

This article is published in a peer-reviewed section of the Utrecht Law Review

Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law

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1. Introduction

The problems related to international judicial cooperation are not new. Every criminal proceeding requiring cooperation by the authorities of another state represents a challenge: added complexity, probable delays, difficulties in communicating in another language, explaining what exactly is required for the criminal investigation and, above all, the differences which exist between the different legal systems involved in the judicial cooperation. All these issues are well known and have often been dealt with by scholars and practitioners.¹ The efforts made to simplify and speed up international cooperation have traditionally resulted in mutual legal assistance conventions, either bilateral or multilateral, and more recently in the European Union (EU) in legal cooperation instruments based on the principle of mutual recognition.

Beyond these traditional forms of judicial cooperation between sovereign states the present situation poses new challenges that might demand new solutions and different models of judicial cooperation. Modern society does not act within the territorial borders of the sovereign state, and this is something that is also reflected in the exercise of criminal jurisdiction: criminal cases that require international cooperation are no longer a rarity. Despite these significant changes, the procedure has not adapted to this new reality and still considers transnational proceedings almost exclusively from the point of view of the issuing, transfer and executing of cooperation requests. Lacking an updated statutory framework in most countries it has been left to the courts to draw up applicable guidelines, specifically with regard to the admission and assessment of evidence obtained abroad.²

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1 The literature on European cooperation in criminal matters is immense. Among others see, A.A. Palomo del Arco, 'Cooperación judicial penal en Europa', in *Sistemas penales europeos, Cuadernos de Derecho Judicial*, 2002, pp. 325 et seq.; M. Jimeno Bulnes, *Un proceso europeo para el siglo XXI*, 2011, pp. 25 et seq.; M. Jimeno Bulnes, 'Origen y evolución de la cooperación judicial en la Unión Europea', in M. Jimeno Bulnes (coord.), *La cooperación civil y penal en el ámbito de la Unión Europea: instrumentos procesales*, 2007, pp. 29-57; C. Bassiouni et al. (eds.), *European Cooperation in Penal Matters. Issues and Perspectives*, 2008; L. Bujosa Vadell (coord.), *Hacia un verdadero espacio judicial europeo*, 2008; C. Arangüena Fanego (coord.), *Espacio Europeo de libertad, seguridad y justicia: últimos avances en cooperación judicial penal*, 2010. For an interesting comparative study see A. Eser et al. (eds.), *The Individual as Subject of International Cooperation in Criminal Matters. A comparative Study*, 2002. The objective of this study was to analyse the rules and practices of international judicial cooperation, both from a legal and an empirical perspective, at the EU level and also at the level of the domestic legal regulations of the Member States and in the USA.

2 On this issue regarding the Spanish legal system see A. Rives Seva (ed.), *La prueba en el proceso penal. Doctrina del Tribunal Supremo*, 2008, pp. 543 et seq.

Moreover, in the context of creating a single European area of freedom, security and justice, it appears clear that new models of judicial cooperation have to be put in place in order to efficiently combat transnational organized crime. However, in the field of international judicial cooperation in criminal matters it appears that the protection of the individual rights of the suspect and the accused rather than becoming a priority, have been widely disregarded.³ In many legal systems, evidence obtained abroad is admitted without testing the legality of the execution of international cooperation requests.

The increasing role played by judicial cooperation, especially at the EU level, has made it clear that there is a need to enhance the protection of human rights in transnational criminal proceedings and to advance towards a common legal framework for proceedings with cross-border elements.⁴ The proposal of the *Corpus Iuris* drew attention to the need to create common substantive as well as procedural rules at the European level,⁵ but until now no agreement has been reached on what the general principles for transnational criminal proceedings should be and how they should be implemented. The Tampere Conclusions supported the adoption of the free movement of evidence based on the principle *locus regit actum*, if 'evidence lawfully gathered by one member state's authorities should be admissible before the courts of other member states, taking into account the standards that apply there'.⁶

Most legal systems do not have a consistent and comprehensive regulation on transnational criminal proceedings and rules on the applicable law or conflicts of law rules are largely missing. With regard to evidence obtained abroad, the practice varies greatly. In some cases it is admitted without any further control, whilst on other occasions it is subject to exhaustive domestic filters in order to check its compliance with domestic legal principles and sometimes also with the statutory provisions of the executing state.⁷ This patchwork of rules, principles and practice does not only increase the complexity of transnational justice, but undoubtedly has a negative impact on the protection of fundamental rights and the efficiency of international judicial cooperation, hindering also the free circulation of evidence and its admissibility at trial.

We have witnessed important advances in European judicial cooperation focusing on simplification, establishing time frames for execution and restricting refusal grounds, but there is no parallel effort in identifying and adopting general principles of transnational criminal proceedings.⁸ At present there is neither a common idea on how transnational criminal proceedings should be regulated, nor a uniform understanding on the concept of transnational criminal proceedings.⁹ However, there is agreement on one point: being subject to a transnational criminal procedure should not affect negatively the right to defence and should not result in a lowering of the procedural rights of the accused.¹⁰ To that end it would be advisable to establish clear –and if possible also homogeneous– criteria governing judicial cooperation and the development of transnational criminal proceedings in the EU.¹¹

3 See, for example, O. Lagodny, 'Comparative Overview', in Eser et al., supra note 1, p. 761.

4 See the Stockholm Programme (OJ C 115, 4.5.2010, p. 1) and the Action Plan of the Stockholm Programme of 20 April 2010 (COM(2010) 171 final), where special emphasis is put on the 'new and comprehensive systems on the obtaining of evidence'. See also D. Ziegenhahn, *Der Schutz der Menschenrechte bei der grenzüberschreitenden Zusammenarbeit in Strafsachen*, 2002, p. 523.

5 The proposal for a *Corpus Iuris* can be read in M. Delmas-Marty (ed.), *Corpus Iuris*, 1997. On harmonization, unification and cooperation models of criminal law within the European area of justice see, U. Sieber, 'Die Zukunft des Europäischen Strafrechts', 2009 *ZStW* 121, no. 1, pp. 17 et seq. and also U. Sieber, 'Rechtliche Ordnung in einer globalen Welt', 2010 *Rechtstheorie* 41, no. 2, pp. 180 et seq.

6 European Council (15-16 October 1999), Conclusions of the Presidency.

7 On the stages and acts that encompass the transnational evidentiary procedure see also S. Ruggeri, 'Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposal to the proposal for a Directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?' in S. Ruggeri (ed.) *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2013, pp. 287 et seq.

8 The discussions on this issue are not new as can be seen, among others, in B. Schünemann (ed.), *Ein Gesamtkonzept für die Europäische Strafrechtspflege. A programme for European Criminal Justice*, 2006, which is focused precisely on the principles of European transnational criminal proceedings. Essential on this topic are the comprehensive studies by S. Gless, *Grenzüberschreitende Strafverfolgung*, 2006; T. Krüssmann, *Transnationales Strafprozessrecht*, 2009; and for an empirical study at the EU level see G. Vermeulen et al., *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, 2010.

9 Certainly several steps have been taken in this direction: the principle of *ne bis in idem* has been recognized at the European constitutional level and some progress has been made towards the regulation of criminal jurisdiction, as well as with regard to the procedural rights of the suspect in criminal proceedings.

10 And as Van Hoek and Luchtman point out 'the current inter-state practice thus creates a gap in legal protection that does not exist in purely national cases' (A. van Hoek & M. Luchtman, 'Transnational cooperation in criminal matters and the safeguarding of human rights', 2005 *Utrecht Law Review* 1, no. 2, p. 16.

11 See K. Ligeti, *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union*, 2005, pp. 221-226, who highlights the problems

This paper does not intend to address all the problems of European transnational proceedings, nor recall the numerous legal debates on this topic.¹² The objective is more humble: to focus on the issues related to the gathering and admissibility of witness evidence obtained in another Member State. Identifying common rules applicable to all kinds of cross-border evidence would not allow this paper to enter into detailed principles and rules, as the various types of evidence entail great differences. This is why I have opted here to follow a step-by-step approach, and to start defining what such rules or general principles should be with regard to only witness evidence.

The hearing of a witness in another Member State and its admissibility as evidence causes a variety of problems and the solutions provided in the domestic laws of the Member States show great discrepancies.¹³ With the aim of identifying general principles that should be applied to witness evidence in transnational criminal proceedings, the starting point has to be the case law of the European Court of Human Rights (ECtHR) on the right to a public hearing and the right to cross-examine witnesses. However, before we concentrate on this topic, it is worth clarifying the concept of transnational criminal proceedings as it will be used here.

2. The concept of transnational criminal proceedings

European transnational criminal procedure has been defined as the procedure in which several Member States are involved in the prosecution of a crime,¹⁴ albeit because the crime has ramifications in different states or because international judicial cooperation is required in order to carry out single investigative acts, to adopt precautionary measures or to arrest the suspect.¹⁵

The definitions vary depending on whether they put greater emphasis on the final result, on mutual assistance or on the integral protection of the human rights of the parties involved in the proceedings. The scholars who have studied this topic consider that the transnational process is the one where the acts carried out in another state later become part of the original proceedings, and thus form a unitary procedure composed of different pieces or elements.¹⁶ It has also been defined as a criminal procedure where the rules of different legal systems, national and/or international, become intermingled.¹⁷ For Krüssmann the concept of transnational procedure refers to the idea that the converging of rules from different legal systems in one single proceeding should not result in a lowering of the procedural rights of the parties, and especially the accused's right of defence.¹⁸

As has been seen, there is no common definition of the concept of transnational proceedings. Therefore it might be appropriate to clarify that within this study the broad concept of transnational proceedings will be used – the proceedings in which cross-border elements converge and which seek to reach an adequate balance between efficiency and respect for procedural safeguards.

arising from the overlapping of police, judicial and administrative cooperation between the EU Member States, without a precise delimitation of the different ambits and without a clear definition of administrative and criminal offences.

