The right to confrontation and the taking of witness evidence in the field of transnational criminal justice

O direito ao contraditório e à obtenção da prova testemunhal no campo da justiça criminal transnacional

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1. Introduction

In recent years, the fight against transnational crimes has determined an increase in the number of transnational criminal proceedings, which has brought about significant changes in transnational evidence law. The possibility of gathering evidence overseas and using it before domestic courts has become all the more relevant, especially from the viewpoint of accurate judicial ascertainment. In particular, significant steps forward have been taken to strengthen judicial cooperation in the gathering of evidence, which, in turn, has highlighted the need to improve the protection of human rights in transnational criminal justice[2]. Indeed, "being subject to a transnational criminal procedure should not affect the right to defence and should not result in a lowering of the procedural rights of the accused"[3].

In this light, this paper addresses the problems related to the gathering and use of testimonial evidence obtained in other countries from the perspective of a participatory approach to transnational criminal justice. Indeed, taking evidence overseas can hamper the defendants' right to confrontation if they are not duly given an opportunity to challenge and question witnesses testifying against them.

This analysis will preliminarily consider whether Article 6(3)(d) ECHR, which enshrines the right to confrontation, is also relevant in transnational criminal proceedings[4]. Furthermore, we will investigate whether the taking of testimonial evidence in other countries meets the requirement set out by this fundamental provision.

2 *This contribution is the outcome of a joint investigation. A. Falcone wrote sections 1, 2, 4, and 4.1. C. Orlando wrote sections 3, 4.2, and 5.
L. Bachmaier Winter, *Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case-Law*, in *Utrecht Law Review*, vol. 9, no. 4, 2013, p. 128. In light of this, a current definition of transnational criminal proceedings depicts them as "concerned with the relationship between the requesting and the requested states (international dimension), as well as with the relationship between the requesting or the requested State on the one hand and the individual (defendant, victim, third party) on the other (internal dimension)". M. Böse, M. Bröcker, A. Schneider, *Judicial Protection in Transnational Criminal Proceedings*, Springer, Cham, 2020, p. 1. On this topic, see T. Hackner, § 74 IRG, in W. Schomburg, O. Lagodny, S. Gless, T. Hackner, S. Trautmann (eds.), *Internationale Rechtshilfe in Strafsachen*, C.H. Beck, 2020, München; J. Vogel, C. Burchard, *Vor § 1 IRG*, in H. Grützner, P.G. Pötz, C. Kress, N. Gazeas (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, C.F. Müller, Heidelberg, 2019. This notion proves that international cooperation – irrespective of the mutual legal assistance procedures and those based on mutual recognition – rely upon a human rights-oriented perspective and on a participatory understanding of the gathering of transnational evidence. S. Ruggeri, Audi Alteram Partem *in Criminal Proceedings. Towards a Participatory Understanding of Criminal Justice in Europe and Latin America*, Springer, Cham, 2017, pp. 511-527.

3 L. Bachmaier Winter, *Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case-Law*, cit., p. 128.

4 See S. Gless: *Das Recht auf Konfrontation eines Auslandsbelastungszeugen. Eine europäische Perspektive aus Karlsruhe*, in M. A. Zöller, H. Hilger, W. Küper, C. Roxin (eds.), *Gesamte Strafrechtswissenschaft in Internationaler Dimension. Festschrift für Jürgen Wolter zum 70. Geburtstag am 7. September 2013*, Duncker & Humboldt, Berlin, 2013, pp. 1335-1370. See also H. Satzger, *International and European criminal law*, Beck-Hart-Nomos, Munich, 2013.

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In particular, after clarifying the meaning of the formulation of Article 6(3)(d) ECHR, which acknowledges the right of the accused 'to examine or have examined witnesses against him', there is a need to understand (i) which country should bear the responsibility for ensuring that the accused enjoys an adequate opportunity for confrontation[5] (ii) and whether the admissibility and the use of untested evidence taken abroad could still entail a fair trial.

To this end, we will analyse whether and to what extent the evolution of transnational evidence-gathering procedures – from mutual legal assistance to mutual recognition models – can ensure a proper protection of the right to confrontation. Mutual legal assistance by means of letters rogatory, indeed, has been traditionally used to convey statements rendered abroad by witnesses, experts, victims, suspects, or defendants which, in turn, have been read out at the trial without cross-examination. However, when the defence is not allowed to effectively contribute to the gathering of testimonial evidence overseas – due, for instance, to a lack of an accurate information about the opportunity of formulating or requesting that specific questions be put to the witness abroad –, recourse to letters rogatory could infringe upon the right of the accused to challenge prosecutorial arguments. In light of this, with a view to more human rights-oriented judicial cooperation, this paper aims to explore new models of ensuring the protection of this relevant right. In particular, we will focus on the potential advantages of videoconferencing, which as we will see is not just to be understood as an alternative method of confrontation held in courtrooms but also as an innovative technique to replace the outdated systems offered by letters rogatory.

To tackle these issues properly, there is need for a comprehensive approach aimed at providing an overview of the principal rules and caselaw that are currently available in the European legal scenario.

5 We need to examine whether an approach based on full inquiry into foreign law is compatible with the principle of transnational fairness in criminal proceedings, particularly in the European Union, where cooperation among member states is based on mutual trust. It should be remembered that the non-inquiry approach assumes that the formalities and procedural rules relating to the gathering of evidence in another state are not subject to questioning or confirmation by the national authorities conducting the proceedings.

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2. The evolution of transnational evidence-gathering procedures: trade-offs, gaps and challenges.

As has been anticipated, letters rogatory are the most used method of gathering evidence overseas and are provided for by mutual legal assistance conventions[6].

Starting with the Council of Europe level, it is worth mentioning the 1959 European Convention on Mutual Assistance in Criminal Matters (often called the "mother treaty")[7]. In line with a traditional understanding of national sovereignty, the Convention allowed for evidence-gathering cooperation based on the *locus regit actum* principle, according to which the gathering of evidence was governed by the law of the state where it took place. However, this principle entailed two main shortcomings. On one hand, it led to a 'patchwork procedure', as it combined the rules of state A governing the evidence-gathering with those of state B regarding the admissibility of evidence taken abroad[8]. In this way, evidence, despite being admissible according to the law of the cooperating country, could be regarded as inadmissible from the perspective of the law of the state in which it was to be used[9], thus jeopardising judicial ascertainment. On the other hand, the 1959 Convention did not expressly deal with the right to challenge prosecutorial arguments. Indeed, witnesses' statements rendered abroad under *lex loci* were conveyed through written letters rogatory and read out to the court of the trial country without cross-examination. Besides, Article 4 of the 1959 Convention specified that national authorities and parties could attend the carrying out of a letter rogatory only if the requested state

6 For the sake of completeness, it should be borne in mind that a letter rogatory (or letter of request for judicial assistance) is a request from one state to another one asking for the carrying out of a procedural activity or act which, if done without the cooperating country's intervention, would constitute a violation of territorial principle and sovereignty. The foreign state has no obligation to execute the letters rogatory and the decision as to whether to enforce them is ultimately at its own discretion. However, the reciprocity principle – that governs the international relationships between states in the absence of specific treaties – usually suffices, provided that the letters rogatory's execution neither surpasses the jurisdiction or power of the requested state's judiciary nor impinges upon its sovereignty. D. Vigoni, *Dalla rogatoria all'acquisizione diretta*, in G. La Greca, M. R. Marchetti (ed.), *Rogatorie penali e cooperazione giudiziaria internazionale*, Giappichelli, Torino, 2003, p. 417 ff.

