Simone Lonati[*]

Anonymous Witness Evidence before the European Court of Human Rights: Is It Still Possible to Speak of "Fair Trial"?

Abstract

The purpose of this paper is to encourage a reflection on the use of anonymous witness evidence by the European Court of Human Rights. An analysis of the leading cases solved by the Strasbourg judges will provide an overview of the European case law developments on such a delicate topic, considering how the accused's right of defence is seriously impaired when anonymous depositions are admitted in proceedings. The Court's most recent decisions on this topic do create some concern. They represent a considerable step backward in the guaranteed right to confrontation, which, especially when dealing with anonymity, does not seem acceptable. While there is no question on the need to protect persons other than the accused in criminal proceedings and on the urgency to safeguard the safety of witnesses, when in danger, and preserve the source of evidence, on the other hand, it is hard to imagine what "counterbalancing procedures" could compensate for all that the accused is denied when the identity of the person making incriminating statements against him/her is concealed. It is, therefore, a matter of making a civilised choice, and of asking ourselves whether in a trial that still aspires to be defined as "fair", anonymous incriminations may be tolerated.

1. Introduction

The purpose of this paper is to encourage a reflection on the topic of anonymous witness evidence, with particular attention to the cases addressed and the solutions identified by the European Court of Human Rights, to which reference is often made in the aim to justify recourse to said measure in the individual domestic systems[1].

* Department of Law, Bocconi University, Milano, Italy, simone.lonati@unibocconi.it.

1 Said protective measure, expressly referred to in Article 24(2)(a) of the Palermo Convention, is by now provided, albeit with specific limitations, by most legal systems. This possibility is, for instance, admitted in Germany (Article 68 of the criminal procedure code), Austria (Articles 166, 258(3) and 323(2) of the criminal procedure code) and in the Netherlands (Articles 136c, 226a and 226b). Other countries, such as Lithuania and Hungary, are also considering the possibility to introduce the anonymous witness figure. In the United Kingdom, anonymous witness evidence was the subject of a statutory provision in the *Criminal Evidence Act* dated 2008, subsequently replaced by the *Coroners and Justice Act* of 2009: on this point see *D.*

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After having identified the specific witness category, according to the autonomous notion adopted by the Strasbourg judges, a thorough analysis shall be made of the leading cases on witness anonymity solved by the Court. Only a careful description of the facts from time to time submitted to the Court's attention will help understand the legal principles set forth in its judgments[2]. Said principles have subsequently been referred to in all the following decisions issued on the matter.

The aforementioned analysis will provide an overview of the European case law[3] developments on a topic that is extremely delicate, given that the rights of the defence are seriously impaired when anonymous witness evidence is used in proceedings: indeed, without knowing a witness's true identity (often unknown to the judge as well) and being unable to observe his/her demeanour (including facial expressions) during the deposition, the accused's possibility to challenge the credibility of the witness is denied or strongly jeopardized.

Howarth, The Criminal Evidence (Witness Anonymity) Act, Archbold News (AN) 2008, p. 1; *L.C.H. Hoyano*, Coroners and Justice Act 2009: special measures directions take two: entrenching unequal access to justice?, Criminal Law Review (CLR) 2010, p. 345; *D. Ormerod*, Blackstone's Criminal Practice, 2012, p. 1709 et seq.; *D. Omerdod, A.L. Choo, R.L. Easter*, Coroners and Justice Act 2009: the "witness anonymity" and "investigation anonymity" provisions, Criminal. Law Review (CLR) 2010, p. 368; *A. G. Ward*, The Evidence of Anonymous Witnesses in Criminal Courts: now and into the future, The Denning Law Journal (DLJ) 2009, vol. 21, pp. 67-92. Law no. 136 of 2010 envisaged for the first time the possibility to use anonymous witness evidence in the Italian procedural system. By introducing a new paragraph 2-*bis* to Article 479 of the criminal procedure code, the Law set forth that any officers and other persons acting undercover be heard through remote examination methods, that suitable measures be applied so that the face of the witness is not visible and that the witness may use the same personal information used in the undercover operations. Since said information is fictitious, it may not in any way be traced back to the witness' past life.

2 As strongly underlined, the decisions of the European Court must be considered, as to their value as precedents, precisely in relation to the fact that they regard concrete cases and, therefore, the scope of the principles set forth therein must necessarily be assessed in light of this characteristic. (see *V. Zagrebelsky*, Relazione svolta al convegno "Processo penale e giustizia europea", Torino, 26-27 settembre 2008, in Processo penale e giustizia europea. Omaggio a Giovanni Conso. Atti del Convegno dell'Associazione tra gli studiosi del processo penale, 2010, p. 14,.

3 For the Court's case law, see *S. Bartole, P. De Sena, V. Zagrebelsky*, Commentario breve alla Convenzione europea dei diritti dell'uomo, 2012; *V. Berger*, Jurisprudence de la Cour Européenne des Droits de l'Homme, 2014; *L. Berg*, Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'Homme: liber amicorum Vincent Berger, 2013; *A. Di Stasi*, CEDU e ordinamento italiano, 2016, p. 34 s.; *P. Dourneau-Josette*, Convention européenne des droits de l'homme: jurisprudence de la Cour européenne des droits de l'homme en matière pénale, 2013; *D.J. Harris, M. O'Boyle, C. Warbrick*, Law of the European Convention on Human Rights, 2014; *A. Klip*, European Criminal Law. An Integrative Approach, 2016; P. Leach, *Taking a case to the European Court of Human Rights*, 2011; *S. Maringele*, European Human Rights Law. The work of European Court of Human Rights, 2014; *F. Sudre, J.P. Marguénaud, J. Andriantsimbazovina, A. Gouttenoire, G. Gonzales, L. Milano, H. Surrel*, Les grands arrêts de la Cour européenne des droits de l'homme, 2015; *F. Sudre*, Les conflits de droits dans la jurisprudence de la Cour européenne des droits de l'homme, 2014; *K. Tonami*, Essential cases of the European Court of Human Rights, 2008.

The final section of this paper will examine how the recent overruling of the Grand Chamber regarding absent witnesses (starting with *Al-Khawaja v. The United Kingdom* of 2011), has also produced effects on the case law relating to anonymous witnesses, as the two matters were viewed as presenting the same issues.

The most recent decisions of the European Court on this issue do create some concern, as, in practice, they allow a conviction to be based to a decisive extent on statements made by a person not only whom the accused has never had the chance to question directly but also whose identity and background are unknown. This aspect represents a further step backward by the European Court in the right to a fair trial. It is, therefore, a matter of making a civilised choice, and asking ourselves whether in the context of a trial that still wants to be defined as "fair", anonymous incriminating statements may be tolerated.

2. *The "elastic" notion of witness*

As is known, Article 6(3)(d) of the ECHR guarantees the accused's right to "examine or have examined" witnesses[4].

Over the years, the European Court has developed an autonomous notion of "witness", clarifying that, under the Convention, this concept should include any persons who "regardless of their procedural status, as governed by domestic law, have information regarding criminal proceedings"[5].