12 I refer to the comprehensive works just cited by Gless, supra note 8 and Krüssmann, supra note 8.

13 For a complete analysis of the questioning of witnesses abroad and the admissibility of the pre-trial statements as evidence, although only from a German legal perspective, see F.P. Schuster, *Verwertbarkeit in Ausland gewonnener Beweise im deutschen Strafprozess*, 2006, pp. 142 et seq. See also, D. Vicoli, 'Ammissione della prova e divieti probatori', pp. 20 et seq. and G. Aimonetto, 'L'acquisizione della prova dichiarativa', pp. 36 et seq., both in G. Illuminati (ed.), *Prova penale e Unione europea*, 2009; J.M. Chozas Alonso, *El interrogatorio de testigos en los procesos civil y penal*, 2010, pp. 664 et seq., the latter more generally on the admissibility of pre-trial witness statements.

14 S. Braum, *Europäische Strafgesetzmäßigkeit*, 2003, cited by Krüssmann, supra note 8, p. 134, states that it would be more accurate to use the term 'trans-statal' procedure to highlight the cross-border element and the existence of inter-state cooperation. Without entering into this semantic discussion, in this study the more extended term of transnational proceedings will be used.

15 See B. Schünemann, 'Die Grundlagen eines transnationalen Strafverfahrens', in Schünemann (ed.), supra note 8, p. 100.

16 See Schomburg, Lagodny, Gless, Hackner, *Internationale Rechtshilfe in Strafsachen. Becksche Kurzkommentare*, 2012, pp. 22 et seq. The German literature uses the term '*international-arbeitsteiliges Verfahren*', which is also found in the judgement of the German Constitutional Court of 27 July 1999, NJW 2000, pp. 1252 et seq., in a case concerning the excessive duration of an arrest during an extradition process.

17 See Krüssmann, supra note 8, p. 134.

18 Krüssmann, supra note 8, p. 134.

3. The case law of the ECtHR on evidence and witness evidence in criminal proceedings

In order to identify common principles and minimum standards with regard to the gathering and admissibility of witness evidence that could be used as general rules in transnational criminal proceedings, it is inevitable to start by taking a look at the case law of the ECtHR. By only taking a look at the precise circumstances of the cases decided by the ECtHR, general rules and principles can be deduced. To that end, it is worth including here a brief description of some of the most relevant cases – being aware, of course, that this is only a small selection of cases. It is not our intention to study this case law, as there are already many textbooks and articles that have done so. But it might be appropriate to recall here the particular facts of these judgments, first to analyse if there are really clear rules on this particular issue; and second, if the principles set out for national criminal proceedings are the same as those established for witness evidence in transnational criminal proceedings.

With regard to criminal evidence in general the Court has stated that the rules on the admissibility of evidence are a matter for regulation by national law and national courts.¹⁹ However, 'in considering whether the proceedings as a whole were fair, respect for the defence requires that in principle all evidence must be produced in the presence of the accused at a public hearing where it can be challenged in an adversarial procedure.'²⁰ This involves the opportunity to question witnesses and to comment on their evidence.²¹ As a rule, the use of indirect evidence is not prohibited by the European Convention on Human Rights (ECHR), but it has to be considered, however, whether it is in fact the sole piece of evidence.²² On the other hand, the rule excluding hearsay evidence is not, in principle, contrary to Article 6(1) ECHR.²³

The use of unlawfully obtained evidence is not excluded as a matter of principle.²⁴ However, the way the evidence was obtained and the role played at the trial will be examined in the context of ascertaining whether the trial, as a whole, was fair.²⁵ No evidence obtained by means of oppression, entrapment or coercion should be admitted. Other unlawful elements do not necessarily render the proceedings unlawful per se.²⁶

As to the assessment of evidence, it is not for the Court to review it, unless the assessment is grossly unfair or arbitrary.²⁷

3.1. The ECtHR's case law on witness evidence in national criminal proceedings

With regard to witness examination, the general rule set out by the Court is that, before an accused can be convicted, all the evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument.²⁸ This requires, as a rule, the presence of the witnesses at the trial, so

19 See, for example, *Hümmer v Germany*, appl. no. 29881/07, 19 July 2012. See also K. Reid, *A Practitioner's Guide to the ECHR*, 2008, pp. 119 et seq. For a more detailed approach, see S. Maffei, *The Right to Confrontation in Europe. Absent, Anonymous and Vulnerable Witnesses*, 2012, pp. 80 et seq.

20 See, for example, *Barberá, Messegué and Jabardo v Spain*, appl. nos. 10588/83, 10589/83, and 10590/83, of 6 December 1988; *Bricmont v Belgium*, appl. no. 10857/84, 7 July 1989; *Kostovski v The Netherlands*, appl. no. 11454/85, 20 November 1989.

21 *Bricmont v Belgium*, appl. no. 10857/84, 7 July 1989; *Kamasinski v Austria*, appl. no. 9783/82, 19 December 1989.

22 See, for example, Commission decision *S. v Federal Republic of Germany*, appl. no. 8945/80, 13 December 1983.

23 See the Commission's inadmissibility decision in *Blastland v UK*, appl. no. 12045/86, 7 May 1987.

24 Gless, *supra* note 8, p. 485.

25 See, for example, Commission decision *Wischnewski v Federal Republic of Germany*, appl. no. 12505/86, 11 October 1988.

26 See *Schenk v Switzerland*, appl. no. 10862/84, 12 July 1988, where a telephone tap had not been ordered by the investigating judge; this fact was not considered to be an automatic violation of Art. 6 of the Convention. In *Khan v UK*, appl. no. 35394/97, 12 May 2000, where taped telephone conversations obtained without any legal basis amounted to the only evidence, the Court still found its use not to be unfair as the applicant had enough opportunity to challenge the evidence. These issues are usually considered by the Court under Art. 8 ECHR rather than under Art. 6 ECHR.

27 See *Company X. v Austria*, appl. no. 7987/77, decision of the Commission of 13 December 1979, although regarding the assessment of evidence in a civil procedure. See also *García Ruiz v Spain*, appl. no. 30544/96, 21 January 1999. What this means in practice has not been further explored by the Court nor have any guidelines as to the possible scope of this review of the assessment of evidence been established by national courts.

28 See S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, pp. 291 et seq. On the case law of the ECtHR on witness evidence and criminal procedure in general see also Maffei, *supra* note 19, pp. 71 et seq.; J. McBride, *Human rights and criminal procedure. The case law of the European Court of Human Rights*, 2009, pp. 189 et seq.; K. Reid, *A Practitioner's Guide to the ECHR*, 2008, pp. 209 et seq.; B. Emerson et al., *Human Rights and Criminal Justice*, 2007, pp. 639 et seq.; P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights*, 2006, pp. 644-649.

that the defence is accorded an effective opportunity to challenge the evidence against the accused and to check the truthfulness and reliability of the witness evidence. However, the Court has allowed exceptions to the right to a public hearing as well as to the right to cross-examine witnesses in certain cases.

It is not easy to identify general rules on the admissibility of witness evidence without any cross-examination from the case law of the ECtHR, as the Court does not examine Article 6(3)(d) ECHR separately but jointly with the right to a fair procedure (Article 6(1) ECHR).²⁹ Assessing the overall fairness of the proceedings is an adequate approach, but this does not help in identifying the elements for the admissibility of a witness statement without cross-examination. Only by taking a look at the precise facts of several cases decided by the ECtHR will it be possible to draw some conclusions on general principles regarding the right to cross-examine witnesses and its exceptions.

In *Lüdi v Switzerland*,³⁰ the Court found a violation of Article 6(3)(d) ECHR in a case where the conviction was based on a written statement by an undercover agent and a written transcription of telephone conversations with the defendant, without the defence having any opportunity to confront the witness, neither during the trial nor at the pre-trial stage.

In *Hulki Günes v Turkey*,³¹ the defendant was not assisted by a lawyer during the investigation and had not had a proper opportunity to cross-examine the witnesses during the investigation stage or during the trial. The Court considered that it was of crucial importance in this case that the prosecution witnesses were examined by the trial court to check the reliability of their versions of the events.³² This case is also relevant because the Court stated that the fight against terrorism does not justify a restriction on the right of the defence to confront witnesses.³³

In *Asch v Austria*,³⁴ a case involving domestic violence against a female victim, the victim, after reporting the events to the police and being examined by a doctor, had refused to give evidence during the resulting trial. The pre-trial record was read out, but the police officer who questioned the victim and the doctor who examined her were also heard at the trial. The fact that the defence had the opportunity to discuss the witness evidence and that it was not the sole evidence meant that the Court found no violation of the Convention.³⁵

A violation of Article 6 ECHR was also found in the case *Luca v Italy*³⁶ where the witness' questioning took place during the investigative stage without any opportunity to cross-examine later at the trial because of the witness' refusal to give evidence. The Court in this case made a general statement in favour

29 See, for example, *Salduz v Turkey* (GC), appl. no. 36391, 27 November 2008; *Al-Khawaja and Tahery v the United Kingdom*, appl. nos. 26766/05 and 22228/06, Grand Chamber judgment of 15 December 2011, Para. 142: 'Trial proceedings must ensure that a defendant's Article 6 rights are not unacceptably restricted and that he or she remains able to participate effectively in the proceedings (see *T. v the United Kingdom* [GC], Appl. No. 24724/94, § 83, 16 December 1999; *Stanford v the United Kingdom*, 23 February 1994, § 26, Series A no. 282-A). The Court's assessment of whether a criminal trial has been fair cannot depend solely on whether the evidence against the accused appears *prima facie* to be reliable, if there are no means of challenging that evidence once it is admitted.'

