30] Hence what this article does is draw together some of the most heavily litigated ECHR guarantees and some of the more prominent themes in current commentary on ECtHR case law more generally. To be clear, this article is not an argument *against* subsidiarity or deference in the criminal justice context: the argument is more nuanced. The argument on this point is that, despite the typical framing of 'autonomous meanings' as being primarily about supranational standards, the recent jurisprudence reveals deference to States is taking place under the guise of analysis of autonomous meanings and supranational consistent European standards. This criticism also dovetails with the criticism of irrational flexibility outlined above, and with broader recent trends in which the ECtHR goes out of its way to facilitate governments' public interest balancing arguments in the criminal justice arena.[31]

This article is divided into several parts, each of which outlines briefly the traditional orthodox position but then moves to advance the arguments above with a sharp focus on the ECtHR's reasoning in decisions over the last decade. I first outline the tripartite *Engel* criteria in their jurisprudential context and summarize the standard accounts of their application. I then proceed to use the different elements of the *Engel* test as prisms through which to analyse the recent case law and, in particular, to advance the two major overlapping themes of argument outlined above in the context of each of the *Engel* criteria.

2. INTRODUCING THE *ENGEL* CRITERIA

As noted above, the *Engel* criteria are central to the ECtHR's application of the autonomous meaning of 'criminal'. *Engel* concerned a number of applicants who, as conscript soldiers, had been subject to penalties for offences against military discipline.[32] The question was how to apply 'a distinction of long standing . . . between disciplinary proceedings and criminal proceedings': a person subject to the latter would enjoy the full range of Article 6 guarantees, while a person subject to the former may not.[33] Given the significance of the *Engel* decision it is worth setting out in full the ECtHR's summary of that context:

> The [ECHR] leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. . . .

[26] See eg Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 176; Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68 *International and Comparative Law Quarterly* 91.

[27] See, eg, Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court' at 185; Goss, 'The Disappearing "Minimum Rights" of Article 6 ECHR: the Unfortunate Legacy of Ibrahim and Beuze' (2023) 23 *Human Rights Law Review* 1 at 2–3.

[28] Bates, 'Strasbourg's Integrationist Role, or the Need for Self-restraint?' (2020) 1 *European Convention on Human Rights Law Review* 14 at 20–21.

[29] Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' at 483–485.

[30] *Ramanauskas v Lithuania (GC)* (5 February 2008) (App 74420/02) at para 53; *Kostovski v Netherlands* (20 November 1989) (App 11454/85) at para 44. These statements certainly warrant critical scrutiny: cf Goss, *Criminal Fair Trial Rights* at 185–201.

[31] See eg Samartzis, 'Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the ECHR' (2021) *Human Rights Law Review* 1; Goss, 'The Disappearing "Minimum Rights" of Article 6 ECHR: the Unfortunate Legacy of Ibrahim and Beuze'.

[32] *Engel v Netherlands* at 12.

[33] Ibid at 80.

> The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will . . . The [ECtHR]therefore has jurisdiction, under Article 6 and even without reference to Articles 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal.
>
> In short, the 'autonomy' of the concept of 'criminal' operates, as it were, one way only.[34]

The judgment then went on to set out what have become known as the *Engel* criteria:

> [Criterion 1] In this connection, **it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently.** This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.
>
> [Criterion 2] **The very nature of the offence is a factor of greater import**. When a service-man finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law . . . .
>
> [Criterion 3] However, supervision by the [ECtHR] does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration **the degree of severity of the penalty that the person concerned risks incurring**. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the [ECHR] to respect for the physical liberty of the person all require that this should be so . . . .[35]

This article is primarily a doctrinal analysis, but it is worthwhile to dwell for a moment on what is *not* in the *Engel* criteria: we may note that the criteria do not offer a substantive theoretical account of what *is*, or what is *not*, a criminal offence. Even Criterion 2, which Trechsel has suggested 'ought to be the essential' criterion,[36] seems to beg the question. One could imagine, to adapt Lamond's approach as one example, an alternative jurisprudence in which the ECtHR asked whether the relevant provisions or norms deal with 'the sorts of serious wrongs that merit state punishment of the wrongdoer'.[37] The absence of such a theoretical account is perhaps one reason that helps explain the difficulties that, as this article argues, characterize some of the recent ECtHR case law.

Central to that case law is the ECtHR's understanding of the relationship between the various criteria. The orthodox position typically describes Criterion 1 as a standalone threshold question, before moving on to Criteria 2 and 3, which are then usually described as *alternative*

[34] Ibid at 81.
[35] Ibid at 82 (emphasis added).
[36] Trechsel, *Human Rights in Criminal Proceedings* at 30.
[37] Lamond, 'What is a Crime?' at 631.

criteria. The commonly-expressed formula was recently articulated in the late-2023 decision in *Vasile Sorin Marin v Romania*:

> The second and third criteria are *alternative and not necessarily cumulative*. However, *this does not exclude a cumulative approach in cases where separate analysis of each criterion does not make it possible to reach a clear conclusion* as to the existence of a criminal charge . . . .[38]

In the recent case law this formulation is plentiful,[39] and this summary is also mostly reflected in the existing literature.[40] It is worth pausing to note that this formula—*alternative and not necessarily cumulative, except where a cumulative approach is necessary*—may allow for significant analytical flexibility. We have two factors that are standalone alternatives, except when they are not. A charitable interpretation may be that this is a very pragmatic approach on the part of the ECtHR, providing a range of ways of analysing a diverse set of jurisdictions, and reflecting a desire to avoid a one-size-fits-all test in a complex field of law.

But one might wonder if this formula also allows a particular overall result to be reverse engineered by choosing between *alternative* and *cumulative* approaches in a particular case. That is, if a judge was inclined to find that a particular proceedings were *not* criminal but analysis under Criterion 2 tended to suggest they *may be* criminal, then that judge could adopt a *cumulative* approach whereby countervailing Criterion 3 factors could be deployed to overcome the Criterion 2 factors.[41] Another judge looking at the same matter might instead simply regard the criteria as *alternatives* and hence go no further than noting that Criterion 2 dictated a finding that the proceedings were criminal.[42] This flexibility may be the sort of phenomenon that Judges Sicilianos, Ravarani, and Serghides had in mind when they described the application of the *Engel* criteria as not being 'an exact science; much depends on where the emphasis is placed'.[43] We will return to these questions below.

There is an important acknowledgment or nuance to add here. The ECtHR's insistence, that the *Engel* criteria are alternative and not necessarily cumulative, naturally builds in flexibility as a core element of the *Engel* assessment. The critique made in this article is not of flexibility per se. Instead, as the argument will continue, the criticism is of that form of '*irrational flexibility*' wherein the ECtHR fails to treat like cases alike and fails to explain the reasons for that treatment, or fails to explain why it has departed from its approach in previous cases. As noted above, the

[38] *Vasile Sorin Marin v Romania* at para 41 (emphasis added).