7 The Council of Europe created new legal instruments related to mutual legal assistance, with a focus on the 1990 European Convention on laundering, search, seizure, and confiscation. Additionally, since 1995, the Council of Europe's Committee of Experts on the Operation of European Conventions in the Criminal Field has been working on updating the 1959 CoE Convention for 21st century crime fighting, leading to the signing of the Second Additional Protocol on 8 November 2001. See G. Vermeulen, *Eu conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters*, in *Revue Internationale de Droit Pénal*, vol. 77, n. 1-2, 2006 p. 80; K. Karsai, Locus/Forum Regit Actum – *A Dual Principle in Transnational Criminal Matters*, in *Hungarian Journal of Legal Studies*, vol. 60, n. 2, 2019, p. 161.

8 Along these lines, see S. Gless, *Die „Verkehrsfähigkeit von Beweisen" im Strafverfahren*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2003, p. 132 ff.; H. Satzger, F. Zimmermann, *Manifest zum Europäischen Strafverfahrensrecht. European Criminal Policy Initiative*, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2013, p. 412.

9 Cf. I. Zerbes, *Fragmentiertes Strafverfahren. Beweiserhebung und Beweisverwertung nach dem Verordnungsentwurf zur Europäischen Staatsanwaltschaft*, in *Zeitschrift für Internationale Strafrechtsdogmatik*, no. 3, 2015, p. 149.

agreed. However, even though this Convention developed a new participatory form of MLA cooperation, it did not expressly grant the defence the right to actively participate in the taking of evidence abroad, thus resulting in a possible exclusion of the accused from the questioning of foreign witnesses, victims and experts[10]. The occurrence that defendants and their defence counsels were not able to effectively participate in the gathering of evidence overseas turned out to expose the right to confrontation to infringements. In order to avoid the breach of this relevant right, the competent authorities of the trial country had two options: either to declare inadmissible the evidence obtained abroad or "giv[e] lesser credit to such 'tainted' evidence"[11].

To maximise the chances of evidence gathered abroad being admissible in the trial country, the European Convention on Mutual Assistance in Criminal Matters of 2000 (ECMACM) introduced a new approach in the framework of the European Union [12]. The 2000 Convention tempered the *locus regit actum* principle, as the requested state had to comply with requirements and procedures specifically indicated by the requesting one (*lex fori*), unless otherwise provided by the Convention and provided that the denoted procedures did not conflict with the fundamental principles of the law of the requested member state [Article 4(1)]. Although this flexible mechanism represented a significant change and led to great expectations for the future efficiency of judicial cooperation in Europe, the combination of *lex loci* and *lex fori* entailed "new gaps that required revision of both the instrument and its regulatory framework in order to be solved"[13]. Firstly, the request to apply certain formalities or procedures did not necessarily imply the admissibility of evidence at trial[14]. Secondly, from the viewpoint of this study, it is noteworthy that not even the Brussels Convention attached great importance to the participatory rights of the accused. Indeed, the defendant's participation in evidence-gathering abroad, despite being theoretically possible, was still subjected to a request by the judicial authority of the trial state [Article 6(2)], thus inevitably jeopardising the very

10 Although the national authorities' possibility to attend the execution of the letter rogatory seems limited, Article 4 was interpreted in a way that allowed for the competent authorities to suggest necessary formalities and procedures for the admissibility at trial of evidence gathered abroad. See D.Vigoni, *Dalla rogatoria all'acquisizione diretta,* cit., p. 423.

11 See R. Schünemann, *Solution models and principles governing the transnational evidence-gathering in the EU,* in S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, Springer, Cham, 2014, p. 163.

12 Indeed, the Convention states that requests for mutual assistance shall be transmitted directly between the competent judicial authorities, unless otherwise provided for (Article 6).

13 See K. Karsai, Locus/Forum Regit Actum, cit. p. 161.

14 For the sake of completeness, one might also consider that recourse to foreign rules did not always ensure the lawfulness of evidence-gathering. See M. Kusak, *Mutual admissibility of evidence and the European investigation order: aspirations lost,* in *ERA Forum*, vol. 19, 2019, p. 394.

essence of the right to confrontation. Furthermore, even though the defence was allowed to participate in the taking of testimonial evidence overseas, the accused were not always granted the right to effectively contribute to the evidence-gathering because they were not informed about the conditions in which witness examination would take place abroad.

Nonetheless, the approach set out by the 2000 Convention did not fit the EU judicial cooperation based on the mutual recognition principle. As is well known, the Tampere European Council, by dealing with the problems of the free movement of evidence (*Beweisverkehr*) within the EU, put forward the innovative concept of mutual admissibility of evidence, according to which "evidence lawfully gathered by one member state's authorities should be admissible for the courts of other member states, assuming the standards that are employed there"[15]. However, the European Union failed to enact coordinated rules meant to improve the mutual admissibility of investigative measures and even years later introduced a legal instrument, the European Investigation Order (EIO)[16], which followed a rather different path.

Indeed, EIO represents a new channel of cooperation between judicial authorities, replacing the existing evidence-gathering instruments developed in the field of MLA between member states. Article 9(2) of the directive 2014/41/EU sets out the main rules governing evidence-gathering abroad, which constitutes a hybridisation between the rigidity of mutual recognition and the flexibility of mutual legal assistance principles. Pursuant to Article 9(2), indeed, the executing authority must observe the formalities and procedures specifically indicated by the issuing authority unless they are "contrary to the fundamental principles of the law of the executing state"[17]. The right to confrontation and defence rights gain particular relevance in the framework of the European Investigation Order (EIO), as reflected in the general reference to the fundamental rights of the person involved in a transnational inquiry. However, confrontation in taking evidence abroad still depends on whether it is permitted by the law of the executing state or explicitly requested by the ordering authority. Additionally, on one hand, the EIO directive expressly

15 European Council, Presidency Conclusions, Tampere, 15 and 16 October 1999, p. 36. The principle of assimilation also played a supporting role since, if a similar (domestic) procedural act does exist in the legal system of the requested state, legal assistance cannot be refused. K. Karsai, Locus/Forum Regit Actum, cit., p. 164.