30 *Lüdi v Switzerland*, appl. no. 12433/86, 15 June 1992.

31 *Hulki Günes v Turkey*, appl. no. 28490/95, 19 June 2003.

32 The Court had already admitted the application based on the fact that the trial court (a National Security Court) lacked independence and impartiality and this made it unnecessary to examine the fairness of the trial, as such a court cannot guarantee a fair trial (Para. 84), but nonetheless the Court 'due to the particular circumstances of the case' entered into an examination of the violation of Art. 6(3)(d) ECHR. The case dealt with a charge of an armed attack resulting in the death of a soldier. The defendant also alleged a violation of Art. 3 of the Convention, based on the medical examination of the applicant while detained. The three witnesses were gendarmes and were questioned by the police investigators. Other evidence did not corroborate the applicant's statements.

33 'The lack of any confrontation before the trial court deprived him in certain respects of a fair trial. The Court is fully aware of the undeniable difficulties of combating terrorism – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by this problem, but considers that such factors cannot justify restricting to this extent the rights of the defence of any person charged with a criminal offence. In short, there has been a violation of Article 6 §§ 1 and 3 (d).' (Para. 96)

34 *Asch v Austria*, appl. no. 12398/86, 26 April 1991.

35 The case of *Asch v Austria* is very similar to the earlier case of *Unterpertinger v Austria*, appl. no. 9120/80, 24 November 1986, and was also a case of a domestic quarrel resulting in bodily harm, where the victim (the wife), after reporting the aggression to the police and making statements to the prosecutor, refused to testify against her husband at the trial. However, the outcome is different, because in *Unterpertinger* the Court found that the Austrian Court of Appeal had based the conviction mainly on the untested witness testimony, which resulted in a violation of Art. 6 ECHR. See also, *Ninn-Hansen v Denmark*, appl. no. 18972/95, 18 May 1999. For criticism concerning the inconsistency of this corroboration doctrine, see Maffei, *supra* note 19, pp. 108-109.

36 *Luca v Italy*, appl. no. 33354/96, 27 February 2001. In a similar sense see *Vidgen v The Netherlands*, appl. no. 29353/06, 10 July 2012, where the Court also found a violation of Art. 6(3)(d), because the pre-trial witness statement – as the witness had made use of his right not to give evidence at the trial – had been the sole and decisive evidence to convict the applicant.

of the possibility to assess a witness pre-trial statement, although in this case it finally found a violation of Article 6(3)(d) of the Convention. It stated:

‘If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene Article 6.1 and 3 (d) ECHR. (...) The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during investigation or at the trial, the rights of the defence are restricted to an extent that it is incompatible with the guarantees provided by Article 6.’

In the case *P.S. v Germany*³⁷ an 8-year-old female victim was questioned shortly after the offence had been committed and when her mother had reported the facts – sexual abuse by a music teacher – to the police. The district court decided not to hear the girl during the trial in order to protect her personal development. The fact that the witness pre-trial statement was the sole and decisive evidence for the conviction was considered to be a violation of Article 6 ECHR.

In the case *Accardi v Italy*,³⁸ the defendant, assisted by defence counsel, could be present during the pre-trial examination of a minor, but only behind a two-way mirror and without an opportunity to question the minor directly (the minor could only be questioned through the Investigating Judge). All the examination was video recorded and reproduced at the trial. The Court held that no violation of Article 6(1) ECHR could be found in this case.

In the case *Ferrantelli and Santangelo v Italy*,³⁹ even if there was no opportunity to cross-examine the witness because he had died, the Court found no violation of Article 6 ECHR, because there was other evidence confirming the witness statements.

In *Al-Khawaja and Tahery v the United Kingdom* of 15 December 2011, already cited,⁴⁰ the Court dealt with two different applications, which were decided jointly as both dealt with Article 6(3)(d) of the Convention. In the *Al-Khawaja* case, a case of indecent assault by a consultant physician against a patient, the victim had died before the trial and, as there was no other direct evidence, her statement was read out before the trial; the defendant was subsequently convicted by an unanimous verdict. The jury was instructed as to the unreliability of the evidence and the possible inconsistencies with other witness statements. The Grand Chamber stated in this case⁴¹ – contrary to the prior judgment of the Chamber – that ‘viewing the fairness of the proceedings as a whole (...) notwithstanding the difficulties caused to the defence (...) there were sufficient counterbalancing factors to conclude that the admission in evidence of the victim’s statement (made to the police) did not result in a breach of Article 61 read in conjunction with Article 6 (3) (d) of the Convention.’

In the same judgment, the Court also dealt with the case of Tahery, a man convicted by a majority verdict and sentenced to 9 years imprisonment (reduced to 7 years on appeal) for wounding with intent to cause serious bodily harm. In this case the decisive witness statement had been made before the trial judge behind a screen and not before the jury, because the witness was too frightened to appear at the trial due to threats that he had received. In this case the Grand Chamber⁴² took into account that the witness statement was decisive, there were no corroborative evidence, the counterbalancing factors to compensate for the difficulties to the defence were not sufficient and thus the jury were unable to make a fair assessment of the reliability of the witness, which resulted in a breach of the overall fairness of the proceedings and a violation of Articles 6(1) and 6(3)(d).

37 *P.S. v Germany*, appl. no. 33900/96, 20 December 2001. On this decision see also K. Ambos, *Principios del proceso penal europeo. Análisis de la Convención Europea de Derechos Humanos*, 2005, pp. 45-46.

38 *Accardi v Italy*, appl. no. 50598/02, 20 January 2005.

39 *Ferrantelli and Santangelo v Italy*, appl. no. 19874/92, 7 August 1996.

40 See note 29, supra.

41 See Para. 158.

42 See Para. 165. The Court first analysed whether there were sufficient grounds to allow the absence of the witness during trial. As was stated in *Pello v Estonia* (appl. no. 11423/03, 12 April 2003), ‘absence due to fear calls for closer examination.’

In *Fafrovicz v Poland*⁴³ the statement of the juvenile suspect questioned by the police as a witness to a case of car theft and drug dealing was read out during the trial, because the witness was living in the USA at the time of the trial. The Court found no violation of the fairness of the proceedings, since the witness evidence was supplemented by other evidence. It is interesting in this case to see how the Court assessed the due diligence of the trial court to ensure the attendance of witnesses at trial. The applicant in this case contended that the trial court had not used sufficient means to secure the presence of the witness; in answer the Court asserted that the ‘trial court cannot be blamed of having failed to request international legal assistance since it had not been established that the court knew the witness’ address in the USA.’ However, in *Pello v Estonia*⁴⁴ the Court stated that ‘all efforts will be made to secure witness attendance at trial, and if the witness is not present, enquire whether the absence is justified.’⁴⁵

In *Sievert v Germany*⁴⁶ the applicant had been a police officer who had been dismissed when his conviction for ill-treatment causing death while exercising a public office had become final. The criminal courts had based their findings mainly, but not exclusively, on the witness testimonies of G., H.G. and H. who were colleagues of the defendant and had initially been held as co-accused. They were questioned by a judge at the pre-trial stage, but exercised their right to remain silent during the trial. The defence had had no opportunity to question them directly at any stage of the proceedings. Notwithstanding this fact, the Court analysed the overall fairness of the proceedings,⁴⁷ the existence of other evidence, the opportunity of the defence to challenge the truthfulness of the witness depositions and their reliability, as well as the particular scrutiny of the evidence exercised by the trial Court. In view of all these circumstances, the Court decided that there had been no violation of Article 6 ECHR.

On the same date the judgment in *Hümmer v Germany*, cited above,⁴⁸ was delivered where the only eyewitnesses to the events had been questioned during the pre-trial stage in the presence of neither the defendant nor his lawyer. The defendant was accused of strangling his sister and injuring his brother with an axe. As family members of the defendant (the mother, brother and sister), they used their right not to testify and refused to testify during the trial. Neither the defence nor the prosecution were able to examine them during trial. The trial court heard the Investigating Judge who gave an account of the witnesses’ pre-trial statements. The only evidence conclusively demonstrating that the applicant had committed the assault was the witnesses’ pre-trial statements. The hearsay statement of the three direct witnesses, as recorded by the Investigating Judge, was the sole and decisive evidence against the defendant. In this case the Court pointed to the fact that defence counsel was not present during the pre-trial hearing of the witnesses, and that the statements and circumstances of such questioning were ‘to some extent contradictory or at least incoherent’. In the absence of any strong corroborating evidence the Court considered that the way in which the witness evidence was produced was unable to provide a proper assessment of the reliability of the evidence, and thus found that there had been a violation of Article 6 ECHR.

The case *S.N. v Sweden*⁴⁹ is highly important, as it represents an exception to the previous argument that a conviction based solely – or to a decisive degree – on the statement of a witness who could not be cross-examined is in violation of Article 6 ECHR.⁵⁰ In this case, the minor victim of a sexual offence was questioned by the police and video-recorded. The Court noted that the videotape of the first police interview was shown during the trial and appeal hearings and the second interview was read out before the trial court. The videotape was again played before the Court of Appeals. The Court stated

43 *Fafrovicz v Poland*, appl. no. 43609/07, 17 April 2012.