[39] See, in the recent cases: *Mihalache v Romania (GC)* (8 July 2019) (App 54012/10) at para 54; *Polyakh and Ors v Ukraine* [154]; *Ali Riza and Ors v Turkey* (28 January 2020) (App 30226/10) at para 153; *Piskin v Turkey* at para 103; *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 78; *Xhoxhaj v Albania* at para 241; *Buliga v Romania* at para 24; *Negulescu v Romania* (16 February 2021) (App 11230/12) at para 22; *Milosevic v Croatia* (31 August 2021) (App 12022/16) at para 30; *Goulandris and Vardinogianni v Greece* (16 June 2022) (App 1735/13) at para 52; *Grosam v Czech Republic (Chamber)* at para 93; *Angerjarv and Greinoman v Estonia* (4 October 2022) (App 16358/18) at para 87; *Vegotex Int SA v Belgium (GC)* (3 November 2022) (App 49812/09) at para 67; *Grosam v Czech Republic (GC)* at para 113; *Tuleya v Poland* (6 July 2023) (App 21181/19) at para 279. Much earlier, see *Ezeh and Connors v United Kingdom (GC)* (9 October 2003) (App 39665/98) at para 86.

[40] See eg Harris and others, *Law of the European Convention on Human Rights* at 380; Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* at 212–213; Trechsel, *Human Rights in Criminal Proceedings* at 27–28. But the literature has offered some additional points of nuance: suggesting, for example, that the criteria 'are to be assessed independently and . . . most importance is to be attached to the third' (Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* at 211); or noting that the ECtHR's case law is not 'quite consistent' in treating the criteria as alternatives (Trechsel, *Human Rights in Criminal Proceedings* at 27–28); cf van Dijk and others, *Theory and practice of the European Convention on Human Rights* (5th edn) at 532, citing *Ozturk v Germany* (21 February 1984) (App 8544/79) at para 54 and *Lutz v Germany* (25 August 1987) (App 8544/79) at para 55.

[41] By analogy, see Goss, *Criminal Fair Trial Rights* at 139–159 on counterbalancing.

[42] As an indication of the ECtHR's awareness of the availability of choice, see, eg the conclusion in *Ali Riza and Ors v Turkey* at para 154: 'the Court considers that none of the elements above, *taken alternatively or cumulatively*, is sufficient to reach a conclusion that the disciplinary proceedings against the applicants concerned the determination of a criminal charge within the meaning of Article 6 of the Convention.' (emphasis added).

[43] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 6 of JDO. Compare, in a different Article 6 context, the criticism of the ECtHR's 'proceedings as a whole' jurisprudence in Goss, *Criminal Fair Trial Rights* at 136–138.

ECtHR itself has explained how the interests of 'legal certainty, foreseeability and equality before the law' are furthered when it does 'not depart, without cogent reason,' from approaches taken in previous cases.[44] Flexibility per se is not the problem.

There are now almost 50 years of case law on the *Engel* criteria, and the focus of this article is principally on the case law over the last decade. It is noteworthy that, almost two decades ago, Trechsel described the state of the law in these terms: 'There are numerous criteria and sub-criteria, but the relationship between these criteria is not obvious and there are a number of contradictions. . . . '.[45] In what follows, this article uses the two overarching themes of argument to work through the most recent case law, and how it addresses and applies the *Engel* criteria. In so doing, the article expands upon the older concerns expressed by Trechsel and others, and argues that the ECtHR's case law frequently exhibits an irrational flexibility that often facilitates Contracting States' arguments to limit the application of Article 6 guarantees.

3. THE DISPENSABLE STARTING POINT? (CRITERION 1)

In the literature and the case law it is often hard to detect much enthusiasm or interest in the first of the *Engel* criteria. Criterion 1 often appears to be regarded simply as a time- and labour-saving threshold question: if 'the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law'[46] then the full range of Article 6 guarantees will likely apply, and there is little need to be too concerned about the second and third criteria. As was said in *Engel*, 'the "autonomy" of the concept of "criminal" operates . . . one way only'.[47]

A similar approach is evident in the most recent case law. In *Gestur Jónsson and Ragnar Halldór Hall v Iceland*, for example, the majority of the ECtHR reiterated that 'the first of the *Engel* criteria is of relative weight and serves only as a starting-point'.[48] In both *Zaja v Croatia* and *Pantalon v Croatia*, the ECtHR repeat this phrase and add:

> If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Court will look behind the national classification and examine the offence in the light of the second and/or third criteria . . . [49]

Many of the other recent cases offer similar explanations,[50] including, where appropriate, emphasising that a finding that domestic law classifies an offence as *non*-criminal will *not* be

[44] *Stafford v United Kingdom* (App 46,295/99) (2002) 35 EHRR 32 at para 68. See also ibid at 7–8.

[45] Trechsel, *Human Rights in Criminal Proceedings* at 29–30.

[46] *Engel v Netherlands* at para 82 (emphasis added).

[47] Ibid at para 81. See also Harris and others, *Law of the European Convention on Human Rights* at 380; Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* at 211–212; van Dijk and others, *Theory and practice of the European Convention on Human Rights (5th edn)* at 528.

[48] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 85, citing *Weber v Switzerland* (22 May 1990) (App 11034/84) at para 31 and *A Menarini Diagnostics SRL v Italy* (27 September 2011) (App 43509/08) at para 39.

[49] *Zaja v Croatia* (4 October 2016) (App 37462/09) at para 86; *Pantalon v Croatia* (19 November 2020) (App 2953/14) at para 29. This language also appears in the ECtHR Registry's 'Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial 'criminal limb' (31 August 2022), as noted with respect to an earlier edition by the Joint Dissenting Opinion in *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* (fn 7 of JDO).

[50] Among the recent case law, for other examples of this type of application of Criterion 1, see eg *Vasile Sorin Marin v Romania* (3 October 2023) (App 17412/16) at paras 41–42; *Buliga v Romania* (16 February 2021) (App 22003/12) at para 27; *Produkcija Plus Storitveno Podjetje DOO v Slovenia* (23 October 2018) (App 47072/15) at para 41, 45; *Sancakli v Turkey* (15 May 2018) (App 1385/07) at para 30; *Ozmurat Insaat Elektrik Nakliyat Temizlik SVTLS v Turkey* (28 November 2017) (App 48657/06) at para 25; *Kiiveri v Finland* (10 February 2015) (App 10644/17) at para 32; *Osterlund v Finland* (10 February 2015) (App 53197/13) at para 38; *Rinas v Finland* (27 January 2015) (App 17039/13) at para 42; *Pakozdi v Hungary* (25 November 2014) (App 51269/07) at para 19; *Hakka v Finland* (20 May 2014) (App 758/11) at para 39; *Nyakanen v Finland* (20 May 2014) (App 11828/11) at para 40; *Pirttimaki v Finland* (20 May 2014) (App 35232/11) at para 47; *Grande Stevens and Ors v Italy* (4 March 2014) (App 18640/10) at para 95.

decisive.[51] This conventional explanation is certainly reflected in some of the recent case law. We may nonetheless complicate that conventional approach.

