THE IMPACT OF THE LISBON REFORM TREATY IN THE FIELD OF CRIMINAL PROCEDURAL LAW

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1. THE PROSPECTS OF HARMONIZING PROCEDURAL LAWS

Developments in the European Union (EU) clearly indicate a trend towards substantive uniformity in domestic criminal laws. As a result of conventions concluded within the EU, as well as of decisions of the European Council, Member States have enacted criminal law provisions which are notably similar in content. Examples include criminalizing the corruption of EU or foreign officials or corruption in the private sector, money laundering, and providing for the liability of legal persons or the confiscation of the proceeds of crime.[1] In like manner, the Framework Decision on the European Arrest Warrant,[2] though addressing issues of international cooperation, is likely to lead to further homogeneity in the substantive criminal laws of Member States. For certain conduct defined as criminal in the issuing state, the executing state may not refuse to surrender suspected offenders, claiming the lack of dual criminality. States will therefore certainly take steps, provided that they wish to maintain at least the appearance of sovereignty, to make conduct enumerated in the framework decision a criminal offense under their national law as well.

This trend towards legislative homogeneity in criminal law is not limited to the EU. Numerous international treaties concluded in the past have also had a harmonizing

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1 See for example: The Convention on the Fight against Corruption involving officials of the European Communities or officials of Member States of the European Union [OJ 97/C 195/01 25.6.97]; Framework decision criminalising corruption in the private sector [OJ L 192/54 31.7.2003]; and Framework decision on money laundering, dealing with the identification, tracing, freezing and confiscation of criminal assets and the proceeds of crime 2001/500/JHA [OJ L 182, 5.7.2001].

2 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

impact on the Member States' criminal laws within the Council of Europe.[3] Furthermore, on a global level, the harmonization of national criminal laws has become a priority over the last two decades. Clearly, the conventions on drug crime[4], transnational organized crime[5] and corruption[6] both reflect and catalyse the trend.[7] Mention should also be made of the Statute of the International Criminal Court adopted in 1998 which, though in a limited area, has made a substantial contribution to harmonizing and even unifying national laws. Due to the complementary jurisdiction of the permanent International Criminal Court, state parties to the treaty have been prompted to define war crimes and crimes against humanity in a uniform manner by following the wording of the Statute.[8]

Whereas the tendency of harmonizing substantive criminal laws is clearly evident, much less has so far been achieved in the area of criminal procedure.[9] Even within the EU, differences in criminal procedural law are still considerable in areas of such significance as the legal preconditions for employing coercive measures, the rules of collecting and assessing evidence, the role of the pre-trial stage of the process, the rights of suspects, or whether prosecution is mandatory or can be made dependant on considerations of expediency.[10]

Moreover, the measures currently envisaged to encourage harmonization of criminal procedure within the EU are rather modest.[11] The explanation may lie in that the rules of the criminal process are dependant to a considerable extent on the organizational structure of the criminal justice system, the extent to which the court

3 While the primary aim of some of these treaties – such as the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular at Football Matches (ETS No. 120, 1985), the European Convention on Offences relating to Cultural Property (ETS No. 119, 1985) and others – is to facilitate more effective international cooperation, a direct effect of this has been a degree of harmonization of national laws.

4 1961 Single Convention on Narcotic drugs; 1971 Convention on Psychotropic Substances; 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

5 United Nations Convention against Transnational Organized Crime and its protocols (2000): Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Protocol against the Smuggling of Migrants by Land, Air and Sea, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

6 United Nations Convention against Corruption (2003).

7 It should be added that facilitating cooperation is also among the aims of these conventions.

8 The definition of genocide in the Statute (see Article 6 and also Article 25 for incitement to commit genocide) in essence follows the wording of the definition of genocide (see Article 2) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948).

9 This seems to be surprising in the light of the frequently voiced assumption that changes in substantive law will inevitably have an impact on the rules of the criminal process which, it is held, primarily serves the enforcement of substantive penal law.