4 For an analysis of the right set forth in Article 6(3)(d) of the ECHR, see *M. Biral*, The Right to Examine or Have Examined Witnesses as a Minimum Right for a Fair Trial, European Journal of Crime, Criminal Law and Criminal Justice (EJCCL), 2014, p. 330 et seq.; *M. Chiavario*, in: S. Bartole, B. Conforti, G. Raimondi (eds.), Commentario alla Convenzione europea, 2001, art. 6; *A. Choo*, Hearsay and Confrontation in Criminal Trials, 1996; *E. Dacaux, P. H. Imbert, L. Pettiti* (ed.), La Convention européenne des droits de l'homme, Commentaire article par article, Paris, 1995, p. 145 s.; *F. Jacobs, R. White, C. Ovey*, The European Convention on Human Rights, 2014, p. 65 et seq.,, p. 282 et seq.; *C. Focarelli*, Equo processo e Convenzione europea dei diritti dell'uomo, 2001, p. 150 et seq.; *S. Lonati*, Il diritto dell'accusato a "interrogare o fare interrogare" le fonti di prova a carico, 2008; *R.E. Kostoris*, Manuale di procedura penale europea, 2017, p. 146 et seq.; *S. Maffei*, The European Right to Confrontation in Criminal Proceedings – Absent, Anonymous and Vulnerable Witnesses, 2006; *F. Renucci*, Droit européen des droits de l'homme – Contentieux européen, 2010, p. 475; *H. Satzger*, International and European Crininal Law, 2012, p. 161 et seq.; *J.R. Spencer*, Hearsay Evidence in Criminal Proceedings, 2008; *G. Ubertis*, Principi di procedura penale europea, 2009, p. 58; *S. Buzzelli, R. Casiraghi, F. Cassibba, P. Concolino, L. Pressacco,* Art. 6, in: G. Ubertis, F. Viganò (eds), Corte di Strasburgo e giustizia penale, 2017, p. 229 et seq.; *F. Zacchè*, Gli effetti della giurisprudenza europea in tema di privilegio contro le autoincriminazioni e diritto al silenzio, in: A. Balsamo, R. E. Kostoris (eds.), Giurisprudenza europea e processo penale italiano, 2010, p. 180; *F. Zacchè*, Il diritto al confronto nella giurisprudenza europea, in: A. Gaito, D. Chinnici, Regole europee e processo penale, 2016, p. 207 et seq.

5 The definition is drawn from Recommendation of the Committee of Ministers to the Member States No. R(97)13, § 2 and pointed out again in Recommendation No. R (2005) 9, *Appendix*, § 1. In case law, see, for example, *Isgrò v. Italy*, Application no. 194-A, Judgement 19 February 1991, margin no 33; *Kostovski v. The Netherlands*, Application no. 11454/85, Judgement 20 November 1989, margin no 40. Said definition is also reffered to in *S. Buzzelli, R. Casir-*

Said notion responds to the interpretation[6] choice made by the European Court to generally consider the legal terminology used in the Convention as carrying an autonomous, independent meaning that does not necessarily correspond to that of the similar or identical terms present in the legal systems of the Member States[7].

In order to ensure a uniform interpretation, it is not possible to assign to specific concepts the meaning these concepts usually take on in a specific State; rather, it is necessary to develop a notion that may be defined as "elastic" in such a way as to "adapt"

aghi, F. Cassibba, P. Concolino, L. Pressacco, (fn. 4), p. 209 et seq.; *S. Lonati* (fn. 4), p. 180; *Decaux, Imbert, Pettiti*, (fn. 4), p. 275.

6 On the methods of interpretation adopted by the Court of Strasbourg, see, with no claim to exhaustiveness, *M. Delmas-Marty*, Pour un droit commun, 1994; *A. Di Stasi*, CEDU e ordinamento italiano, 2016, p. 34 et seq.; *C. Focarelli*, Equo processo e Convenzione europea dei diritti dell'uomo, 2001, p. 253; *W. J. Ganshof van der Meersch*, Quelques aperçus de la méthode d'interpretation de la Convention de Rome du 4 novembre 1950 par la Cour européenne des droits de l'homme, in: Robert Legros, Raymond vander Elst (eds.), Mélanges offerts à Robert Legros, 1985, p. 207; *W. J. Ganshof van der Meersch*, Les méthodes d'interprétation de la Cour européenne des droits de l'homme, in: Various Authors, Perspectives canadiennes et européennes des droits de la personne, 1986, p. 189; *R. Goss*, Criminal Fair Trial Rights, 2014; *S. Greer*, The European Convention on Human Rights: Achievements, Problems and Prospects, 2006; *F. Jacobs, R. White, C. Ovey*, The European Convention on Human Rights, 2014, p. 65 et seq.; *O. Jacot-Guillarmod*, Règles, méthodes et principes d'interprétation dans la jurisprudence de la Cour européenne des droits de l'homme, in: E. Dacaux, P. H. Imbert, L. Pettiti (eds.), La Convention européenne des droits de l'homme, Commentaire article par article, 1995, p. 41 et seq.; *S. Lonati*, Fair Trial and the Interpretation Approach Adopted by the Strasbourg Court, European Journal of Crime, Criminal Law and Criminal Justice (EJCCL), 2017 pp. 52-75; *F. Matscher*, Methods of Interpretation of the Convention, in: R. Mcdonald, F. Matscher, H. Petzold (eds.), The European System for the Protection of Human Rights, 1993, p. 63 et seq.; *S. McInerney-Lankford*, Fragmentation of International Law Redux: the Case of Strasbourg, Oxford Journal Legal Studies, (OJLS) 2012, p. 624; *H. Mosler*, Problems of Interpretation in the Case Law of the European Court of Human Rights, in: F. Kalshoven (eds.), Essay on the Development of the International Legal Order, 1980, p. 149 et seq.; *F. Ost*, Les directives d'interprétation adoptées par la Cour européenne des droits de l'homme; l'esprit plutôt que la lettre?, in: J. F. Perrin (eds.), Les règles d'interpretation, 1989, p. 90; *S. Perbensen*, Evolutive interpretation of the European Convention on Human Rights, in: P. Mahoney and others, Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal, 2000, p. 1123 et seq.; *S. Rolland*, L'interprétation de la Convention européenne des droits de l'homme, Revue universelle des droit de l'homme (RUDH) 1991, p. 280; *F. Sudre*, A propos du dynamisme interpretative de la Cour européenne des droit de l'homme, Semaire Juridique edition géneralé (JCPG) 2001, p. 1365 et seq.; *F. Sudre*, L'interprétation de la Convention européenne des droit de l'homme, 1998; *F. Vigano*, Il giudice penale e l'interpretazione conforme alle norme sovranazionali, in: P. Corso, E. Zanetti (eds.), Studi in onore di Mario Pisani, 2010, p. 634 et seq.

7 An example of the autonomous quality of the concepts used by the Convention can already be found in *König v. Germany,* Application no. 6232/73, Judgement 28 june 1978, margin no 27. See also, *Maner v. Austria*, Application. no. 35401/97, Judgement 20 June 2000; *Stubbings and others v. The United Kingdom*, Application no. 1487, Judgement 22 October 1996, margin no 50; *Fayed v. The United Kingdom*, Application no. 17101/90, Judgement 21 November 1994, margin no 65; *Deweer v. Belgium*, Application no. 6903/75, Judgement 27 February 1990, margin no 49.

the needs implied in the Convention to the practical cases that are from time to time examined[8].

The importance of assigning an autonomous meaning to the notion of witness was clarified for the first time in the judgment *Engel and others vs. The Netherlands*. On that occasion, the judges explained that if the Member States could classify an individual as a "witness" at their own discretion, the application of the provisions contained in Article 6 would consequently be "subordinated" to their sovereign will. A margin of discretion this extended "might lead to results incompatible with the purpose and object of the Convention"[9].

On the other hand, a "restrictive" definition of the term "witness" would, firstly, impose arbitrary boundaries on the right to confrontation, thereby subjectively limiting the guaranteed right to "examine or have examined witnesses against him". Secondly, it would entail an equally unfair restriction of the right to request and obtain the attendance and examination of witnesses "on his behalf", as provided in the second part of the provision[10].

The Court's subsequent case law then played a role in further defining this legal concept, by classifying as "witness evidence" the statements that, regardless of whether they have been read in court, have been entered in the trial records[11]. The definition of "witness" in this case takes on a particularly wide scope: the only requirement necessary to include a person in such "category" is that his/her deposition be brought to the knowledge of the judge (or jury), regardless of whether it has been read at a hearing or otherwise. It is sufficient that the statements may effectively help the judges form their opinion on the accused's liability.