44 *Pello v Estonia*, appl. no. 11423/03, 12 April 2007.

45 On assessing the conduct of the state in securing the presence of witnesses at trial, see also, *Verdam v The Netherlands*, appl. no. 35253/97, 31 August 1999 (the trial had been adjourned on several occasions due to the non-attendance of a witness); *H.K. v The Netherlands*, appl. no. 20341/92, 6 January 1993 (the state was not responsible for a reluctant attitude in ensuring the right to confront a witness in France); *Haas v Germany*, appl. no. 73047/01, 17 November 2005 (witness abroad, written questions and efforts to bring the witness to trial in Germany). See also, J.D. Jackson & J.D. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions*, 2012, pp. 349 et seq.

46 *Sievert v Germany*, appl. no. 29881/97, 19 July 2012.

47 Following *Al-Khawaja and Tahery v the United Kingdom*, supra note 29.

48 See note 19, supra.

49 *S.N. v Sweden*, appl. no. 34209/96, 2 July 2002.

50 Commenting on this judgment A. Ashworth & C. Ovey, ‘Conviction Based on Taped Interviews of Alleged Victim by Police Officer’, 2002 *Crim. L. Rev.*, no. 10, pp. 831 et seq.

that Article 6(3)(d) ECHR does not require that questions be put directly to the accused or his/her defence counsel through cross-examination. The circumstances of the case were considered sufficient to enable the applicant to challenge the victim's statements and his credibility in the course of the criminal proceedings.

With regard to anonymous witnesses the Court has accepted exceptions to the right to cross-examine a witness in a public hearing.⁵¹ In *Doorson v The Netherlands*,⁵² a drug trafficking case, where several witnesses remained anonymous, two identified witnesses provided statements to the police and the investigating judge, but one of them did not appear at the trial and the other withdrew his incriminating pre-trial statement. The Court in this case found no violation of the Convention, as the anonymous witness's statements were not the sole and decisive evidence. Furthermore, this case is interesting because the ECtHR also admitted that when trial and pre-trial statements contradict one another, the Court can freely choose which one to believe and attribute evidentiary value. However, in the judgment *Van Mechelen and others v The Netherlands*,⁵³ a case involving a series of robberies, the Court stated that the questioning of an anonymous witness via a sound link, with the Investigating Judge and the police officers in a separate room from the accused and the defence and thus not allowing any direct visual contact, were not a proper substitute for the right to cross-examine the witness. Different from the *Doorson* case, in this case the anonymous witnesses' statements were the only evidence on which the conviction was based, and therefore the Court found in this case that there had been a violation of Article 6 ECHR. In *Birutis and others v Lithuania*⁵⁴ the Court also found that the proceedings lacked fairness: the statements were read out before the trial court as they had been recorded by the investigating authorities and there was no opportunity to examine the manner and the circumstances in which the anonymous witness statements had been obtained.

Although in order to comply with Article 6(3)(d) ECHR the general rule requires that the defence has the opportunity to cross-examine the witnesses at trial, exceptions are admitted, as has been seen in the decisions and judgments cited above. With the case law of the ECtHR the following conclusions can be drawn regarding the admissibility of witness pre-trial statements.

1) *With cross-examination at the pre-trial stage*: if there was an opportunity to cross-examine the witness and the defendant had the assistance of lawyer, the evidence is admissible, even if the witness examination did not take place before a judicial authority. It is not necessary for the admissibility of this evidence that the defendant was present during the questioning, it being enough that defence counsel had the opportunity to question the witness and that the statements thus obtained could be discussed during the trial. In the decision on the breach of Article 6(1) and 6(3)(d), the Court usually does not test the reasons why the witness did not appear at the trial.

2) *Without cross-examination at the pre-trial stage*: The general rule is to determine the inadmissibility of the evidence. However, the ECtHR exceptionally allows such evidence to be taken into account as long as it is not the sole and decisive evidence for the conviction. In these cases, the non-appearance of the witness at trial shall be justified and the trial court must demonstrate that it had made reasonable efforts to ensure the presence of the witness at trial. The Court chooses to accept this untested pre-trial evidence, but compensates its unreliability by requiring that it is not the sole and decisive evidence.

3) *Without cross-examination at the pre-trial stage but statements recorded by video-tape*: As has been seen in the cases of *S.N. v Sweden*, of 2 July 2002 and *Accardi v Italy* of 20 January 2005, the Court has exceptionally admitted such testimony, even if it was the sole and decisive evidence. The Court considers that the defendant had the opportunity to challenge the witness evidence as the recorded statement was played during trial. In this case the right to directly confront a witness has been balanced with the need to protect the interests of a child victim of sexual abuse. It is difficult to assess whether under different

51 Trechsel, supra note 28, pp. 317-320.

52 *Doorson v The Netherlands*, appl. no. 20524/92, 26 March 1996.

53 *Van Mechelen and others v The Netherlands*, appl. no. 21363/93, 23 April 1997.

54 *Birutis and others v Lithuania*, appl. nos. 47698/99 and 48115/99, of 28 March 2002.

circumstances the Court would have been inclined to admit the video-recorded pre-trial statement without any cross-examination, even if it was the sole evidence. In other words, it is unclear if a pre-trial statement without cross-examination is in any event admissible as full evidence, or if this exception only applies to minors who have been the victims of sexual abuse.

4) *Without cross-examination at the pre-trial stage with the witness being present at trial but refusing to testify*: The Court does not exclude the use of pre-trial statements when the witness who is present at trial refuses to testify. For the Court, the fact that the witness exercises his right not to testify does not preclude the possibility to use his pre-trial statements as evidence. The Court has not laid down any guidelines on this issue, but refers to the domestic rules on the admissibility of evidence.

The aforementioned principles on witness evidence have been established within the ambit of national criminal proceedings without any cross-border element, except for those cases where the witness statement could not be obtained because the witness lived abroad and no address was known. It should be considered if these principles should be applied in the same way when the witness lives abroad and is questioned by way of international judicial cooperation. As will be seen in the next section the ECtHR appears to suggest that the right to cross-examine a witness who is abroad may be subject to lower requirements.

3.2. *The ECtHR's case law and witness testimony obtained abroad through international cooperation*

With regard to witnesses who live abroad and whose statements are obtained through international judicial cooperation, it is worth mentioning the following cases.⁵⁵

In the decision by the Commission in *P.V. v Germany*⁵⁶ the Court found a violation of Article 6 ECHR. The witness was questioned by the Turkish authorities while executing a letter rogatory issued in Germany, where the proceedings had been instigated. The defendant had no opportunity to cross-examine the witness, because he was not summoned for that hearing, despite the fact that his presence was required by Turkish law and that the letter rogatory expressly requested the Turkish authorities to summon the defendant and his counsel. The Commission held that the use of this evidence involved such limitations on the rights of the defence that it amounted to a violation of Article 6 of the Convention. This decision includes important statements on witness evidence obtained abroad, which are worth being reproduced here:

‘Article 6 para. 3 (d) (Article 63d) of the Convention does not grant the defence total freedom to call any potential witness at any time in the proceedings, but allows a refusal to call witnesses whose statements are not likely to assist in ascertaining the truth (...). The Commission recalls that Article 6 para. 3 (d) (Article 63d) of the Convention does not grant the accused an unlimited right to secure the appearance of witnesses in court. Its purpose is rather to ensure equality between the defence and the prosecution as regards the summoning and examining of witnesses (cf. e.g. No. 4428/70, Dec. 1.6.72, CD 40 p. 1[8]; No. 8417/78, Dec. 4.5.79, D.R. 16 p. 200 [207]). It does not exclude that witnesses residing abroad whose presence at the trial cannot be enforced by the trial court are examined on commission by a court at their place of residence. This is a well-established practice provided for in numerous bilateral and multilateral international conventions. Its very purpose is to assure to the greatest possible extent the availability of evidence, which cannot be collected otherwise.

(...) Furthermore, Article 6 para. 3 (d) (Article 63d) does not require that the defence must always have the opportunity of directly examining a witness. According to this provision, the accused has the right to ‘examine or have examined’ witnesses. The Commission finds that

55 On the ECtHR's case law on witness statements obtained abroad see also R. Vogler, ‘Transnational Inquiries and the Protection of Human Rights in the Case-Law of the European Court of Human Rights’, in S. Ruggeri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, 2013, pp. 30-32.

56 *P.V. v Federal Republic of Germany*, appl. no. 11853/85, admissibility decision of 13 July 1987. On this decision see the interesting analysis by Van Hoek & Luchtman, supra note 10, p. 19.

this requirement is not only complied with if the accused or his defence counsel have the opportunity of putting questions to the witnesses themselves, but also if they can request that certain questions are put to the witness by the court. Especially, this holds true if witnesses are to be examined on commission (...).⁵⁷

The case of *A.M. v Italy*⁵⁸ again shows that if written statements by the witness are the sole piece of evidence for the conviction and there are no other counterbalancing factors that compensate for the lack of cross-examination, the Court will find a violation of Article 6 ECHR. A minor reported to the authorities in Seattle that he had been the victim of an indecent assault by the defendant during a holiday in Italy. The Italian prosecutor requested via a letter rogatory the questioning of the minor, his father, mother and the doctor treating him, without the presence of lawyer. The minor was not questioned, and the written answers of the other witnesses were read out at the trial, although the prosecution had asked the court to summon the witnesses to appear in court. The Strasbourg Court stated that the applicant had never had an opportunity to confront the witnesses and to challenge their statements and this resulted in a violation of Article 6 of the Convention.