10 See Robert Esser: *Auf dem Weg zu einem europäischen Strafverfahrensrecht*. Berlin, 2002, De Gruyter Recht, p. 5.

11 Proposal of the Commission for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union 2004/0113 (CNS).

system is based on the so-called hierarchical or the coordinate model,[12] the role of lay decision-makers, etc. These factors are, in turn, influenced by the cultural background, *i.e.* historical and political experience of a given people, the "*Zeitgeist*" in a particular society and socio-psychological factors.[13] The criminal process is not only a reflection of the cultural values; by giving them expression in the course of its operation it serves to further strengthen and entrench these values.[14]

Some authors blame traditional comparative criminal procedural scholarship – which stresses the differences between existing criminal justice systems – for the lack of harmonizing efforts. According to *Summers* the prevailing approach has its source in legal nationalism. Commentators, she argues, "(…) instead of positively identifying those elements that make up their system, (…) seek to differentiate themselves from the perceived negative aspects of other systems."[15] She is of the view that by carefully studying the ideas expounded by 19th century scholars in England, France or Germany we may discern the values and principles underlying the European criminal procedural tradition.[16] She also makes an attempt to reveal these principles in the jurisprudence of the European Court of Human Rights. Indeed, *Esser* in his voluminous book also considers the Strasbourg jurisprudence as an important catalyst for harmonizing criminal procedural law in Europe.[17] The comprehensive comparative study of *Delmas-Marty* and *Spencer* however shows that in spite of certain signs of convergence in national laws the actual level of harmonization is still relatively low.[18]

Thus it appears that harmonization is a difficult undertaking in the area of criminal procedure. One can of course ask if there is a need at all for harmonization. Do potential benefits of making national criminal justice systems resemble each other outweigh the value of diversity? And assuming that harmonization is given priority over heterogeneity then which model will the harmonized European criminal process follow?

And in particular how will harmonization look like after the Lisbon Treaty?[19]

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12 Mirjan R. Damaska: *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*. New Haven, 1986, Yale University Press.

13 On the cultural factors explaining differences of systems of criminal procedure see Tatjana Hörnle: Unterschiede zwischen Verfahrensordnungen und ihre kulturellen Hintergründe. *Zeitschrift für die gesamte Strafrechtswissentschaft*, vol. 117, 2005/4, pp. 801–838.

14 *Ibid,* p. 834. By this we assume that the goal of the criminal process is not limited to the enforcement of substantive law provisions. The autonomous function of the process is to express and demonstrate its link to the cultural background.

15 Sarah J Summers: *Fair Trials. The European Criminal Procedural Tradition and the European Court of Human Rights.* Oxford and Portland, Oregon, 2007, Hart Publishing, p. 11. It is to be noted that *Summer's* critics is focused on the traditional distinction between adversarial and inquisitorial type of procedure.

16 *Ibid*. p. 17.

17 See Robert Esser: *Auf dem Weg zu einem europäischen Strafverfahrensrecht*. Berlin, 2002, De Gruyter Recht, p. 45.

18 Mireille Delmas-Marty – J.R. Spencer (eds.): *European Criminal Procedures*. Cambridge, 2005, Cambridge University Press.

19 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. OJ C306/50, 17 December 2007.

2. THE SECURITY PARADIGM COUNTERBALANCED

Before assessing Article 82 TFEU,[20] which envisages the setting of certain standards in the area of criminal procedural law, let me make a general comment. The text of Article 82 provides for the legal framework: it says that a certain level of harmonization is envisaged in several areas, including the rights of criminal defendants. However, the Article provides no indication of how the harmonized process would look and does not elaborate on the extent to which defendants' rights should be developed. Thus, Lisbon provides for the legal framework only; the content has to be determined by the Member States and the competent organs of the Union respectively. However, an assessment of the Lisbon Treaty as a whole – and the spirit of the Treaty – may assist us in predicting possible trajectories in this area. One can also adopt a historical approach, taking stock of what has been done so far, to help forecast (beyond mere speculation) the likely future of a harmonized criminal procedure and the position of defendants within that criminal process.

I think I am not wrong when stating that the security paradigm is likely to prevail. The general trend is therefore likely to be more security-driven, accompanied by further interferences and intrusions into the individuals' life. Such an approach is not inconsistent with the basic idea behind the mutual recognition principle which prioritizes the imperative of increased efficiency: The free movement and the mutual acceptance of judicial decisions are meant to remove obstacles that jeopardize the efficiency of criminal prosecutions. However, a number of provisions in the TEU[21] and the TFEU indicate that there are at least some efforts to counterbalance the security paradigm by increasing respect for human rights.