Furthermore, the autonomous notion developed by Strasbourg is capable of "absorbing" the multiple and distinct conceptual categories present in the legal traditions of the Member States. For instance, after a restrictive approach, leading Article 6(3)(d) of the Convention to be construed as solely referring to witnesses and not also "experts"[12], Strasbourg later decided to embrace the "category" of "expert witnesses"[13], as any persons appointed by the Court or by the parties to express their opinion on specific aspects of the case falling within their field of expertise [14]. In such a way, the European judges acknowledged that the applicability of the rules considered herein to

8 On the formulation "by principles" of the constitutional rules on fundamental rights and on the consequences in terms of interpretation, in addition to the classic analyses of *R. Dworkin*, Taking Rights Seriously, 1977; *G. Zagrebelsky,* Il diritto mite, 1992, pp. 148-149 and pp. 199-203.

9 See*, Engel and others v. The Netherlands*, Application no. 5100/71, Judgement 8 June 1976, margin no. 81.

10 *Van Dijk – Van Hoff*, Theory and practice of the European Convention on Human Rights, 1984, p. 474.

11 See *ECtHR, Kostovski v. The Netherlands*, (fn. 5), margin no 40.

12 See *Brandstetter v. Austria*, Application no. 11170/84, 28 August 1991, margin no 20.

13 See *Philip S. D. King., Michael P. Reynolds,* The Expert Witness and His Evidence, 1992, p. 21 et seq.

14 The Committee of Ministers, with Recommendation R(97)13, 10 September 1997, cit., explicity included experts in the witness category. Paragraph 1 specifies that the term "witness"

any persons to whom technical opinions are requested[15] – Court- or party-appointed experts[16] – stems, if not directly from the wording of Article 6(3)(d) of the European Convention, then at least from its connection to the notion of "*procès equitable*"[17]. Along these lines, a "co-accused" – although not a witness technically speaking – may be regarded as such for the purposes of Article 6(3)(d)[18].

3. "Anonymous" witnesses: the difficult balance between the need to protect the community and the rights of the defence

Having defined the notion of witness developed in the European case law, the Strasbourg Court focused particular attention on the use of anonymous witnesses, by reason of the great prejudice caused to the rights of the defence[19]. Anonymous witnesses are persons whose true identity is not disclosed to the accused and to his/her counsel.

means "*toute persone qui*, *indépendamment de sa situation au regard des textes régissant la procédure pénale nationale*, *dispose d'informations en rapport avec une affaire pénale. Cette définition s'applique également aux experts et aux intèrprètes*". With reference to the Italian procedural system, the concept of "expert witness" as including all court- and party-appointed experts, is used, among others, in *De Cataldo NeuBurger*, Esame e controesame nel processo penale, 2000, p. 251 e *R. E. Kostoris*, I consulenti tecnici nel processo penale, 1993.

15 *Bönisch v. Austria*, Application no. 8658/79, Judgement 6 May 1985, margin no 32. See also, *mutatis mutandis*, *ECtHR, Engel and others v. The Netherlands* (fn. 9), margin no 91; *Delcourt v. Belgium*, Application no. 2689/65, Judgement 17 January 1970, margin no 28.

16 See the Report from the Commission dated 12 March 1984 in the case *ECtHR*, *Bönisch v. Austria* (fn. 15), margin no 88.

17 See, *Kostoviski v. The Netherlands*, Application no. 11454/85, Judgement 20 November 1989, margin no 25.

18 See *inter alia*, *Artner v. Austria*, Application no. 13161/87, Judgement 28 August 1992, margin no. 19; *Asch v. Austria*, Application no. 12398/86, Judgement 26 April 1991, margin no 25; *ECtHR, Isgrò v. Italia* (fn. 5), margin no 33. See *F. Matscher*, Le principe du contradictorie, Documentaçao e dereito comparado (DDC), 1998, p. 126,: "*soulignons que le mot "témoin" ne se limite pas à la notion technique de ce terme; en effet*, *il vaut pour tous les moyens de preuve*, *y compris les experts*, *les dépositions de la partie privé qui a porté plainte ou une déscente sur les lieux*". For some European Court case law, among many others, see *ECtHR, Asch v. Austria* (fn. 18), margin no. 27 and *ECtHR, Bönisch v. Austria* (fn. 15), margin no 29.

19 See, in the literature, *A. Balsamo*, Testimonianze anonime ed effettività delle garanzie sul terreno del diritto vivente nel processo di integrazione giuridica europea, Cassazione penale (CP) 2006, p. 3008 et seq.; *M. A. Beernaert*, Témoignage anonyme: un vent nouveu de Strasbourg, Revue de droit penal et de criminology (RDPC) 1997, p. 1229 et seq.; *S. Burns*, Blind Shots at a Hidden Target, New Law Journal (NLJ) 2008, p. 1091; *J. Callewaert*, Témoignages anonymes et droits de la défense, Revue trimestrielle des droits de l'homme (RTDH) 1990, p. 270 et seq.; *A.L.T. Choo*, Hearsay and confrontation in criminal trials, 1996; *J. Doak*, *R. Huxley-Binns*, Anonymous Witnesses in England and Wales: Charting a Course from Strasbourg?, The Journal of Crime Law (JCLC) 2009, pp. 508-529; *D. Omerod*, Evidence: Witnesses Anonymity, Criminal Law Reviue (CLR) 2009, p. 70; *S. Enright*, The Anonymous Witness, New Law Journal (NLJ) 1996, p. 146; *R. Friedman*, Face to Face: Rediscovering the Right to Confront Prosecution Witnesses, The International Journal of Evidence & Proof, (IJEP) 2004, p. 1-30; *S. Lonati* (fn. 4), p. 180; *S. Maffei*, Il diritto al confronto con l'accusatore, 2003, p. 363; *E. Marique*, Témoignage anonyme, Actualités du droit (ADD) 1998,

The Court of Strasbourg has considered the guarantee of anonymity a necessary measure in specific situations, usually justified by needs of protection and to avoid intimidation. Although it is considered the civic duty of every citizen, testifying does not imply that one's own safety may be jeopardized or exposed to risks merely for the purpose of fulfilling said obligation.

Albeit not expressly acknowledged in Article 6 of the Convention, the interests of witnesses and victims of crimes against life, security, and freedom, are protected by other provisions of the Convention and may not be ignored. In this regard, the European judges have noted: "It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention"[20].

Even if the need to protect witnesses and victims has its grounds in provisions other than Article 6 of the ECHR, it is undisputed that the "principles of fair trial also require that in appropriate cases the interests of defence are balanced against those of the witnesses or victims called upon to testify".

In particular, the outstanding importance of the principle of "fair administration of justice" requires that any measure capable of undermining the rights of the defence be applied only if strictly necessary and that less restrictive measures be preferred when the latter appear sufficient for the aim pursued[21]. It is clear, in fact, that effective rules aiming to protect witnesses and the truthfulness of their statements from intimidating pressures may result in a more or less clear derogation from the "ordinary" rules on the methods for taking witness evidence, whether with reference to the principle of confrontation, or to the characteristics of the prosecuting system.

To this regard, the Council of Europe's Committee of Ministers, in indicating the channels through which to achieve a common penal policy, has pointed out to some measures that appear necessary with reference to witness protection[22].

p. 561 s.; *W. O'Brian*, The Right of Confrontation: Us and European Prospective, Law quarterly review (LQR), p. 481; *L. Salvadego*, La normative internazionale sulla protezione dei testimoni nel contrasto alla criminalità organizzata transnazionale, in Rivista di diritto internazionale (RDI) 2014, p. 159 et seq.; *M. Vogliotti*, La logica floue della Corte europea dei diritti dell'uomo tra tutela del testimone e salvaguardia del contraddittorio: il caso delle "testimonianze anonime", in Giurisprudenza italiana (GI) 1997, p. 851 et seq.

20 See *Van Mechelen and others v. The Netherlands*, Application no. 21363/93, Judgement 23 April 1997, margin no 54.

21 See *ECtHR, Van Mechelen and others v. The Netherlands* (fn. 20), margin no 58; See also *ECtHR, Delcourt v. Belgium* (fn. 15), margin no 25.