In *Solakov v Former Yugoslav Republic of Macedonia*,⁵⁹ the Court dealt with a case of drug trafficking where five witnesses were questioned in the USA by the Investigating Judge of Skopje in the presence of an American prosecutor and an interpreter. The defence lawyers were informed of the date of the hearing and were summoned to appear at that hearing, but for different reasons both lawyers did not appear at the hearing in the USA. The testimonies were recorded in writing. The Court did not find a breach of Article 6 of the Convention, as there was no proof that the applicant had been denied his right to be present during the witness questioning.

In the case *Haas v Germany*⁶⁰ the prosecution tried to get a witness who was in Lebanon to travel to Germany to be questioned. As the transfer was not authorized, written questions were sent to Lebanon with a request that the defence should be allowed to be present during the hearing of the witness. However, as this presence was not foreseen under domestic law, it was not granted. The written record of the witness's answers was admitted as evidence, and in this case the Court found no violation of the Convention because the evidence was treated with extreme care and there was other evidence to corroborate the recorded pre-trial witness statements.⁶¹

From the case law of the ECtHR it becomes clear that the presence of the defence is essential for the pre-trial statement to be evaluated as evidence and if there has not been such an opportunity at any stage of the proceedings there will be a breach of Article 6 ECHR.⁶² However, the Court does not require that the defence is actually present during the pre-trial hearing of the witness; it is enough that they have been summoned, even if this requires the defence lawyer to travel from Europe to the USA (as was the case in *Solakov v Former Yugoslav Republic of Macedonia*).

Moreover, exceptionally in a case where there has not been an opportunity to be present during the questioning of the witness abroad, the Court has considered that Article 6 ECHR had not been violated if the defence has had the opportunity to send written questions to the witness (*P.V. v Germany*).

57 *P.V. v Federal Republic Germany*, of 13 July 1987, Para. 4 c). The decision also took into account the following facts:

'The applicant does not allege that it was impossible or inappropriate for him to request that in case he applicant or his defence counsel could not attend the hearing certain specific questions should be put to C by the Turkish court examining him on commission regarding C's previous statements to the police which the applicant's defence counsel had a right to consult. Nor does the applicant allege that he made such a request, which was then denied. In these circumstances, the Commission cannot find that the applicant's right under Article 6 para. 3 (d) (Art. 63d) to have witnesses examined was in any way impaired.'

58 *A.M. v Italy*, appl. no. 37019/97, 14 December 1999.

59 *Solakov v Former Yugoslav Republic of Macedonia*, appl. no. 47023/99, 31 October 2001.

60 *Haas v Germany*, appl. no. 73047/01, 17 November 2005.

61 The case *Sommer v Italy*, appl. no. 36586/08, 23 March 2010, a case of war crimes committed during the Second World War, also deals with witness statements obtained abroad (in Germany) through mutual legal assistance. In this case, even if the witness was not called to appear at trial, the Court found no violation of the Convention due to the fact that the defendant's lawyer had been able to take part in the pre-trial witness hearing and that the witness's statement was not the sole evidence.

62 See *A.M. v Italy*, of 14 December 1999. In the same sense Krüssmann, supra note 8, p. 698.

4. The principles set out in the ECtHR's case law as general principles applicable in transnational criminal proceedings?

Once the principles set out in the ECtHR's case law on witness evidence have been identified it appears logical to depart therefrom in defining the general principles of transnational criminal proceedings. It also seems to be logical to apply the same criteria as are applied in national proceedings, unless there is a clear justification to establish different requirements with respect to the right to cross-examine. I shall begin by recapitulating the arguments utilized by the Strasbourg case law, in particular in the decision *P.V. v Germany*.

4.1. The argument that the 'presence of the witness cannot be enforced abroad'

In *P.V. v Germany* the Commission held that the parties do not have an absolute right to secure evidence, as the presence of the witness cannot be enforced abroad. In such circumstances, the Convention seeks to ensure 'equality' between the parties. Certainly the courts of the issuing state lack the coercive power to enforce the presence of a witness who is outside the territorial limits of their jurisdiction. This is still valid from the perspective of the understanding of the principle of sovereignty under international law. Thus, according to the rules of international cooperation, witnesses who have been summoned by a foreign court can freely decide whether or not they will appear in court.⁶³

However, it would be wrong to conclude from the foregoing, without further nuances, that the mere fact that a witness is abroad makes his appearance in court always impossible,⁶⁴ and even less so in a single European area of justice.

The witness should be called in any event, in order to make his voluntary appearance in court possible. This will not be a problem when the address of the witness who is abroad is known. If the court does not know the address where the witness can be summoned, it would be sensible to require from the relevant state a minimum effort to find the whereabouts of the witness. To my mind this would be in conformity with the due diligence that can be expected from the courts and the cooperating authorities to ensure the rights enshrined in Article 6 ECHR. Once the witness is summoned, it would not be enough to rely only on the willingness of the witness to appear. Coercive measures should be put in place to grant the right to cross-examine witnesses.⁶⁵ The non-appearance of a witness after having been summoned cannot automatically be considered to be an impossibility to appear.

In my opinion, in the European context it would not at all be inappropriate to compel Member States to include in their domestic legislation the provision that a witness is obliged to appear before the court of another Member State when the distance to be travelled does not exceed certain limits; and that a witness is in any event obliged to appear before the national court of his place of residence to testify, through a video link, in the proceedings taking place in another Member State. There should be swift cooperation not only at the pre-trial stage for gathering evidence, but also at the trial stage. The EU Convention on Mutual Legal Assistance in Criminal Matters of 2000 does not expressly mention the assistance during trial, but it is implicitly included as it refers to mutual assistance in criminal proceedings in general, and is thus not limited to the pre-trial stage. Furthermore, Article 10 of the EU Convention of 2000 regulates the hearing of witnesses by video conference, and does not exclude a video conference held during the trial.

Within the European Union the Member States have already assumed the obligation to execute foreign courts' requests aimed at collecting evidence and this obligation also extends to facilitating the appearance of witnesses at the trial being held in a foreign court, at least through a video conference. There would be no contradiction with the principle of state sovereignty, which determines that the trial court does not have coercive powers to enforce the appearance of a witness who resides in a foreign

63 Art. 8 of the European Convention on Mutual Assistance in Criminal Matters, adopted on the 20th April 1959, Art. 5 of the European Union Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union done in Brussels on the 29th May 2000 and Art. 52(3) of the Convention implementing the Schengen Agreement (derogated from by Art. 2 of the EU Convention of 29 May 2000)

64 In the same sense Schuster, *supra* note 13, pp. 164 et seq.

65 However, budgetary reasons often prevent the enforcement of witness summonses as Maffei, *supra* note 19, p. 53, points out.

country, as the witness would be summoned by the requested state. The use of video conferencing, as provided in Article 10 of the EU Convention of 2000, seems to be the most appropriate solution from the perspective of respecting the right of defence, the principle of equality of arms and the right to cross-examine a witness recognized by Article 6(1) and 6(3)(d) ECHR. Only practical or economic arguments could prevail and these hindrances should be overcome.

It should be kept in mind that in *P.V. v Germany* the Commission analysed the fairness of the proceedings and compliance with Article 6(1) and 6(3)(d) ECHR within the context of the communication technology which existed at that time. That decision was taken in 1987 while communications – and the costs thereof – have since then evolved in a way that was unimaginable just a decade ago. In addition, it should be recalled that the case did not refer to judicial cooperation between EU Member States – the letter rogatory had been sent to Turkey – and therefore its *dicta* are not necessarily applicable to the system of judicial cooperation within the European Union.

In sum, the fact that a witness is in foreign country within the EU should no longer be considered equivalent to an impossibility to call him to appear in court. Once this is accepted, it is just a question of analysing how international cooperation could be articulated to make the appearance of the witness possible. At least, a mechanism should be established to make it obligatory for a witness to appear in court through a video conference, as is provided under Article 10(8) of the EU Convention on Mutual Legal Assistance of 2000.

4.2. Inadmissibility if the untested witness evidence is the sole and decisive evidence and particular scrutiny as counterbalancing factors

The ECHR does not only grant a right to have a witness cross-examined, but also to refuse unreliable testimonies.⁶⁶ Witness statements obtained without confrontation are obviously less reliable. In any event it appears clear that the lack of a possibility to cross-examine a witness does not result in the inadmissibility of the evidence, but in a lower evidentiary value according to the balancing test of the 'sole and decisive evidence' rule. There are no reasons that would justify applying a different standard to the assessment of untested witness evidence depending on the reasons that have caused the witnesses' non-attendance at the trial, hence, the same principles should apply to witnesses who live in the state of the trial court and to witnesses who live in another EU Member State.

4.3. Cross-examination and written questions

In the case *P.V. v Germany*, the Commission further stated that the right to cross-examine witnesses when they are abroad is considered to be respected if the defence has had the opportunity to send written questions.

The argument that the defendant could have requested the court to send the requested authority a written questionnaire is not convincing. In this case the authorities of the requested state had infringed their own legal provisions with regard to the questioning of the witness. Furthermore, they did not comply with the formalities required in the letter rogatory, as the defendant was not given the opportunity to be present during the questioning. Even if for the ECtHR the violation of the domestic legal provisions might not be decisive for the fairness of the proceedings taken as a whole, I consider that according to the circumstances under which the witness pre-trial statement took place, the rights of the defence were not adequately safeguarded. If this were a domestic case instead of one concerned with a cross-border questioning of a witness, it would have cast doubt as to the reliability of the witness statement and would only have been admitted if it were not the sole and decisive evidence on which to base the conviction.