16 The directive 2014/41/EU ensures the fulfilment of national rules governing the admissibility of evidence, but at the same time it does not entail that national law on evidence-gathering will be strictly met. This seems to be problematic, if one considers the rationale behind the exclusionary rules, which aim at balancing the fact-finding method and the protection of fundamental rights. M. Daniele, *L'impatto dell'ordine europeo di indagine penale sulle regole probatorie nazionali*, in *Diritto penale contemporaneo*, no. 3, 2016, p. 64.

17 "A purification [...] in favour of the binding nature of (certain) individual interests is required to make the EIO lawful". S. Gless, *Grenzüberschreitende Beweissammlung*, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 125, 2013, p. 573.

provides the competent authorities of the issuing state with the possibility of taking part in the evidence-gathering overseas. This request can be rejected only by alleging the breach of fundamental principles. On the other hand, nothing is said about the participation of the defence, which, although not excluded, is therefore not specifically recognised [Article 9(4)], thus jeopardising, once again, the right to confrontation[18].

This short – and non-exhaustive – overview has revealed that the problem of achieving a trade-off between the requirements of the issuing state's law and those of the executing state's law remains unsolved. As has been pointed out, this is essentially due to the lack of legal models which can ensure mutual admissibility of evidence, and, above all, a unitary and shared system that can provide participatory rights with an adequate protection[19].

3. The right to confrontation and the taking of witness evidence in other countries in ECtHR case-law

The analysis carried out so far on the evolution of legal instruments regarding transnational evidence-gathering procedures is of fundamental relevance if we are to properly tackle the difficult challenges posed by the need to enhance the participatory rights of the accused in transnational cases. We have seen that the European Convention on Mutual Assistance of 1959 did not enable the defendant to examine witnesses against him in the event of testimonial evidence being gathered in another country through letters rogatory. This raises the question as to whether Article 6(3)(d) ECHR also applies to transnational criminal proceedings. This provision – which, as is well known, grants everyone charged with a criminal offence the right to examine or have examined witnesses against him – requires that the accused must be granted an adequate and proper opportunity to challenge and question prosecutorial witnesses either when the statements were made or at a later stage of the proceedings[20].

18 M. R. Marchetti, *Oltre le rogatorie: i nuovi strumenti per la circolazione degli atti investigativi e delle prove penali*, in M. R. Marchetti (ed.), *I nuovi orizzonti della giustizia penale europea*, Giuffrè, Milano, 2015, pp. 217-224. S. Ruggeri, *Procedimento penale, diritto di difesa e garanzie partecipative nel diritto dell'Unione Europea*, in *Diritto penale contemporaneo,* 2018, p. 33.

19 R. Del Coco, *Ordine europeo di indagine e poteri sanzionatori del giudice*, in *Diritto penale contemporaneo*, no. 4, 2015. In the absence of a legislative intervention, we hope that the "EIO could produce a kind of indirect harmonisation". F. Siracusano, *The European Investigation Order for Evidence Gathering Abroad*, in R. Belfiore, T. Rafaraci (eds.), *EU Criminal Justice. Fundamental Rights, Transnational Proceedings and the European Public Prosecutor's Office*, Springer, Cham, 2019, p. 101.

20 In this light, see *ex multis* ECtHR, judgment of 3 November 2011, *Vanfuli v. France*, Application no. 24885/05, § 107; Id., judgment of 19 October 2006, *Majadallah v. Italy*, Application no. 62094/00; Id., judgment of 20 September 1993, *Saïdi v. France*, Application no. 14647/89, § 43; Id., judgment of 24 April 2004, *Zhoglo v. Ukraine*, Application no. 17988/02, § 38; Id., judgment of 15 June 1992, *Lüdi v. Switzerland*, Application no. 12433/86, § 47.

To properly address this problem, we should start with the solutions adopted several years ago by the European Commission of Human Rights (EComHR). The EComHR, indeed, had addressed this issue in the case *X., Y. and Z. v. Austria* of 1973, outlining that, even if the European Convention on Mutual Assistance did not entitle the accused to examine witnesses overseas, everyone charged with a criminal offence must be granted the right to challenge prosecutorial arguments also in the gathering of evidence in other countries[21]. This approach posed the premises for a participatory understanding of transnational evidence-gathering and for a discussion on the relationship between the needs of transnational criminal proceedings and confrontation rights.

Indeed, after having assumed that the defendant's right to confrontation is applicable regardless of whether the testimonial evidence is obtained in the trial country or abroad[22], we shall analyse whether the taking of witness evidence overseas meets the requirements set out by Article 6(3)(d) ECHR. This is a difficult challenge to address since the transnational dimension of a criminal procedure entails the need to clarify the following aspects: first, who holds the responsibility for ensuring a proper opportunity of confrontation; second, the consequences of the admissibility and the use in the trial country of the untested evidence taken abroad.

In order to tackle these two fundamental issues, we should clarify the meaning of the formulation of Article 6(3)(d) ECHR which, as noted, acknowledges the right of the accused 'to examine or have examined witnesses against him'. The drafters of the ECHR adopted a broad interpretation of the right to confrontation, allowing for both direct and indirect confrontation – *i.e.*, a judicial hearing conducted by an impartial body, such as an investigating magistrate – provided that the defence is effectively involved in the taking of evidence[23]. Clearly, international cooperation makes it difficult to always ensure direct confrontation with prosecutorial witnesses[24]. In the light of this, in the case *P.V. v. Federal Republic of Germany* the EComHR stated that

21 EComHR, decision of 5 February 1973, *X., Y. and Z. v. Austria*, Application no. 5049/71.

22 See B. Schünemann, *Solution Models and Principles Governing the Transnational Evidence-Gathering in the EU*, cit., p. 163.

23 See J.D. Jackson, S.J. Summers, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions*, Cambridge University Press, Cambridge, 2012, p. 349; S. Ruggeri, *Personal Participation in Criminal Proceedings,* In Absentia *Trials and* Inaudito Reo *Procedures. Solution Models and Deficiencies in ECtHR Case-Law*, in S. Quattrocolo, S. Ruggeri (eds.), *Personal Participation in Criminal Proceedings. A Comparative Study of Participatory Safeguards and* In Absentia *Trials in Europe*, Springer, Cham, 2019, p. 597; S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, p. 311 ff.; J.R. Spencer, *Hearsay evidence in criminal proceedings*, Hart Publishing, Oxford, 2014, p. 48 ff.

24 S. Ruggeri, Audi Alteram Partem *in Criminal Proceedings*, cit., p. 419.

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> "[the right to confrontation] 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"[25].