22 See *Committee of Ministers*, 10 September 1997, Recommendation R(97)13, *Intimidation of witnesses and the rights of the defence*, § III, 8. Following the adoption of the Recommendation of the Council of Europe, many Member States have set forth rules on the guarantee of anonymity in proceedings for organized crimes. See Article 130 of the Norwegian code of criminal procedure, as supplemented by Law No. 98/01; Articles 75-*bis*, 155-*ter*, 315-*bis* of the Belgian *code d'instruction criminelle*, added in 2002; Articles 706/57-706/63 of the French *code de procédure pénale*, introduced by Law No. 1062/01 and, with reference to the United

The Member States are required to ensure an appropriate protection of the persons called upon to testify, who must be able to speak freely without being subject to any sort of intimidation[23]. "Intimidation"[24] means any direct, indirect or potential threat against the witness that may interfere with his/her duty to release a truthful deposition. Said concept includes the fear arising from the awareness that a criminal organization exists and is capable of acts of violence or retaliation, as well as the fear arising from the fact of belonging to a closed social group within which the witness holds a position of weakness.

Furthermore, it seems appropriate to weigh out the rights of the defence against those of witnesses in order to find the best possible balance. While it is true that the defence may submit questions, both orally and in writing, for the person being examined, the nature and the scope of said questions is inevitably limited. Indeed, without knowing the identity of the person to be examined it is impossible to dispose of all those specific elements that may prove whether, for instance, the witness is biased, hostile or unreliable. Furthermore, since generally the witness' face is hidden during the deposition, the defence and the judge cannot observe the witness' demeanour or facial expressions, nor use said elements as the basis for forming their opinion as to the credibility of said witness[25]. This means the accused is faced with a clear procedural handicap, which is incompatible with the Convention if not adequately counterbalanced by other material guarantees[26].

The solutions proposed by both the Committee and the Strasbourg Court are well articulated, and range from ensuring the witness' anonymity, up to taking the depositions outside the Court or assigning greater evidentiary weight to the statements released by witnesses at the pre-trial stage[27]. More specifically, the above authorities suggest adopting an autonomous judicial procedure capable of verifying the fulfilment of the requirements justifying the use of anonymity and of counterbalancing the sacrifices weighing on the defence as a result of such choice.

Kingdom, House of Lords, dec. 17 December 2001, *Regina (Al-Fawwaz et al.) v. Governor of Brixton Prison*, *Arch. nuova proc. pen.*, 2003, p. 88.

23 See Committee of Ministers, *Recommendation* R(97)13, cit., *Principes generaux n. 1*, § II, according to which: "*Des mesures législatives et pratiques appropriées devraient êntre prises pour faire en sorte que les témoins puissent témoigner librement; et sans être soumis à aucune manoeuvre d'intimidation*".

24 See also Committee of Ministers, *Recommendation* R(97)13, cit., *Définitions*, § I; *Comitato dei Ministri*, *Recommendation* R(2005)9, cit., *Définitions*, § 1.

25 See *ECtHR, Van Mechelen and others v. The Netherlands* (fn. 20), margin no 59; *Windisch v. Austria*, Application no. 12489/86, Judgement 27 September 1990, margin no 28-29; *ECtHR, Kostovski v. The Netherlands* (fn. 5), margin no 42-43.

26 See *ECtHR*, *Van Mechelen and others v. The Netherlands* (fn. 20), margin no 54; *Doorson v. The Netherlands*, Application no. 20524/92, Judgement 26 March 1996, margin no 72.

27 The witness protection programs have been defined by the Council of Europe as "[a] standard or tailor-made set of individual protection measures which are, for example, described in a memorandum of understanding, signed by the responsible authorities and the protected witness or collaborator of justice": see also the Recommendation of the Committee of Ministers No. R (2005) 9, *On the Protection of Witnesses and Collaborators of Justice*, of April 20 2005, also available online at www.wcd.coe.int., section I.

There are two minimum requirements for granting the guarantee of anonymity: the life or freedom of the witness must be seriously threatened and the witness must provide guarantees for his/her reliability and credibility[28]. To this regard, the court will have to conduct an appropriate investigation to determine whether "objective grounds" exist for the witness' fear[29]. By reason of the extensive prejudice caused to the right of defence, it is emphasized that said possibility should be turned to only as a last resort, having previously verified the absence of any other alternative solution any time the defence has not had the chance to examine the witness beforehand.

Balancing the interests at stake is even more delicate when dealing with the possibility of ensuring the anonymity of police officers and agents involved in undercover activities. On one hand, there is the need to ensure adequate protection to the officer in question and to the members of his/her family, and that to safeguard the Government's interest in using him/her in future undercover activities[30]; on the other, the position of said individuals may not be entirely compared to that of witnesses/victims or disinterested witnesses, by reason of the duty of obedience tying them to the State's executive authorities and of the inevitable links with the prosecution. Even in these cases, the granting of anonymity is conditioned upon fulfilment of a proportionality requirement and must be ruled out every time the protection of a witness may be achieved with a measure that is less restrictive of the rights of the defence[31], such as, for instance, recurring to disguises or protective screens capable of avoiding visual contact with the accused and the audience in the courtroom.

In all cases, however, a conviction may not be based solely or to a decisive degree on the statements of anonymous witnesses[32].

28 See Recommendation of the Committee of Ministers R(97)13, cit., §§ 76 and 77; and Recommendation R(2005)9, cit.

29 Concept referred to also more recently by the Court in *Al-Khawaja and Tahery v. The United Kingdom*, Applications no 26766/05 and 22228/06, Judgement 15 december 2011, margin no 124. In this sense, see *Krasniki v. The Czech Republic,* Application. no. 51277/99, Judgement 28 February 2006, margin no 80-83.

30 See *Lüdi v. Switzerland*, Application no. 12433/86, Judgement 15 June 1992; ECtHR, *Van Mechelen and Others v. The Netherlands* (fn. 20), margin no 57; *Calabrò v. Italy*, Application no 59895/00, Judgement 21 March 2002.

31 See *ECtHR*, *Van Mechelen and others v. The Netherlands* (fn. 20), margin no 58: "Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the Defence should be strictly necessary: if a less restrictive measure is sufficient, then that measure should be applied".

32 Principle expressed by the Court in *Teixeira de Castro v. Portugal*, Application no. 25829/94, Judgement 9 June 1998, margin no 38 – 39.

4. The compatibility of anonymous statements with the European Convention (Kostovski v. The Netherlands).

The Strasbourg Court was called to address the compatibility of anonymous witness evidence with the European Convention of Human Rights for the first time in the case Kostovski v. The Netherlands[33].

The applicant had complained that his conviction had been based on the depositions of two witnesses whose identities were unknown to him and known only to the police.

While avoiding to take a stand in abstract as to the compatibility of the anonymous statements with the Convention[34], the European Court unanimously concluded in its judgment that "the circumstances of the case and the constraints affecting the rights of defence were such that Mr. Kostovski cannot be said to have received a fair trial"[35].

To this regard, the Strasbourg judges have stated that the Convention does not bar the possibility to use secret informants during the investigation phase, but the further use of anonymous statements as sufficient evidence to ground a conviction raises a different issue[36]. In principle, evidence must be produced before the accused at a public hearing for the purpose of confrontation. This does not imply that witness statements must be given in court for them to be used as evidence; it is however necessary that the accused be granted an "adequate and proper opportunity" to challenge any adverse statements and to question witnesses at the time of the deposition or later on.

In the case at hand, the serious limitations to the right to confrontation, arising from the decision to ensure anonymity, had not been compensated for by any procedural mechanisms granting the accused an "adequate" and "proper" opportunity to challenge the adverse statements. Indeed, no impartial judge knew the witnesses' identity, nor did the trial judge have the possibility to directly examine said sources of evidence (which would have given much greater chances to assess credibility). Furthermore, the possibility granted to the defence to submit questions in writing only – without thereby being able to observe the related reactions – and to examine only indirect witnesses can be said to translate into an improper and inadequate opportunity to raise doubts on the credibility of the declarants. Even more so since the conviction had been based "to a decisive extent"[37] on the incriminating statements, as the Government itself had acknowledged in its defence brief.