In this context the most frequently quoted provision is Article 6 TEU, which in addition to recognizing the Charter of Fundamental Rights of the Union also proclaims that the Charter shall have the same legal value as the Treaties.

Further, Article 6 states that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms and that the fundamental rights as guaranteed by the European Human Rights Convention constitute general principles of the Union's law. Indeed, the extension of the competencies of the European Court of Justice proves that there is increasing sensitivity towards basic rights. In this context may I mention Article 267 TFEU, which provides that the Court of Justice shall act with minimum delay when requested to give a preliminary ruling in a case pending before a court of a Member State where a person is in custody.

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20 Treaty on the Functioning of the European Union (Consolidated Version), OJ C115/73, 9 May 2008.

21 Treaty on the European Union (Consolidated Version), OJ C83/13, 30 March 2010.

3. HARMONIZATION AS THE PRECONDITION FOR THE OPERATION OF THE MUTUAL RECOGNITION PRINCIPLE

Coming now to Article 82 TFEU, this is the provision that provides the legal basis for approximation, which before did not exist (or at least, in the course of the discussions on defendants' rights and the Union's legislative competence in that area, was questioned by many of the Member States). I just note that this has not prevented the Council from legislating with regard to victims' concerns, such as their standing in the criminal process and provision for compensation.[22]

As indicated earlier, approximation is also intended to enhance mutual recognition. Thus the trend that started perhaps ten years ago will continue in that mutual recognition will remain the "motor of European integration in criminal matters".[23] That said, what was clear (or should have been clear) right from the outset has now been recognized and realized by the drafters of the new treaty. Although the principle of mutual recognition was originally meant to serve as an alternative to harmonization (which turned out to be time-consuming and even unrealistic), it has become clear that in order to operationalize the mutual recognition principle, a minimum level of harmonization is needed. In other words, it has become evident that mutual recognition and harmonization are not mutually exclusive alternatives.[24] Mutual recognition presupposes trust in each other's justice system and such trust presupposes a minimum level of common standards.

Difficulties in the implementation and in the practical functioning of the European Arrest Warrant (EAW)[25] made it clear that the there is considerable distrust among Member States.[26] Somewhat paradoxically, as long as Member States knew little about the functioning of each other's legal system they did trust each other, thus ignorance created trust and the moment they gained first hand experience of how the other's justice system operates in practice they have become more cautious and more mistrustful.

Against this backdrop, Article 83 par. 2 TFEU draws the necessary conclusions when envisaging the harmonization of national criminal procedural laws in various areas with the explicit aim of enhancing mutual recognition. In addition to measures of a more practical and technical nature which are likely to create mutual trust (such

22 2001/220/JHA: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings. OJ L082, 22 March 2001.

23 Valsamis Mitsilegas: *EU Criminal Law*. Oxford-Portland, 2009, Hart Publishing, p. 117.

24 In fact the Commission itself was aware that a certain degree of harmonization is essential for making the principle of mutual recognition work. See Mitsilegas, op.cit. p. 117l.

25 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

26 Ester Herlin-Karnell: The Lisbon Treaty and the Area of Criminal Law and Justice. *European Policy Analysis*, Swedish Institute for European Policy Studies, 2008/3, April, p. 5.

as judicial training and measures designed to prevent and settle jurisdictional conflicts as set forth in Article 82 par. 1 TFEU), the further approximation of procedural laws in certain areas through the setting of minimum rules is also envisaged.

The list of areas where minimum standards by means of directives should be established prove that the drafters drew the relevant lessons from the criticisms regarding the applicability of the principle of mutual recognition to justice and home affairs cooperation. According to the critics the principle of mutual recognition, when applied to the free movement of goods it clearly contributes to "liberalization and socialization"[27], *i.e.* it broadens the private sphere and extends "the rights of individuals engaged in trade and consumption."[28] When applied to the sphere of judicial cooperation, however, it contributes to the strengthening of the enforcement capacities of governmental actors instead of extending the freedom of the individual. Thus, as *Lavenex* describes, the mutual recognition principle while serving as "a tool of liberalization in one sector may become an instrument of *governmentalization* in another one."[29]

In order to counterbalance "*over-governmentalization*" (and by this the potential shrinking of the individual's freedom), agreement on common minimum standards of procedural law is needed, primarily on commonly shared standards as to criminal defendants' rights. Thus Article 82 par. 2, in addition to standards related to the mutual admissibility of evidence between Member States and victims' rights, makes explicit mention of defendants' rights as an area where minimum standards are to be set.