The ECtHR confirmed this approach in the case *Solakov v. The Former Yugoslav Republic of Macedonia*, stressing that there was no violation of Article 6(3)(d) ECHR since the defence was informed of the date of the hearing and of the possibility of formulating written questions to the witness abroad[26]. Nevertheless, this solution does not seem suitable in the case of transnational criminal proceedings. Since indirect confrontation does not grant the defence the same opportunities as cross-examination, the accused must be put in a position to effectively contribute to the taking of prosecutorial evidence overseas, by at least being thoroughly informed about the possibility of formulating questions to the witnesses abroad and about the conditions in which the hearing will take place[27]. In any case, in our opinion, a video record of the questioning should be assured, with a view to more efficient judicial cooperation. However, in the *Solakov* case the applicant argued that "the investigating judge had summoned [his] lawyer only one week before the trip" and that "the summons had contained no detailed description about the venue or exact date of the questioning, the number and names of the witnesses to be heard, or the questions that the investigating judge wished to put to them"[28]. It is quite evident that in such circumstances the accused was not able to exercise the participatory rights enshrined in the European Convention. In the light of this, the solution adopted by the Court seems to be somehow questionable. As we will note in the subsequent paragraphs, innovative methods of confrontation – such as videoconferencing – could fill the gaps produced by the taking of evidence overseas by means of letters rogatory, enabling a more interactive way of participating in the hearing and questioning the witnesses abroad.

Against this background, we can now focus on the critical topics raised above: *i.e.*, the responsibility for ensuring confrontation, and the admissibility and the use in the trial country of the untested evidence taken abroad. These problematic issues should be

25 Cf. EComHR, decision of 13 July 1987, *P.V. v. Federal Republic of Germany*, Application no. 11853/85; see A. Van Hoek, M. Luchtman, *Transnational cooperation in criminal matters and the safeguarding of human rights*, in *Utrecht Law Review*, vol. 1, no. 2, 2005, p. 19.

26 See ECtHR, judgment of 31 October 2001, *Solakov v. The Former Yugoslav Republic of Macedonia*, Application no. 47023/99, § 62-67.

27 Cf. S. Ruggeri, Audi Alteram Partem *in Criminal Proceedings*, cit., p. 419.

28 ECtHR, *Solakov v. The Former Yugoslav Republic of Macedonia*, cit., § 41.

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analysed together since they are strictly linked with each other. Once again, we should start with the solutions adopted by the EComHR in the cases *X., Y. and Z. v. Austria* and *P.V. v. Federal Republic of Germany*[29]. In *X. Y. and Z.*, the Commission highlighted that, if the witness examination takes place in another country, the cooperating country holds full responsibility for ensuring confrontation[30]. In *P. V.*, the EComHR argued that the countries involved in transnational evidence-gathering procedures are responsible only for applying their own law. These conclusions were in line with the international-law instruments existing at the time of this decision (*i.e.*, the European Convention on Mutual Assistance of 1959, which was based on the *locus regit actum* principle). Therefore, there is a need to understand whether these solutions are still valid today in the light of developments in the field of judicial cooperation and ECtHR case-law. As we have seen, the 2000 Convention of Mutual Assistance and the EIO directive softened the *locus regit actum* principle, recognising a flexible mechanism of combination between *lex loci* and *lex fori*[31]. Indeed, even though the competent authority of the trial country has no jurisdiction in the activities that must be carried out in the cooperating country, the latter should ensure the accused a proper opportunity of confrontation if *lex fori* provides for it and the trial country specifically requests it.

The ECtHR shared such a view in *A.M. v. Italy*. In this case, the applicant complained that he had been convicted only on the basis of testimonial evidence obtained by means of letters rogatory in the USA which was read out at his trial before the Italian Criminal Court without confrontation having ever taken place[32]. In particular, the applicant argued that the rogatory letters had been issued without his knowledge and that, as a result, he

29 See also the well-known *Soering* case (ECtHR,7 July 1989, *Soering v United Kingdom*, Application no. 14038/88), in which the ECtHR decided that "although the Convention does not require contracting states to impose Convention standards on non-contracting states, the actions of the cooperating contracting State can be tested against the Convention in as far as its cooperation has as a direct consequence of the exposure of an individual to prescribed treatment". See, A. Van Hoek, M. Luchtman, *Transnational cooperation in criminal matters and the safeguarding of human rights*, cit., p. 15; J. T Parry, *International extradition, the rule of non-inquiry, and the problem of sovereignty*, in *Boston University Law Review*, vol. 90., 2010, pp. 1973–2029; S. Ruggeri, *Introduction to the Proposal of a European Investigation Order: Due Process Concerns and Open Issues*, in S. Ruggeri (ed.), *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, Springer, Cham, 2014, p. 15; Id., *O contributo do direito internacional de direitos humanos à definição das garantias do devido processo em matéria de justiça penal transnacional. Uma comparação entre as jurisprudências do Tribunal europeu de direitos do homem e da Corte interamericana de direitos humanos*, in M.M.G. Valente, A. Wunderlich (eds.), *Direito e Liberdade. Estudos em homenagem ao professor doutor Nereu José Giacomolli*, Almedina Brasil, Almedina, 2021, p. 803 ff.

30 See EComHR, *X., Y. and Z. v. Austria*, cit.: "The Austrian authorities were fully responsible for the form and conduct of this hearing on commission including the question of who should participate at the hearing".

31 Cf. S. Ruggeri, Audi Alteram Partem *in Criminal Proceedings*, cit., p. 418; F. Siracusano, *The European Investigation Order for Evidence Gathering Abroad*, cit., p. 86 ff.

32 Cf. ECtHR, judgment of 14 December 1999, *AM v. Italy*, Application no. 37019/97, § 21; see 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.),

had been unable to exercise the rights and liberties afforded by Article 14 of the Mutual Assistance Treaty between Italy and USA[33]. Indeed, it is interesting to note that no lawyer had been allowed to attend the witnesses' examination due to a specific request of the Italian public prosecutor. In the light of this, the ECtHR found a violation of Article 6(3) (d) ECHR, since the defence had had no opportunity of challenging the reliability of the decisive evidence taken abroad.

It is worth noting that in this case the ECtHR, in order to verify whether the proceeding was conducted fairly, applied the 'sole or decisive rule'. This rule – which has been developed to strike a balance between a strict understanding of the right to confrontation and the use of untested evidence in national proceedings[34] – acknowledges that if the accused had no chance to challenge evidence in any stage of the domestic proceeding he cannot be convicted solely or mainly on the basis of such evidence[35]. Within this perspective, it is important to stress that in recent years the approach of the ECtHR in the field of the right to confrontation has significantly changed. In the landmark decisions *Al-Khawaja and Tahery v. The United Kingdom* and *Schatschaschwili v. Germany*, the Court ruled out that 'the sole or decisive rule' could be inflexible, stressing that, where a conviction is based solely or decisively on untested evidence, the Court must scrutinise whether domestic authorities provided for sufficient counterbalancing factors aimed at compensating for the lack of confrontation[36]. Therefore, in the event of untested evidence being the sole

Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings. A Study in Memory of Vittorio Grevi and Giovanni Tranchina, Springer, Cham, 2013, p. 31.

