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## Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle

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### 1. Introduction

‘When the snows fall and the white winds blow, the lone wolf dies, but the pack survives.’ So says Ned Stark in *A Song of Ice and Fire*. The lone fighter against the organized pack is a well-known character in the movies, especially crime dramas. A humble defence attorney battles against the machinery of a mighty prosecution service, the latter having access to Interpol, Europol – perhaps even the secret service. This set-up strikes a chord with our desire for justice as well as our fighting spirit: we almost hope that the loner has a secret weapon, a special resource that makes up for the odds of his isolation, a weapon that will restore the ‘equality of arms’ between the characters. It hardly needs saying that ‘equality of arms’ is a core aspect of our current European understanding of a ‘fair criminal trial’.

But do the accused and his defence lawyer become even lonelier in the space between different jurisdictions, because they do not belong to any of the ‘packs’ on either side of the border and we lack an overarching framework for guaranteeing a fair trial? This question arises in cases which affect more than one jurisdiction; either because an alleged crime causes damage in different countries or evidence is located abroad or for some other reason. In looking for an answer, this paper explores whether there is an avenue out of the legal no man’s land that currently exists, even in Europe, as the following example indicates:

D, a Belgian national and middle manager at a medium-sized pharmaceutical company situated in Germany, travels by train from Mannheim to Brussels for work on a monthly basis. One day, the German police find a suitcase on the train containing what seems to be performance-enhancing drugs. After running an identity check, they discover that D is listed for ‘discreet surveillance’ in the Schengen Information System (SIS). D is arrested. Back at the police station, information comes that D is wanted by the Spanish authorities for alleged complicity in a large doping scheme. D claims that he has nothing to do with the suitcase and holds a German permit for dealing with certain substances, but is quickly sent to Madrid on the basis of a European arrest warrant. D’s Spanish defence lawyer is the typical loner: he dedicates himself to time-consuming, poorly paid criminal defence work on D’s behalf. What are his chances of building a good case for D, and subsequently helping D to secure a fair trial?

In contrast to defending an alleged criminal in a purely national case, the defence in a criminal procedure affecting more than one jurisdiction faces a bigger problem than *incapacity*. Although D’s defence counsel

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may normally work alone and so most probably is used to coping without the prosecution service's access to resources, manpower, information, and compulsory measures,<sup>1</sup> transnational prosecution itself, however, poses new difficulties for him.<sup>2</sup> In fact, the need for cooperation between jurisdictions may risk the right to equality of arms, because it not only closes the circuit between domestic and foreign prosecuting agencies, but may ultimately go so far as to modify the rules of the game, as will be illustrated subsequently.

Defence lawyers have to contend with the threat of *forum shopping* because the prosecution services are embedded in formal transborder networks which help them to find the best place to prosecute a case. Furthermore, *evidence* may be *gathered* differently abroad (in some countries, witness testimony may be heard in the defendant's absence), but still be admitted at trial based on the pragmatic approach of you 'can't look a gift horse in the mouth'. Fourth, and on top of all this, *language* is a problem. All in all, the rules for securing equality of arms in the national setting may not serve the defence sufficiently in the transnational setting.

Faced with this scenario, the question is: do we need a general principle of fair trial guiding us through transnational criminal justice, helping our two loners – the defendant and the defence attorney – in a case that falls 'between jurisdictions'?

## 2. Current sources for the right to a fair trial

In this paper, 'fair trial' and 'equality of arms' in transnational criminal cases are understood to include investigative measures, evidentiary matters and acts of cooperation.<sup>3</sup> They are thus not limited to 'determinations of criminal charges' before the court that decides guilt or innocence.<sup>4</sup>

From a 'Eurocentric' point of view, the key provision is Article 6 of the European Convention on Human Rights (ECHR), which grants the right to a fair trial. The European human rights standard has triggered abundant case law and scholarly debate; it serves as a regular reference point for current EU law in the area of freedom, security and justice.<sup>5</sup> Another fair trial right appears in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>6</sup>

Although there is no single, comprehensive definition of a fair trial, there is a common understanding of some of its crucial aspects; 'equality of arms' being amongst them.<sup>7</sup> In the following, I illustrate this understanding of a fair trial in the European context and, in particular, the principle of equality of arms.

### 2.1. Right to a fair trial and the guarantee of 'equality of arms'

Equality of arms requires that each party be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his or her opponent.<sup>8</sup> The principle of equality of arms is another feature of the wider concept of a fair trial, which also includes the fundamental right to adversarial proceedings. Accordingly, both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations made and the evidence adduced by the other party.<sup>9</sup> Although the two concepts – equality of arms and adversarial

1 See for example C. Safferling, *International Criminal Procedure*, 2001, pp. 16 et seq. for the IMT Statute and p. 180 for the ICC Statute.

2 For an overview see N. Boister, *An introduction to Transnational Criminal Law*, 2012, pp 13-22.

3 For the case history of situations which trigger Art. 6 ECHR rights, see ECtHR 27 February 1980, *Deweert v Belgium*, appl. no. 6903/75, Para. 46; ECtHR 15 July 1982, *Eckle v Germany*, appl. no. 8130/78, Para. 73; S. Trechsel & S. Summers, *Human Rights in Criminal Proceedings*, 2005, pp. 138-140; P. van Dijk et al. (eds.), *Theory and practice of the European Convention on Human Rights*, 2006, pp. 603-605.

4 For details see S. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights*, 2007, pp. 82-94.

5 See e.g. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55, Preamble (14); ECJ 6 December 2011, C329/11, *Achughbabian v Préfet du Val-de-Marne*, Para. 49.

6 Entered into force on 23 March 1976; *UN Treaty Series*, Vol. 999, p. 171 and Vol. 1057, p. 407 (procès-verbal of rectification of the authentic Spanish text); depositary notification C.N.782.2001. TREATIES-6 of 5 October 2001.

7 Trechsel & Summers, *supra* note 3, p. 94; R. Esser, 'Art. 6 EMRK', in V. Erb et al. (eds.), *Löwe-Rosenberg Kommentar StPO*, 2012, p. 422, Paras. 202-203.

8 See, ECtHR 18 February 1997, *Niderost-Huber v Switzerland*, appl. no. 18990/91, Para. 23.

9 ECtHR 12 February 2009, *Samokhvalov v Russia*, appl. no. 3891/03, Para. 46; also see ECtHR 6 September 2005, *Salov v Ukraine*, appl. no. 65518/01, Para. 87; ECtHR 8 April 2010, *Sabayev v Russia*, appl. no. 11994/03, Para. 35.

earings – overlap in many aspects, they are not the same.<sup>10</sup> This is most probably because Continental Europe, with its civil law tradition, is not so familiar with the idea of adversarial criminal proceedings. Therefore the concept of equality of arms is generally given more consideration and has thus gained a prominent position.

In Europe, the notion of ‘equality of arms’ has been shaped by the European Court of Human Rights in Strasbourg (ECtHR): Article 6(3)(b) ECHR guarantees the accused ‘adequate time and facilities for the preparation of his defence.’<sup>11</sup> In Strasbourg’s view, equality of arms ‘implies that the substantive defence activity on his behalf may comprise everything which is “necessary” to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings.’<sup>12</sup> Of course, also in proceedings with transnational elements, the defence may present its case before the national authorities. The very nature of these types of cases may, however, render the right null and void, because neither the statutory basis nor the case law is shaped to accommodate transnational cases, such as for instance the doctrine of the right to confront a witness against oneself shows.<sup>13</sup>

It flows from the case law that national authorities and courts must look beyond the defendant’s or prosecution’s actions in a certain situation and look at the set-up of procedural safeguards as a whole: ‘[A court] must (...) scrutinise the decision-making procedure to ensure that, as far as possible, it complied with the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.’<sup>14</sup> There may thus arise an obligation in those cases in which the right of the defence to equality of arms is an entitlement only in theory because, in practice, it cannot be given effect in a transnational situation. Consequently, the authorities and courts must modify the procedures in transnational cases; for instance, if witnesses are located abroad or evidence cannot be called by the defence on its own.<sup>15</sup>

Generally, the ECtHR has emphasised the duty of the prosecution ‘to ensure that the accused receives a fair trial’ and that ‘any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.’<sup>16</sup>

The ECHR serves as the human rights point of reference in the law of the EU. The preamble to the Framework Decision on the European arrest warrant, for instance, states that ‘This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof.’<sup>17</sup>

Article 47 of the Charter of Fundamental Rights of the European Union (EU Charter) provides, furthermore, that ‘Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.’ The rights in the ECHR and the EU Charter are viewed as substantively identical.<sup>18</sup> In the future, however, it must be shown whether such an assumption will prove to be still ultimately correct.<sup>19</sup>

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10 For the difference between equality of arms and adversarial proceedings, see Esser, *supra* note 7, N 220.

11 ECtHR 31 March 2009, *Natunen v Finland*, appl. no. 21022/04.

12 ECtHR 31 March 2009, *Natunen v Finland*, appl. no. 21022/04, Para. 42 with reference to the Commission’s report of 12 July 1984, *Can v Austria*, appl. no. 9300/81, Series A no. 96, § 53, and ECtHR 9 October 2008, *Moiseyev v Russia*, appl. no. 62936/00, Para. 220.

13 See Section 3.1.2, *infra*.

14 ECtHR 16 February 2000, *Jasper v The United Kingdom*, appl. no. 27052/95, Para. 53.

15 See for more general approaches Boister, *supra* note 2, pp. 275-278.

16 ECtHR 16 February 2000, *Jasper v The United Kingdom*, appl. no. 27052/95, Para. 52 with reference to ECtHR 26 March 1996, *Doorson v The Netherlands*, appl. no. 20524/92, Para. 72 and ECtHR 23 April 1997, *Van Mechelen and Others v The Netherlands*, appl. nos. 21363/93, 21364/93, 21427/93 and 22056/93, Para. 54.