Work on establishing common standards on defendants' procedural rights started quite long ago with the Commission's Green paper[30] and the subsequent proposal for a framework decision with a focus on the rights to be guaranteed primarily to foreign suspects and defendants.[31] However, in addition to those rights that have to be guaranteed to defendants prosecuted in countries other than their homeland, the Commission proposal provided also for the right to specific attention for persons who, for various reasons (their age, mental, physical or emotional condition), have difficulties in comprehending or following the procedure.

Following the submission of the Commission proposal we have witnessed increasing discomfort on the part of many Member States. One of the arguments of those opposing the adoption of the framework decision was that the Union lacked competence to interfere through legislation with purely national criminal proceedings. The current Article 82 now provides the basis for EU legislation in the area of criminal

27 Sandra Lavenex: Mutual recognition and the monopoly of force: limits of the single market analogy. *Journal of European Public Policy* 14:5 August 2007, p. 765.

28 *Ibid*.

29 *Ibid*.

30 Green Paper from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union. COM(2003) 75, 19 February 2003.

31 Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union. COM(2004) 328, 28 April 2004.

proceedings, national proceedings included, though the objective of harmonization is the facilitation of mutual recognition of judicial decisions and facilitation of police and judicial cooperation in cases with a cross-border dimension.

As a result of the debates around the proposed framework decision on procedural rights, and specifically, as a result of the concerns voiced by several Member States, the Council Resolution on a Roadmap strengthening defendants' procedural rights[32] envisages a step-by-step approach giving priority to the rights of foreign suspects and defendants by ranking the right to translation and interpretation first. In the meantime, a directive making reference to Article 82 par. 2 TFEU has been adopted which regulates in some detail how the right to interpretation and translation should be ensured.[33]

4. THE ADDED VALUE IN ADOPTING EU LEGISLATION ON DEFENDANTS' RIGHTS

In the light of what I have outlined so far there are certain questions that inevitably arise. Among the provisions of the TEU that may be cause for optimism, I made reference to Article 6, which (among others) envisages the Union's accession to the ECHR and states that ECHR rights form part of the general principles of Union law. If one adds that all EU Member States are parties to the ECHR and that there is extensive Strasbourg jurisprudence on Article 6 of the Convention on the minimum standards of a fair trial, one wonders why harmonization of defendants' rights on the EU level is needed. The skeptics argue that adding new instruments to the existing ones addressing the same issue will jeopardize legal certainty. National judges who will have to apply the Charter of Fundamental Rights, the specific EU legislation on defendants' rights, the Strasbourg jurisprudence and their own country's constitutional provisions will face immense difficulties. Here in Ljubljana it is perhaps appropriate to refer to Judge *Zupančič's* and his co-author's *Johan Callewaert's* concerns: they claim that the multiplication of texts to be used by national courts will result in hesitation by judges which in turn will provide for more room for litigation by potential plaintiffs. This is certainly not needed in Europe. They also remind us that any new EU instrument may not prevent individuals from making use of Strasbourg after the final determination of their case, thereby further increasing the length of proceedings.[34]

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32 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. 2009/C 295/01. OJ C295/1, 4 December 2009.

33 In the meanwhile the text was adopted, see Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. OJ L280/1, 26 October 2010.

34 Boštjan M. Zupančić – Johan Callewaert: Relationship of the EU Framework Decision to the ECHR:Towards the fundamental principles of criminal procedure. *ERA Forum* (2007) 8, p. 267.

