# Introduction

**STEFANO RUGGERI**[1]
steruggeri@unime.it

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## 1. Premise

In the field of criminal justice, fair trial safeguards have long played enormous relevance in the case-law of international and constitutional courts, which have not established new standards of traditional individual rights but have also strongly contributed to the acknowledgment of new rights and guarantees by means of a systematic understanding of international or constitutional charters. The increase of transjudicial dialogue between judicial bodies in the last decades has certainly favoured the search for solution models and methodological approaches which could overcome the differences of cases and legal experiences, with the ultimate goal of achieving ever higher standards of human rights protection and more sustainable trade-offs among conflicting interests.

Yet procedural fairness today finds itself confronted with unprecedented challenges, and there is little doubt that one of the most relevant factors determining such radical changes is the increasing transnationaliation of criminal investigation and judicial procedures. This outcome is due to a number of complex and different causes. Among them, we should firstly include the in-depth transformations occurred several forms of criminality, which have not only led to traditional offences gaining transborder features, but furthermore have given rise to the emergence of new and extremely aggressive criminal

1 Ordinario di diritto processuale penale. Professor of European and Transnational Criminal Justice. Dipartimento di Giurisprudenza "S. Pugliatti". Università di Messina. Piazza Pugliatti 1. 98100 Messina.

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phenomena of a transnational nature, and mostly organised offenders acting across territorial borders, and more and more even without borders. The evolution of science and technology has in turn also contributed to such changes, and brought about even more radical transformations, by way of putting at the disposal of criminal organisations an enormous set of recourses that often enable them to elude investigation and prosecution, thus frustrating the aims of an effective criminal-law action. But we should not overlook another important factor from a legal perspective, i.e. that the progressive erosion of the traditional boundaries between national and transnational criminal justice is also coupled with the softening of the traditional division lines existing between formally criminal matters and matters which, despite belonging to other legal areas, are characterised by levels of sanctions that inevitably interact with criminal justice.

Against such complex scenarios, the ongoing process of transnationalisation of fair trial safeguards provides a privileged viewpoint to understand the developments that have taken (and are constantly taking) place in the ways criminal justice complies with its goals – and therefore justifies its functions and its very existence – in the current societies, characterised by increasing degrees of multiculturalism, digital transformations and new rhythms of human (and thus also criminal) action.

## 2. Procedural fairness in transnational criminal justice: the challenges of a long-overlooked topic

This study deals with the transnational changes of procedural fairness by using an interdisciplinary method which is mainly based upon a case-law approach. The intervention of international and constitutional case-law in the field of transnational criminal justice, with a view to rethinking fair trial guarantees from a transnational perspective, is a much less old but equally significant phenomenon. Until the '90s, there were only a few rulings in Strasbourg case-law that specifically treated fair trial rights in the context of criminal proceedings entailing international cooperation, or anyway having a transnational dimension, and remarkably, it was only in relatively recent times that legal studies were carried out on the role of international and constitutional case-law to this difficult field.

Nevertheless, it would probably be oversimplifying to acknowledge the somehow scant jurisprudence on this topic. Further relevant factors need to be taken into consideration, starting with the traditional way of conceiving the international procedures of judicial cooperation in criminal matters. An in-depth analysis of international human rights case-law, indeed, reveals that even in relatively recent times at least some transborder

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procedures were still seen in terms of mechanisms of administrative assistance, which led to accepting a certain margin of flexibility in dealing with fair trial principles. Another relevant aspect deserves examination to understand this delay, that is, the way international courts have long acknowledged (and today still largely acknowledge) most fundamental safeguards in the light of a systematic and global view of criminal proceedings. The jurisprudence of European Court of human rights, in particular, provides a number of examples of this approach, which has led it to tolerate restrictions on fundamental rights as long as national authorities have adopted adequate tools and guarantees to avid a violation of the Convention. This approach, which opened up the door to flexible forms compensation for breaches of international charters at subsequent stages of the proceedings, confirmed the widespread conviction that international human rights charters – as far as their relevant provisions in the field of criminal justice were at stake – maintained a scope largely limited to individual jurisdictions.