17 OJ L 190, 18.7.2002, p. 1, Preamble (12).

18 Although the wording of Art. 6 ECHR and Art. 47 EU Charter is not identical, and thus Art. 52(3) EU Charter may not apply directly, the case law simply states that basically Art. 47 of the Charter secures in EU law the protection afforded by Art. 6 of the ECHR, ECJ (Grand Chamber) 6 November 2012, Case C-199/11, *EU v Otis ao*, Para. 47, ECJ (Second Chamber) 8 December 2011, Case C-386/10 P, *Chalkor v Commission*, Para. 51.

19 E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law*, 2012, pp. 227-232; A. Klip, *European Criminal Law*, 2012, pp. 127 et seq.

It is noteworthy that Article 47 EU Charter does not refer to a right to a fair *trial* explicitly. But the ECJ – in deciding certain competition cases – defines the substance of a fair *hearing* congruent to the fair trial according to the ECHR: ‘The principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.’<sup>20</sup> According to existing EU case law this notion includes ‘[t]he principle of equality of arms, which is a corollary of the very concept of a fair hearing’ and ‘implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.’<sup>21</sup> The EU guarantee has not yet been discussed in a transnational criminal case. The idea itself relies on the self-proclaimed concept that the Union is a community based on the rule of law.<sup>22</sup>

## 2.2. Equality of arms as a notion of transnational criminal justice

Contrary to what one might expect from *European* convention, neither the ECHR nor the EU Charter make special provision for fair trial, fair hearing or ‘equality of arms’ principles in transnational – or even European – law enforcement proceedings.

As far as the ECHR is concerned, its primary function is to secure human rights in the judicial systems of its Contracting Parties. Equally, few ECtHR cases explicitly refer to transnational notions of equality of arms in the framework of cross-border cooperation. For the EU Charter there is, as yet, little material to substantiate the notion of a fair hearing at all. It basically refers in substance to the ECtHR jurisprudence. Thus, on safeguarding the ‘fair trial’ right when ECHR Contracting Parties cooperate in criminal matters, it is more helpful to look to Strasbourg.

The ECtHR has not, however, developed a specific doctrine regarding equality of arms in transnational criminal cases. The ECtHR’s case law discusses particularly the handing over of persons to the custody of other states. In *Soering*, Strasbourg held that an extraditing party may violate Article 6 ECHR if ‘the fugitive suffered or risks suffering a *flagrant denial of a fair trial* in the requesting country.’<sup>23</sup>

*Soering* is a landmark judgment for it enlarged the signatory states’ responsibilities for breaches of the ECHR; and the doctrine has been repeatedly endorsed.<sup>24</sup> Thus, each Contracting Party must now consider the consequences of cooperating with non-signatory countries, even if the potential violation takes place outside Europe; or they run the risk of violating the Convention’s obligations. However, the jurisprudence only directly addresses extradition, deportation or the handing over of individuals to non-signatory states or organizations.<sup>25</sup> It does not establish a blanket doctrine applicable to other cases of cooperation. When providing, for example, mutual legal assistance in the collection of evidence (to non-signatory states of the ECHR), Contracting Parties risk liability under the ECHR only if the facts satisfy the very strict ‘flagrant denial’ test.<sup>26</sup>

The ECtHR gives the obvious reason for its restraint in expanding human rights’ obligations during cross-border cooperation in *Soering*: The European Convention cannot ‘govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.’<sup>27</sup>

Among ECHR states, the Court has recently opened a new door to liability in cases involving mutual legal assistance in criminal matters. In *Stojkovic v France and Belgium*, French authorities had requested by letters rogatory that Mr Stojkovic, who was being detained in Belgium, be interrogated (in the presence of a lawyer) for his alleged involvement in an armed robbery in France. Subsequently, the

20 ECJ (Grand Chamber) 6 November 2012, Case C-199/11, *EU v Otis ao*, Para. 48.

21 ECJ (Grand Chamber) 21 September 2010, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, Para. 88; ECJ (Grand Chamber) 6 November 2012, Case C-199/11, *EU v Otis ao*, Para. 71.

22 See for instance ECJ 23 April 1986, C-294/83, ‘*Les Verts*’ v *European Parliament*, Para. 23.

23 ECtHR 7 July 1989, *Soering v The United Kingdom*, appl. no. 14038/88, Para. 113.

24 For further information, see: Klip, *supra* note 19, pp. 481-482.

25 See recently ECtHR 27 October 2011, *Ahorugeze v Sweden*, appl. no. 37075/09, Paras. 113-115; ECtHR 17 January 2012, *Othman (Abu Qatada) v UK*, appl. no. 8139/09, Para. 258.

26 For details see R. Ivory, ‘The Right to a Fair Trial and International Cooperation in Criminal Matters: Article 6 ECHR and the Recovery of Assets in Grand Corruption Cases’, 2013 *Utrecht Law Review* 9, no. 4, pp. 147-164.

27 ECtHR 7 July 1989, *Soering v The United Kingdom*, appl. no. 14038/88, Para. 86.

applicant was interrogated by Belgian police officers in the presence of the French investigating judge and a French district attorney, but no lawyer was appointed for him, although the applicant had requested the assistance of a lawyer. The ECtHR held that the fact that two representatives of an ECHR state were present at the questioning was sufficient to establish the responsibility of that state for the person who had been questioned pursuant to a letter rogatory issued by that state. The foreign representatives should have reminded the local law enforcement authorities of the requested state's duty to abide by the ECHR's standards.<sup>28</sup> The Strasbourg Court did not explicitly state the implications of its judgment for human rights obligations during cooperation, but made it clear that defendants are entitled to their rights granted by Article 6(3) ECHR also in a situation of transborder investigation.<sup>29</sup>

The absence of transnational rights and guarantees in the ECHR could be explained by their historical context; surprising, however, is the absence of relevant rules in the EU Charter. Although the framers of the Charter acknowledged the transnational aspect of 'justice' in the EU – by drafting, for instance, Article 50 of the Charter to grant a transnational the right not to be prosecuted or punished twice<sup>30</sup> – the EU Charter does not give an insight into how fair trial rights shall apply to cooperation in criminal cases.

Looking at European human rights law as a whole, however, we can deduce a right to a fair trial in transnational cooperation matters from *Soering* and subsequent cases, as well as from the approach of shared responsibilities in *Stojkovic*, and from the general fair trial guarantee during criminal prosecutions. It is based on the assumption that judicial guarantees pertain not only to proceedings wholly within the jurisdiction of Contracting States, but also during cooperation between such states. For instance, the right to have access to a lawyer during interrogation abroad, when an investigating judge or prosecutor is present, is crucial for a reasonable opportunity to present one's case later before the court under conditions that are not substantially disadvantaged vis-à-vis the prosecution.

### **3. The effects of cross-border cooperation on the right to a fair trial**

The notion that states may put equality of arms at risk by cooperating across borders in criminal matters has long been a point of criticism for defence lawyers and NGOs;<sup>31</sup> however, to date, their criticisms have not been thoroughly developed.

The specific problems concerning the capacity of the defence to 'stand up' to the prosecution services will be discussed in the following sub-sections more thoroughly.

#### **3.1. Investigation across borders and evidence transfer**

Many of the dangers to the right to a fair trial in transborder criminal proceedings do not arise during, but instead before or outside of the court hearing that will decide the case,<sup>32</sup> as has been indicated in our example case:

When D is arrested in Cologne and sent to Madrid, following the streamlined procedure of a European arrest warrant, a brief report about the 'Cologne incident' is sent to the Spanish authorities. Although it remains unclear whether the report is admissible as evidence under Spanish law or whether it gives an accurate account of the incident at all, the authorities add it to the files. Neither D nor his Spanish defence lawyer are able to call D's fellow train passengers as witnesses because their identities remain unknown. Neither lawyer nor defendant has had the opportunity to confront other persons who had given testimony abroad or to challenge the entry in the SIS or scrutinize the circumstances by which it was made. Nonetheless, the 'Cologne incident' becomes the primary accusation against D.

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28 ECtHR 27 October 2011, *Stojkovic v France and Belgium*, appl. no. 25303/08, Paras. 56 et seq.

29 Ibid., Paras. 51 et seq.

30 See J. Lelieur, "'Transnationalising' *Ne Bis In Idem*: How the Rule of *Ne Bis In Idem* Reveals the Principle of Personal Legal Certainty", 2013 *Utrecht Law Review* 9, no. 4, pp. 198-210.

31 See for instance: H. Ahlbrecht, 'Strukturelle Defizite Europäischer Verteidigung – Gründe und Möglichkeiten ihrer Überwindung', 2012 *StV*, no. 8, pp. 491 et seq.; S. Peers, 'Rights for Criminal Suspects and EU law', available at <<http://www.statewatch.org/news/2007/apr/Statewatch-analysis-crim-proced.pdf>>.

32 For further details see: Summers, *supra* note 4, pp. 82-94.

Reports or minutes of interviews or other records may be easily sent across borders; the question of the admissibility of such documents as evidence in a criminal trial is much more difficult to answer. The issues of the traditional procedure with letters rogatory have been discussed at length,<sup>33</sup> including the question of how the ‘fair trial’ guarantee for criminal prosecutions applies to such situations.<sup>34</sup>

The question is: does evidence gathered in a different country, perhaps in a manner which is not in accordance with the rules in the defendant’s home state, affect the right to a fair trial?

### 3.1.1. Evidence gathering on the basis of foreign law

Intuitively, the answer may be: no; at least not in principle. The reasoning behind such thinking is that *all* evidence must be admitted. If evidence is excluded, that generally works to the benefit of the defendant.