33 Article 14 of the Mutual Assistance Treaty between Italy and USA states that: "A person from whom evidence is sought shall, if necessary, be compelled to appear and testify to the same extent as would be required in criminal investigations or proceedings in the Requested State. Upon request, the Requested State shall specify the date and place of the taking of testimony. The Requested State shall permit the presence [at the hearing] of an accused, counsel for the accused, and persons charged with the enforcement of the criminal laws to which the request relates. The executing authority shall provide persons permitted to be present [at the hearing] the opportunity to question the person whose testimony is sought in accordance with the laws of the Requested State. The executing authority shall provide persons permitted to be present [at the hearing] the opportunity to propose additional questions and other investigative measures. Testimonial privileges under the laws of the Requesting State shall not apply in the execution of a request, but such questions of privilege shall be preserved for the Requesting State".

34 S. Ruggeri, Audi Alteram Partem *in Criminal Proceedings*, cit., p. 329.

35 See ECtHR, judgment of 27 February 2001, *Lucà v. Italy*, Application no. 33354/96, § 40: "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 the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6".

36 See ECtHR, judgment of 15 December 2011, *Al-Khawaja and Tahery v. The United Kingdom*, Applications nos. 26766/05, 22228/06, § 147; Id., judgment of 15 December 2015, *Schatschaschwili v. Germany*, Application no. 9154/10, § 116: "Given that the Court's concern is to ascertain whether the proceedings as a whole were fair, it must review the existence of sufficient counterbalancing factors not only in cases in which the evidence given by an absent witness was the sole or decisive basis for the applicant's conviction but also in those cases where, following its assessment of the domestic courts' evaluation of the weight of the evidence, it finds it unclear whether the

or decisive element against the accused, its use at trial does not automatically entail a breach of the right to confrontation pursuant to an overall examination of the fairness of the proceedings[37]. However, the counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence[38].

Within this new framework, the solution adopted by the Strasbourg Court in the case *Paić v. Croatia* is all the more relevant. In this case, the ECtHR found a violation of Article 6(3)(d) ECHR since the defendant never had the opportunity of examining or having examined the key prosecutorial witness, whose testimonial evidence had been gathered in the Czech Republic. Indeed, neither the applicant nor his lawyer were invited to put questions to the witness abroad and no video recording of the questioning was shown at the hearing in Croatia[39]. This case can be distinguished from the previous ones because the ECtHR also attached significant importance to the evaluation of the existence of adequate counterbalancing factors. In particular, the Court pointed out that "the national courts did not even attempt to summon [the prosecution witness] to the applicant's trial and that the reasons they provided for such conduct were not sufficient"[40]. Moreover, in the view of the Court, the fact that the accused was able to challenge prosecutorial arguments by giving evidence himself or examining other witnesses cannot be deemed as a sufficient counterbalancing factor[41].

This approach is particularly meaningful for this study for two main reasons: first, because the Court stresses the need to verify whether other fundamental safeguards could justify a potential breach of the Convention occurring in another country; second, since this solution casts doubts on what country should hold the responsibility for ensuring for the accused suitable opportunities for confrontation. As we have seen, the accused must be granted the opportunity to examine or have examined the prosecutorial witnesses overseas if provided for by *lex fori* and requested by the trial country. From this it follows that the trial country should not be held responsible for not having applied

evidence in question was the sole or decisive basis but is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the defence".

37 See L. Bachmaier Winter, *Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case-Law*, cit., p. 130.

38 Cf. ECtHR, *Schatschaschwili v. Germany*, cit., § 125: "The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair".

39 See ECtHR, judgment of 29 March 2016, *Paić v. Croatia*, Application no. 47082/12, § 47; see also Id., judgment of 18 December 2014, *Scholer v. Germany*, Application no. 14212/10, § 60; Id., judgment of 25 April 2013, *Yevgeniy Ivanov v. Russia*, Application no. 27100/03, § 49; Id., judgment of 18 July 2013, *Vronchenko v. Estonia*, Application no. 59632/09, § 65.

40 ECtHR, *Paić v. Croatia*, cit., § 52.

41 ECtHR, *Paić v. Croatia*, cit., § 51.

any counterbalancing factor related to activities that do not fall within its jurisdiction[42]. Nevertheless, the ECtHR seems to broaden the scope of the 'counterbalance test', by verifying whether other procedural guarantees offered by the trial country could offset the difficulties faced by the defence due to the admission of witness evidence taken abroad without confrontation. This method seems problematic, since a strict application of this test would give too much leeway to the interested countries[43], relieving the cooperating country from its duty to ensure to the accused suitable opportunities of confrontation, and encouraging the trial state to use the untested evidence collected abroad on the basis of the possibility to compensate for a previous lack of confrontation at the later stage.

4. The use of videoconferencing in transnational evidence-gathering procedures and the right to confrontation

Letters rogatory, as seen above, are still today the main means of gathering evidence overseas[44]. However, if the accused is not allowed to effectively contribute to the taking of witness evidence, recourse to letters rogatory can infringe upon their fair trial rights, and especially the right to confrontation[45]. This was a concrete risk according to the solution envisaged by the EComHR and later confirmed by the ECtHR, which acknowledged the defendant's right to put written questions to the witness abroad. In the light of the

42 See S. Ruggeri, *O contributo do direito internacional de direitos humanos à definição das garantias do devido processo em matéria de justiça penal transnacional. Uma comparação entre as jurisprudências do Tribunal europeu de direitos do homem e da Corte interamericana de direitos humanos*, cit., p. 803 ff.

43 Judge Paulo Pinto de Albuquerque eloquently argued that "the cure was worse than the disease: [...] such application of the three-step examination would imply its redundancy so long as the overall fairness test was fulfilled, which would not only fail to provide any guidance to the national authorities as to the appropriate application of the *Al-Khawaja and Tahery* test, but indeed would give them too much leeway". See ECtHR, judgment of 18 December 2018, *Murtazaliyeva v. Russia*, Application no. 36658/05, *Dissenting opinion of Judge Paulo Pinto de Albuquerque*, § 48.