Some other authors fear that potential differences in the interpretation of the European Human Rights Convention by the Strasbourg and the Luxembourg courts would weaken legal certainty. And there are commentators who even envisage a potential lowering of the standard of protection afforded currently to criminal defendants by the ECHR. There are indications that the Union is prepared to deviate from the standard safeguards protecting defendants in case of suspects of terrorist crimes,[35] whereas the Strasbourg Court made it clear that everyone is entitled to a fair trial regardless of the nature of the charges whether it be "fraud, rape, murder or terrorist offences", thus the community's interest in security cannot justify a divergence from the general standards of the right to a fair trial.[36]

All these are legitimate concerns. However, one should also consider that there is an added value in adopting EU legislation on defendants' rights. First, this could definitely help EU Member States to comply with rulings of the Strasbourg Court. The primary task of the ECtHR is to render judgment on whether the Convention rights have been observed in an individual case. And in spite of the authority of the Court to indicate general measures on how a repetition of the violation of a Convention right can avoided, there are serious limitations as to the formulation of instructions of a general nature. On the one hand, it is not easy to formulate on an abstract level the lessons drawn from an individual case. And on the other hand, this is particularly difficult in Article 6 cases, due to the fact that the Strasbourg Court uses the "totality of circumstances" approach: that is, it will assess if the procedure as a whole has met the requirement of fairness. As the ECtHR in *Jalloh v. Germany* emphasized: "[When examining the case under Article 6] (t)he question which must be answered is whether the proceedings as a whole (…) were fair."[37] Thus, a particular deficiency in one case may amount to a violation of Article 6 of the Convention, while in another case the same deficiency will not result in finding a breach of the right to a fair trial since it might have been counterbalanced by factors that have guaranteed the overall fairness of the procedure.

In the light of this, the added value of Union legislation on procedural rights is that standards of fairness can be formulated with sufficient precision on the abstract level and also that certain rights that are not explicitly set forth in the ECHR can be introduced. I must add, though, that the Strasbourg Court in the past made a pretty good job in identifying so-called implied rights which are inevitable components of fairness. These include among others the equality of arms principle, the right to silence and the right to a reasoned judgment.

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35 See Jörg Polakiewicz: Durchsetzung von EMRK- Standards mit Hilfe des EU-Rechts? *EuGRZ,* vol. 37, no. 1–5 (2010), p.15.

36 See par. 71 of the report adopted by the Commission on 10 May 1994. *Saunders v. the United Kingdom* 19187/91 (17/12/1996), Reports 1996-VI.

37 *Jalloh v. Germany* [GC] 54810/00 (11/07/2006), Reports of Judgments and Decisions 2006-IX, par. 95.

There are of course limits as to the precision of formulating procedural rights in Union legislation since it is essential that legislation does not prevent the Strasbourg Court in further developing the standards by interpreting the Convention provisions in the light of new developments.

5. HARMONIZING EXCLUSIONARY RULES?

Let me conclude by a few comments on the procedural rights listed in Article 82 TFEU and those in the directive referred to above. As concerns the latter on the right to translation and interpretation, one may say that formally it is aiming at standardization. However it does not contribute to harmonizing the status of criminal defendants throughout the EU; since it simply calls for ensuring the basic preconditions of a criminal process in the proper sense. In my view, it only obliges Member States to secure the "infrastructure" for a criminal process which recognizes the defendant as a subject and not simply as the object of the procedure. Thus Member States are called upon to ensure that a procedure in the proper sense can be conducted. Interpretation and translation of essential documents are simply part of the infrastructure, in the same way as court buildings or clerks.

By this, however, I do not wish to underestimate the importance of either the directive and the stress laid in Article 82 TFEU, or of the "Roadmap" on the specific needs of foreign suspects and defendants for the simple reason that it is exactly this area where in my view (and in the view of many other commentators) the Strasbourg jurisprudence is rather underdeveloped. Article 6 is interpreted as to apply to the determination of the "criminal charge" in the narrow sense, that is to the proceedings before the authorities that render judgment on the merits of the case. Everything else that was undertaken in the context of cooperation between authorities falls outside Article 6. Even blatant breaches of international law and human rights may go unpunished as the Strasbourg Court still seems to accept the *male captus bene iudicatus* principle.[38]