In practice, however, the solutions are rather ambiguous. Evidence from abroad is usually not excluded, but is admitted on a rather selective basis. A brief look at the German case law illustrates the problems involved: German courts – like the national courts in other states – have basically admitted foreign evidence even if it did not meet their own national standards.<sup>35</sup> For instance, in 2010 the German *Bundesgerichtshof* approved the reading in court of a witness statement which had been established without defence presence during a witness interrogation conducted in Turkey although such a statement would have been excluded had the interview taken place in Germany.<sup>36</sup> The conviction of guilt was upheld because the trial court had evaluated the witness statement with special caution, and there was other evidence that indicated the defendant’s guilt. Furthermore, the German highest court reasoned that as the German authorities had pushed a claim for the presence of the defendant’s lawyer during the interview it should thus not be held responsible if the Turkish authorities hampered the defence.<sup>37</sup> Basically, the rationale is that the courts may rely on foreign evidence in certain cases, but must accept that the authorities in the foreign country regularly gather evidence according to their law (*locus regit actum*<sup>38</sup>). Once admitted, the evidence is caught by the wide net of rules governing the appreciation of evidence: i.e. that the evidence was gathered properly.<sup>39</sup> From the defendant’s point of view, however, the crucial question is whether she has had the opportunity to confront a witness or to challenge documentary evidence, not who is responsible for actually hampering the defence.<sup>40</sup> During the last decade, however, the German courts have paid more and more attention to securing the defendants’ rights during cross-border cooperation.<sup>41</sup>

The problem basically arises because national criminal procedures lack any special law governing the admissibility of evidence from abroad. National courts are unable to solve the dilemma of wanting to clarify and establish facts and allowing only evidence which is collected in a way which ensures that the process of fact finding is deemed reliable and ‘fair’ (by the legal community in whose name a judgment is rendered). In criminal cases, in which evidence is brought in from abroad, the crucial question, however, must be whether the transferred evidence is reliable and its use fair from the point of view of the *lex fori*. For instance, in the example case:

D’s lawyer may, for instance, claim before the deciding court that the report about the ‘Cologne incident’ is inadmissible under Spanish law, because such statements cannot be read out in court or because D could not

33 Klip, *supra* note 19, pp. 336 et seq.; A. Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters*, 2011, p. 26.

34 N. Capus, *Strafrecht und Souveränität: Das Erfordernis der beidseitigen Strafbarkeit in der internationalen Rechtshilfe in Strafsachen*, 2010, pp. 269 et seq.; S. Gless, *Internationales Strafrecht*, 2011, Para. 218; Trechsel & Summers, *supra* note 3, p. 36.

35 Bundesgerichtshof, Urteil vom 28.10.1954 – 3 StR 466/54; Bundesgerichtshof, Beschluss vom 3.11.1987 – 5 StR 579/87; Bundesgerichtshof, Beschluss vom 4.3.1992 – 3 StR 460/91.

36 The leading case is Bundesgerichtshof, Beschluss vom 29.10.1992 – 4 StR 126/92; see furthermore: Bundesgerichtshof, Urteil vom 12.1.1996 – 5 StR 756/94. Bundesgerichtshof, Urteil vom 21.5.1996 – 1 StR 154/96.

37 BGH vom 17.3.2010, 2 StR 397/09 = NJW 2010, 2224.

38 C. Joubert, *Judicial Control of Foreign Evidence in Comparative Perspective*, 2005, pp. 13 et seq.; S. Gless, ‘Obtaining Evidence Abroad’, in R. Miller & P. Zumbansen (eds.), *1 Annual of German & European Law*, 2003, p. 70.

39 Gless, *supra* note 38, p. 71.

40 Although there is a tendency towards converging standards, at least in Europe, see for details: J. Jackson & S. Summers, *The Internalisation of Criminal Evidence*, 2012, pp. 19-29.

41 German perspective: BGH Beschl. v. 21.11.2012 – 1 StR 310/12; Swiss perspective: Bezirksgericht Zürich, 9. Abt., Urt. U Beschl. v. 26. November 2008 DG070656/U (ZH), veröffentlicht in fp 2010; see also: C. Riedo et al. (eds.), *Strafprozessrecht sowie Rechtshilfe in Strafsachen*, 2011, RN 3164.

confront all witnesses. The prosecution would then probably assert that such information could be used as evidence in the country of origin and therefore should also be admissible in other courts where the information is needed. There is no rule on the national level determining when foreign evidence is to be admitted. In practice, for reasons of resources it might, however, be easier for the prosecution (with the help of Eurojust) to substantiate its claim than for the defence to refute such an argument. Other ways of weakening the report's credibility (such as calling D's fellow train passengers as witnesses) are limited because their identities remain unknown. Neither has had the opportunity to confront other persons who had given testimony abroad or to challenge the entry in the SIS or scrutinize the circumstances by which it was made. Nonetheless, the 'Cologne incident' becomes the primary accusation against D.

Today, specific ideas of evidence transfer in the legal framework of the EU on the basis of mutual recognition pose new challenges.<sup>42</sup> The project on an EU-wide admissibility of evidence rule is stipulated in Article 82 of the Treaty on the Functioning of the EU (TFEU) and is part of the foundations of an area of freedom, security and justice.<sup>43</sup> The mutual recognition of evidence does, however, bar any objection on the grounds of an exclusionary rule valid under the law of evidence in the receiving country. If, for instance, in our example case the 'brief report' would have been established correctly following German law, the Spanish court would have to admit it as evidence, even if Spanish law never allows such 'brief reports' to be used as evidence. If the idea of mutual recognition would be realized in a 'pure form', it could not be challenged by the defence.<sup>44</sup> This shift from cooperation to mutual recognition illustrates, among other things, the transition from occasional cooperation to a model of criminal prosecution based on the idea of teamwork and one that is embedded in a close-knit culture of collaboration among states. The question then arises whether the accused or his defence must have the possibility to have a part in such cooperation models in order to secure a fair trial. A similar question arises with regard to information sharing. The Schengen Information System may, for instance, among other things, provide 'movement records', which can be of interest to both the prosecution and the defence: however, only the prosecution has access to such data.

### *3.1.2. The right to confront witnesses – Even abroad?*

Furthermore, in transnational criminal cases the issue quite often arises that witnesses – who do not live in the country where the criminal act was committed and do not (or cannot) appear to testify at the trial in that state – are questioned abroad. In our case study, would D have a right to confront those witnesses, including the other train passengers, who might now be all over Europe? Is this right granted by Article 6(3) ECHR? What if the prosecution is unable to contact these people? Should their written testimony be excluded? It is well known that the Strasbourg Court allows modifications to the right to confront a witness<sup>45</sup> so long as the proceedings as a whole are fair.<sup>46</sup> According to the case law of the ECtHR the general rules apply to witnesses abroad, too, as is explained in Lorena Bachmaier's contribution in detail.<sup>47</sup> In general, if a national court relies on witness evidence as 'sole and decisive',<sup>48</sup>

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42 See for instance from an EU perspective: L. Bachmaier Winter, 'European investigation order for obtaining evidence in the criminal proceedings', 2010 *ZIS*, no. 9, p. 580; I. Bantekas, 'The principle of mutual recognition in EU criminal law', 2007 *European Law Review*, no. 3, p. 365; J. Spencer, 'The Green Paper on obtaining evidence from one Member State to another and securing its admissibility: the Reaction of one British Lawyer', 2010 *ZIS*, no. 9, p. 602.

43 H. Satzger, *International and European Criminal Law*, 2013, § 8 no. 35.

44 S. Allegrezza, 'Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility', 2010 *ZIS*, no. 9, pp. 569-579; R. Belfiore, 'Movement of Evidence in the EU: The Present Scenario and Possible Future Developments', 2009 *European Journal of Crime, Criminal Law and Criminal Justice* 17, no. 1, p. 1.

45 See, for the development of the case law, for instance, ECtHR 27 September 1990, *Windisch v Austria*, appl. no. 12489/86, Para. 28; ECtHR 23 April 1997, *Van Mechelen and Others v the Netherlands*, appl. nos. 21363/93, 21364/93, 21427/93 and 22056/93, Para. 51; ECtHR 28 March 2002, *Birutis and Others v Lithuania*, appl. nos. 47698/99 and 48115/99, 28.6.2002, Para. 28; ECtHR 19 October 2012, *Sievert v Germany*, appl. no. 29881/07, Para. 58; ECtHR 15 December 2011, *Al-Khawaja and Tahery v UK*, appl. nos. 26766/05 and 22228/06, Para. 118; Trechsel & Summers, *supra* note 3, p. 311.

46 ECtHR 31 October 2001, *Solakov v The Former Yugoslav Republic of Macedonia*, appl. no. 47023/99, Para. 62; ECtHR 14 December 1999, *A.M. v Italy*, appl. no. 37019/97, Para. 27.

47 L. Bachmaier Winter, 'Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR's Case Law', 2013 *Utrecht Law Review* 9, no. 4, pp. 127-146.

48 For further information on the development of the sole and decisive rule, see: ECtHR 15 December 2011, *Al-Khawaja and Tahery v UK*, appl. nos. 26766/05 and 22228/06, Paras. 89 et seq.

which the defence could not confront, Article 6(3) ECHR has been violated.<sup>49</sup> If witnesses are abroad, the authorities must try to find them.<sup>50</sup> However, the overall *fair-provisio* applies: as long as the procedure as a whole is fair, the ECHR is not violated. In the specific situation of the witness abroad, the efforts to find the witness will be taken into account.<sup>51</sup>

The ECtHR's position has been criticized as being unsatisfactory.<sup>52</sup> On a general level, even if the 'margin of appreciation' encourages the reception of European law into national law, it cannot outweigh the benefit of a clear and strict rule regarding the consequences of an individual's right to confront those who give evidence against him or her. Even if a witness is abroad and is difficult to find for the authorities, the defendant must have the right to challenge his or her statement or it cannot be used.

### 3.2. Cross-border cooperation and the risk of forum shopping

A possible risk to the right to a fair trial is set in the structures of cross-border cooperation, as can be illustrated with our example case:

Before the German authorities send D to Madrid, they contact Europol and Eurojust to see whether more action has to be taken, considering for instance further arrest warrants, investigations in other countries or relevant information or rather evidence located elsewhere.

Criminal law still lacks a clear transnationally binding rule on jurisdiction as Anna Petrig explains in detail in her contribution.<sup>53</sup> Therefore forum shopping is an option, if indeed a 'best' jurisdiction can be picked, either by the prosecution or by the defence.