44 Summoning and hearing witnesses from foreign countries is often a cumbersome business. See A. Rafalko, *Depositions, Commissions and Letters Rogatory in a Conflicts of Law Case*, in *Duquesne University Law Review*, vol. 4, no. 115, 1965, p. 115 ff. According to Klimek, in adversarial legal systems, in-person witness testimony and cross-examination are of the utmost importance, thus making evidence obtained by foreign authorities less 'desirable'. In contrast, inquisitorial systems, which rely on written evidence, have less of an issue with this. L. Klimek, *Free movement of evidence in criminal matters in the EU*, in *The Law Quarterly*, no. 4, 2012, p. 252. The requesting state may perhaps have no means of coercion to enforce the examination of the witness in the trial country. Furthermore, structural measures are needed to provide for the hearing of a witness or a defendant who is able and willing to come to the court from abroad. It is even more troublesome for judges, prosecutors, and lawyers to travel overseas and hear the persons who are, conversely, unable or unwilling to take part in the trial. Cf. J. Kapplinghaus, *Testimony through an international video conference basic idea, relevant legal instruments and first experiences in Europe*, in *134th International training course visiting experts' papers*, https://www.unafei.or.jp/publications/pdf/RS_No73/No73_08VE_Kapplinghaus3.pdf, p. 34.

45 D. Vigoni, *Dalla rogatoria all'acquisizione diretta,* in G. La Greca, M. R. Marchetti (ed.), *Rogatorie penali e cooperazione giudiziaria internazionale*, Giappichelli, Torino, 2003, p. 417 ff.

evolution of technology, one might wonder whether modern tools, which allow for remote attendance, could represent a valid solution to the unsolved problems arising from a participatory understanding of transnational evidence-gathering and related to the right to confrontation.

4.1. Videoconferencing in the field of transnational criminal justice in Europe

To start with videoconferencing[46], it is apparent that it makes it possible to overcome most of the shortcomings linked to the participatory rogatory model as well as to the co-celebrating one, which require the judicial authorities and the participants to travel overseas to gather evidence. Videoconferencing entails undeniable advantages for the fulfilment of the right to confrontation in transnational evidence-gathering procedures. For instance, the recourse to online video-link connections enables the accused and their defence counsels to participate in witness examination – albeit remotely – and provide them with greater opportunities to prepare an effective defence strategy, since they can put their own questions directly to the witnesses abroad and, at the same time, challenge the prosecutorial arguments.

In the field of transnational criminal justice, there is little doubt that remote participation in the hearing protects the right of the accused to confront witnesses against him more effectively than is possible by requesting that specific questions be put by the competent authority to the declarant. Hence, it is no surprise that recourse to videoconferencing has increased at a transnational level where the transfer of the evidence gathered in the 'best place' is recurrent. This assumes that the 'best place' is where it is appropriate or possible to gather evidence or where it is simply located (*i.e.*, delocalisation)[47].

The Convention on Mutual Legal Assistance of 2000 already allowed for the use of videoconferencing methods when it is necessary to gather testimonial evidence of witnesses and experts abroad (Article 10) if the person to be heard has given consent. However, according to this instrument a remote connection may not be initiated in two cases. Firstly, whenever a breach of the fundamental principles of the requested country's

46 For the purposes of this paper, the term 'videoconferencing' refers to a system that allows the two-way and simultaneous communication of image and sound enabling visual, audio and verbal interaction during the remote hearing.

47 It has been also noted that, since some states require the presence of suspects and defendants for specific acts, especially in the first interviews carried out during the investigation or pre-trail detention or when the exercise of defence rights presupposes physical presence, recourse to videoconferencing systems may be beneficial for suspects and defendants when European arrest warrants (EAWs) or International Arrest warrants (IAWs) are unnecessary because they are simply ordered to secure physical presence in the requesting state and there are no serious risks of escaping.

legal system has occurred and, secondly, when there lack the technical means necessary to establish the link in the requested State[48]. The arrangements introduced by the Bruxelles Convention in this regard are of the utmost importance, as they transformed long-distance cooperation into a form of close assistance that combines a regular request for assistance by the requested member state and a direct exercise of jurisdiction by the issuing member state. On one hand, the requested member state was responsible for questioning the person to be heard, providing technically the real-time link, and making sure that national fundamental rights and procedural guarantees were respected. On the other hand, the hearing was conducted by or under the supervision of the judicial authority of the requesting member state according to its domestic law.

Evidence-gathering by means of videoconference was positively welcomed at the time of its enactment. Not surprisingly, the convention's rules were incorporated by Article 24 (Hearing by videoconference or other audio-visual broadcasting) in the EIO directive, which lays down specific rules on hearings by videoconference. The remote examination of witnesses, victims, experts, and defendants is conducted, or at least supervised by the authorities of the issuing state and, as far as possible, the executing state provides the foreign country only with technical arrangements[49].

Nevertheless, hearings by videoconference entail some problematic issues. The main difficulties concern practical and technical aspects, which can infringe upon the right to confrontation. In some cases addressed by Eurojust, for instance, the issuing authorities did not indicate the questions to be put to the witness or did not clarify whether the participation of a judicial or police authority was necessary. Moreover, Eurojust's

48 The requesting country could remedy this deficiency by providing the necessary technical equipment.

49 This rule clearly recalls Article 10 of the Brussels Convention. Despite these similarities, some differences can be stressed. With regard to the remote hearing, there is no longer reference to the "incompatibility" or "impossibility" of the witness or expert appearing in the territory of the requesting state (Article 24, 1). Thus, it seems that the directive has broadened the scope of this innovative instrument. However, Article 6(1)(b), according to which "the investigative measure(s) indicated in the EIO can be ordered under the same conditions in a similar domestic case", seems to exclude such an interpretation. In addition, no reference is made to the conditions of execution. This should not be seen as extraordinary for two reasons. Firstly, Article 10(2) excludes the executing country from any control of the legality of non-coercive measures as well as of taking statements, including those to be carried out by videoconference. Secondly, one might note that the execution of an EIO may be refused if the use of videoconferencing methods in a particular case would be contrary to the fundamental principles of the law of the executing State [Art. 24(2)]. The fact that videoconferencing may be rejected by the executing state, however, poses problems of compatibility with the recent European Court caselaw, according to which video-links are an extremely effective way of providing the defendant with an adequate opportunity to confront witnesses in cross-border criminal proceedings. Therefore, we might wonder whether such a refusal from a member state could automatically constitute a violation of Article 6(3)(d) of the European Convention on Human Rights. See F. Siracusano, *Tra semplificazione e ibridismo: insidie e aporie dell'Ordine europeo di indagine penale*, in *Archivio penale*, 2017, p. 687; Similarly, B. Galgani, *Assistenza giudiziaria in materia penale tra gli Stati membri dell'Unione europea*, in A. A. Marandola (ed.), *Cooperazione giudiziaria europea in materia penale*, Giuffrè, Milano, 2018, p. 452.

intervention often made it possible to reschedule hearing dates within a short period of time, due to witnesses being unavailable. Several cases also concerned the participation of the defence counsel in the witness examination, which was questionable under the different views of states. In one case, for instance, the issuing authority requested that the examination of the witness take place in the presence of the lawyer, in line with the provisions of the l*ex fori*. The executing authority stated, however, that the attendance of a lawyer was contrary to the principles of its legal system and that it was, therefore, not possible to comply with this request[50].