33 For a more detailed analysis on the circumstances of the case, see *J. Callewaert*, Témoignages anonymes et droits de la défense, Revue trimistrielle des droits de l'homme (RTDH) 1990, p. 270 et seq.

34 See *Vogliotti*, GI 1997, p. 855.

35 See *ECtHR, Kostovski v. The Netherlands* (fn. 5), margin no 45.

36 See *ECtHR, Kostovski v. The Netherlands* (fn. 5), margin no 44.

37 Said expression is used in para. 44 of the judgment under examination. In opposition, see the dissenting opinion of judge Van Dijk at the bottom of the *Van Mechelen v. The Netherlands judgment*.

5. The use of anonymous statements for the purpose of investigation and as evidence in a conviction (Windisch v. Austria)

Nearly one year later, the case Kostovski v. The Netherlands was followed by yet another case dealing with the use of two anonymous depositions as evidence; this time by the Austrian judges[38].

After having witnessed a burglary in a café, two women had reported the incident to the police and requested that their identity remain unknown due to fear of reprisals. Following the arrest, the applicant had been identified by the two women during a 'covert confrontation' and had been convicted by the Court. The judgment was based on the statements made by the anonymous witnesses and on the depositions of the police officers who had recorded said statements. Even in this case, just as in the previous one, the requests made by the applicant to summon the two women for a face-to-face confrontation had been rejected, since the police had promised not to disclose their identities. The appellate Court and the Court of cassation later upheld the first instance judgment.

Before the European Court, the applicant complained that he had been convicted on the basis of the statements of the anonymous witnesses, deemed decisive in the assessment of the evidence against him.

The Court examined the application in light of Article 6(1) and 3(d) of the Convention. Although the two women had not given their statements in court, the Strasbourg Court still considered them witnesses, since their depositions, as reported by the police officers, had been taken into consideration by the judges for the purpose of the decision[39].

In general, the Convention sets forth that the accused must be given an adequate and proper opportunity to challenge the statements made against him/her and to examine witnesses at one point or another of the proceedings. In the case at hand, the two women had only been heard by the police agents; therefore, neither the applicant, nor his counsel, had had the chance to examine them. The possibility to examine the police officers or to submit written questions to the witnesses, according to the Court, could not in any case be considered a due substitute for the accused's right to interrogate the witnesses during trial. Furthermore, the nature and scope of the questions had been strongly affected by the decision not to disclose the women's identities. Finally, the national judges had not been able to form their opinion as to the credibility of said witnesses. Despite the legitimacy of the reasons that had led to the protection of the witnesses, even with a view to encouraging the community to cooperate with the authorities, the fair administration of justice could not be sacrificed.

38 See *ECtHR, Windisch v. Austria* (fn. 25). It is useful to highlight that in the Austrian legal system, as in the Dutch system at the time of the events, no statutory provision expressly envisaged anonymous witness evidence. The origin of its judicial use, therefore, belongs exclusively to case law. The requests arising as a result of the conviction later induced the Austrian legislator to govern expressis verbis the procedural use of this source of evidence.

39 See back, § 2.

Even in this case, in stating the breach of Article 6(3)(d) of the Convention, the Court stressed once again that relying on anonymous statements at the pre-trial stage to justify pursuing an investigation, and using said statements to ground a conviction, and are two very different matters.

The judgment therefore reflects the judges' unanimous decision to admit the applicant's complaint. Besides, in the presence of the aforementioned criteria, no other solution could have been envisaged: if a breach of Article 6 of the Convention was found in the Dutch case, "a fortiori" the same statement of incompatibility with the principles of "fair trial" was due in this case as well. The handicaps to the defence, with reference to the Kostovski v. The Netherlands judgment, were the absence of any examination of the anonymous witnesses by the investigating judge and the absence of any written questions by the defence to said witnesses[40]. Furthermore, with reference to this last aspect, the Court – in preferring the substance of the interests at stake over their form – overruled the objection raised by the Government according to which the absence of any written questions to the witnesses was due to the fact that the defence had not submitted any such request. On the contrary, as can be gathered from the trial records, the defence had submitted numerous and repeated requests to obtain confrontation with the witnesses, albeit not in accordance with procedural rules. Besides, even if the Government's objection were to be sustained, the Court highlighted that in this context the submission of written questions may not be considered a proper substitute for the prosecution's right to directly examine the witnesses before the Court. In particular, "the nature and scope of the questions that could be put in either of these ways were, in the circumstances of the case, considerably restricted by reason of the decision to preserve the anonymity of these two persons"[41]. Even in this case, the depositions of anonymous witnesses had, in the Court's opinion, been "decisive" for the conviction.

6. The criteria for assessing anonymous statements (Doorson v. The Netherlands)

After nearly six years – during which the unanimous ban, imposed on the use of anonymous witness statements in the two cases mentioned above, seemed to leave little room for this type of evidence – the European Court was once again called to rule on

40 See *ECtHR*, *Kostovski v. The Netherlands* (fn. 5), margin no 45. These aspects are identified by Vogliotti, *La logica floue della Corte europea dei diritti dell'uomo*, GI 1997,p. 856.

41 See *ECtHR, Windisch v. Austria* (fn. 5), margin no 28.

the issue in the Doorson v. The Netherlands case[42]. With this decision, the Strasbourg judges definitely approved the use of anonymous statements[43].

The applicant complained that in the course of the first instance proceedings, the anonymous witnesses had been examined by the investigating judge without the participation of the accused. Furthermore, the examination of the witnesses in the presence of the applicant's counsel could not be considered a due substitute for a personal face-to-face confrontation. The fact of concealing the witnesses' identities had deprived the defence from the possibility to explore their credibility. In addition, the very grounds for the decision to preserve the witnesses' identities was questioned given that none of them had actually been exposed to any violence or threats.

The Government, however, pointed out that the deposition heard by the investigating judge had provided sufficient guarantees, since, on one hand, the judge is an impartial body whose duty is to look not only for elements against but also for elements in favour of the accused, and on the other, the defence had been given the opportunity to attend the examination and directly question the witnesses. Furthermore, the investigating judge knew the identity of the witnesses and had expressed an opinion as to their credibility.

The Strasbourg Court's assessment opens with a statement of principle, only implicitly present in Kostovski v. The Netherlands[44] and Windisch v. Austria[45], according to which "the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants"[46]. This statement is then followed by another statement of great importance for the purpose of regulating the relationship between the interests of witnesses and the rights of the defence. The judgment states: "It is true that article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming gener-

42 See *ECtHR, Doorson v. The Netherlands* (fn. 26), margin no 69. It is useful to recall the statutory framework from which the case arose. After the conviction by the Strasbourg judges, the Netherlands' Court of cassation, with judgment dated 2 July 1990, had restricted the scope of admissibility of anonymous depositions, by setting more selective criteria. In light of said amendments, in order for an anonymous deposition to be admitted as evidence in the Dutch system, it had to be taken by a judge who: a) knew the identity of the witness; b) provided an assessment in the deposition records of the credibility of the witness and gave reasons for concealing the witness' identity; c) granted the defence the opportunity to address or to have addressed questions to the witness. In case of written documents containing witness statements, anonymity could only be used: if the defence had not requested, at any stage of the proceedings, an authorization to examine the witness; 2) if the conviction was based to a significant extent on other evidence; 3) if the court specified to have used the witness evidence with caution and circumspection.

43 See *ECtHR Kostovski v. The Netherlands* (fn. 5), margin no 28. Unlike the two cases previously examined, the order of rejection of the application in *Doorson v. The Netherlands*, was criticized by two judges issuing a common dissenting opinion, which essentially expressed the same conclusion as the large minority of the Commission (12 votes against 15 in favour).

44 See *ECtHR, Kostovski v. The Netherlands* (fn. 5).

45 See *ECtHR*, *Windisch v. Austria* (fn. 25).

46 See *ECtHR Doorson v. The Netherlands* (fn. 26), margin no 69.

ally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperilled"[47].