As we have seen, the conventional position has involved a deferential approach to domestic classifications of offences as *criminal*, and a less deferential approach to domestic classification of offences or proceedings as *non-criminal*. But deference can be in the eye of the beholder. Indeed, an unusual aspect of the significant 2020 Grand Chamber decision in *Gestur Jónsson and Ragnar Halldór Hall v Iceland* is that the ECtHR is *deferential* to the views of the Contracting State as expressed by the *lawyers for the Contracting State before the Grand Chamber*, while arguably being *non-deferential* to the *Contracting State's domestic judiciary*'s classification of the proceedings. A little context is necessary. The Iceland Supreme Court concluded that the fines in question in this case 'are by nature a penalty'.[52] At the Chamber level, there had been no dispute about Criterion 1, and the Second Section's 2018 Chamber reasons were concise on this point:

> . . . .the [Iceland] Supreme Court concluded that the fine imposed on the applicants had amounted to a criminal penalty . . . . This finding by the Supreme Court was not disputed between the parties, who agreed that the fines imposed amounted to a 'criminal offence'. Therefore, and in particular having regard to the first *Engel* criterion, the legal classification of the offence under national law, the Court sees no reason to disagree with the Supreme Court . . . .[53]

The Second Section went on to conclude that the criminal limb of Article 6 was indeed engaged.[54] So far, so unsurprising. But by the time the Grand Chamber considered the case, the Iceland Government had 'altered their stance on this issue and invited [the Grand Chamber] to hold that Article 6 was inapplicable'.[55] The Iceland Government did this by arguing that the Supreme Court had 'omitted to examine specifically whether the *Engel* criteria had been met' and that, to some extent, the Supreme Court of Iceland had got it wrong in its own classification of the offence under Iceland domestic law.[56]

In fact, contrary to the Chamber's finding that the 'Supreme Court concluded that the fine imposed on the applicants had amounted to a criminal penalty',[57] the Grand Chamber reasoned that the Iceland Supreme Court had *not*, in fact, regarded 'offences of the type in question as being classified as criminal under national law'.[58] The Grand Chamber further highlighted that 'the offence in question' was located in a chapter of the *Criminal Procedure Act* headed 'Procedural fines' and that it bore similarity to similar provisions in the *Civil Procedure Act;* and that prosecution of the offences could be initiated by the court of its own motion.[59] As such,

[51] Among the recent case law, see eg *Vasile Sorin Marin v Romania* at para 42 ('this element alone cannot be decisive'; conclusion at para 45); *Buliga v Romania* at para 27 ('the characterisation under domestic law is merely a starting point'; conclusion at para 36); *Produkcija Plus Storitveno Podjetje DOO v Slovenia* at para 41 ('this consideration is not decisive, as the indications furnished by the domestic law have only a relative value'; conclusion at para 46); *Sancakli v Turkey* at para 30 ('However, this is not decisive'; conclusion also at para 30).

[52] See extract from Part VI of the Supreme Court's reasons excerpted in *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 33.

[53] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (Chamber)* (30 October 2018) (App 68273/14) at para 59. See extract from the Supreme Court's reasons at *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 33.

[54] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (Chamber)* at paras 59–74.

[55] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 68.

[56] Ibid at paras 68–70.

[57] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (Chamber)* at para 59.

[58] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at paras 84–85. Note the curiosity that this also included (1) Judge Spano changing his own position on this issue between the time of his joining the unanimous Second Section decision and his joining the Grand Chamber decision: at paras 1–4 of Concurring Opinion of Judge Spano; and (2) the majority later seeming to acknowledge that the Supreme Court had indeed 'consider[ed] it to be criminal': ibid at para 90.

[59] Ibid at para 84. One may note that the majority's emphasis on the heading 'Procedural fines' was not matched by emphasis on the title of the legislation itself as the *Criminal Procedure Act*.

the Grand Chamber reached the 'surprising'[60] conclusion with respect to Criterion 1 that 'it has not been demonstrated that the offence in question was classified as "criminal" under domestic law'.[61]

It is certainly possible that the Iceland Government's argument before the Grand Chamber could be understood as effectively reflecting a dispute between domestic authorities about *what the Supreme Court had actually held* when it concluded that the fines were 'by nature a penalty'. From such a perspective, one might think the Grand Chamber was bound to resolve this factual dispute, and that the majority's resolution of that dispute was within the range of reasonable resolutions (even if the approach might, in certain scenarios, risk encouraging Contracting States to generate disputes amongst domestic authorities). But if one adheres more closely to the approach adopted by the Second Section, or indeed by the Joint Dissenting Opinion in the Grand Chamber, there is an alternative way to read and understand the majority's approach.

Indeed, as the Joint Dissenting Opinion of Judges Sicilianos, Ravarani, and Serghides noted, the majority had 'called into question . . . the domestic law's qualification of an offence as criminal, authoritatively interpreted as such by the highest judicial body of the country concerned'.[62] The Joint Dissenting Judges regarded this as the first time the ECtHR had used *Engel* Criterion 1 to 'question the classification of an offence' where the domestic classification being questioned was *criminal* rather than *non-criminal*.[63] Later, in its application of Criterion 2, the majority acknowledges that '[it] is, of course, open to States to bring what are considered to be more serious examples of disorderly conduct within the sphere of criminal law'.[64] As the Joint Dissenting Opinion notes, this 'should or at least could have lead the majority to simply endorse the [Iceland] Supreme Court's findings that the applicants' behaviour was of a criminal nature'.[65]

So what to take away from this significant Grand Chamber analysis of Criterion 1? One implication is that *Engel* Criterion 1 may no longer be as innocuous as it had seemed. It may no longer be the case that 'the "autonomy" of the concept of "criminal" operates . . . one way only'.[66] We might frame the Grand Chamber's decision here as being *non-deferential* to a domestic court's classification of 'criminality' or we might frame it as being *deferential* to the views of the Contracting State as expressed by the *lawyers for the Contracting State*. Either way, this seems in tension with what has been described as 'a premise of the Court's deference', namely that deference 'is based on the assumption that domestic institutions and procedures are working as they should, in a transparent manner, allowing for participation of affected rights-holders and, generally, under conditions that are capable of generating reasonable outcomes.'[67] But in any event perhaps the framing is beside the point. In either case, the result is the same: the majority's reasoning in *Gestur Jónsson and Ragnar Halldór Hall v Iceland* is striking insofar as it goes out of its way to facilitate Government arguments justifying restrictions ECHR rights,[68] or facilitate Government arguments that limit ECtHR scrutiny. The notion of autonomous meanings—usually said to emphasize European supervision rather than Contracting State sovereignty—can

[60] Ibid at para 10 of JDO.
[61] Ibid at para 84.
[62] Ibid at para 11 of JDO. See also paras 2–3 of JDO.
[63] Ibid at para 11 of JDO. But cf Andrijauskaitė, 'The case of Gestur Jónsson and Ragnar Halldór Hall v Iceland: Between Two Paradigms Of Punishment' discussing *Escoubet v Belgium (GC)* (28 October 1999) (App 26,780/95).
[64] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 89.
[65] Ibid at para 15 of JDO.
[66] *Engel v Netherlands* at para 81. See also Harris and others, *Law of the European Convention on Human Rights* at 380; Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* at 211–212.
[67] Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' at 101; Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' at 199–200.
[68] See, on a similar thread, Goss, 'The Disappearing "Minimum Rights" of Article 6 ECHR: the Unfortunate Legacy of Ibrahim and Beuze'.

conceal ECtHR decision-making that enhances and facilitates Contracting State sovereignty. On the facts of *Gestur Jónsson and Ragnar Halldór Hall v Iceland,* this overall hitherto-unusual approach risked the ECtHR affording a lesser level of fair trial rights protection 'than the domestic authorities were prepared to',[69] and also allowed Iceland to avoid scrutiny under a related Article 7 complaint.[70]

A second complication in the recent case law, on a smaller scale, but consistently with the analysis above: there are a number of recent cases in which the ECtHR first finds that the domestic classification is *non-criminal* for the purposes of Criterion 1 and then, later, after analysing Criteria 2 and 3, ultimately reaches the overall conclusion that the proceedings are *non-criminal.*[71] There is nothing objectionable or necessarily surprising about this, given the logic of the *Engel* test. But in at least half a dozen such recent cases meeting this description, it is striking what the ECtHR *omits* from its analysis of Criterion 1. Namely, and contrary to the overall trend, in this group of cases the ECtHR omits any suggestion that its conclusion on Criterion 1 was 'not decisive' or 'merely a starting point'.[72] This is not sinister.[73] But one might wonder if the ECtHR sometimes describes its conclusions on Criterion 1 as 'not decisive' or 'merely a starting point' to bolster its conclusion of 'criminality', and omits such descriptions when it intends to reach a conclusion of '*non*-criminality'. The risk is that, with the omissions, a stream of jurisprudence drifts away from the orthodox position; this point will be built upon in the next section's analysis of how the ECtHR describes the relationships between the various criteria.