Moreover, in my opinion, even if there had been no legal infringements in the requested state, accepting a written questionnaire as a valid substitute for the opportunity to cross-examine witnesses does not seem to be fully adequate at the present stage of the communication society. Rules for European transnational proceedings should provide for more efficient cooperation and not be satisfied with the opportunity to send written questions: the questioning of a witness should in any event be recorded by video.

66 Trechsel, *supra* note 28, pp. 296-300.

Of course, it goes without saying that if the written questions sent to the witness abroad are formulated only by the prosecution, as happened in *A.M. v Italy* of 14 December 1999, then the questionnaire does not fulfil the requirements of Article 6 ECHR.

5. Transfer of evidence and the principle of non-inquiry

In matters of international judicial cooperation most countries have been applying the so-called rule or principle of non-inquiry, where the requesting state does not check the way in which the evidence was obtained in the requested state.⁶⁷ For example, a very similar stance has been adopted in Spain, where the Supreme Court has expressly refused to inquire into or supervise the acts carried out in a foreign country by foreign authorities. In its judgment of 10 January 2003 it clearly states that the Spanish courts shall not become supervisors of the legality of acts executed in another EU Member State:⁶⁸ ‘in a common European area of freedom, security and justice (...) it is not acceptable to control the judicial acts and measures carried out in the different EU Member States in execution of letters rogatory issued in conformity with Article 3 of the 1959 Convention.’⁶⁹

However, a few countries have already departed from the inquiry principle, and they tend to subject the evidence obtained abroad to a double-check, with the aim of discovering whether it complies with the rules of the executing state as well as the rules of the issuing state. This is the case, for example, in Swiss case law, where the trial court controls, by way of international judicial cooperation, that the procedural safeguards and the rights of the defence are not curtailed.⁷⁰

There are three main reasons that have traditionally justified the application of the non-inquiry principle: first, the classical argument of respecting the sovereignty of the cooperating state; second, a more pragmatic reason such as the factual impossibility of checking whether the letter rogatory has been executed according to the law of the executing state; and third, the principle of mutual trust, that may exist between states that share common legal principles and rules, like, for example the Scandinavian countries.⁷¹

The crucial question here is to determine if the principle of non-inquiry is still valid and should be kept within the EU or if, on the contrary, with regard to the evidence obtained abroad, the issuing state should in any event analyse the way it was obtained. The answer to this question is far from easy; therefore the three arguments given for retaining the principle of non-inquiry should be reconsidered.

On the one hand, taking the stance that respect for human rights and compliance with the ECHR have to prevail over classical concepts of sovereignty, it would be logical to require the trial court – where the evidence obtained will be used – to ensure that such evidence has been legally obtained and thus the right to a fair trial would be adequately protected.

On the other hand, the argument that it is impossible to check if the evidence obtained abroad has complied with the rules of the executing state lacks, to my mind, any justification nowadays, at least within the European Union: nowadays it is perfectly feasible to check if the collecting of evidence complies with both the law of the forum as well as the law of the executing state, as most of the codes of procedure of the EU Member States are available in different languages and are accessible online; and second, it should not be very complicated to request the executing state to describe the way in which the evidence was obtained. Of course, this control would be much easier if the principles with regard to evidence were harmonized at the European level and also if the defence were allowed to be present

67 See, among others, D. Ziegenhahn, *Der Schutz der Menschenrechte bei der grenzüberschreitenden Zusammenarbeit in Strafsachen*, 2002, pp. 359 et seq.; Van Hoek & Luchtman, *supra* note 10, pp. 3 et seq.

68 Judgment of the Spanish Supreme Court (STS), Criminal Chamber of 10 January 2003 (RAJ 2007/588). In the same sense STS of 27 December 2006 (RAJ 2007/588).

69 See STS 1521/2002, of 25 September 2002. However, the principle of non-inquiry is not applied to witness evidence, where the Spanish courts do check the way in which witness questioning was carried out abroad in order to determine its admissibility and its evidentiary value under Spanish procedural rules.

70 See Krüssmann, *supra* note 8, p. 663.

71 S. Gless, ‘National report: Europe’, in Eser et al. (eds.), *supra* note 1, p. 120: ‘common trust based on the idea that the MS are governed by comparable systems of justice, leads to the non inquiry by the MS into the human rights situation of the other in regard to cooperation in criminal matters’.

during the execution of the request for judicial cooperation. But this lack of harmonization should not automatically justify the fact that the legality check is impossible.

Finally, the argument of mutual trust can be understood in different ways and may therefore appear to be contradictory. On the one side, the existence of mutual confidence, which is given as the reason for not checking the acts of the executing state and accepting the admissibility of the evidence without any further control, is indeed in line with the principle of mutual recognition. As the principle of mutual recognition is the cornerstone of judicial cooperation in the EU, it seems that from this point of view the principle of non-inquiry should not only be accepted, but should also be extended.

On the other side, however, mutual trust, which is claimed to exist between judicial authorities or state institutions, does not necessarily exist on the side of the defence.⁷² Rather on the contrary, the function of the defence is not to trust, but to check compliance with the law and to ensure that the rights of the defendant are safeguarded. From this perspective the principle of non-inquiry – as well as the principle of mutual recognition – in theory impedes the defence in checking and thus in detecting possible infringements of the rights of the defence during the obtaining of evidence. In other words, if the argument of mutual trust stands in the way of the right of the defence, the principle of non-inquiry should be rethought.

In short, the three reasons given in favour of the principle of non-inquiry do not seem to have absolute validity. Moreover, they no longer seem to be justified in a European area of justice. Does this mean that the principle of non-inquiry should be abandoned and be substituted with the obligation of the requesting authorities to check the way in which the evidence was obtained in the executing state?

With regard to the transfer of evidence, and the role of the requesting state in checking the acts carried out in the requested state, the Commission stated in *P.V. v Germany*: 'Although this court was not responsible for the examination of C on commission it is in principle conceivable that the use of the evidence thereby contained could be contrary to that provision (i.e. Article 6(3)(d)).'

The Court did not go as far as to say that not checking the way the evidence was collected abroad is contrary to the fairness of the proceedings as a whole and for this reason the evidence should be rendered inadmissible.⁷³ However, even if the Court has not imposed an obligation on the issuing state to check if the requested authorities have respected human rights while executing the request, it has stated that the trial may be unfair if there was a violation of human rights in the state where the evidence was obtained.

Similarly, in the opposite situation, in *Soering v United Kingdom*, of 7 July 1989, the Court did find a possible violation of the Convention by the requested state when executing an extradition request. The case is well known and therefore it is not necessary to enter into all the details of the case here. It is sufficient to recall that this case dealt with a request by the USA sent to the UK requiring the extradition of a German citizen for a crime that could entail the death penalty.⁷⁴ In Paragraph 113 of this decision it is said: 'The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.' The Court did not require the executing state to check compliance with human rights in the requesting state, but it did recognize that 'a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accordance with each of the safeguards of the Convention' (Paragraph 86).

In short, the Court stated that a *flagrant denial* of the rights set out in the Convention could entail liability on the part of the Member State that executes a request for cooperation as well as of the requesting state that uses evidentiary material obtained with a flagrant violation of the rights enshrined in the Convention. Although the requesting state is not responsible for disregarding the Convention by the requested authorities, it is responsible for the use of the material as evidence. As Klip puts it, it is not possible to 'launder' evidence.⁷⁵

72 As I already stated earlier in L. Bachmaier, 'European Investigation Order for obtaining evidence in the criminal proceedings: study of the Proposal for a European Directive', 2010 *Zeitschrift für Internationale Strafrechtsdogmatik*, no. 9, p. 586.

73 See also Krüssmann, *supra* note 8, p. 698.

74 There are numerous publications and comments on the *Soering* case which are not necessary to cite here. See Krüssmann, *supra* note 8, pp. 702 et seq., and the literature cited therein.

75 A. Klip, 'Obtaining Evidence from Witnesses Abroad: Comparative Examples of Attitudes and Responses of States in Mutual Legal Assistance in Criminal Matters', in J.M. Reijntjes & J.F. Nijboer (eds.), *Proceedings of the First World Conference on New Trends in Criminal*

6. General principles for transnational proceedings with regard to witness evidence

With regard to evidence the aim in transnational criminal proceedings is to ensure the admissibility of evidence that is fair and, at the same time, to guarantee the refusal of those evidentiary elements that are against fundamental rights and the fairness of the procedure: while the former will foster efficient judicial cooperation and the advancement towards a single area of justice, the latter seeks to strengthen the protection of fundamental rights in criminal proceedings or, at least, that the level of protection is equivalent in each Member State.⁷⁶ Both objectives have to be made compatible and balanced.

At this point the following questions will be addressed: 1) First, should there be an obligation for the trial court to check how the evidence was obtained abroad? 2) Should there be general rules or criteria with regard to the execution of judicial cooperation requests regarding the questioning of witnesses within the EU? 3) Should there be common rules on the admissibility or exclusion of witness evidence obtained in another Member State? And, in this case, what should these rules look like?

6.1. Free movement of evidence, efficiency and the protection of human rights

The right balance between efficiency in international judicial cooperation and the protection of the human rights of the defendant is at present not adequately resolved.⁷⁷ At this point it is worth noting that the perspective of scholars differs notably from the stance of practitioners:⁷⁸ while practitioners naturally assume the principle of non-inquiry, scholars have stressed the idea that judicial cooperation always entails an extra risk for defence rights.