Similarly underdeveloped is the Strasbourg jurisprudence in the area of the law of evidence. As reiterated in the judgments of the Strasbourg Court, developing the rules concerning evidence is a task for domestic law – the evidentiary procedure must take place in the "domestic field" and the weighing of the evidence is a task for the national judge. It is not up to the ECtHR to assess whether the domestic courts have made errors in establishing the facts of the case, it only does so if it finds that the procedure

[38] Stefan Trechsel: *Human Rights in Criminal Proceedings*. Oxford, 2006, Oxford University Press, pp. 431–432.

of the national court was devoid of any rationality and was thus obviously arbitrary.[39] Although the Convention does guarantee the right to a fair trial, it does not contain provisions concerning the use of evidence or its exclusion. Such determinations fall fundamentally within the competence of the domestic courts.[40]

The reluctance of the Court to formulate evidentiary principles or rules on admissibility has its source in its function and mode of operation. The Court's task is to decide whether in an individual case human rights have been observed or not. As to applications alleging the use of unlawful evidence the task of the Court is to determine if the admission of illegally obtained evidence rendered the trial unfair. The focus on individual cases sets limits to formulating general principles or rules.

What is regrettable is that the ECtHR is quite cautious in finding a violation of Article 6 when national courts used evidence that had been obtained in violation of domestic law[41] or the Convention.[42] The EU Network of Independent Experts on Fundamental Rights (CFR-CDF) is right in observing that "national rules of criminal procedure are more protective of the accused than is required by Article 6(1) of the European Convention on Human Rights in this respect."[43]

The case law indicates that the admission of confessions obtained in violation of Article 3 renders the trial unfair irrespective of whether the treatment amounted to torture or inhuman or degrading treatment. Similarly Article 6 is violated if the courts use real evidence obtained directly through torture. In these cases the probative value of the evidence is irrelevant as well as the weight attached by the courts to the confession or the real evidence.[44] The ECtHR, however, has so far failed to settle the issue of whether the admission of real evidence obtained through violation of treatment falling short of torture but still in breach of Article 3 would automatically

39 In the *Vidal* case, for instance [*Vidal v. Belgium* 12351/86 (22/04/1992), A235-B], the Court held that rejecting to hear the witnesses requested by the applicant without reason constituted a violation of the Convention. See Jochen Frowein – Wolfgang Peukert: *Europäische Menschenrechtskonvention: EMRK-Kommentar.* Kehl-Strassburg-Arlington, 1996, N. P. Engel, p. 312. Also see *Papageorgiou v. Greece* 59506/00 (09/05/2003), Reports of Judgments and Decisions 2003-VI. In this decision the Court found a violation of Article 6 (1) and (3) because the national courts refused to allow the accused to adduce and have examined evidence that could have acquitted the accused of the charges. In contrast, see for example *Perna v. Italy* [GC] 48898/99 (06/05/2003), Reports of Judgments and Decisions 2003-V. The ECtHR accepted the position of the Italian courts, which held that refusing to hear the witnesses requested by the accused was justified, because the accused sought to prove circumstances through their testimony that were irrelevant with regards to establishing the facts of the particular case.

40 *Schenk v. Switzerland* 10862/84 (12/07/1988), A140, par. 45–46.

41 *Schenk v. Switzerland* 10862/84 (12/07/1988), A140.

42 *Khan v. the United Kingdom* 35394/97(02/05/2000), Report of Judgments and Decisions 2000-V.

43 Http://cridho.cpdr.ucl.ac.be/documents/Avis.CFR-CDF/Avis2003/CFR-CDF.opinion3–2003.pdf. See p. 6 of the report.

44 *Gäfgen v. Germany* [GC] 22978/05 (01/06/2010), par.166–167 and 173.

render the trial unfair. In both *Jalloh,*[45] and *Gäfgen*[46] it concluded that in this case compliance with Article 6 is to be considered in the context of the trial as a whole.