There is a third point. Here we return to the analysis, above, of the relationship between the various *Engel* criteria. It will be recalled that the ECtHR routinely describes Criterion 1 as a threshold question, before moving on to the *alternative* Criteria 2 and 3. While this is the orthodox position, in a number of recent cases the ECtHR seems to regard *all three* of the *Engel criteria* as falling within the 'alternatively or cumulatively' framework, and not just Criteria 2 and 3. So in a Concurring Opinion in *Ramos Nunes de Carvalho*, for example, Judge Pinto de Albuquerque stated.

> the three *Engel* criteria are not cumulative but alternative. The Grand Chamber makes this explicit . . . regarding the second and third criteria, but it is obviously also true for the first one: any other reading would imply that a sanction needs to be criminal under domestic law in order to be criminal under the Convention . . . .[74]

Indeed, in a number of decisions in the recent case law, the ECtHR includes Criterion 1 in referring to 'the three alternative criteria laid down in *Engel*'[75] or in concluding, for example, the *three* criteria have not been met—'neither alternatively, nor cumulatively'.[76] If one adopts the

[69] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 13 of JDO.

[70] Ibid paras 112–113; and para 23 of JDO.

[71] See, eg *Ramos Nunes de Carvalho ESA v Portugal (GC)* (6 November 2018) (App 55391/13) at paras 124, 127; *Polyakh and Ors v Ukraine* (17 October 2019) (App 58812/15) at paras 156, 159; *Cernius and Rinkevicius v Lithuania* (18 February 2020) (App 73579/17) at para 50; *Ghoumid and Ors v France* (25 June 2020) (App 52273/16) at paras 70, 73; *Piskin v Turkey* (15 December 2020) (App 33399/18) at paras 105, 109; *Xhoxhaj v Albania* (9 February 2021) (App 15227/19) at paras 243, 246; *Grosam v Czech Republic (Chamber)* (23 June 2022) (App 19750/13) at paras 94, 98.

[72] See, eg *Ramos Nunes de Carvalho ESA v Portugal (GC)* at para 124; *Polyakh and Ors v Ukraine* at para 156; *Cernius and Rinkevicius v Lithuania* at para 50; *Ghoumid and Ors v France* at para 70; *Piskin v Turkey* at para 105; *Xhoxhaj v Albania* at para 243; *Grosam v Czech Republic (Chamber)* at para 94.

[73] There are, of course, counterexamples, including *Simkus v Lithuania* (13 June 2017) (App 41788/11) at para 43.

[74] *Ramos Nunes de Carvalho ESA v Portugal (GC)* at para 22 of Concurring Opinion.

[75] See, eg *Milachikj v North Macedonia* (14 October 2021) (App 44773/16) at para 24; *Pantalon v Croatia* at para 29; *Zaja v Croatia* at para 86; *Alenka Pecnik v Slovenia* (27 September 2012) (App 44901/05) at para 30; *Zugic v Croatia* (31 May 2011) (App 3699/08) at para 64; and, earlier, *Ravnsborg v Sweden* (23 March 1994) (App 14220/88) at para 30.

[76] See, eg *Cernius and Rinkevicius v Lithuania* at para 50; cf *Xhoxhaj v Albania* at para 246; *Grosam v Czech Republic (Chamber)* at para 98.

conventional orthodox view of Criterion 1 (built on the notion that 'the "autonomy" of the concept of "criminal" operates . . . *one way only*'[77]), then perhaps it does not matter much whether Criterion 1 is included in the description of the criteria that may be assessed alternatively or cumulatively: on the orthodox view, if criminality is established at Criterion 1, that is the end of the story. Or one could interpret the ECtHR as treating Criterion 1 as dispositive if satisfied, and cumulative if not. But if Criterion 1 operates *both ways* by allowing the ECtHR to second-guess a domestic court's classification of the proceedings—as may have taken place in *Gestur Jónsson and Ragnar Halldór Hall v Iceland*—then it may be significant if Criterion 1 is included in the 'alternatively or cumulatively' formulation. For example: in a case 'where separate analysis of each criterion does not make it possible to reach a clear conclusion',[78] including Criterion 1 in a cumulative analysis might allow a court to identify factors under Criterion 2 or 3 that are capable of overcoming a prima facie criminal classification under Criterion 1. The Grand Chamber majority approach in *Gestur Jónsson and Ragnar Halldór Hall v Iceland* underlines that this is not mere hypothetical risk. This again shows how the ECtHR's flexible approach can facilitate Government arguments that the full range of Article 6 criminal guarantees ought not to apply, even while purporting to be emphasising the importance of supranational European supervision.

4. THE VERY NATURE OF THE OFFENCE (CRITERION 2)

If we move on from the relationship between the criteria to look at Criterion 2 specifically, we see the focus here as being on the 'very nature of the offence'.[79] Writing a decade ago, Emmerson, Ashworth, and Macdonald summarized the orthodox position in this way:

> . . . the [ECtHR] will examine whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character; whether the proceedings are instituted by a public body with statutory powers of enforcement; whether there is a punitive or deterrent element to the process; whether the imposition of any penalty is dependent upon a finding of culpability; and how comparable procedures are classified in other Council of Europe member states.[80]

Consistently with this, but more bluntly, van Dijk and van Hoof indicate that Criterion 2 will only be met with respect to a particular norm 'if both the scope of the violated norm is of a general character, and the purpose of the sanction is deterrent and punitive.'[81] Similarly, Trechsel offered a 'provisional and anticipatory definition' that a charge would be considered criminal 'if it concerns a norm which is basically addressed to everyone rather than to a restricted group of persons, and if the sanction imposed pursues, in the first place, a retributive goal'.[82] We may pause to note that, whereas Criterion 3 is said to be concerned with the severity or nature of the relevant *sanction or penalty* (and we will return to this shortly), the orthodox accounts hold that the nature of the *offence* is to be considered for the purposes of Criterion 2 (for example, does the sanction have a punitive purpose?).