To strengthen the protection of defence rights, the defence should be accorded the possibility to check how the evidence was obtained in the executing state. Additionally, the trial court should also ensure that the evidence sent from another Member State complies with fundamental rights and the fairness of the proceedings. However, to what extent should the requesting authority be obliged to check the acts carried out by the requested authorities? Although the ECtHR has not gone that far, it has already stated that a flagrant denial of justice in the executing state can affect the fairness of the criminal procedure in the requesting state. It is true that an infringement of the right to cross-examine a witness might not be considered to be a flagrant denial of justice and thus not to make the requesting or the executing state automatically liable for a violation of human rights as enshrined in the ECHR. However, this does not mean that the hearing of witnesses abroad should not be checked: greater protection for the fundamental rights of the defence should lead to lower evidentiary value being given to evidence obtained by way of judicial cooperation which has not been checked.⁷⁹

Furthermore, if it is admitted that the historical grounds of the principle of non-inquiry are no longer applicable in judicial cooperation between EU Member States, the solution which is more respectful of human rights is the one that obliges or allows for the checking of the acts accomplished in the executing state. In fact, in the majority of the Member States, cross-border witness evidence usually undergoes such a control by the trial court before such pre-trial statements obtained abroad are used as evidence. As a rule the principle of non-inquiry is widely applied to other elements of the evidence, but is not followed when it comes to witness evidence: witness evidence usually passes through the legal filter of admissibility which is applicable to domestic criminal proceedings.

Requiring a check on the legality of acts carried out in the executing state, however, creates the paradox that has been mentioned earlier: a more thorough control of the transnational evidence is detrimental to the efficiency of the cooperation, to the free movement of evidence and to the principle of mutual recognition.⁸⁰ Moreover, such a check is more burdensome – although feasible, as said earlier –

Investigation and Evidence, 1997, p. 456.

76 On the opposition between the European interest in the free circulation of evidence and the interest of the Member States in keeping control over the admissibility of evidence, see Gless, *supra* note 8, p. 413.

77 See Schuster, *supra* note 13, p. 276.

78 On the tension between efficiency and the protection of fundamental rights and the diverging perspectives of scholars and practitioners see U. Sieber, 'Zusammenfassung der Tagung', in B. Huber (ed.), *Das Corpus Iuris als Grundlage eines Europäischen Strafrechts*, 2000, p. 336.

79 See Krüssmann, *supra* note 8, p. 711.

80 See under Section 5.

as it demands a knowledge and assessment of foreign rules, at least the rules which are applicable to the obtaining and validity of evidence.

It goes without saying that this difficulty would be less if certain minimum requirements for the practice and admissibility of evidence were harmonized. Certain minimum rules would promote legal convergence and would thus facilitate communication between different European legal systems that would undoubtedly be beneficial to the efficiency of the cooperation.⁸¹ But, if the principle of mutual recognition has been chosen as the mechanism to overcome the lack of harmonization, would it not be a contradiction to require more harmonization to implement the principle of mutual recognition? To my mind, the contradiction is only apparent, because both mechanisms – mutual recognition and legal harmonization – are not mutually exclusive. Moreover, increasing harmonization will strengthen the mutual trust needed for the acceptance of the principle of mutual recognition.⁸² On the other hand, both models can coexist: for example, applying the principle of mutual recognition for accepting and executing requests for judicial cooperation while establishing common rules on the admissibility of evidence.

The final objective is to achieve the free movement of evidence, but in order to achieve that goal without lowering the fundamental rights of the defendant and without causing inconsistencies within the domestic proceedings it is desirable to attain a certain harmonization in matters of procedural safeguards and evidentiary principles.⁸³ Until the required legal harmonization at the EU level is achieved, the solution for the free transfer of witness evidence, guaranteeing both the admissibility of such evidence and the protection of defence rights, could be that the witness hearing abroad is carried out in conformity with the principle of *forum regit actum*.⁸⁴

Which option would be better for the European transnational witness evidence, legal harmonization or the application of the principle of *forum regit actum*? The answer depends on where the focus is placed. If the aim is only to make the judicial cooperation more efficient, the latter solution is sufficient. But if the aim is to reach a higher dimension of judicial integration, to create a common legal culture and to provide efficient tools for a supranational European prosecution service, the harmonization is clearly the option to be followed.⁸⁵ However, according to Hecker it can be questioned whether the effort required for the harmonization might be disproportionate and whether the solution would conflict with the principle of subsidiarity.⁸⁶

6.2. Principles applicable to witness evidence in transnational criminal proceedings

This paper focuses on the principles of transnational criminal proceedings in cross-border witness evidence, not only because of its practical importance, but mainly because, despite the existing differences in its regulation, admissibility and assessment in the different Member States, the agreement on common general rules should be less controversial than with regard to other evidentiary elements: as long as the questioning of witnesses does not imply a restriction of fundamental rights – although coercive measures can be applied – the differences should be easier to overcome.

To ensure the admissibility of the cross-border witness evidence in the issuing state, granting respect for fair trial rights, and facilitating the checking of its legality at the trial, the easiest solution is that the witness is questioned in the executing state according to the *lex fori*.⁸⁷ Respecting the principle of *forum regit actum* will usually not pose any special problems in the executing state. On the other side, it would also make it easier for the trial court and for the defence to check if the evidence has been obtained in compliance with the law, as this would be one's own domestic law.⁸⁸ However, the application of the

81 See G. Illuminati, 'L'armonizzazione della prova penale nell'Unione europea', in G. Illuminati (ed.), *Prova penale e Unione europea*, 2009, pp. 10 et seq.

82 See G. Illuminati, 'Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees', in Ruggeri (ed.), supra note 7, pp. 23-24.

83 In the same sense Schuster, supra note 13, pp. 276-277.

84 As is foreseen in Art. 4(1) of the EU Convention on Mutual Legal Assistance of 2000. See also Krüssmann, supra note 8, p. 722, who considers that the application of the principle *forum regit actum* could be a first step towards a transnational criminal procedure and the way to overcome the divergencies between the laws of the issuing and the executing state.

85 See Illuminati, supra note 81, p. 12.

86 B. Hecker, 'Mutual recognition and transfer of evidence. The European Evidence Warrant', in Ruggeri (ed.), supra note 7, p. 278.

87 As provided in Art. 4(1) of the EU Convention of 29 May 2000.

88 In favour of requiring the trial court to check the obtaining of evidence in the requested state, until there is a harmonized regulation for transnational legal proceedings in Europe see Gless, supra note 8, pp. 415 et seq.

principle of *forum regit actum* in the execution of international cooperation requests would not only run counter to the implementation of the mutual recognition principle, but would still not clarify under which conditions pre-trial witness statements should be admitted as evidence at the trial, although it would clearly facilitate admissibility.⁸⁹

With the aim of ensuring the free movement of witness evidence within the European Union in supranational criminal investigations carried out by the future European Public Prosecutor and for advancing the harmonized protection of the fundamental rights of the defendants in criminal proceedings, the *forum regit actum* might not be enough: general principles applicable to transnational evidence should be defined and established, precisely with regard to witness evidence.⁹⁰ These principles or general rules should also apply when deciding on the admissibility of witness statements obtained abroad. For the following proposal for certain rules, the principles established in the case law of the ECtHR on the right to cross-examine witnesses, without considering the overall fairness assessment perspective, have been taken into account:

1) The questioning of witnesses shall be done without any entrapment, deception or coercion. The trial court shall promote the attendance of the witness at the trial in those cases where the witness statement is relevant. This is a way to protect primarily the right of the defendant to cross-examine the witness in a public hearing. The fact that the witness has his residence abroad is not an automatic reason for not calling the witness. To this end, the trial court will summon the witness to appear if the address is known. During the investigative stage, the court will request the address of the witness to be determined. It shall also request the authorities of the executing state to issue an order directed to the witness on the obligation to communicate any change of address. If, despite all these efforts, the witness cannot be found, because none of the addresses forwarded to the court are still valid and all reasonable efforts to find his whereabouts have been not successful,⁹¹ the possibility of resorting to the pre-trial statements shall be analysed.

2) To enforce the appearance of the witness before the trial court two possible solutions could be considered. The first establishes at the EU level the mandatory attendance of the witnesses in any Member State, at least if the trial court is within a maximum distance and the attendance would not cause an undue burden for the witness. If such requirements are not met, the attendance of the witness at the trial court should not, as a rule, be mandatory, but should be left to the will of the witness. In order to promote such willingness to attend the trial, the witness should be informed that his travelling and accommodation costs will be fully covered in advance.

3) If the witness is to be found locally, but his attendance at the trial would be too burdensome, too costly or the witness does not express a willingness to appear, an appearance via a video link should be organized. In this regard, a European instrument should establish an obligation for Member States to facilitate the attendance of the witness at the trial. This would include not only cooperation in summoning the witness to appear in person, but, when this is not possible or proportionate, to provide for the presence of the witness at the trial via a video link.⁹² Domestic law should establish the obligation for the witness to appear before the court of his residence – or the closest one equipped for video-conference connections –

89 In the same sense, Vermeulen et al., supra note 8, p. 128.

90 The alternative of creating a new ad hoc procedure for gathering evidence in transnational proceedings is also considered by S. Ruggeri, 'Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?', in Ruggeri (ed.), supra note 7, p. 307.

91 On the reasonable efforts required and the impossibility to call the witness see *Calabró v Italy and Germany*, appl. no. 59895/00, 21 March 2002.