Within this legal framework, we will further discuss whether the taking of evidence overseas through the recourse to video-link connections meets the requirements set out by Article 6(3)(d) ECHR and whether the solutions adopted by the 2000 Convention and EIO directive are consistent with the right to confrontation.

4.2. Remote attendance through video-link in ECtHR case-law

Against this background, there is a strict link between confrontation rights and the right of the accused to be personally involved in his own criminal trial. Both essential safeguards require individuals charged with a criminal offence to be put in a fair condition not only to be personally heard and set forth their arguments, but also to challenge the arguments of their accusers.

Indeed, despite the advantages provided by videoconferencing, it is worth noting that even the most advanced technologies conceived for video-links do not grant the participants the same expectation of reality as physical attendance[51]. Currently, cameras cannot perceive all movements and the screen cannot show several details that would be visible if all the individuals involved were physically present in court[52]. Yet, the ECtHR has highlighted that the right to be present in court does not always entail the right of physical attendance and, thereby, remote participation does not necessarily constitute a violation of the right to a fair trial[53].

50 *Report on Eurojust's casework in the field of the European Investigation Order*, 25 November 2020, available at https://www.eurojust.europa.eu/it/publication/report-eurojust-casework-european-investigation-order.

51 See A. Falcone, *Online Hearings and the Right to Effective Defence in Digitalised Trials*, in S. Ruggeri, L. Bachmaier Winter (eds.), *Investigating and Preventing Crime in the Digital Era. New Safeguards, New Rights*, Springer, Cham, 2022, p. 189 ff.; A. Garofano, *Avoiding virtual justice: video-teleconference testimony in federal criminal trials*, in *Catholic University Law Review*, 2007, p. 702.

52 This situation could also negatively impact on the activities of the deliberating judge. Judgement must rely upon the direct analysis of the parties' behaviour and listening to their reasons, in order to evaluate non-verbal communications (real-time facial expressions, body demeanour, voice inflections) and reliability of the outcomes of examination.

53 Cf. ECtHR, judgment of 5 October 2006, *Marcello Viola v. Italy*, Application no. 45106/04, § 76: "*Dans ces conditions, la Cour estime que la participation du requérant aux audiences d'appel de la deuxième procédure pénale par vidéoconférence n'a*

However, transnational evidence-gathering procedures put different authorities in contact with each other: consequently, the countries involved may well have different levels of technological advancement. Against this background, one might stress that such impairment may affect the quality of the images and sounds to the point of compromising the examination irremediably. Hence, video and audio hearings must always serve a legitimate aim and require for adequate arrangements to ensure the full respect of the essence of the right to confrontation[54]. In this light, assuming that this kind of participation is not, as such, incompatible with the notion of a fair trial and public hearing, the Court emphasises the need to ensure the applicant a proper way of following the hearing without technical obstacles[55]. Thus, recourse to the video connection for the examination of witnesses has been deemed in line with the ECHR, provided that its deployment can guarantee effective participation in the hearing. Significantly, the European Commission for the Efficiency of Justice (CEPEJ) has recently developed several guidelines that states and courts should follow to guarantee that the use of videoconferencing in court proceedings does not infringe upon the participatory rights enshrined in Article 6 ECHR[56]. In particular, the CEPEJ pointed out that during the remote hearing the court should be able to continuously monitor the quality of the image and sound of the video link, thus minimising technical incidents[57], and should give the participants the opportunity to test the audio and video quality in order to familiarise themselves with the features of the videoconferencing platform[58]. Furthermore, both the defendant and the other participants (including judges, witnesses and experts) must be put in a condition to see and hear each other[59]. These are just some of the guidelines

pas placé la défense dans une position de désavantage substantiel par rapport aux autres parties au procès, et que l'intéressé a eu la possibilité d'exercer les droits et facultés inhérents à la notion de procès équitable, telle que résultant de l'article 6 de la Convention". In this way, A. Falcone, *Online Hearings and the Right to Effective Defence in Digitalised Trials*, cit., p. 201.

54 This is mainly true if one considers that the EIO directive regulates only cross-border videoconferences, while there is a lack of harmonisation of domestic regulation on videoconferences, thus resulting in a significant difference between domestic and transnational videoconferencing rules. See L. Bachmaier Winter, *Transnational Evidence towards the transposition of directive 2014/41 regarding the European investigation order in Criminal Matters*, in *Eucrim*, no. 2, 2015, p. 50.

55 Cf. ECtHR, judgment of 2 November 2010, *Sakhnovskiy v. Russia*, Application no. 21272/03, § 98; Id., judgment of 9 November 2006, *Golubev v. Russia*, Application no. 26260/02.

56 European Commission for the Efficiency of Justice (CEPEJ), *Guidelines on videoconferencing in judicial proceedings*, available at https://rm.coe.int/cepej-2021-4-guidelines-videoconference-en/1680a2c2f4, 2021, p. 7: "The purpose [of these guidelines] is to provide States with a framework aiming at eliminating any risk of violation of the parties' rights during remote hearings, in particular their right to be heard and to actively participate in proceedings, and the right of defence". See B. Galgani, *Forme e garanzie nel prisma dell'innovazione tecnologica. Alla ricerca di un processo penale "virtuoso"*, Wolters Kluwer, Milano, 2022, p. 308 ff.

57 CEPEJ, *Guidelines on videoconferencing in judicial proceedings*, cit., no. 6, p. 12.

58 CEPEJ, *Guidelines on videoconferencing in judicial proceedings*, cit., no. 5, pp. 11-12.

59 CEPEJ, *Guidelines on videoconferencing in judicial proceedings*, cit., no. 23, p. 15.

that the CEPEJ developed for a better use of video-link connections. The aim is to secure that the digital transition of court proceedings is made in compliance with European standards and, in particular, with the right to a fair trial[60].