So let us turn to the Criterion 2 requirement that the norm be *generally applicable* or *generally binding* rather than being addressed to a *specific group within society*. As Trechsel notes, this requirement is most often enlivened in the context of disciplinary proceedings (for example,

[77] *Engel v Netherlands* at para 81 (emphasis added).
[78] *Vasile Sorin Marin v Romania*at para 41 (emphasis added).
[79] *Engel v Netherlands* at para 82.
[80] Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* at 212 (internal citations omitted).
[81] van Dijk and others, *Theory and practice of the European Convention on Human Rights* (5th edn) at 530.
[82] Trechsel, *Human Rights in Criminal Proceedings* at 19.

military or professional discipline): for a penalty to be characterized as disciplinary rather than criminal 'it is essential that the rule cover a limited number of persons belonging to an identifiable group and that it is imposed in order to sanction behaviour against the internal order of that group'.[83] The recent case law bears this out. Where a norm applies to society at large, the ECtHR's analysis is typically concise, and typically leads to a finding that the norm belongs to the criminal sphere.[84] There are then many cases concerning specific professional disciplinary proceedings. In *Ramos Nunes de Carvalho v Portugal*, the majority judgment offered a catalogue of this jurisprudence as it stood in late 2018:

> The cases concerned several professional categories: lawyers; notaries; civil servants; doctors; members of the armed forces; liquidators; and, as in the circumstances of the present case, judges. . . . .[85]

Among the most recent cases we have proceedings involving football disciplinary processes;[86] 'judges, prosecutors and legal advisors';[87] and 'members of the Bar'.[88]

In some of those recent cases, however, these 'specific' groups or categories seem to have broadened considerably. In *Piskin v Turkey*, concerning Turkey's response to the 'failed military coup of 15 July 2016',[89] the ECtHR described 'a specific category of persons, namely public servants, judges, prosecutors and public-service employees'.[90] One may note that this 'specific category' covers a wide range of occupational groups that may not typically be regarded as homogenous. Moreover, the number of public servants dismissed as part of the Turkish response has been reported to be in excess of 125,000;[91] one might wonder if a category as 'specific' as this risks collapsing into generality. And in *Cernius and Rinkevicius v Lithuania*, the ECtHR seemed to regard a law as applying to the rather-broad but notionally 'specific' category of 'private companies'.[92] There is a risk that this appears to be an example of the ECtHR's irrational flexibility—and in these instances, irrational flexibility that facilitates government arguments that would deny the applicability of Article 6 guarantees.

Concern about the Criterion 2 approach to disciplinary proceedings were also recently expressed in Judge Pinto De Albuquerque's Concurring Opinion in *Ramos Nunes de Carvalho v Portugal*:

> The classification of some offences as 'disciplinary' rather than 'criminal' for the purposes of Article 6 of the Convention, despite the high degree of social offensiveness they represent, the considerable stigma they attract and the severity of the resulting punishment, is only possible if one applies a nominalist distinction which has no basis in European case-law.

[83] Ibid at 21; see also at 20.

[84] See, for example, *Kasparov and Ors v Russia* (3 October 2013) (App 21613/07) at para 42; *Grande Stevens and Ors v Italy* at para 96; *Pakozdi v Hungary* at para 20; *Ozmurat Insaat Elektrik Nakliyat Temizlik SVTLS v Turkey* at para 25 ('applies a general obligation to a specific circumstance'); *Orlen Lietuva Ltd v Lithuania* (29 January 2019) (App 45849/13) at para 62; *Milachikj v North Macedonia* at para 26; *Vegotex Int SA v Belgium (GC)* at para 69. But cf see *Produkcija Plus Storitveno Podjetje DOO v Slovenia* at paras 42–43.

[85] *Ramos Nunes de Carvalho ESA v Portugal (GC)* at para 123 (internal citations omitted).

[86] *Ali Riza and Ors v Turkey* at paras 4, 153–154.

[87] *Xhoxhaj v Albania* at para 244.

[88] *Grosam v Czech Republic (Chamber)* at para 95.

[89] *Piskin v Turkey* at para 9.

[90] Ibid at para 106.

[91] See, eg Yildiz, 'Did Turkey's Recent Emergency Decrees Derogate from the Absolute Rights?' *VerfBlog* (28 September 2019) < https://verfassungsblog.de/did-turkeys-recent-emergency-decrees-derogate-from-the-absolute-rights/ >; Amnesty International, 'Turkey: "Judicial Reform" Package is a Lost Opportunity to Address Deep Flaws in the Justice System' *Amnesty International Public Statement* (8 October 2019) < https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR4411612019ENGLISH.pdf >.

[92] *Cernius and Rinkevicius v Lithuania* at para 50.

> This nominalist interpretation of the Convention is even less convincing when it accepts that the criminal limb of Article 6 is applicable in certain cases involving heavy financial penalties for disciplinary offences. Such an unprincipled approach not only ignores the impact of serious non-financial penalties, like suspension or dismissal from a profession, but leaves the impression of an uncertain and unclear jurisprudence which gives no proper guidance to the respondent States.[93]

Further, as Judge Pinto De Albuquerque notes, the view that norms applicable to 'specific categories' do not come under the Article 6 criminal umbrella:

> ignores a long-standing tradition of criminal offences with a limited personal scope, applicable only to people distinguished by certain personal or professional features. For example, innumerable criminal-law provisions in all countries punish bribe-taking committed specifically by public officials. These criminal-law provisions are designed to protect the profession's honour, reputation and integrity and to maintain public trust in public officials, and no one would dare to argue that they are not criminal in nature for the purposes of Article 6 of the Convention. In other words, the mere fact that an offence is applicable to a specific professional category is not decisive as to its nature.[94]

Nonetheless, in all three of these recent cases, this form of analysis preceded an ECtHR finding that the relevant norm was *non*-criminal, thus denying applicants the full range of Article 6 criminal guarantees. There is a risk that this aspect of Criterion 2 can thus be seen as irrationally flexible—allowing the ECtHR to regard some norms as generally applicable, and other norms as not so. In so doing, the jurisprudence may give rise to an impression of selectivity and unpredictability in the ECtHR approach to Criterion 2, but also facilitates Contracting State sovereignty and governments' efforts to deny the full range of guarantees in given categories of cases.

The second aspect of Criterion 2 concerns whether 'the *purpose of the sanction* is deterrent and punitive'[95] or even 'retributive'.[96] There are certainly examples in the recent case law of the ECtHR considering this factor consistently with the descriptions in the literature.[97] But the recent cases reveal the ECtHR struggling to articulate its preferred analytical relationship between the *purpose* of a measure (notionally relevant to Criterion 2) and the *severity* of the penalty (notionally relevant to Criterion 3). Naturally the two considerations overlap with one another, and may inform one another, but the stated orthodox position is that they are to be considered separately. Yet, for example, in the recent cases at times the *purpose* of the sanction is seemingly considered by the ECtHR in the context of *Criterion 3*, without any explanation, rather than Criterion 2.[98] The reverse also seems true: the recent jurisprudence seems unclear on the relevance of 'seriousness' or 'severity' for the purposes of Criterion 2. In one batch of cases the ECtHR assures us that meeting the Criterion 2 threshold for 'the criminal nature of an offence' does not require that an offence have 'a certain [minimum] degree of seriousness'.[99] Yet in *Gestur Jónsson and Ragnar Halldór Hall*, the Grand Chamber was unable to regard Criterion

[93] *Ramos Nunes de Carvalho ESA v Portugal (GC)* Concurring Opinion of Judge Pinto de Albuquerque at para 30.
[94] Ibid Concurring Opinion of Judge Pinto de Albuquerque at para 31.
[95] van Dijk and others, *Theory and practice of the European Convention on Human Rights* (5th edn) at 530 (emphasis added).
[96] Trechsel, *Human Rights in Criminal Proceedings* at 19.
[97] See eg *Vegotex Int SA v Belgium (GC)* at para 69; *Melgarejo Martinez de Abellanosa v Spain* (14 December 2021) (App 11,200/19) at para 25; *Mikhaylova v Russia* (19 November 2015) (App 46,998/08) at para 64.
[98] See eg *Sancakli v Turkey* at para 30; *Ozmurat Insaat Elektrik Nakliyat Temizlik SVTLS v Turkey* at para 25.
[99] *Buliga v Romania* at para 30; *Milenkovic v Serbia* (1 March 2016) (App 50124/13) at para 35; *Negulescu v Romania* at para 28; *Simkus v Lithuania* at para 43; *Muslija v Bosnia and Herzegovina* (14 January 2014) (App 10644/17) at para 28.