On the side of the defence, Eurojust and Europol may prove helpful for prosecution services and the police to coordinate mutual legal assistance or to give legal and factual information or even to gather evidence abroad.<sup>54</sup> The European organizations have the resources to look all over Europe for other suspicious incidents or patterns of similar alleged crimes,<sup>55</sup> and even to find the 'best jurisdiction' for the case. The implication of such action has not yet been addressed on a superior – here on an EU – level. Consequently, it is left to national law to decide whether information gathered might serve as evidence or as a basis for a decision on whether to prosecute.<sup>56</sup> By contrast, D's defence lawyer has to work on his own without these Europe-wide resources. Does this situation affect the overall fairness of the trial?

One danger identified by defence lawyers is that of forum shopping by law enforcement agencies across Europe.<sup>57</sup> In theory, however, the defendant could opt for a version of 'forum running' himself by turning himself in to the authorities of a jurisdiction supposedly favourable to him. But it is rather unlikely that this defence ploy will succeed, given the powers to transfer suspects between countries if needs be. A network always has greater means at its disposal than an individual. It therefore stands a better chance of being able to achieve its aims, for instance, by moving a case to a more favourable forum. European intelligence and law enforcement agencies – in keeping with their mandates – must compare the legal situations for prosecutions in different countries. According to Article 7 of the Eurojust Decision of 2009,<sup>58</sup> its college issues written opinions in cases of conflict of jurisdictions. The European

49 ECtHR 13 April 2006, *Zentar v France*, appl. no. 17902/02, Paras. 29 et seq.; ECtHR 22 November 2012, *Tseber v Tsech Republic*, appl. no. 46203/08, Para. 48.

50 Ibid.

51 Ibid.

52 K.Gaede, *Fairness als Teilhabe*, 2007, pp. 807 et seq.; H. Jung, 'Strafverteidigung in Europa', 1990 StV, pp. 509 et seq., p. 516; S. Stavros, *The guarantees for accused persons under article 6 of the European Convention on Human Rights*, 1993, pp. 249 et seq.

53 A. Petrig, 'The Expansion of Swiss Criminal Jurisdiction in Light of International Law', 2013 *Utrecht Law Review* 9, no. 4, pp. 34-55.

54 See for instance A. de Moor & G. Vermeulen, 'The Europol Council Decision: Transforming Europol into and Agency of the European Union', 2010 *CMLR* 47, no. 4, pp. 1089-1121, p. 1107.

55 For similar problems in case of ICC prosecution, see E. Baylis, 'Outsourcing investigations', *Legal Studies Research Paper Series*, Working Paper No. 2010-20, p. 145.

56 See also Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328, 15.12.2009, p. 42, which is rather a soft law instrument.

57 H. Ahlbrecht, 'Europäische und internationale Ermittlungsbehörden', in H. Ahlbrecht et al., *Internationales Strafrecht in der Praxis*, 2008, pp. 390 et seq.

58 Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009, p. 14.

agency uses its expertise to show EU countries how to determine the location of prosecutions and present the pros and cons of law enforcement in different states. Forum shopping could only be prevented by binding criteria that govern the choice of forum.<sup>59</sup> Criminal defendants have much less leeway and power to push for a change of forum in a criminal case. The prosecution will always have a clear advantage over the defence.

### 3.3. Language

In principle, one would expect an alleged wrongdoer to be tried in the place where the alleged crime was committed. But, each state has a legitimate right to investigate and eventually prosecute according to its rules on jurisdiction. Such jurisdictional claims appear problematic if, for instance, a state adopts a broad territoriality principle or claims extraterritorial jurisdiction over crime or if, as in the EU, the principle of mutual recognition gives a *de facto* extraterritorial reach to a prosecution.<sup>60</sup>

If a person may be tried in many states, there is an increased risk that he or she may be tried in a foreign language.

In our example, D, a Belgian national, must stand trial in Madrid in Spanish. It has long been acknowledged that proceedings conducted in a language unknown to a defendant pose a threat to his or her prospects of a 'fair trial'.<sup>61</sup>

Therefore, Article 6(3) ECHR stipulates that everyone charged with a criminal offence has the right (a) 'to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him' and (e) 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'.

Subsequently, in a large body of case law, the ECtHR has ruled on the circumstances in and the extent to which 'the free assistance of an interpreter' is one of the minimum rights everyone charged with a criminal offence is entitled to. Generally, Strasbourg considers that '[a] defendant not familiar with the language used by the court may be at a practical disadvantage if the indictment is not translated into a language which he understands'.<sup>62</sup> The Court has even gone so far as to hold that, '[t]o read Art.6 para. 3 (e) (art. 6-3-e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article and in practice, as was rightly emphasised by the Delegates of the Commission, to denying that benefit to any accused person who is eventually convicted. Such an interpretation would deprive Art. 6 para 3 (e) (art. 6-3-e) of much of its effect, for it would leave in existence the disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language – these being the disadvantages that Art. 6 para 3 (e) (art. 6-3-e) is specifically designed to attenuate'.<sup>63</sup> The crucial question is the scope of the assistance given. According to recent case law, the right to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.<sup>64</sup> There is, however, no right to have all documents translated in writing; rather, there is only an entitlement to be enabled, by means of interpretation, to have knowledge of the case against oneself.<sup>65</sup> Up to now, it remains nonetheless unclear to what extent this right also applies in cases of cross-border cooperation.<sup>66</sup>

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59 V. Mitsilegas, *EU Criminal Law*, 2009, p. 156.

60 Klip, *supra* note 19, pp. 96 et seq.; Suominen, *supra* note 33, pp. 20-21.

61 ECtHR 6 April 1994, *Roos v Sweden*, appl. no. 19598/92; ECtHR 23 February 1994, *Standford v UK*, appl. no. 16757/90, Para. 26; Trechsel & Summers, *supra* note 3, p. 328.

62 ECtHR 18 October 2006, *Hermi v Italy*, appl. no. 18114/02, Paras. 68 and 69 with reference to ECtHR 1 March 2006, *Sejdovic v Italy*, appl. no. 56581/00, Para. 89; ECtHR 19 December 1989, *Kamasinski v Austria*, appl. no. 9783/82, Para. 79; ECtHR 17 February 2004, *Tabaï v France*, appl. no. 73805/01.

63 ECtHR 28 November 1978, *Luedicke, Belkacem and Koç v Germany*, appl. nos. 6210/73, 6877/75 and 7132/75, Para. 42.

64 ECtHR 5 January 2010, *Diallo v Sweden*, appl. no. 13205/07, Para. 25; ECtHR 5 April 2011, *Saman v Turkey*, appl. no. 35292/05, Para. 30.

65 ECtHR 5 January 2010, *Diallo v Sweden*, appl. no. 13205/07, Para. 25; ECtHR 24 February 2009, *Protopapa v Turkey*, appl. no. 16084/90, Para. 79.

66 Trechsel & Summers, *supra* note 3, p. 36; Esser, *supra* note 7, p. 640, Para. 844.

### 3.4. Special problems of cross-border cooperation in the EU framework

Problems for the defence may increase as a consequence of the emerging EU framework for judicial cooperation in criminal matters, which is a special sub-set of European law and introduces new institutions, as well as novel legal concepts, for cross-border cooperation.<sup>67</sup> Recent instruments rely on ‘mutual recognition’, which means that a judicial decision rendered in one EU Member State is valid and enforceable in any other.<sup>68</sup> The application of the principle of a fair trial, however, is protected by declaratory references to the validity of the ECHR only.<sup>69</sup>

#### 3.4.1. Problems arising from the concept of mutual recognition

In our example, the Spanish authorities have issued a European arrest warrant against D. Most probably D would not want to be extradited since he contends that he had official permission to handle drugs in his home country, and thus that he was acting legally.

Several questions arise with regard to the right to a fair trial concerning the European arrest warrant (EAW): Does a defendant’s statement amount to a valid defence against the execution of a EAW in his home country, and should thus be given an opportunity to make a case at home? Or, must a person sought with a EAW always stand trial in the issuing country, and bring proof there for exculpation? If claims for exculpation are heard in the issuing state only, does this affect the right to a fair trial (i.e. to present one’s case) negatively? And, ultimately, is the ECHR’s fair trial standard at all relevant to the EU’s framework for judicial cooperation?

As to the first question: The EAW is first and foremost a procedural tool, which secures almost automatically enforceable arrests throughout the EU; after the adoption of the Directive on the right to information in criminal proceedings persons arrested will receive information about their rights routinely.<sup>70</sup> Certain grounds for refusal hinder the execution: here the arrest warrant may connect to substantive law.

In practice, for instance in our example case, the German authorities could ‘save’ D from the Spanish authorities in a rather pragmatic way by opening ‘sham proceedings’ against D which they would then close due to D’s permission to deliver the drugs, barring further Spanish prosecution *non bis in idem*. If the German authorities decide not to intervene, however, D must stand trial in Spain.

In this way, the new instruments on mutual recognition do expand the reach of law enforcement authorities across Europe; indeed, they establish an ‘implementing area’ for European criminal justice. Neither the relevant framework decisions nor the other EU laws establish a blanket human rights defence or another corresponding instrument for a ‘European defence area’. There is no mutual recognition of exculpatory evidence, for instance, holding a permit for a certain conduct. A person sought must raise such a claim in the issuing country. This aspect has contributed to the claim that mutual recognition leads to a ‘unilateral increase of punitiveness.’<sup>71</sup> But as such it does not affect the fairness of the trial. A ‘fair trial’, the opportunity to make one’s case, will be provided when the case goes to trial.

#### 3.4.2. Problems arising from the set-up of European agencies and networks

Another problem, certainly increasing with information exchange under the principle of availability, is the cross-border flow of data,<sup>72</sup> which has already been mentioned above with regard to forum shopping (Section 3.2). Since only competent authorities, and not the defence, may participate in such

67 Klip, *supra* note 19, pp. 419-428.

68 For details see Suominen, *supra* note 33, pp. 20-56.

69 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, Preamble (6), OJ L 196, 2.8.2003, p. 45; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, Preamble (27), OJ L 350, 30.12. 2008, p. 72.

70 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1. Art. 5 of the Framework Decision provides for a right to written information about rights in the European arrest warrant.