Within this framework, in the case *Zhukovskiy v. Ukraine* the ECtHR pointed out that available modern technologies, such as video-links, could offer a more interactive way of questioning witnesses abroad, while having them attend could entail excessive costs and difficulties[61]. The Court recognised the compliance of remote examination with the right to confrontation even when the declarant is sick, or it is necessary to protect victims and witnesses. In the case *Papadakis v. The Former Yugoslav Republic of Macedonia*, the trial court had ordered the public prosecutor to secure the attendance of the witness – who was an undercover agent – or to establish a communication link for the examination[62]. The prosecuting authority did not comply with the court's order, thus failing to secure the attendance of the witness either in presence or through video-link. Indeed, the undercover agent was examined only in the presence of the trial judge and the public prosecutor. The applicant, therefore, complained that his right to challenge the reliability of the testimonial evidence against him was breached since "there had been no live streaming of [the undercover agent] examination despite the fact that streaming media had been available"[63]. According to the first step of the '*Al-Khawaja* test', the Court argued that the efforts of the authorities to guarantee the physical or virtual attendance of the witness were unsatisfactory[64]. In order to determine whether the proceeding as a whole was conducted fairly, the ECtHR also verified whether the opportunity given to the accused to submit written questions to the witness 'immediately after the examination' could compensate for the previous lack of direct confrontation. In particular, it is worth noting that the

60 CEPEJ, *2022-2025 CEPEJ Action plan: "Digitalisation for a better justice"*, 2021, available at https://rm.coe.int/cepej-2021-12-en-cepej-action-plan-2022-2025-digitalisation-justice/1680a4cf2c; Id., *Guidelines on electronic court filing (e-filing) and digitalisation of courts*, 2021, available at https://rm.coe.int/cepej-2021-15-en-e-filing-guidelines-digitalisation-courts/1680a4cf87, p. 5.

61 ECtHR, judgment of 3 March 2011, *Zhukovskiy v. Ukraine*, Application no. 31240/03, § 45. See also M. Daniele, *La formazione digitale delle prove dichiarative*, Giappichelli, Torino, 2012, p. 133; M. Bolognari, *La videoconferenza transnazionale nell'ordine europeo di indagine penale*, in *Rivista di diritto processuale*, 2022, p. 519; See L. Bachmaier Winter, *Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case-Law*, cit., p. 137, who argued that "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".

62 See ECtHR, judgment of 26 February 2013, *Papadakis v. The Former Yugoslav Republic of Macedonia*, Application no. 50254/07, § 31.

63 ECtHR, *Papadakis v. The Former Yugoslav Republic of Macedonia*, cit., § 35.

64 ECtHR, *Papadakis v. The Former Yugoslav Republic of Macedonia*, cit., § 91.

judicial authority gave the defence only one hour to read the transcript of the testimonial evidence, to prepare a defence strategy, and to formulate the questions[65]. The adequacy of this time-limit is questionable, since it does not enable the defence to gain familiarity with the evidence. Indeed, like in the *Solakov* case, the acknowledgment of the opportunity to prepare written questions was somewhat rhetorical[66]. Hence, the ECtHR found a violation of Article 6 ECHR, since domestic authorities failed to provide the accused with sufficient procedural safeguards which could offset the handicap faced by the defence.

The solutions adopted in *Zhukovskiy* and *Papadakis* raise the question of whether the approach followed by the 2000 Convention and EIO directive is consistent with ECHR law. Indeed, the fact that the remote examination of the witnesses is conducted directly by or under the supervision of the sole competent authority of the trial country does not necessarily grant the accused a proper opportunity of confrontation. This is especially the case when the accused or his defence counsel can put further questions to the witness only after he has been examined solely by the competent authority[67]. However, we have seen that the EComHR and ECtHR have recognised a broad interpretation of the right to confrontation, allowing for both direct and indirect confrontation. Therefore, the solutions set out by the 2000 Convention and EIO directive seem to be in line with ECHR law. Nonetheless, especially in the field of transnational criminal justice this approach is questionable since indirect confrontation cannot be deemed equivalent to direct confrontation, and therefore cannot be admitted in absolute terms.

5. Concluding remarks

The analysis carried out in this study has shown that the content of fundamental rights is always the result of conflicting values. This is the case of the right to confrontation in transnational criminal proceedings. Different understandings of this right across Europe, difficulties of ensuring face-to-face confrontation, together with the absence of coordinated rules on transnational evidence-gathering and the admissibility of evidence at trial, have led the ECtHR to strike the balance between the necessity to prosecute transnational criminal offences, on one hand, and the respect of defence rights, on the other. From this viewpoint, it seems that the Court has engaged in a 'race to the bottom' in the protection of the right to confrontation in order to enact efficient cooperation.

65 ECtHR, *Papadakis v. The Former Yugoslav Republic of Macedonia*, cit., § 94.
66 Regarding the *Solakov* case, see the critical remarks raised by S. Ruggeri, Audi Alteram Partem *in Criminal Proceedings*, cit., pp. 419-420.
67 S. Ruggeri, Audi Alteram Partem *in Criminal Proceedings*, cit., p. 420.

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This study also proves that innovative techniques which enable remote participation in the hearing have gained a key role in the evaluation of the overall fairness of criminal proceedings, especially in the field of transnational criminal justice. In several cases characterised by the involvement of two countries in the taking of evidence, the ECtHR recently stressed the need to verify whether the state in which the examination must be carried out provided the accused with a proper opportunity of confrontation through the recourse to video-link connections.

This approach is particularly meaningful for two main reasons. On one hand, the Court seems to express a clear preference for an examination conducted via communication links – where available – compared with the acknowledgment of the possibility for the defence to formulate written questions to the witness abroad. On the other hand, this solution amplifies the 'extent of the procedural guarantees' necessary in order for a trial to be considered as a whole fair. The suitability of the counterbalancing factors aimed at compensating for the lack of confrontation will depend on the weight of the untested evidence: "the stronger that evidence, the more weight the counterbalancing factors will have to carry for a positive ascertainment of the fairness of the domestic proceeding"[68]. Nevertheless, it seems that this new approach implies a significant expansion of the 'counterbalance test' and, therefore, of the ECtHR's decision-making. The Court, indeed, takes into account the possibility of justifying the choice of the prosecuting authorities to not establish a video-link – although available – by verifying whether other procedural safeguards could compensate for this conduct. It is of no consequence that in the *Papadakis* case the ECtHR found a violation of the Convention. The problem stands out in the Court's possibility to offset behaviours clearly not in line with Article 6 ECHR.

This holistic approach does not only give too much leeway to the countries involved in transnational evidence-gathering procedures – which would be allowed to deny the accused an effective opportunity of confrontation, relying on the possibility to compensate for this later – but to the ECtHR itself, thus depriving the right to confrontation of its very essence[69].

68 ECtHR, *Schatschaschwili v Germany*, cit., § 116.

69 Judges Sajó and Karakaş pointed out that "in applying the holistic approach (now presented as 'an overall examination') in order to determine the fairness of the trial, this Court has never stated that fairness can still be achieved if one of the fundamental rights is deprived of its essence. With regard to the right to cross-examine witnesses and the related but broader equality-of-arms principle, the Court has systematically and consistently drawn a bright line, which it has never abandoned, in the form of the sole or decisive rule. Today this last line of protection of the right to defence is being abandoned in the name of an overall examination of fairness". See ECtHR, *Al-Khawaja and Tahery v. The United Kingdom*, cit., *Joint partly dissenting and partly concurring opinion of Judges Sajó and Karakaş*.