While international case-law still defends this view in relation to some key safeguards (*e.g.*, *ne bis in idem* in the field of ECHR law), it is however apparent that an overall understanding of procedural fairness does not fit situations with a transnational dimension. This conclusion has a very simple reason, which is that, as a general rule, individual countries can be deemed liable for those procedural activities that take place within their own jurisdiction, but in cross-border cases, these activities only cover a limited part of a broader procedure with a transnational nature.

Moreover, the transnationalisation of crime justice is today a reality of such importance that requires departing from a reductive understanding of a fair trial from a cross-border (and sometimes even global) perspective. Doubtless, transnational criminal justice endangers a proper protection of fair trial rights, since the individuals involved in cross-border criminal proceedings often undergo additional risks and difficulties to those existing in domestic procedures. In the light of this, there is a need for strong efforts by all the competent authorities to ensure full compliance with international and constitutional law standards of protection. An essential condition of a truly fair criminal justice – as a unique legal experience in all social and constitutional orders based on the rule of law – is indeed the satisfaction of the fundamental principle of equal treatment. It might be argued that not only almost all fair trial rights and main safeguards (*e.g.*, the right to an independent and impartial judge or tribunal) but a number of core principles in some jurisdictions (*e.g.*, the principle of mandatory prosecution) are strictly linked to this core requirement, which entails the need to redefine the scope of the fundamental safeguards of fair trial in the light of the increasingly transnational and global changes of the procedures dealing with *ius terribile*.

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Constitutional and international courts have shown increasing flexibility in adapting their jurisprudence to these new challenges. But in Europe we should also mention the contribution that the supranational case-law of the European Court of Justice has made to such important developments in various areas concerning relevant fair trial safeguards (right to legal assistance, right to interpretation, etc.) and principles (transnational *ne bis in idem*). A view of transnational criminal proceedings in terms of complex procedures, founded on a suitable division of labours and functions among the competent authorities of different countries, provides a sound theoretical basis to avoid the risk of lowering the thresholds of, or even producing gaps in, the protection of fair trial rights.

## 3. The structure and contents of this dossier: a multilevel approach

Within this general conceptual framework, the present dossier starts with the examination of one of the most controversial problems in transnational criminal justice, concerning the independence of the judiciary in criminal trials from the viewpoint of EU law. The study conducted by *Giulia Colavecchio*, following the evolution of the case-law of the ECJ, culminates in the analysis of the transnational dimension of this key principle in the context of international surrender procedures by means of EAWs. Our study then focuses on the perspective of fair trial rights of the accused. Within this area, *Lorena Bachmaier Winter* analyses a right of the utmost relevance in every fair criminal justice system, i.e. the right to lawyer-client confidentiality, viewed in its multiple applications from the perspective of ECtHR case-law and in relation to the challenges set by EU cross-border criminal procedures.

There is little doubt that the existence of a fully confidential relationship between lawyer and client is an essential precondition for the effective exercise of the right to a defence in its multiple applications, starting with the right to confrontation and the right to be heard fairly, which gain particular relevance in transnational cases. Following a multilevel approach, *Antonella Falcone* and *Claudio Orlando* deal with the evolution of transnational investigation and evidence-gathering procedures from the viewpoint of the transformations undergone by the right to confrontation in cross-border situations. This contribution examines the developments occurred in MLA instruments mainly in the light of ECtHR jurisprudence, but analysis is also extended to the potentials of new technological means with a view to ensuring remote attendance and a proper collection of testimonial evidence in transborder criminal proceedings particularly in the EU area. Certainly, digital technology can help strike more proper trade-offs among conflicting interests than in the past, especially between the defendant's right to confrontation and

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the protection of victims and witnesses, though new challenges. Finally, the study of *Viviana Di Nuzzo* and *Elisea Malino* – by way of cutting across international law, EU law, and ECtHR case-law – focuses on the role of victims in transborder criminal investigations, court proceedings, as well as in the challenging area of restorative justice.

The challenges concerned with fair trial safeguards in the field of transnational criminal justice, moreover, go beyond the sole area of criminal inquiries and court proceedings, covering also the complex sphere of crime control and prevention. This topic has been examined by *Antonio Balsamo* & *Alessia Fusco*, whose contribution deals with the sensitive issue of patrimonial preventive measures, and the need to apply standards of procedural fairness with a view to ensuring a fair preventive procedure and facilitating cross-border cooperation.