71 In this regard, for instance: S. Allegrezza, ‘The Interaction Between The ECJ and the ECHR with Respect to the Protection of Procedural Safeguards after Lisbon’, in K. Ligeti (ed.), *Towards a Prosecutor for the European Union*, Vol. 1, 2013, pp. 941-942; Klip, *supra* note 19, pp. 305 et seq.; B. Schünemann, ‘Verteidigung in Europa’, 2006 StV, p. 361.

72 Mitsilegas, *supra* note 59, pp. 250-263.

data networks, the question arises whether the two sides have equal opportunities in making their case. From the perspective of international cooperation in criminal matters the data exchange illustrates that equality of arms – or rather, an effective defence – is relevant *before* a case goes to trial. As is held by the ECtHR, the manner in which Article 6 ECHR is to be applied during preliminary investigations ‘depends on the special features of the proceedings involved and on the circumstances of the case.’<sup>73</sup> This may affect information exchange, too. We lack, however, relevant case law on this topic.

Furthermore, defence attorneys have no direct access to the networks of the police and prosecution services or to central agencies, such as Europol and Eurojust, and only some jurisdictions allow the defence to instigate a request to Europol or Eurojust through a motion for the taking of evidence. Put another way, and more simply: the European central services are not available to the defence. Does this jeopardise the right to a fair trial or, more specifically, the principle of equality of arms? The establishment of low-threshold networks for law enforcement agencies and centralised institutions serving law enforcement agencies is a feature of transnational cooperation in criminal matters. And a unilateral strengthening of law enforcement through the centralisation of institutions (for instance, Europol, Eurojust and – possibly – a European Public Prosecutor<sup>74</sup>) may eventually result in a structural weakening of the criminal defence, because they lack access to cross-border information or coordinating measures.<sup>75</sup> Whether such a development merely mirrors the situation on the national level, where we nevertheless assume equality of arms, or whether the situation on the EU level surpasses equality requirements must be analysed, which has not yet been done. It is plausible, however, that defence lawyers can put up with their loneliness on the national level. But in transnational cases the exclusion from a network organized on a cross-border basis hurts more, because language and financial needs as well as the advantage of being able to contact somebody on the spot become a more valuable asset.

### 3.4.3. Does the individual have a right to a fair trial in the EU cooperation framework

More fundamental still is the question of whether an alleged violation of the ECHR’s right to a fair trial is a valid claim within the EU’s judicial cooperative framework. This matter was widely discussed pre-Lisbon after *Bosphorus Airlines v Ireland*.<sup>76</sup> In that case, the ECtHR determined the premises for ECHR Contracting Parties to be held responsible for actions taken under the banner of the EU; Strasbourg used the doctrine of ‘equivalent protection’ to establish their responsibility. Accordingly, Contracting Parties are not prohibited from transferring sovereign power to an international organisation, but they remain responsible for all acts and omissions of their organs. The Court will presume that a state has acted in compliance with the ECHR as long as the international organisation ‘is considered to protect fundamental rights (...) in a manner which can be considered at least equivalent to that for which the Convention provides.’<sup>77</sup> That presumption can be rebutted. Read together with the ensuing scholarly literature, *Bosphorus* thus conveys the global implications of concurring regional human rights frameworks and their implications for legal accountability. It does not, however, settle the ongoing issue of the responsibility of countries and/or international organisations under different international legal frameworks.<sup>78</sup>

In a bid to pay more and more attention to securing defendants’ rights during cross-border evidence transfer, national courts have also asked for a valid EU structure safeguarding defendants’ rights during

73 ECtHR 11 December 2008, *Panovits v Cyprus*, appl. no. 4268/04, Para. 64 with reference to ECtHR 24 November 1993, *Imbrioscia v Switzerland*, appl. no. 13972/88, Para. 38.

74 See e.g. M. Böse, ‘The System of Vertical and Horizontal Cooperation in Administrative Investigations in EU Competition Cases’, in K. Ligeti (ed.), *Towards a Prosecutor for the European Union*, Vol. 1, 2013, pp. 838-869.

75 Art. 86 TFEU; S. Gless, ‘Police and Judicial Cooperation between the European Union Member States, Results and Prospects’, in C. Fijnaut & J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union*, 2009, pp. 30 et seq.; S. Nürnberger, ‘Die zukünftige Europäische Staatsanwaltschaft’, 2009 *ZIS*, no. 5, p. 494.

76 ECtHR 30 June 2005, *Bosphorus Airlines v Ireland*, appl. no. 45036/98.

77 ECtHR 30 June 2005, *Bosphorus Airlines v Ireland*, appl. no. 45036/98, Para. 155.

78 C. Costello, ‘The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’, 2006 *Oxford Human Rights Law Review* 6, no. 1, pp. 87-130; T. Lock, ‘Beyond *Bosphorus*: The European Court of Human Rights’ Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights’, 2010 *Oxford Human Rights Law Review* 10, no. 3, pp. 529-545; F. Schorkopf, ‘The Judgment of the European Court of Human Rights in the Case of *Bosphorus Hava Yollari Turizm v Ireland*’, 2005 *German Law Journal* 6, no. 9, pp. 1255-1264.

information exchange, like the German Federal Court (*Bundesgerichtshof*) did in a judgment handed down in 2012: emphasizing individual rights,<sup>79</sup> as well as the position of the individual in international law and the subsequent rights and entitlements,<sup>80</sup> cautiously reminds us that a reliable EU-wide structure for compliance with the rule of law and human rights is a prerequisite for exercising mutual recognition.<sup>81</sup>

### 3.5. Interim conclusion

Looking at the effect of cross-border cooperation on equality of arms one will not find a flagrant violation on the face of it; for transnational criminal cases the most problematic aspects are the accumulated, rather than separate, encroachments. If the defence has no access to the benefit of cross-border cooperation by way of mutual legal or closer network cooperation or finds itself faced with evidence it cannot contest in practice, a pragmatic solution may be found on a case to case basis, but it adds up to a structural weakening of the defendant's position, who must in turn find a way through a complex cross-border situation.

Courts must remain alert to this risk that signatories to the ECHR may, collectively, expose individuals to cooperative measures which infringe the ECHR's guarantees, especially by curtailing their rights to an adequate defence. If one applies an 'infringement' test to cases of cooperation between ECHR Contracting Parties, EU Member States would have duties to actively enquire into the fairness of the proceedings that evolve from acts of cooperation. Eventually, states may have an obligation to build a proper structure for a cross-border defence, i.e. by giving access to certain networks, implementing legislation for the admissibility of evidence gathered in a foreign criminal justice system, etc.

Currently, the notions of the right to a fair trial and to equality of arms in Article 6 ECHR are not designed to protect individuals affected by transnational cooperation in criminal matters fully. The protection for such individuals is inadequate in situations, for instance, where mutual legal assistance is not looked upon as part the criminal trial, and is thus not covered by ECHR guarantees,<sup>82</sup> or in those situations where the guarantees granted during a criminal trial on the national level are void.<sup>83</sup>

The absence of a critical discussion about forum shopping in judgments of the Luxembourg Court, which is aware of the phenomenon,<sup>84</sup> is just one indication of this. The question is thus whether we must and, if so, how we can make up for the shortfalls and restore the balance so as to ensure a 'fair trial' in transnational criminal cases.<sup>85</sup> Or, to put it another way, is there a European law that could effectively guarantee a fair trial in transnational criminal cases and thus adequately address the apparent inequality of arms *de lege lata* at the European level?

## 4. Possible cures for current shortfalls *de lege lata*

Perhaps the most obvious place to start is Article 6 ECHR itself and to ask whether its right to equality of arms could serve as a cure for the existing shortfalls.

### 4.1. ECHR as a possible cure

It is well known that the convention grants certain rights during a criminal trial. These apply in all Contracting States. An alleged violation of such rights may be brought before the Court in Strasbourg. This form of state accountability has contributed to the establishment of effective criminal defences at the

79 BGH Beschl. v. 21.11.2012 – 1 StR 310/12, Rn 38.

80 BGH Beschl. v. 21.11.2012 – 1 StR 310/12, Rn 23 und 25; see for further information: O. Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland*, 1987, pp. 19 and 93; K. Gaede, in M. Böse (ed.), *Enzyklopädie des Europarechts*, 2013, § 3 no. 3.

81 BGH Beschl. v. 21.11.2012 – 1 StR 310/12, Rn 35.

82 See for instance S. Breitenmoser, 'Neuere Rechtsentwicklungen in den Bereichen der internationalen Amts- und Rechtshilfe', in B. Ehrenzeller (ed.), *Aktuelle Fragen der internationalen Amts- und Rechtshilfe*, 2005, pp. 9-40, pp. 35 et seq.; Esser, *supra* note 7, p. 383, N 87; Trechsel & Summers, *supra* note 3, p. 36.

83 ECtHR 27 October 2011, *Stojkovic v France and Belgium*, appl. no. 25303/08, Paras. 51 et seq.; S. Gless, 'Sachverhaltsaufklärung durch Auslandszeugen', in H. Müller et al. (eds.), *Festschrift für Ulrich Eisenberg*, 2009, p. 500.

84 Albeit only on a national level: ECtHR 29 April 1999, *Aquilina v Malta*, appl. no. 25642/94; ECtHR 29 April 1999, *Case of T. v Malta*, appl. no. 25644/94; ECtHR 3 May 2011, *Sutyagin v Russia*, appl. no. 30024/02.

85 For terminology see N. Boister, "'Transnational Criminal Law'?", 2003 *European Journal of International Law* 14, no. 5, pp. 953-976 as well as S. Gless & J. Vervaele, 'Law Should Govern: Aspiring General Principles for Transnational Justice', 2013 *Utrecht Law Review* 9, no. 4, pp. 1-10.

national level in ECHR Contracting Parties. It has triggered, in fact, a pan-European exchange of ideas about criminal procedure and the right to a fair trial. Today it is thus generally accepted that the ECtHR has strengthened the position of the defence at the national level at least with regard to the ECHR.