92 In favour of the questioning of witnesses through video conferencing as is already foreseen in Art. 10 of the European Convention of 29 May 2000, see also T. Hackner & C. Schierholt, *Internationale Rechtshilfe in Strafsachen*, 2012, p. 203. These authors point out that this form of attendance may present technical or organizational difficulties, but not legal problems. See also Ambos, supra note 37, p. 90 and the literature cited therein. Regarding the use of a video link in international cooperation in Spain see A. Montesinos García, *La videoconferencia como instrumento probatorio en el proceso penal*, 2009, pp. 65-70; M. Carmona Ruano, 'Formas específicas de asistencia judicial (ii). La adaptación a las así llamadas nuevas tecnologías', in A. Galgo Pacheco (coord.), *Derecho penal supranacional y cooperación judicial internacional. Cuadernos del CGPJ*, 2004, pp. 220 et seq.; and the Spanish General Public Prosecutor's Instruction 3/2002 on the use of video link in criminal proceedings.

and the resulting sanctions for unjustified non-appearance and non-cooperation.⁹³ The trial court should bear the costs derived from the questioning of the witness by video link.⁹⁴

4) The use of pre-trial statements as a rule should only be admitted if the attendance of the witness residing abroad is not possible – neither his physical presence nor through a video conference. The reasons given by the authorities of the executing state with regard to the efforts made for summoning the witness should be accepted without any further corroboration by the requesting authority, but there should be the opportunity for the defence to check those circumstances.

5) If, despite the efforts undertaken to ensure or facilitate the presence of the witness at the trial, the witness is unavailable, it shall be considered if the pre-trial statements of the witness shall be read out or reproduced. The questioning of the witness at the pre-trial stage shall be done, as a rule, before a judicial authority in the presence of the defendant and the defence lawyer with a full opportunity to cross-examine.⁹⁵ Under such circumstances, the pre-trial statements comply with the requirements set out in Article 6(3)(d) ECHR.

In order to guarantee the principle of immediacy – at least a second level immediacy principle – the pre-trial hearing should always be video recorded, so that the jury in common law systems or the trial court in civil law systems can make a better assessment of the witness evidence.⁹⁶ The video-taped hearing is always preferable to the reading out of written statements. Under these conditions the pre-trial statement may have full evidentiary value.⁹⁷

As to the exclusionary rules of evidence in Article 33 of the *Corpus Iuris*, it has to be noted that this proposal contains a general rule on evidence and not only for witness statements.⁹⁸ This rule, apart from excluding evidence that violates the rights enshrined in the ECHR, establishes the principle of mutual recognition: as long as there is no violation of human rights, the legal differences which exist in the Member States will not be used to refuse the admissibility of evidence. Here I have opted for a different approach: the establishment of general principles applicable to transnational witness statements that, once complied with, should lead to the admissibility of such evidence.

6) But, what happens if some of the mentioned conditions are not met? What if the witness was questioned by the police, or without the presence of the defence or the questioning was not videotaped? These situations shall be addressed separately.

- If the witness statement was made to the police, but the defence was present, there was an opportunity to cross-examine the witness and the hearing was videotaped, the admission would not infringe the case law of the ECtHR on Article 6(3)(d) ECHR, as the right to confront the witness would have been respected, and the reliability and truthfulness of any statement could be further tested during the trial.

93 As provided in Art. 10.8 EU Convention of 29 May 2000.

94 As provided in Art. 10.7 EU Convention of 29 May 2000.

95 Similar requirements are set out under Art. 71 of the Rules of Procedure of the ICTY at The Hague: a video link for witness depositions and the exceptional admissibility of written statements, subject to the condition that the other party has had the opportunity to cross-examine a witness who does not appear at the trial. Later the Rules of the ICC, Art. 67 (Live testimony by means of audio or video link technology) and Art. 68 (Prior recorded testimony), provide for similar rules.

96 In the same sense see also Gless, *supra* note 8, p. 331; Schuster, *supra* note 13, pp. 163 and 280; Montesinos, *supra* note 92, pp. 100 et seq.

97 The requirements set out here are consistent with the proposal contained in the *Corpus Iuris* on the admissibility of evidence, even if I have come to this conclusion by other ways. However, to my mind, for the admissibility of pre-trial statements obtained abroad the trial court should first make reasonable efforts to provide for the attendance of the witness at trial.

Article 32(1)(a) of the *Corpus Iuris* reads: Admissible evidence

1. 'In Member States of the EU, the following evidence is admitted:

a) testimony, either direct, or presented at the trial via an audio-visual link if the witness is in another MS, or recorded by the EPP in the form of a 'European deposition'. For the latter, the witness must be examined before a judge, the defence lawyer must be present and allowed to put questions, and the operation must be recorded on video;'

98 Article 33 Exclusion of evidence illegally obtained

1. 'In proceedings for one of the offences set out above (arts. 1-8), evidence must be excluded if it was obtained by Community or national agents either in violation of the fundamental rights enshrined in the ECHR, or in violation of the European rules set out above (Articles 31 and 32), or in violation of applicable national law without being justified by the European rules previously set out.

2. The national law applicable to determine whether evidence has been obtained legally or illegally must be the law of the country where the evidence was obtained. When evidence has been obtained legally in this sense it should not be possible to oppose the use of this evidence because it was obtained in a way that would have been illegal in the country of use. But it should always be possible to object to the use of such evidence, even where it was obtained in accordance with the law of the country where it was obtained, if it has nevertheless violated rights enshrined in the ECHR or the European rules.' (see, p. 138 of the *Corpus Iuris*).

- If the witness was interviewed by the police or by an investigating judge without giving an opportunity for defence counsel to be present and to cross-examine the witness, the ECtHR states that such evidence can be exceptionally admitted as long as the rule of the ‘sole and decisive evidence’ applies. As seen earlier, such evidence, due to less reliability being attributed to it, cannot form the basis of a conviction, but can only be evaluated together with other corroborative elements. The ECtHR shows flexibility with the right to cross-examine witnesses at a public hearing, but is strict concerning the need to have the opportunity to cross-examine the witness at some point of the proceedings. To that end, the presence of the defence is essential. If the defence has not had any opportunity to cross-examine a decisive witness, the ‘sole and decisive’ evidentiary rule shall apply.
- A distinction should be made here between a pre-trial hearing without the presence of the defence that has been video recorded and the one that has not been filmed. As a rule, the questioning of a witness as part of a request for judicial cooperation within the EU should always be video-recorded. If it was video-recorded, even if the defence was not present during the pre-trial hearing, the ECtHR has exceptionally admitted such evidence with full evidentiary value in the case of a minor victim of a sexual offence.
If the pre-trial statement without cross-examination could not be video-recorded, the written statement could exceptionally be introduced at the trial through the testimony of the judge or the police officer who carried out the questioning, and only subsidiarily by reading out the written statement. In any event, the ‘sole and decisive’ evidentiary rule should apply.

7) Finally, there remains the issue regarding the admissibility of the pre-trial witness statement when the witness is present at the trial, but exercises his right not to testify. This issue would require a specific study in order to determine which rules should apply here and how the witness should be informed about his right not to testify as the practice in the legal systems of the different Member States differs greatly. There are no guidelines in the case law of the ECtHR on this issue, but the Court does not object to the admission of pre-trial statements when the witness later refuses to testify at the trial.⁹⁹ The EU Convention of 29 May 2000 already provides for the right to refuse to testify in Article 10(5)(e). It is not my intention to make any proposal with regard to the principles that should apply to these cases. However, I think that a pre-trial statement should not be used as evidence if the witness was not informed of his right not to testify during the pre-trial questioning, although special rules should apply when the witness is the victim who reports the crime.

7. Concluding remarks

Evidence transfer, legal certainty, predictability, compatibility and full respect for fundamental procedural rights might only be made possible through legal harmonization at the EU level.¹⁰⁰ Therefore I am of the opinion that there should be a minimum harmonization of the essential rules and principles regarding evidence and, as seen here, regarding witness evidence and the admissibility of pre-trial statements.¹⁰¹ Efforts must be made to provide for clear guidance on rules for transnational evidence and the struggle for their inclusion in the different domestic rules on criminal procedure of the Member States. As long as such harmonization is not attained, judicial cooperation regarding witness evidence should be based on the principle of *forum regit actum* as a first step towards a European transnational criminal proceeding. Otherwise, the mutual recognition principle and the non-inquiry principle would hamper the protection of defence rights and efficiency would not be achieved at the cost of defence rights. The Member States

99 See *Unterpertinger v Austria*, appl. no. 9120/80, 24 November 1986, Para. 32: ‘the reading out of statements in this way (when the witness refuses to give evidence at trial) cannot be regarded as being inconsistent with Article 6 §§ 1 and 3 (d) (Art. 6-1, Art. 6-3-d) of the Convention, but the use made of them as evidence must nevertheless comply with the rights of the defence, which it is the object and purpose of Article 6 to protect.’

100 Although, as Gless, *supra* note 8, p. 415, points out, it is unclear to what extent the European institutions are obliged to elaborate a harmonized legal framework to ensure the free circulation of evidence in criminal matters.

101 Schuster, *supra* note 13, p. 275.

have to ensure that no evidence which has been obtained with a violation of the human rights as defined in the ECHR is admitted at trial.¹⁰²

Rather than defining general rules which are applicable to all kinds of evidence for achieving the conditions for the free circulation of evidence a step-by-step approach might be more realistic. Starting with the identification of general principles which are applicable to witness evidence might be a first step for the future approval of a more comprehensive set of rules of procedure to be applied to cross-border evidence. Once the general principles are adequately identified to guarantee the fairness of transnational criminal proceedings a comprehensive set of rules for European cross-border proceedings and for a future EU criminal procedure directed by the European Public Prosecutor in certain supranational criminal investigations could be implemented. ¶

¹⁰² See also Gless, *supra* note 8, p. 437.