2 as satisfied despite 'a severe violation of . . . professional duties' and 'despite the seriousness of the breach of the professional duties'.[100] Even if not outright contradictory, the two approaches are hard to reconcile: 'insignificant' criminal acts are capable of satisfying Criterion 2 and severe violations and serious breaches are not.[101] The result of all of this is case law that is incongruent with the stated test and difficult to follow, and case law that, when combined with the analytical flexibility afforded by the 'cumulative or alternative' point above, allows the ECtHR extraordinary flexibility.

This analysis also suggests underlying sense of confusion about the role of 'seriousness' or 'severity' when it comes to assessing the purpose of a measure for Criterion 2, and for assessing the severity of the penalty for Criterion 3. In order to advance this argument further, we will turn shortly to look squarely at Criterion 3. For the reasons already outlined, and for those about to be offered in the next section, the ECtHR's approach with respect to Criterion 1 and Criterion 2 makes its application of Criterion 3 especially significant. An example of that significance is reflected in *Gestur Jónsson and Ragnar Halldór Hall*. In this Grand Chamber decision, Criterion 1 'serve[d] only as a starting-point'[102] and Criterion 2 was unable to produce a clear answer:

> despite the seriousness of the breach of the professional duties in question [under Iceland's *Criminal Procedure Act*], it is not clear whether the applicants' offence is to be considered criminal or disciplinary in nature. It is therefore necessary to examine the matter under the third criterion, namely the nature and degree of severity of the penalty that the applicants risked incurring'.[103]

With Criterion 1 not being decisive, and Criterion 2 unable to reach a conclusion in this case, *Gestur Jónsson and Ragnar Halldór Hall* is another prompt for us to examine more closely the recent jurisprudence on Criterion 3.

5. THE DEGREE OF SEVERITY OF THE *PENALTY* THAT THE PERSON CONCERNED RISKS INCURRING (CRITERION 3)

Neither the longstanding Criterion 3 jurisprudence nor the more recent jurisprudence lends itself easily to a principled analysis or summary of overarching guiding considerations. This difficulty is particularly acute where the penalty at issue is a monetary fine or another *non*-incarceration or *non*-detention-based penalty; it is this type of cases that best brings out the complexity of the ECtHR's analysis.[104] In orthodox accounts, it is always emphasized that 'decisive' factor will be 'the potential penalty, rather than the actual penalty imposed'; 'the nature and severity of the possible, not the actual, punishment'.[105] But beyond that, and perhaps understandably, existing accounts often attempt to *catalogue* the results or facts of the ECtHR's decisions in this area, for example here from Harris et al:

> The possibility of a fine being converted into imprisonment for non-payment has been taken into account, as has non-entry on a criminal record. Disqualification from holding public office

[100] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at paras 90–91; cf JDO at paras 14–17.
[101] Compare *Buliga v Romania* at paras 30–31 and *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at paras 90–91.
[102] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 85.
[103] Ibid at para 91.
[104] Cf van Dijk and others, *Theory and practice of the European Convention on Human Rights (5th edn)* at 533–537; cf *De Tommaso v Italy (GC)* (23 February 2017) (App 43395/09), especially at paras 32–43 of Partly Dissenting Opinion of Judge Pinto De Albuquerque.
[105] Emmerson, Ashworth and Macdonald, *Human Rights and Criminal Justice* at 213; Harris and others, *Law of the European Convention on Human Rights* at 382. See also Trechsel, *Human Rights in Criminal Proceedings* at 26.

> or the deduction of points that may lead to the loss of a driving licence for road traffic offences may be criminal penalties, as may the demolition of a building for lack of planning permission; but the withdrawal of a liquor licence, although severe in its consequences, was held not to be. Nor was a penalty of disqualification from standing for election for exceeding election expenses limits.[106]

In *Gestur Jónsson and Ragnar Halldór Hall v Iceland* the Grand Chamber attempted its own similar catalogue:

> In considering that the third criterion *did not bring the matter into the 'criminal' sphere, the Court has had regard to factors such as the following*: that the amount imposed as a fine had not been substantial or had corresponded to the minimum provided for by domestic law; that, although the size of the potential fine (∼€36,000) was such that it must be regarded as having a punitive effect, the severity of this sanction did not bring the matter into the criminal sphere; that a ceiling had been provided for by domestic law; that the fines were not entered in the criminal record, and the court could only convert them into a prison sentence if they were unpaid; that an appeal lay against such decisions; or that the penalty could only be converted into a prison sentence in limited circumstances and then subject to the defendant being summoned to appear before the court for an oral hearing in separate proceedings.[107]

Proceeding on a case-by-case basis may be considered a pragmatic approach given the multitude of types of norms and types of penalties utilized by Contracting States. The difficulty is that the absence of overarching principle seems to lead to inconsistency in the recent case law. It is this inconsistency that we focus on in this section, before examining another recent case in which the ECtHR went out of its way to accommodate a Contracting State's public interest balancing arguments.

To begin with the inconsistency in the jurisprudence. As we will see: sometimes, small fines with a punitive purpose will make the ECtHR's conclusion 'criminal';[108] other times, considerably larger fines with a punitive purpose will be too small to meet the ECtHR's threshold for 'criminal'.[109] Sometimes, the punitive purpose of the penalty will be significant in reaching a conclusion of 'criminality';[110] other times, the punitive purpose of the penalty will be insufficient.[111] Two recent Grand Chamber decisions provide jumping-off points for examining the difficulties the ECtHR's case law creates.

First, to return to *Gestur Jónsson and Ragnar Halldór Hall v Iceland*. In that decision, the Grand Chamber described the €6200 fines as 'high' and as lacking 'an upper statutory limit'.[112] As the Joint Dissenting Opinion noted, the fine was also 'ten times higher than any fine imposed previously'.[113] But none of this 'suffice[d] to deem the severity and nature of the sanction as "criminal"'.[114] In so finding, the Grand Chamber first noted that the fines 'could not be converted into deprivation of liberty in the event of non-payment'.[115] Second, the Grand

[106] Harris and others, *Law of the European Convention on Human Rights* at 382 (internal citations omitted).
[107] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 82 (emphasis added) (internal citations omitted)
[108] See discussion of *Sancakli v Turkey* below.
[109] See discussion of *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* below.
[110] See discussion of *Pakozdi v Hungary* below.
[111] See discussion of *Grosam v Czech Republic (GC)* below.
[112] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at paras 21; 96. The latter point being important given the frequent emphasis on 'the potential penalty, rather than the actual penalty imposed': see n 105 above.
[113] Ibid at para 19 of JDO.
[114] Ibid at para 96.
[115] Ibid at para 95. cf *Cernius and Rinkevicius v Lithuania* at para 50.