What is unclear is whether Strasbourg's jurisprudence can serve as a remedy for all problems and cure all ills. If we look at the shortfalls identified in transnational criminal cases under the EU framework in particular, it becomes clear that the chances of a cure through the channels of the ECHR are slim. The ECHR lacks an explicit rule for these cases, on the one hand (see Section 2.1.), and, even more critically, was not set up for curing human rights deficiencies outside national criminal justice systems, on the other. The framers of the convention focused on securing human rights at a national level and – being products of their time – did not see the pitfalls of transnational cooperation (see Section 2.2).

#### **4.2. Lack of an explicit rule – The need for new case law**

Although no rule in the ECHR explicitly guarantees a fair trial in transnational criminal law enforcement, the ECtHR has addressed certain aspects of this problem in its case law. It has done so mostly by discussing the prerequisites of cooperation with third states, ostensibly assuming that there are few shortfalls in cases of cooperation among ECHR states.

##### **4.2.1. Flagrant denial of justice?**

The most prominent line of argumentation (developed with regard to cooperation with third states) is the flagrant denial of fair trial test, which also offers an interesting point of departure for a more profound debate about the human rights' obligations of ECHR signatory states as well as others. A detailed discussion is provided by Radha Ivory.<sup>86</sup> The following short exploration discusses the specific implications which the case law holds for using ECHR guarantees to fill gaps in a transnational criminal justice system.

As the ECtHR held in *Soering*, an extraditing party may be responsible for a violation of Article 6 ECHR if 'the fugitive suffered or risks suffering a *flagrant denial of a fair trial* in the requesting country' (emphasis added).<sup>87</sup> This *dictum* has determined the limits for cross-border cooperation in subsequent ECtHR case law, especially on alleged terrorism, since it

'is established in the Court's case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country'.<sup>88</sup> A flagrant denial of justice occurs if a trial is manifestly contrary to the provisions of Article 6 or the principles embodied therein,<sup>89</sup> for instance where a trial 'is summary in nature and conducted with a total disregard for the rights of the defence' or 'there has been a deliberate and systematic refusal of access to a lawyer'.<sup>90</sup>

##### **4.2.2. Implications of the 'flagrant denial test'**

Thus, at first sight the *Soering* doctrine is primarily a sort of a 'fair trial emergency brake' on transnational criminal cases. It is not construed as a device that can secure the standard array of Article 6 fair trial standards in transnational criminal cases. The remaining question is whether the *Soering* 'flagrant denial'

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86 Ivory, *supra* note 26.

87 ECtHR 7 July 1989, *Soering v The United Kingdom*, appl. no. 14038/88, Para. 113; emphasis added by the author.

88 ECtHR 17 January 2012, *Othman (Abu Qatada) v UK*, appl. no. 8139/09, Para. 258; with reference to, *inter alia*, ECtHR 4 February 2005, *Mamatkulov and Askarov*, appl. nos. 46827/99 and 46951/99, Paras. 90 and 91; ECtHR 2 March 2010, *Al-Saadoon and Mufdhi v the United Kingdom*, appl. no. 61498/08, Para. 149.

89 ECtHR 17 January 2012, *Othman (Abu Qatada) v UK*, appl. no. 8139/09, Para. 259; ECtHR 1 March 2006, *Sejdovic v Italy*, appl. no. 56581/00, Para. 84; ECtHR 27 October 2011, *Stojkovic v France and Belgium*, appl. no. 25303/08, Para. 56; ECtHR 26 June 1992, *Drozdz and Janousek v France and Spain*, appl. no. 12747/87, Para. 110.

90 ECtHR 17 January 2012, *Othman v UK*, appl. no. 8139/09, Para. 259; ECtHR 8 November 2005, *Bader and Kanbor v Sweden*, appl. no. 13284/04, Para. 47; ECtHR 20 February 2007, *Al-Moayad v Germany*, appl. no. 35865/03, Para. 101.

doctrine has the potential to be used more broadly to equalize the position of transnational prosecution and defence.<sup>91</sup>

From the fact that the Court applies a ‘test of last resort’ to cooperation with third states one may draw the conclusion that a test applied to cooperation among ECHR parties must be much stricter, securing the standard array of Article 6 fair trial entitlements.

If the ‘flagrant denial of justice’ is a stringent test of unfairness,<sup>92</sup> the test applied to cooperation among ECHR states must cover less serious irregularities or a lack of safeguards.

The Strasbourg Court has not yet explained whether – or rather when – the flagrant denial test is applicable in other cases of cooperation, either those that do not involve the surrender of persons<sup>93</sup> or those which involve ECHR states.

The *Soering* doctrine restrains ECHR states, but is also a relief to them: Because the Contracting Parties cannot impose their human rights standards on non-signatory states. But they must show ECHR compliance when cooperating among themselves, even if they cooperate in the special framework of the EU.

Although the Strasbourg Court left some space for such special legal frameworks, even in human rights questions, as can be seen from the ECtHR’s approach to reviewing EU law in *Bosphorus*:<sup>94</sup> all other things being equal, it assumes that these states recognize their special obligation to adhere to human rights including in respect of cooperation. The European Court of Justice (ECJ) in Luxembourg, however, has not yet developed its own specific human rights standards when deciding the merits of human rights issues with regard to special cooperation among EU Member States.

#### 4.2.3. Interim conclusion: ECHR as a limited cure, but a living instrument

The ECHR thus provides only limited benefits for establishing a cure to defence shortfalls in transnational criminal cases at the moment. The framers of the ECHR strove for the protection of human rights in Europe after the atrocities committed by Germany and after the trauma of the Second World War.<sup>95</sup> For today’s specific challenges of cross-border cooperation in crime control the benefits of the Convention are thus quite limited. The ECHR, however, has proven to be a ‘living instrument’ and to be very able to adapt to new challenges.<sup>96</sup> If the ECHR is envisioned as a possible cure, two aspects have to be kept in mind.

First, the ECHR can only ‘cure’ human right problems in national law if those problems correspond with a convention right. This is the other side of the principle of ‘no right without remedy’: in the absence of a clear conventional right or an effective commitment that a breach will be followed by sanctions, the power of the Strasbourg Court to create jurisprudence is non-existent. This is important because the ECHR only provides criminal procedural rights and the rights of the criminal defence in passing. It does not stipulate a broad code for the defence, even when it provides a variety of defence rights in relation to the entitlement to a ‘fair trial’.<sup>97</sup>

Second, the ECtHR leaves room for states to find solutions that are acceptable at the national level. The ‘margin of appreciation’ approach<sup>98</sup> allows the ECtHR to apply a doctrine in a flexible way. The judges in Strasbourg often leave the concrete sanction of a human rights violation to the national system and limit themselves, ultimately, to the overall assessment of the fairness of the process.<sup>99</sup> This approach has

91 See Ivory, *supra* note 26.

92 ECtHR 17 January 2012, *Othman (Abu Qatada) v UK*, appl. no. 8139/09, Para. 260.

93 So far, it has applied the *Soering* reasoning to the enforcement of a foreign criminal sentence by a Contracting State in *Drozdz and Janousek v France and Spain* (ECtHR 26 June 1992, appl. no. 12747/87, Para. 110). For more details see See Ivory, *supra* note 26.

94 See above the *Bosphorus doctrine* as well as EGMR Rep. 1999-I, 251, §§ 32-34 *Matthews*; ECtHR 20 January 2009, *Nederlandse Kokkelvisserij*, appl. no. 13645/05.

95 See Van Dijk et al., *supra* note 3, p. 3.

96 ECtHR 17 September 2009, *Scoppola v Italy (No. 2)*, appl. no. 10249/03, Para. 104; ECtHR 25 April 1978, *Tyrer v the United Kingdom*, appl. no. 5856/72, Para. 31, Series A no. 26; see also *Kress v France* [GC], appl. no. 39594/98, Para. 70, ECHR 2001VI; and *Christine Goodwin v the United Kingdom* [GC], appl. no. 28957/95, Para. 74, ECHR 2002-VI.

97 See Van Dijk et al., *supra* note 3, p. 635.

98 In this regard: A. Peters & T. Altwicker, *Einführung in die Europäische Menschenrechtskonvention*, 2012, pp. 25 et seq. with further references; K. Gaede, ‘EGMR v. 23. 11. 2005 – Beschwerde-Nr. 73047/01, Zum Recht des Angeklagten auf Konfrontation mit einem Belastungszeugen – Der Fall Monika Haas’, 2006 *JR*, no. 7, p. 292 for a ‘total consideration’.

99 See, for example recently: ECtHR 10 March 2009, *Bykov v Russia*, appl. no. 4378/02, Para. 89. For a detailed discussion of the margin of

probably contributed significantly to the ECtHR's success as well as to its legitimacy. It has allowed State Parties to adopt human rights doctrines into their national legal systems when they deemed it the time right to do so, as the example of Germany shows.<sup>100</sup> Strasbourg's generosity towards respondent states – especially in complex cases – does increase the risk for those defence lawyers who are considering taking their cases to Strasbourg, however.

#### *4.3. EU law as a possible cure*

The need for a new transnational concept of fair trial arises with particular urgency in the emerging EU framework for judicial cooperation in criminal matters.<sup>101</sup> With its new instruments and agencies, the area of freedom, security and justice in the EU is a prominent illustration of the transition of case-by-case assistance to a system of close-knit cooperation in a specific framework,<sup>102</sup> which has put criminal defence in a difficult spot. But EU law has also benefited in three key respects: first and second, it has brought an exemption from punishment with regard to the four fundamental freedoms<sup>103</sup> and established a system for the prohibition of double jeopardy in all Schengen states with Article 54 CISA;<sup>104</sup> third, it has characterized the rights of the defence as an expression of general principles of law.<sup>105</sup>

The first two examples are rather specific to the EU; the third, however, is important for our purposes as it uses the terminology of 'general principles' and takes into account the substance of the ECJ's jurisprudence as it benefits the defence. In that respect it also shows the potential of a general principle in an international framework. The current case law rulings on human rights issues within the framework of the EU, however, send a mixed message, as responsibility is either delegated to the Member States and the buck is passed to national courts on the basis of not entirely clear-cut standards,<sup>106</sup> or is ignored deliberately as in decisions on the execution of the European arrest warrant.<sup>107</sup>

##### *4.3.1. The substance of a cure?*

The notion of general principles of law stipulated in Article 6 of the Lisbon Treaty of the European Union (TEU) has allowed the judges in Luxembourg to guarantee due process, legal protection and minimum rights of the defence.<sup>108</sup> When there is no relevant rule at the EU level, they develop common legal precepts from the general principles of law, and thus practice in a certain way that which Anne Marie Slaughter has depicted globally in her image of an international community of courts.<sup>109</sup> These principles do not only nowadays shape competition law and disciplinary proceedings at the EU level as well as *in loco* inspections by the European Anti-Fraud Office (OLAF), but give a broader perspective of what could be conventions of EU fair trial.<sup>110</sup>

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appreciation approach, see H. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 1996.