If the violation of the absolute right of freedom from torture and inhuman or degrading treatment does not automatically result in finding a breach of the right to a fair trial then it does not come as a surprise that the use of evidence obtained through the breach of qualified rights such as the right to private life will not render the trial *a fortiori* unfair. Not all the judges of the ECtHR are of the view that this approach is the correct one. In *Schenk*, the leading case, the minority drew the attention of the majority to the fact that "compliance with the law when taking evidence is not an abstract or formalistic requirement. On the contrary, we consider that it is of the first importance for the fairness of a criminal trial. No court can, without detriment to the proper administration of justice, rely on evidence which has been obtained not only by unfair means but, above all, unlawfully. If it does so, the trial cannot be fair within the meaning of the Convention."[47] In his dissenting opinion in *Khan*, Judge *Loucaides* criticized the position of the majority: "The basic argument against such an exclusionary rule is the pursuit of the truth and the public interest values in effective criminal law enforcement which entail the admission of reliable and trustworthy evidence, for otherwise these values may suffer and guilty defendants may escape the sanctions of the law", whereas "breaking the law, in order to enforce it, is a contradiction in terms and an absurd proposition."[48] The Court was split in a number of recent cases, and several judges expressed serious concerns as to the correctness of their colleagues' reasoning – even if they agreed with the result reached in those cases. In *Jalloh*, Judge *Bratza* expresses his reservation since the reasoning seemed to suggest that in serious cases the admission of real evidence obtained through violation of Article 3 would not necessarily render the trial unfair.[49] The authors of the concurring opinion in *Gäfgen* blamed the majority for its failure to assert categorically "that irrespective of the conduct of an accused, fairness, for the purpose of Article 6, presupposes respect for the rule of law and requires, as a self-evident proposition, the exclusion of any evidence that has been obtained in violation of Article 3."[50] It is the same reason that led Judge *Zupančič* to mourn the "change in the zeitgeist": what was

45 *Jalloh v. Germany* [GC] 54810/00 (11/07/2006), Reports of Judgments and Decisions 2006-IX.

46 *Gäfgen v. Germany* [GC] 22978/05 (01/06/2010).

47 See the joint dissenting opinion of Judges *Pettiti, Spielmann, De Meyer* and *Carillo Salcedo. Schenk v. Switzerland* 10862/84 (12/07/1988), A140.

48 *Khan v. the United Kingdom* 35394/97 (04/10/2000), Reports of Judgments and Decisions 2000-V.

49 *Jalloh v. Germany* [GC] 54810/00 (11/07/2006), Reports of Judgments and Decisions 2006-IX, Concurring opinion of Judge *Bratza*.

50 *Gäfgen v. Germany* [GC] 22978/05 (01/06/2010), the partly dissenting opinion of Judges *Rozakis*, *Tulkens*, *Jebens*, *Ziemele*, *Bianku* and *Power,* point 2.

50 years ago something simply intolerable has by now "become an issue that must be extensively – and not just in this case – pondered, argued and debated."[51]

For all outlined above it is laudable that Article 82 par 2 makes explicit mention of the mutual admissibility of evidence between Member States among the areas to be harmonized through directives. The Green Paper presented by the Commission in November 2009 on obtaining evidence[52] envisages the adoption of one single instrument that would replace the mutual assistance (like the 1959 Council of Europe[53] or the 2000 EU Convention[54] and mutual recognition instruments currently in force). In addition it lists the questions the answers to which will determine the direction future work will take.

The Statement of the European Criminal Bar Association on the Green Paper[55] indicates one of the directions, namely the approach which fully respects procedural rights of defendants involved in criminal matters with a cross-border component, and it envisages a model of cooperation between agencies of Member States which lays stress on the overall fairness of the entire process.

One can of-course contemplate whether it is presently realistic to demand (for instance) the application of all the exclusionary rules of both the issuing and the executing state as laid down in the ECBA position paper. One can ask why defendants suspected of criminal offenses with a cross-boarder component should be better positioned than those whose alleged criminal activity does not trespass national borders.

At the same time the ECBA Statement convincingly shows that cooperation between the judiciaries, that respects defendants' rights without discriminating any group of defendants, presupposes harmonization of national procedural laws to a much larger extent than that which is the case today.

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51 *Jalloh v. Germany* [GC] 54810/00 (11/07/2006), Reports of Judgments and Decisions 2006-IX, concurring opinion of Judge *Zupančič* (point III).

52 Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. COM(2009) 624. 11 November 2009.

53 European Convention on Mutual Assistance in Criminal Matters (1959). ETS 030.

54 Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union. 2000/C 197/01, *Official Journal* C197/1, 12 July 2000.

55 Available at: www.ecba.com.