Having established the legal framework embracing the protection provided by the Convention to the extensive notion of "witness" described in Article 6(3)(d), the Court concludes by saying that the "principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify"[48].

Now the question is whether, in the case at hand, the aforementioned Dutch courts effectively balanced out the different interests. First of all, the decision to preserve the anonymity of the two witnesses, despite there being no evidence of any threats against them by the applicant, was not, according to the Court, without reason. Indeed, in addition to the presence of an overall intimidating environment in cases relating to drug trafficking – like the one at hand – the trial records indicated that one of the two witnesses had suffered violence by a drug dealer against whom he had testified, while the other one had been threatened.

The presence of sufficient reasons to conceal the witnesses' identities does not per se justify the procedural use of anonymity. An appropriate procedure must compensate for the obstacles raised in such a way on the defence's path. Now, unlike the precedents on the topic, in this case the identity of the witnesses was known not only to the police but also to the investigating judge, who is bound by an institutional duty of impartiality. Said judge, as indicated in the proceedings files, had carefully indicated in the deposition records the circumstances upon which the trial judge could have assessed their credibility. Furthermore, the defence counsel not only had been present at the examination of the witnesses by the investigating judge, but was also given the opportunity to ask questions.

Overall, therefore, the procedural counterbalancing measures laid down had – always according to the Strasbourg Court – sufficiently compensated for the limitations caused to confrontation. The defence had indeed been put in a position to challenge the depositions released in the presence of the investigating judge and to consequently raise doubts as to the credibility of the witnesses[49]. Furthermore, the reasons stated for the conviction show how the Dutch judges had assessed the anonymous statements "with the necessary caution and circumspection"[50]: a factor which in Doorson v. The Netherlands seems to take on the "dignity of an autonomous assessment standard"[51].

By reason of said circumstances, the European Court declared the application ill-founded. Note should be taken, however, of the shared dissenting opinion of two

47 See *ECtHR Doorson v. The Netherlands* (fn. 26), margin no 69.
48 See *ECtHR Doorson v. The Netherlands* (fn. 26), margin no 70.
49 See *Kamasinski v. Austria*, Application no. 9783/82, Judgement 19 November 1989, margin no 91.
50 See *ECtHR*, *Doorson v. The Netherlands* (fn. 26), margin no 34.
51 See *Vogliotti*, GI 1997, p. 857.

judges who believed the rights of the defence had indeed been violated as the issue of witness protection does not only concern drug trafficking cases and that it could not therefore be solved by derogating from the essential principle according to which witness evidence that has been challenged by the accused may not be taken into consideration against him/her, when said accused was not given the possibility to examine, in his presence, the author of the deposition. In the case at hand – as noted by the dissenting judges – the applicant not only was unable to attend the examination of the witnesses, but he was not even informed of their identities so as to challenge their reliability[52].

7. Anonymous statements released by police officers (Van Mechelen and others v. The Netherlands)

In analysing the Van Mechelen and others v. The Netherlands judgment, one can immediately gather the greater thought put by the national judges into articulating the procedure for taking statements by police officers who remained anonymous. The European Court did however censor the balance found by the domestic judges between the rights of the defence and the need to protect the witnesses and the community, given that the judgment was based "to a decisive extent" on the statements made to a police officer by other anonymous agents, statements which were confirmed in trial through a mere audio connection to the room in which the accused, their counsels and the public prosecutor were present[53].

Anonymity raises particular issues when the witnesses belong to law enforcement: while on one hand their interests are worthy of protection, on the other, they cannot be considered the same as ordinary witnesses or victims. For this reason alone, they should be used as anonymous witnesses only in exceptional cases. The Court does not, however, disregard the interest that a police officer may have in preserving his/her anonymity for the purpose of taking part in undercover operations and not just for safeguarding his/her own safety or that of his/her family.

In the case at hand, not only did the defence not know the identity of the police officers, but it had also been deprived of the possibility to directly ask questions in order to observe their reactions and assess their reliability and credibility.

It is worth highlighting that in this case the investigating judge knew the police officers' identity and had carefully tested their credibility by directly hearing the sources. Furthermore, the judge had drawn up a report on the deposition whereby he had provided detailed reasons for the witnesses' reliability and for protecting their anonymity.

Nonetheless, the fact that the police officers had been questioned by an investigating judge who knew their identities was not enough to compensate for the disadvantage caused; especially considering that the only evidence clearly supporting the applicant's

52 Dissenting opinions of judges Ryssdal and Meyer.
53 See *ECtHR*, Van *Mechelen and others v. The Netherlands* (fn. 20), margin no 59.

guilt were the anonymous statements. For these reasons, the European Court held there had been a breach of Article 6(1) and (3)(d) of the Convention.

In its assessment, the Court noted a significant difference with Doorson v. The Netherlands[54]. In the latter case, the investigating judge had not just feared an abstract danger, but had described, in detail, the reasons supporting the belief of a concrete danger threatening the physical safety of the two witnesses. On the other hand, in the Van Mechelen and others v. The Netherlands case[55], the judge's assessment did not underline any specific imminent danger confirming the threatening atmosphere almost always surrounding a serious case of armed robbery and murder, like the one at hand.

The European Court then noted another difference with Doorson v. The Netherlands[56], this time with reference to the right to confrontation. While in the Doorson case the defence counsel had been able to personally attend the anonymous witnesses' depositions and directly ask questions, in the Van Mechelen case, the accused and his counsel had been placed in a separate room to where the depositions were taking place.

8. Anonymous statements by undercover agents (Lüdi v. Switzerland)

The European Court was also called to rule on the use, as evidence in trial, of statements by undercover agents, whose true identity is kept secret.

Without ever radically questioning their legitimacy, the Court has, nonetheless, set forth a series of guarantees, which are particularly pressing when the anonymous witness is, precisely, an undercover agent.

The term "undercover agent" indicates an individual who infiltrates criminal organizations for the purpose of gathering useful information capable of bringing their members to justice. It is often pointed out that this figure, defined in very general terms, actually includes many different sub- categories, each raising their own issues.

The peculiarity of this matter requires to limit the scope of the analysis merely to the cases in which the "infiltration" is governed by the State for the purpose of criminal repression, while leaving out all those, so to say, "private" forms of "infiltration" and "provocation".

More specifically, based on the Strasbourg Court's case law, an "undercover agent"[57] is an individual, belonging to or officially cooperating with a law enforcement agency, who acts within the framework of an official preliminary investigation of which the authorities are aware. The agent's work is justified by the existence of suspicions against one or more persons, and the lawfulness of the agent's actions under domestic and international law is assessed by an independent and impartial judge. Finally, the

54 See *ECtHR, Doorson v. The Netherlands* (fn. 26), margin no 76.
55 See *ECtHR*, Van *Mechelen and others v. The Netherlands* (fn. 20), margin no 70.
56 See *ECtHR, Doorson v. The Netherlands* (fn. 26), margin no 78.
57 The term "undercover agents" ("*agents infiltrés*" in French) is used to distinguish the concept from that of "*agents provocateurs*" which, as will be seen later on, the Court uses to indicate law enforcement agents who exercise on the persons with whom they make contact an influence such as to induce them to commit a crime.

undercover agent is prohibited from encouraging criminal conducts that, without the agent's actions, would not have otherwise been committed, thereby limiting his/her activity merely to observation and containment.

The most important judgment on this specific issue is the decision issued by the European Court in the case Lüdi v. Switzerland[58]. On said occasion, the Strasbourg judges noted a violation of the European Convention since the applicant's conviction had been based on the records of the telephone conversations between himself and an undercover agent who was never examined in trial[59].

The Court does not, in any case, seem to find in the police officers' written statements any particular element capable of limiting in some way their use from a procedural standpoint. Rather, it adds yet another "legitimate" interest to the plate in view of weighing-up the reasons for preserving the witnesses' anonymity: the interest of the justice administration in being able to use the testifying agent in future operations[60]. In the case examined – according to the European Court – "the legitimate interest of the police authorities in a drug trafficking case in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future"[61], was not safeguarded with suitable measures also securing the right of defence. In other words, the Court reprimanded the national judges for not having taken due note of all the different aspects of the case and consequently for not laying down a procedure for taking the anonymous deposition in a way that was sufficiently respectful of all the interests at stake.