100 In this regard: E. Lambert Abdelgawad & A. Weber, 'The Reception Process in France and Germany', in A. Stone Sweet & H. Keller (eds.), *A Europe of rights: the impact of the ECHR on national legal systems*, 2008, pp. 141 et seq.

101 See e.g. Ahlbrecht, *supra* note 31, p. 493; Klip, *supra* note 19, pp. 419-428.

102 Klip, *supra* note 19, pp. 336-417; S. Gless, 'Zum Prinzip der gegenseitigen Anerkennung', 2004 *Zeitschrift für die gesamte Strafrechtswissenschaft* 116, no. 2, p. 353.

103 Satzger, *supra* note 43, § 7 no. 84.

104 See J. Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?', 2013 *Utrecht Law Review* 9, no. 4, pp. 211-229; Lelieur, *supra* note 30.

105 Klip, *supra* note 19, pp. 228-246.

106 See for instance with regard to the common asylum system: ECJ 21 December 2011, Joined Cases C-411/10 and 493/10, *N.S. and Others*, Paras. 70-108, and the very restrictive approach for review in EAW cases: ECJ 1 December 2008, Case C-388/08, *Leymann/Pustarov*, Para. 51.

107 See most recently: ECJ 29 January 2013, Case C-396/11, *Radu*, Paras. 31 and 39, in contrast to Advocate General Sharpston, Opinion of 18 October 2012, Paras. 55-61.

108 P. Craig & G. de Búrca, *Eu Law – Text, Cases and Materials*, 2011, pp. 366 et seq.; Conclusion of Advocate General Ruiz-Jarabo Colomer of 12 October 2009, Case C-476/93 P = Col. 1995, I-4125 (4131, no. 17), on the right to defence: ECJ 16 September 2009, Cases T-305 to 307/94, T-313 to 316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, Col. = 1999, II-931 (II-931, Mn. 246): 'The maintenance of defence rights represents in all processes that lead to sanctions – especially fines or compulsory penalty payments – a fundamental principle of Community law, which must also be observed in an administrative procedure.'

109 A.-M. Slaughter, 'A Global community of Courts', 2003 *Harvard International Law Journal* 44, pp. 215 et seq.

110 See e.g. Craig & De Búrca, *supra* note 108, p. 367; S. Gless & H. Zeitler, 'Fair Trial Rights and the European Community's Fight Against Fraud', 2001 *ELJ* 7, no. 2, p. 219; for an insight into possible policy initiatives: Commission of the European Communities, Green Paper on the Presumption of Innocence, COM(2006) 174 final.

The general principles of law may only guarantee a minimum standard, but their effects should not be underestimated due to their European 'status'. The ECJ's *Kadi* judgment demonstrated the meaning of that jurisprudence, insofar as the Court in Luxembourg<sup>111</sup> declared null and void the instruments that ordered the freezing of funds of alleged terrorists without effective judicial review or defence rights. It, therefore, struck down the practice of 'smart sanctions' imposed by the EU and the UN. A national court would not have been able<sup>112</sup> to deliver a more significant lesson on the implications of a regional human rights regime for global justice systems.<sup>113</sup>

#### 4.3.2. Provisional findings: is EU law only a limited cure?

Does EU legislation benefit the criminal defence in a way which makes up for all possible shortfalls emerging in transnational cooperation? At the moment the answer is no, although it may help – more by chance than by design, however.

Within the remit of the national and the European legislators is the responsibility to adopt a legal framework which balances liberty and security in law enforcement and criminal prosecution. The EU framework must allow for an effective criminal defence.<sup>114</sup>

Legislators at the national and the European level have always recognized this responsibility.<sup>115</sup> And, while the Luxembourg Court acted rather cautiously at the beginning, over time the right to a defence has come to occupy a more prominent place on the EU's agenda. Therefore, 'respect for the rights of the defence' is now judged to be a high-ranking responsibility when (a) institutions, bodies and agencies of the EU act in the area of criminal prosecution, (b) Member States implement and enforce European legislation in this area.<sup>116</sup>

Its broader implementation in legal practice is, however, still pending. The 'Roadmap for strengthening procedural rights of defendants in criminal proceedings' issued in November 2009<sup>117</sup> identified specific points that should eventually be regulated by EU directives. The minimum rights grouped rather arbitrarily there (e.g. interpretation or information about 'basic rights') indicate that a comprehensive approach will be difficult,<sup>118</sup> requiring ultimately a decision between the minimum-maximum dichotomy or a harmonisation of criminal procedures.<sup>119</sup> For the time being EU policies have, if anything, reinforced distrust for instance by German lawyers who fear the '*Einheitsbrei aus Brüssel*'.<sup>120</sup>

Up to now, two EU directives establishing a European instrument for procedural rights and rights of the defence<sup>121</sup> have been adopted:

- (1) A directive on the right to interpretation and translation in criminal proceedings,<sup>122</sup> which basically requires Member States to ensure that suspects and accused who do not speak or understand the language of criminal proceedings are provided, free of charge, with interpretation during those proceedings and the interpretation of essential documents (Articles 2 and 3). Furthermore, Member States must ensure that interpretations and translations are of a sufficient quality to safeguard the

111 ECJ 21 September 2005, Case T-315/01, *Kadi*.

112 S. Gless & D. Schaffner, 'Judicial review of freezing orders due to a UN listing by European Courts', in S. Braum & A. Weyembergh (eds.), *Le controle juridictionnel dans l'espace penal européen*, 2009, pp. 163-193.

113 A. Reinisch, *Challenging Acts of International Organizations before National Courts*, 2010, p. 9.

114 The Lisbon Treaty foresees the European regulation of the rights of the individual, but not for the criminal defence. See for detail, Art. 82 and Art. 83 TFEU. See in this regard, for instance: Klip, *supra* note 19, pp. 214-228.

115 See for instance, The Hague Programme from 2004, OJ C 53, 3.3.2005, p. 1, no. III 3.3.1; Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009, p. 1, Mn. 8.

116 ECJ 22 November 2012, Case C-277/11, *M.M. v Minister for Justice*, Paras. 81 et seq.; ECJ 15 November 2012, Case C-417/11 P, *Council of the European Union v Nadiany Bamba*, Paras. 49 et seq.

117 OJ C 295, 4.12.2009, p. 1.

118 See for instance: M. Jimeno-Bulnes, *The EU Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings*, 2009, p. 158; B. Schünemann, 'Fortschritte und Fehlritte in der Europäisierung der Strafrechtspflege', 2004 *GA*, p. 193.

119 For more information on Art. 82 TFEU: A. Suominen, 'EU criminal law cooperation before and after the Lisbon Treaty', 2012 *JFT*, no. 6, p. 577.

120 See the assessment of interviews with professionals by T. Wahl, 'The Perception of the Mutual Recognition Principle in Criminal Matters in Germany', in G. Vernimmen-Van Tiggelen et al. (eds.), *The future of mutual recognition in criminal matters in the European Union*, 2009, pp. 115-146.

121 Ahlbrecht, *supra* note 31, p. 493.

122 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 L 280, 26.10.2010, p. 1.

fairness of the proceedings (Article 5), and must provide training of judges, prosecutors and judicial staff 'to pay special attention to the particularities of communicating with the assistance of an interpreter as to ensure efficient and effective communication' (Article 6).

- (2) A directive that provides for the right to information in criminal proceedings.<sup>123</sup> In summary, the law provides for the following particular rights: the right to information about rights (Article 3), reinforced by a right to written information about rights on arrest (the letter of rights) (Article 4); the right to information about the charge (Article 6); and the right of access to the case file (Article 7).

Institutionalised defence services, such as *Eurodefensor*<sup>124</sup> or the *European Criminal Law Ombudsman*,<sup>125</sup> have not yet been established. In any case, it is doubtful that such a centralised European defence agency would solve all the problems. To this day, defence lawyers do not have access to an organization that allows them to exchange relevant information or to resources financing the coordination of cross-border criminal defence. *De lege lata* the framework is far from what defence lawyers claim must be the minimum standard for a criminal defence that matches the development of cross-border cooperation in criminal prosecution.<sup>126</sup>

Thus, many see a long-term solution in the accession of the EU to the ECHR as is foreseen in Article 6(2) TEU.<sup>127</sup> Before then, however, a solution must be found to align the approaches of the Strasbourg and Luxembourg Courts. The Committee of Ministers of the Council of Europe gave an ad hoc mandate to its Steering Committee for Human Rights to elaborate the necessary legal instrument with its EU partners; the EU Justice Ministers mandated the EU Commission to do the same.

Accession will be a major step in the development of human rights in Europe.<sup>128</sup> It will provide a much needed opportunity for a discussion of the main problems of EU cooperation and the right to a fair trial; ideally, a 'mainstreaming of defence rights' would ensue.

## 5. Approaches towards establishing a general principle

The right to a fair trial is a core tenet of legitimate criminal prosecutions. It holds – among other things – that there is an ideal of equal weaponry for the prosecution and defence ('equality of arms'). But, the available 'hard' law devices, as shaped by current doctrine, do not seem to provide appropriate solutions. Even in Europe, the ECHR does not carry an explicit remedy and EU law has yet to develop a comprehensive answer of its own.