Chamber compared the €6200 fine in this case with the fine in a number of other cases, each of which had been well in excess of €100,000 and the conclusion had been criminality, and also with a case with a fine of €136,000 where the conclusion had been non-criminality.[116] The extraordinary implication of the Grand Chamber's reasoning risks appearing to be that fines under €100,000 'though having a punitive effect, [may not be] so severe as to bring the matter within the criminal sphere'.[117]

It is important to be blunt here: there are cases in which such an approach is flatly contradicted. Three examples will suffice. In the 2018 decision of *Sancakli v Turkey*, a 'punitive' fine of just €62 led to a finding of criminality; the fine was acknowledged to be 'not a substantial amount'.[118] In the 2015 decision in *Mikhaylova v Russia*, the ECtHR found criminality on the basis of a fine of just €28; the fine was 'punitive and deterrent in nature, which is also a characteristic of criminal penalties' (note that the fine could not 'be converted into a custodial sentence in the event of non-payment').[119] In *Pakozdi v Hungary,* a 'very substantial' fine of €19,500 was sufficiently 'sever[e]', together with the purpose of the penalty, to render Article 6 applicable under its criminal head.[120] It is hard to reconcile such conclusions with the examples cited in *Gestur Jónsson and Ragnar Halldór Hall v Iceland* or with the apparent underlying logic of the Grand Chamber's reasoning. To draw a contrast with one of the cases cited by the Grand Chamber, why was a 'punitive' fine of €36,000 insufficient to bring charges into the criminal sphere in *Muller Hartburg* in February 2013, but the 'severity' of a fine of €19,500 sufficient to bring charges into the criminal sphere in *Pakozdi* in November 2014?

Second, consider the Grand Chamber's 2023 decision in *Grosam v Czech Republic*.[121] In *Grosam*, the applicant was an 'enforcement officer' subjected to proceedings that the Czech Government argued were strictly disciplinary or civil, rather than criminal.[122] In the Grand Chamber, the parties 'disagreed only as to whether the third Engel criterion was met, that is, whether the severity of the penalty the applicant risked incurring rendered the offence criminal.'[123] The penalty involved possibilities of a fine of up to €30,981, a reprimand and dismissal from office as an enforcement officer; non-payment of the fine could not result in deprivation of liberty.[124] The Grand Chamber acknowledged that the possible fine 'may appear substantial' and 'fully agreed' with the Chamber's assessment that 'the size of the potential fine is such that it must be regarded as having a punitive effect'.[125] But the Grand Chamber also agreed with the Chamber that 'the severity of this sanction in itself does not bring the charges into the criminal sphere'.[126] Such a conclusion is difficult to reconcile with, for example, *Sancakali* or *Mikhaylova* or *Pakozdi* above. Remarkably, *Grosam* does not stand alone: there are other recent cases in which the ECtHR that 'the severity of the sanction in itself does not bring the charges into the criminal sphere' for the purposes of Criterion 3, even where '*the amount of the fine may be substantial and it is therefore punitive in nature*'.[127] Thus even a substantial, punitive, severe fine may not be capable of satisfying *Engel* Criterion 3's focus on 'the degree of severity of the

[116] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 96, citing *Muller Hartburg v Austria* (19 February 2013) (App 47195/06) at para 47; *Ramos Nunes de Carvalho ESA v Portugal (GC)* at paras 25, 71, 126, 217;; *Mamidakis v Greece* (11 January 2007) (App 35533/04) at para 21; *Grande Stevens and Ors v Italy* at para 99; *Produkcija Plus Storitveno Podjetje DOO v Slovenia* at paras 10 and 45.

[117] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 96, citing *Muller Hartburg v Austria* at para 47.

[118] *Sancakli v Turkey* at para 30.

[119] *Mikhaylova v Russia* at paras 63–69.

[120] *Pakozdi v Hungary* at para 21. See also *Ozmurat Insaat Elektrik Nakliyat Temizlik SVTLS v Turkey* at paras 7, 25, where an €82,000 fine was 'both deterrent and punitive' in its purpose and as such Article 6 applied under its criminal head.

[121] *Grosam v Czech Republic (GC)*.

[122] Ibid at paras 14, 105–110.

[123] Ibid at para 114.

[124] Ibid at paras 119–120.

[125] Ibid at paras 119–120.

[126] Ibid at paras 119–120.

penalty that the person concerned risks incurring'.[128] This is remarkable. To sharpen the point: the ECtHR tell us that *for a criterion that examines the degree of severity of a penalty, the severity of a penalty is simply not enough*. The incoherence only exacerbates the inconsistency.

The judgment in *Grosam* discloses two possible explanations for such an approach. First, the Grand Chamber may be concluding that, while the fine was substantial, punitive and severe, it was not *as severe as it could have been* (for example, by not having imprisonment for default). But to argue that a substantial, punitive, and severe penalty is insufficient because it could have been *more* severe seems at odds with recent decisions of the ECtHR, including *Mikhaylova*, and with usual accounts of the *Engel* test. This is especially so given what is at stake: 'Huge interests can be at stake, and such proceedings can lead to extremely heavy sanctions.'[129] Second, immediately after stating its view about the fine, the Grand Chamber added a seemingly-non sequitur sentence about *Bayer,* a 2009 case concerning 'disciplinary proceedings against enforcement officers (bailiffs)', in which it had 'held that the proceedings in question had not involved the determination of a "criminal charge"'.[130] This non sequitur is curious, and not only because *Bayer* reached this apparently-significant conclusion in just a single short sentence.[131] The only issue before the Grand Chamber in *Grosam* was Criterion 3, and yet here the ECtHR seems to be digressing into an analysis of Criterion 1 or Criterion 2. How was the single short sentence from *Bayer* related to an assessment of the severity of the penalty applied in *Grosam*? Perhaps the Grand Chamber was simply trying to confirm its approach by reference to a case which (fleetingly) considered a broadly similar fact pattern; perhaps it was attempting to shore up its conclusion on Criterion 3 by reference to material more relevant to Criterion 1 or Criterion 2.[132]

This technique links back to concerns identified earlier about the ECtHR framing the three *Engel* criteria as factors that may be considered alternatively and not necessarily cumulatively, except where a cumulative approach is necessary. If the ECtHR wishes to find that a €62 fine brought proceedings into the criminal sphere, it can do so by treating Criterion 3 as an alternative. If the ECtHR wishes to find that a €30,981 fine is not sufficient, it can do so by implicitly or explicitly treating the criteria as cumulative, and use Criterion 1 or Criterion 2 factors to outweigh or counterbalance the Criterion 3 factors. The risk here is irrational flexibility: 'the ability to apply different tests or approaches without explaining why one test or approach is appropriate in one situation but not in another'.[133]

This flexibility is exacerbated by, and contributes to, the willingness of the ECtHR to accommodate governments' public interest balancing arguments.[134] For context: at the outset of this section, I noted that much of the recent case law in which Criterion 3 was contentious concerned monetary fines. There are, nonetheless, other penalties that have attracted attention in the contemporary jurisprudence, for example, lustration proceedings, preventive supervision, or bans from participating in football.[135] One non-financial measure deserves particular attention. In its 2020 decision in *Ghoumid v France*, the ECtHR considered an application made by:

[127] *Ramos Nunes de Carvalho ESA v Portugal (GC)* at para 126 (emphasis added) (cf ibid Concurring Opinion of Judge Pinto de Albuquerque at para 32); *Muller Hartburg v Austria* at para 47; *Piskin v Turkey* at para 107.

[128] *Engel v Netherlands* at para 82.

[129] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 22 of JDO.

[130] *Grosam v Czech Republic (GC)* at para 121, citing *Bayer v Germany* (16 July 2009) (App 8453/04) at para 37.

[131] 'The Court notes that the proceedings in the present case did not involve the determination of a criminal charge against the applicant.': *Bayer v Germany* at para 37.