Finally, the European judges recalled the "weight" that the anonymous deposition had been given in the conviction. The Court, in fact, denied a "decisive" role to said source of evidence in its final decision (the anonymous deposition would have simply had "a role" in the reconstruction of the facts), thereby demonstrating to have given this element a more rhetorical, ancillary value rather than any real considerable weight in the decision-making process. Besides, the partially dissenting opinion of Judge Matscher highlighted how, unlike in the cases Kostowski v. The Netherlands and Windisch v. Austria[62], the national court had reached its decision based on the applicant's confessions and on the statements made by his co-accused: the failure to examine the undercover agent in trial could not be condemned since a similar hearing would not in any case have helped clarify the facts regarding the allegations later made against the accused. Therefore, in the opinion of Judge Matscher, there had been no violation of the rights of the defence[63].

58 See, *ECtHR, Lüdi v. Switzerland* (fn. 30).
59 See *G. Ubertis*, Princìpi di procedura penale europea, 2009, p. 60.
60 In this sense, see *Vogliotti*, GI 1997, p. 857.
61 The quote is drawn from *ECtHR, Lüdi v. Switzerland* (fn. 30), margin no 49.
62 *ECtHR*, *Kostovski v. The Netherlands* (fn. 5) and *ECtHR*, *Windisch v. Austria* (fn. 25).
63 In his dissenting opinion, Judge Matscher expresses reservations about the actual possibility to provide a procedure according to which the judge and the defence may examine the witness without revealing the agent's identity.

9. The "praetor's edict" of the admissibility and use of anonymous witness evidence

Having completed the analysis of the most significant judgements issued by the European Court, it may be useful to take a step back and look at the case law regarding anonymous witnesses as a whole in the aim to find the common thread linking all the different decisions together and identify a series of criteria making up what has been defined as the "praetor's edict" of the admissibility and use of anonymous witness evidence[64].

The complex case law examined shows a progressive refinement of the solutions proposed by the European Court.

At first, the Court generally adopted a restrictive approach towards to use of anonymous witnesses: while their use was justifiable at the investigation stage, grounding a judgment on statements released by anonymous sources could generate a number of issues. In particular, depriving the defence from the possibility to examine the witness does not seem compliant with the principles set forth in Article 6(3)(d) of the Convention.

> *«[T]he Court notes that the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. However, the subsequent use of their statements by the trial court to found a conviction is another matter. The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed»*[65].

Later, the European judges' line of reasoning changed when faced with a complex case which forced the Strasbourg Court to consider not only the interests of the defence but also those of the person called upon to testify, as acknowledged by the Convention itself under Article 8.

> *«It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention.…Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify»*[66].

While, in principle, anonymous statements are to be considered exceptional as they contrast with a full exercise of the right of defence, their admissibility and subsequent-

64 The expression is used by *Vogliotti*, GI 1997, p. 859. For additional case law references, please refer to *M. De Salvia*, Compendium della CEDU, 2000, p. 194.
65 See *ECtHR*, *Windisch v. Austria* (fn. 25), margin no 30.
66 See *ECtHR*, *Doorson v. The Netherlands* (fn. 26), margin no 70.

ly their use as evidence, cannot, per se, be excluded, but must be subject to some rules regarding their admission, taking and assessment[67].

The admissibility of said depositions should first of all comply with the proportionality principle[68]: provided that any measure limiting the rights of the defence may be applied only if strictly necessary, should any other less restrictive solution be equally effective, this latter solution must be applied in lieu of anonymity. Having said this, an anonymous deposition is admissible only when the safety of the adverse witnesses and/or of their families is exposed to a concrete and current danger, which must emerge from an individual assessment, carried out and properly documented by the authorities, taking into account specific factors of danger attributable to the accused or to the criminal organization of which he/she is a member[69].

With reference to law enforcement or security service agents, anonymity – to be limited to exceptional cases – may also be aimed at protecting an agent involved in secret operations or his/her family, or at not jeopardizing the possibility to make use of him/her in similar activities in the future.

> *«In the Court's opinion, the balancing of the interests of the defence against arguments in favour of maintaining the anonymity of witnesses raises special problems if the witnesses in question are members of the police force of the State. Although their interests – and indeed those of their families – also deserve protection under the Convention, it must be recognised that their position is to some extent different from that of a disinterested witness or a victim. They owe a general duty of obedience to the State's executive authorities and usually have links with the prosecution; for these reasons alone their use as anonymous witnesses should be resorted to only in exceptional circumstances. In addition, it is in the nature of things that their duties, particularly in the case of arresting officers, may involve giving evidence in open court»*[70].

As to the methods for taking the anonymous statements, it was deemed that the unfavourable position of the defence may be adequately counterbalanced by a procedure whereby the protected hearing of the witness is carried out without the accused but with the active participation of the counsel and in the presence of the judge. However, while according to less recent case law, the judge had to be informed of the witness' identity in order to verify his/her credibility[71], said condition is now no longer re-

67 See *ECtHR*, *Kostovski v. The Netherlands* (fn. 5), margin no 44.

68 For the European Court, the restrictions brought on a right are proportional if the means are proportional to the aim pursued: see The Grand Chamber, *Markovic and Others v. Italy*, Application no 1398/03, Judgement 14 December 2006, margin no 99.

69 See *Krasniki v. the Czech Republic,* Application no. 57325/00, Judgement 28 February 2006.

70 See *ECtHR*, Van *Mechelen and others v. The Netherlands* (fn. 20), margin no 50, see also margin no 56 thereof for the statement according to which the special duties of law enforcement officers allows to maintain their anonymity only in exceptional cases, certainly more limited than the ones admitted for any other person.

71 See *ECtHR*, Van *Mechelen and others v. The Netherlands* (fn. 20), margin no 50.

quired, it being considered sufficient that the court and defence counsel be given the chance to observe and listen to the witness during the deposition in court[72].

The last general guideline concerns the criteria for assessing the evidence: for proceedings to be considered fair, if anonymous witness evidence has been admitted, it is necessary that the conviction not be based «solely or at least to a decisive extent» on said evidence. This principle serves as a proper barrier: should the evidence have had an exclusive or decisive role, all the precautions mentioned above will be of no use to save the proceedings from being considered unfair.

> *«Even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements»*[73].

10. Assessing anonymous witness evidence after Al-Khawaja v. The United Kingdom and Schatschaschwili v. Germany

Ever since the Doorson case, the Court has been concerned with setting a minimum threshold for the protection of the right of defence that every State will be able to comply with. The Court requires verification on whether – even when the accused has not been ensured an "adequate and proper"[74] opportunity to examine the adverse witnesses – the conviction is based "solely or to a decisive extent"[75] on the statements released by the anonymous witnesses. In other words, an accused may not be convicted if the only or decisive evidence of guilt is the anonymous or hearsay evidence, without it resulting in an unfair restriction of the right of defence, per se incompatible with Article 6(2)(d) of the Convention.

The impossibility to found a conviction exclusively or to a decisive degree upon the evidence brought by anonymous witnesses has always been considered a sort of "rejection rule" adopted by the system, operating even when other requirements (regarding the admission and taking of the depositions) were fulfilled.

72 Ellis, Simms and Martin, 10.4.2012.

73 See *ECtHR, Doorson v. The Netherlands* (fn. 26), margin no 70 for the general statement according to which the principles of a fair trial require that a balance be found between the interests of the defence, that of the victims and that of the witnesses, all equally protected by the Convention. In the literature see *Ubertis* (fn. 59), p. 52 et seq.