The ECtHR, with decisions such as *Soering* and *Stojkevic*, offers the building blocks for a basic approach, holding firmly that states must always fulfil their commitment to human rights and implying that they do have responsibilities for human rights compliance in cases of mutual legal assistance or cross-border cooperation. The ECtHR, however, has not yet built a bridge to a broader approach: the project is to establish the fair trial right and, particularly, the right to equality of arms as a general principle that is valid in all (European) transnational criminal cases, and thus offers a 'cure' to current shortfalls, especially for transnational criminal cases. Milestones could be the development of a framework for transborder evidence gathering without curtailments of defence rights or a clear proposition on cross-border information exchange over networks affecting defence rights and its implications for fair trial. To get there, establishing a 'general principle of fair trial' or, rather, 'equality of arms' is necessary.

123 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1.

124 For more details see: C. Nestler, 'Europäische Verteidigung bei transnationalen Strafverfahren', in B. Schünemann (ed.), *A Programme for European Criminal Justice*, 2006, pp. 172 et seq.

125 J. Mitchell, 'Eine Entgegnung auf das Konzept des "Eurodefensors" als Mittel zur Stärkung der Verteidigung in transnationalen Strafverfahren (Korreferat)', in B. Schünemann (ed.), *A Programme for European Criminal Justice*, 2006, pp. 193-194.

126 See the proposal for a Framework Decision on the strengthening of the procedural rights of suspects or defendants in criminal proceedings; Green Paper on presumption of innocence as well as the Council's follow up with Resolution of 30 November 2009, On a roadmap for strengthening the procedural rights of suspects or defendants in criminal proceedings, OJ C 295, 4.12.2009, p. 1; 'EU: "Ambitious, yet realistic": Europol seeks to further increase in its role in European policing', *Statewatch News Online*, September 2012, available at <<http://database.statewatch.org/article.asp?aid=31815>>.

127 See e.g. Allegrezza, *supra* note 71, pp. 918-822.

128 See for instance the Venice Commission's comments on EU accession, <<http://www.venice.coe.int/docs/2007/CDL%282007%29096-e.asp>>.

### 5.1. Notion of a general principle

To advocate such an approach, we first need to map the concept of a general principle of transnational criminal justice. For the purpose of this project, a ‘principle’ is a general proposition of law of some importance from which concrete ‘rules’ derive;<sup>129</sup> general principles are general parameters which apply to certain conflicts of interest.<sup>130</sup> Even if there is little agreement as to their details,<sup>131</sup> there is consensus that ‘principles’ are essential elements agreed upon by all that courts need to make sense of the law and are based on a common canon of values.<sup>132</sup>

### 5.2. Basis of validity

In any case, the right to a fair trial is one of these basic parameters, for it includes fundamental notions of the conduct of legal procedures in different legal traditions.<sup>133</sup> Mixing the two methodologies – inductive-comparative and teleological-deductive – suggested in the introduction to this special issue,<sup>134</sup> it is argued that the right to a fair trial and, within it, equality of arms are required throughout Europe: the notion determines certain rules of procedures for criminal trials and so forms a common basis for interaction beyond person-to-person or rather state-to-state negotiations. They are thus equally necessary for achieving justice in transnational criminal trials. Also, equality of arms would appear to be embedded in the European understanding of human rights and is indisputable in the European context. Nevertheless, establishing a right to ‘equal weaponry’ as a general principle and giving it substance in the European context is only superficially simple. The ECHR binds only the signatory states, and their commitment may not determine fair trial rules beyond the district of ECHR states. Are only those states that have committed themselves to the ECHR obliged to comply with the principle or is there a more generalized obligation? Is everybody entitled to the right to a fair trial or is it valid only in certain situations, for instance detention in a particular territory or control over a person? And, finally, how does one resolve a conflict with other commitments and possible conflicting commitments?<sup>135</sup>

### 5.3. Implications

What, then, are the implications of a continent-wide commitment to a principle that applies to criminal trials in each state when several states cooperate to prosecute crimes and so – due to a certain situation – may in fact dissolve the assignment of clear responsibility between them? Determining concrete rules means again revisiting the basis of validity and deducing the code from there.

The case law of the ECtHR is an important basis and an obvious point of reference since it establishes that a commitment to human rights does not stop at the edge of national borders.<sup>136</sup> However, the argument advanced in *Soering* for establishing the strict ‘flagrant denial’ test builds on the rationale that the ECHR’s standard must not be imposed on third parties.<sup>137</sup> Seemingly this – correct – assumption is a drawback to the ECHR serving as a point of reference for a certain fair trial standard in transnational criminal cases. However, instead of stopping at the restraint aspect, one should use the argument and deduce that it follows (a) at least in cooperation among signatory states that ECHR standards must always be adhered to by all without exception, and (b) that ECHR states must find a way in their judicial system to ensure the validity of the ECHR guarantees as well as they possibly can. What does that mean in practice? When evidence is gathered across borders among ECHR states they must make sure that all

129 See R. Dworkin, *Taking Rights Seriously*, 1994, pp. 24 et seq. as well as *Oxford English Dictionary*, available at <<http://www.oed.com/view/Entry/151459?isAdvanced=false&result=1&rskey=dT5Wjo&>>.

130 See Gless & Vervaele, supra note 85.

131 See e.g. K. Ambos, ‘General principles of criminal law in the Rome Statute’, 1999 *Criminal Law Forum* 10, no. 1, pp. 1-32; M. Bassiouni, ‘A Functional Approach to “General Principles of International Law”’, 1989-1990 *Mich. J. Int’l L.* 11, pp. 768-818; J. Dewey, ‘Logical Method and Law’, 1924-1925 *Cornell L.Q.* 10, no. 1, pp. 17-28; H. Koh, ‘Transnational Legal Process’, 1996 *Nebraska Law Review*, pp. 181-206.

132 See Gless & Vervaele, supra note 85.

133 Trechsel & Summers, supra note 3, pp. 82 et seq.; see e.g. US Sixth Amendment to the Bill of Rights; Switzerland: Art. 130, 131 Abs. 3 and 343 Abs. 2 StPO; Germany: Art. 20 Abs. 3 GG in conjunction with Art. 2 Abs. 1 GG; EU: Art. 47 EU Charter; American Continent: Art. 7 Paras. 4 to 6 American Convention on Human Rights; Art. 19(e) Cairo Declaration on Human Rights in Islam.

134 See Gless & Vervaele, supra note 85.

135 See Ivory, supra note 26.

136 See e.g. Jackson & Summers, supra note 40, pp. 77-107.

137 ECtHR 7July 1989, *Soering v The United Kingdom*, appl. no. 14038/88, Para. 86.

relevant standards are kept or the evidence cannot be used; if evidence is transferred from non-ECHR states and does not meet the standards of the criminal justice system where the trial takes place, it cannot be admitted.

In doctrine the implication is the following: states that commit themselves to a certain human rights standard may not create a no man's land by allocating amongst each other investigatory and prosecutorial duties. If a deficit becomes apparent, Contracting Parties should have the obligation to provide a structure that helps secure the rights of the defence. *Stojkovic* corroborates this rationale as it stands for the principle that a State Party is responsible during mutual legal assistance for the fact that the requesting state maintains ECHR standards. The ECtHR case law suggests that ECHR Contracting States must not only refrain from exposing individuals to cooperation that infringes the ECHR's guarantees, they must also provide the necessary means to secure those rights when put at risk. There is a need to consider a special obligation to actively compensate for curtailments of human rights in situations of cooperation.

## 6. Conclusion

Cross-border investigations and transnational cooperation affect the equality of arms in criminal cases, by the accumulation of separate, small encroachments. Since we lack a global legal framework for guaranteeing a fair trial it is up to the courts to be alert to this risk. Otherwise the defendant and the defence will become ever lonelier in the no man's land between borders.

The right to a fair trial, including equality of arms, must be established as a general principle with implications for our understanding of criminal investigations and prosecutions not limited to national criminal justice systems. However, despite various commitments, states introduce new, efficiency-oriented instruments on cooperation and argue, in particular cases, that their pledges do not bind them in cooperative settings. These arguments do nothing to change our view that equality of arms is indispensable in any fair criminal trial and that equality of arms in transnational criminal cases can be resorted to only if the general principle is upheld as the rule of the game.

One of the most promising avenues for establishing general principles on a global level appears to be a direct alliance with human rights.<sup>138</sup> Human rights help to identify possible fundamental principles, to provide a basis for their validity, and to illustrate their possible consequences. They contribute to the prevention of miscarriages of justice and protect the position of accused individuals' vis-à-vis the authorities.<sup>139</sup> This is particularly obvious in Europe where the right to a fair trial and the principle of equality of arms form part of an enforceable human rights standard on due process, backed by a pan-European 'community of courts'.<sup>140</sup> Allying general principles of transnational criminal law with settled human rights standards also comes at a cost, however. Whilst they provide an easy answer to the question of the validity of those principles, they also set their boundaries to those of a particular human rights convention, which is, as pointed out at the beginning of the paper, the 'pledge of the pack'. Thus, the question of validity remains unanswered as soon as the context is not clearly within a legal commitment of a community – such as is the case with transnational criminal law.

Thus, the question of validity remains unanswered as soon as the context is not clearly within the pack's commitment – such as is the case with transnational criminal law.

The future task of transnational criminal justice practitioners is thus to identify and embrace relevant general principles with regard to equality of arms and more generally. Only in so doing will they be able to build 'a world under law'<sup>141</sup> which is based on common judicial values and serves all citizens of the world when confronted with criminal charges. ¶

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138 For more details on the alliance of fundamental rights and criminal process: C. Brants & S. Franken, 'The protection of fundamental human rights in criminal process', 2009 *Utrecht Law Review* 5, no. 2, pp. 8-17.

139 See for an example ECtHR 27 November 2008, *Salduz v Turkey*, appl. no. 36391/02, Para. 53.

140 Slaughter, *supra* note 109, pp. 215 et seq.

141 *Ibid.*, p. 219. See furthermore: Herlin-Karnell, *supra* note 19, pp. 62-86; K. Parlett, *The Individual in the International Legal System*, 2011, pp. 365-372; A. Peters, 'Membership in the Global Constitutional Community', in J. Klabbers et al., *The Constitutionalization of International Law*, 2012, pp. 153-200.