[132] Another example of such cross-contamination evident in *Xhoxhaj v Albania* at para 245 (considering a Criterion 1 factor, the categorisation of the law, in the course of its Criterion 3 analysis).

[133] Goss, *Criminal Fair Trial Rights* at 10.

[134] See eg Samartzis, 'Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the ECHR'; Goss, 'The Disappearing "Minimum Rights" of Article 6 ECHR: the Unfortunate Legacy of Ibrahim and Beuze'.

[135] *Polyakh and Ors v Ukraine* at para 157–158; *De Tommaso v Italy (GC)* at para 17; *Ali Riza and Ors v Turkey* at para 154.

> five dual nationals who were convicted in 2007 for their participation in a criminal conspiracy to commit a terrorist act, and released from prison in 2009 or 2010, before being deprived of their French nationality in October 2015 by orders of the Prime Minister.[136]

The application alleged a violation of Article 4 of Protocol 7, arguing that 'the deprivation of their French nationality was a "disguised punishment", being tantamount to a sanction aimed at penalising the same conduct as that for which they had been convicted in 2007'.[137] To be clear, what follows is not an argument that as a general matter deprivation of nationality need always be regarded as an *inherently* criminal penalty; instead it is that a close examination of the ECtHR's reasoning reveals a curious approach to its application of the longstanding *Engel* criteria and particularly to its application of Criterion 3.

With respect to Criterion 3, the applicants in *Ghoumid* argued the deprivation of nationality was 'undoubtedly punitive when it was ordered in circumstances such as' these, submitting it was 'a sanction for a presumed lack of loyalty and resulted in the loss of a number of rights.'[138] The French Government suggested that while nationality deprivation 'was a sanction with a certain degree of severity, *it was not disproportionate*' in light of the seriousness of the offence, the fact that the deprivation did not entail deportation and could not be applied to render someone stateless and on the basis that the French Constitutional Council had validated the measures under domestic law.[139] One may immediately notice the French Government's addition to Criterion 3 of a hitherto-unrecognized proportionality justification element.

Despite an absence of support in the existing jurisprudence or commentary for this hitherto-unrecognized component, the ECtHR accepted the French Government's suggestion that a justification ought to be taken into account as part of the Criterion 3 assessment:

> as to the degree of severity of the measure in question, the Court does not underestimate either the serious nature of the message that the State thereby addresses to those concerned . . . or the impact that it may have on their identity. Its degree of severity must, however, be unreservedly put into perspective, having regard to the fact that deprivation of nationality . . . is directed against conduct which, in the case of terrorist acts, undermines the very foundation of democracy. The Court would further point out that this measure does not in itself result in the deportation from France of those concerned . . . Lastly, . . . it notes that it is not a sanction that can be regarded as criminal in nature.[140]

The ECtHR thus achieves the remarkable feat of emphasising the seriousness of the offence (which might ordinarily contribute to a finding of criminality under Criterion 2) and the 'serious' nature of the penalty (which might contribute to a finding of criminality under Criterion 3) on its way to concluding that this significant sanction is *not* criminal in nature. In the final sentence of the extract above we also see the ECtHR once again taking advantage of the 'alternatively and not necessarily cumulatively, except where a cumulative approach is necessary' formula: the ECtHR seeks to shore up the apparently-shaky conclusion on Criterion 3 by a gratuitous reference to its conclusion on Criterion 2. But much more significantly, this decision facilitates the French Government's public interest balancing arguments, and in so doing, facilitates French Government efforts to avoid the full range of rights being available to the applicants.[141] In *Ghoumid* this application of the *Engel* criteria meant France was able to

[136] *Ghoumid and Ors v France* at para 1.
[137] Ibid at para 53.
[138] Ibid at para 62.
[139] Ibid at para 58 (emphasis added).
[140] Ibid at para 72.

avoid the obligations of Article 4 of Protocol 7, but the same logic would apply to allow public interest balancing arguments to justify avoiding the full range of Article 6 fair trial guarantees. It must again be emphasized that there is nothing in the text of Article 6,[142] or in the decades of *Engel* criteria case law, to provide support for such an approach by the ECtHR. Notably and unfortunately, this also forms part of a broader recent pattern in the criminal justice arena, by which the ECtHR goes out of its way to facilitate governments' public interest balancing arguments.[143]

This section, then, has scrutinized the recent Criterion 3 jurisprudence, and drawn out the inconsistency and lack of principle in the ECtHR's case law on this crucial element of the *Engel* criteria. No doubt it is difficult for the ECtHR to draw bright lines between penalties that are sufficiently severe or serious and those that are not. But it is incumbent on the ECtHR to offer a more principled and clearly-articulated approach to its attempts to draw those lines. The same interests demand that the ECtHR not facilitate public interest justification arguments that lack any support in the text of the ECHR or the jurisprudence. If the ECtHR is unable to approach Criterion 3 in a principled coherent way, it may be time to accept Trechsel's suggestion that Criterion 3 'ought to be dropped' in most circumstances.[144]

6. CONCLUSION

When the ECtHR utilizes the *Engel* criteria, 'Huge interests can be at stake'.[145] This article has closely analysed dozens of underexamined ECtHR decisions from the last decade, including two major Grand Chamber decisions.

In so doing, I have advanced two major threads of argument. First, in myriad ways this article showed how the ECtHR's *Engel* jurisprudence exhibits irrational flexibility. Under close examination, the case law reveals inconsistency and incoherence, with troubling consequences for those citizens, lawyers and domestic officials trying to grapple with the guidance provided by the ECtHR.

The second argument situates the article to participate in broader conversations about the ECtHR's contemporary approaches to deference and subsidiarity. I argued that, while traditional accounts of autonomous meaning emphasize its virtue as being supranational supervision and European consistency, the recent case law suggests that such rhetoric may conceal efforts to facilitate deference to States. These two arguments dovetail with one another, and also with other recent criticism of the ECtHR for facilitating State public interest justification arguments in the criminal justice context.

As has been apparent, both these criticisms take on particularly acute significance in the Grand Chamber decisions of *Gestur Jónsson and Ragnar Halldór Hall v Iceland* and *Grosam v Czech Republic*, but they are also reflected in the broader case law. The ECtHR, then, is encouraged to strive for greater coherence, consistency, and predictability in its decision-making and explanations in the *Engel* criminal justice context. At the very least, these concerns could be ameliorated by the ECtHR explaining much more clearly why a particular approach was taken in one case but not another.

The consequences of the criticisms made in this article must be remembered. The ECtHR approach facilitates State efforts to deny the full range of human rights guarantees in the criminal justice sphere. Complaints are not considered, or are not considered fully. Hearings of considerable significance to applicants will proceed without guarantees and without sufficient

[141] Ibid at paras 73–74.
[142] cf Goss, *Criminal Fair Trial Rights* at 115–204.
[143] See n 134 above.
[144] Trechsel, *Human Rights in Criminal Proceedings* at 30.
[145] *Gestur Jónsson and Ragnar Halldór Hall v Iceland (GC)* at para 22 of JDO.

explanation as to their absence. The ECtHR ought to consider whether its contemporary approach to the *Engel* criteria lives up to the standard set by the text of the ECHR.

ACKNOWLEDGMENTS

With thanks to the editors, and the anonymous reviewers, for their constructive suggestions. Dedicated with thanks to Professor Andrew Ashworth CBE KC(Hon) FBA.

Human Rights Law Review, 2025, Vol. 25, No. 00, ngaf031
https://doi.org/10.1093/hrlr/ngaf031
Article