74 See *Lucà v. Italy*, Application no. 33354/96, Judgement 27 February 2001.

75 See *A.M. v. Italy*, Application no. 37019/97, Judgement 14 dicembre 1999.

Over this framework, however, there has been a "partial overruling"[76] of the Grand Chamber with reference to absent witnesses[77], introduced with the well-known judgment *Al-Khawaja v. The United Kingdom*[78] and better specified more recently in *Schatschaschwili v. Germany*[79]. These represent revolutionary judgments[80], in which, as known, the Strasbourg judges gave greater flexibility to the "sole and decisive" rule, by accepting to reduce the minimum standard of protection requested in multiple judgments against the Member States. This means that decisive statements that were never subject to confrontation do not automatically entail a violation of the Convention; simply, the Court will have to analyse each case more scrupulously to assess whether adequate counterbalancing measures (i.e. "strong procedural safeguards")[81] were put in place.

76 *F. Zacché*, Rimodulazione della giurisprudenza europea sui testimoni assenti, Diritto penale contemporaneo (DPC) 2012, p. 5. Also judge Bratza (see The Grand Chamber, 15 December 2011, *ECtHR, Al-Khawaja v. The United Kingdom*, *opinion concordante du juge Bratza* (fn. 29), margin no 3, speaks of a "nouveau principe formulé par la Court". Particularly clear in denying the meaning of an overruling to the judgment *Al-Khawaja v. The United Kingdom*, is *P. Ferrua*, Quattro fallacie in tema di prova, Processo penale e giustizia (PPG) 2014, p. 1.

77 "Absent witnesses" means any persons who, after having released statements constituting witness evidence in the pre-trial phase, do not testify in court because they are deceased, seriously ill, unreachable, heard abroad, entitled to remain silent, or subject to intimidation (this latter reason was in particular the one examined in *Al-Khawaja*). The concept of "absent witness" is addressed by, *S. Lonati* (fn. 4), p. 195; *S. Maffei*, Prova d'accusa e dichiarazioni di testimoni "assenti" in una recente sentenza della Corte europea dei diritti dell'uomo, Cassazione Penale (CP) 2001, p. 2844; *J.R. Spencer*, Hearsay evidence in criminal proceedings, 2008, p. 43; *G. Ubertis*, La prova dichiarativa debole: problemi e prospettive in materia di assunzione della testimonianza della vittima vulnerabile alla luce della giurisprudenza sovranazionale, in: G. Ubertis, Argomenti di procedura penale, 2011,p. 139.

78 *ECtHR, Al-Khawaja v. The United Kingdom*, *opinion concordante du juge Bratza* (fn. 29). See for subsequent case law, *Sandru v. Romania,* Application no. 22465/03, Judgement 15 October 2013; *Yevgeniy Ivanov v. Russia*, Application no. 27100/03, Judgement 25 April 2013; *Asadbeyli and others v. Arebaijan*, Application no 3653/05, 14729/05, 20908/05, 26242/05, 36083/05 and 16519/06, Judgement 11 December 2012; *Salikhov v. Russia*, Application no. 23880/05, Judgement 3 May 2012. See, in the literature, *M. Biral*, EJCCL 2014, p. 342 et seq.; *S. Buzzelli, R. Casiraghi, F. Cassibba, P. Concolino, L. Pressacco,* (fn. 4), p. 218 et seq.; *M. Caianiello,* You Can't Always Counterbalance What You Want, European Journal of Crime, Criminal Law and Criminal Justice (EJCCL) 2017, p. 283 et seq.; *I. Dennis*, Al-Khawaja and Tahery v. United Kingdom, Commentary, The Criminal Law Review (CLR) 2012, p. 376; *R. Casiraghi*, Testimoni assenti: la Grande Camera ridefinisce la regola della "prova unica o determinante, Cassazione Penale (CP) 2012, p. 3217-3128; *F. Zacchè*, DPC 2012.

79 The Grand Chamber, *Schatschaschwili v. Germany*, Application no. 9154/10, Judgement 15 December 2015. See also, albeit with some slight differences, *Chukayev v. Russia*, Application no. 36814/06, Judgement 5 November 2015, margin no 125; *Matytsina v. Russia*, Application no. 58428/10, Judgement 27 March 2014, margin no 163; *Vronchenko v. Estonia*, Application no. 59632/09, Judgement 18 July 2013, margin no 58.

80 *M. Auriemma*, Sulla prova "unica o determinante". Il caso Al-Khawaja v. The United Kingdom, Archivio penale (AP) 2014, p. 571.

81 In this sense, *I. Dennis*, Al-Khawaja and Tahery v. United Kingdom, Commentary, The Criminal Law Review (CLR) 2012, p. 376.

«First, there must be a good reason for the non-attendance of a witness. Second, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (the so-called "sole or decisive rule"). As regards the application of the latter rule, the Grand Chamber concluded that where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case»[82].

The balancing logic has therefore been brought to extreme consequences[83]: the minimum threshold below which the rights of the defence may not give in to competing interests is dropped; in fact, confrontation is not necessarily required, even if the "vitiated" element is of critical importance to the conviction. All that is needed are procedural safeguards compensating, to the greatest extent possible, for the denied "defensive chances".

Along this line of reasoning, in the case *Al-Khawaja v. The United Kingdom*, the Court mentioned what measures are deemed adequate to secure the defence's needs: a) the strict requirements to which the use of pre-trial knowledge is subject; b) the prohibition to combine the status of absent witness with that of anonymous witness; c) the obligation for the trial judge to make an assessment as to the impact that the relevant evidence will have in terms of the disadvantages caused to the defence, and to exclude any statement whose admission would cause more disadvantages than advantages (in terms of fairness of the proceedings); d) the obligation to end the proceedings should the judge realize that the case relies solely or to a decisive extent on such an unconvincing source of evidence that, considering its relevance, a conviction would be unfair; e) the need that the jury be warned about the risks of relying on evidence that is not subject to confrontation.

In *Schatschawili v. Germany*[84], the Court tried to clarify better its reasoning, affirming that the overall fairness of the proceedings firstly implied an assessment of the witness' reliability, a task that required verifying how statements were collected and the occurrence of corroboration elements. Secondly, as measures compensating for the lack of confrontation between the defence and the witness, the Court had to consider if the defendant had «the opportunity to give his own version of the events», or an oc-

82 *ECtHR, Schatschaschwili v. Germany* (fn. 79), margin no 25.
83 *M. Biral*, ECJCCL 2014, p. 342.
84 *ECtHR, Schatschaschwili v. Germany* (fn. 79).

casion «to cast doubt on the credibility of witnesses», or, again, «to put questions to witnesses indirectly, for instance in writing»[85].

Other judgments regarded as adequate measures capable of satisfying the defence's needs: the way legal guarantees were applied[86], the possibilities offered to the accused to address the obstacles raised before the defence, the way the judge conducted the proceedings as a whole[87], whether the video recordings of the depositions taken by the investigating judge were shown in trial[88] and so on. To this regard, however, the Court does not provide a list of the "counterbalancing factors"[89] identifiable in abstract, in such a way as to leave extensive room for assessing the particular circumstances of each specific case.

The European Court's new approach – weakening the guarantee set forth in the Convention – has also had consequences on the case law regarding anonymous witnesses[90].

> *«The Court concluded, applying the approach in Al-Khawaja and Tahery, that in cases concerning anonymous witnesses, Article 6 par. 3 lett. d imposed three requirements: first, there had to be a good reason to keep secret the identity of the witness; second, the Court had to consider whether the evidence of the anonymous witness was the sole or decisive basis of the conviction; and third, where a conviction was based solely or decisively on the evidence of anonymous witnesses, the Court had to satisfy itself that there were sufficient counterbalancing factors, including strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place»[91].*

In the Court's opinion, even if the issues connected with absent witnesses and anonymous witnesses are not identical, these two situations do not, in principle, differ in terms of the potential disadvantages caused to the accused's defence.

85 The Grand Chamber, *Schatschaschwili v. Germany*, Application no. 9154/10, Judgement15 december 2015.

86 See also *Brzuszzynski v. Poland*, Application no. 23789/09, Judgement 17 September 2013; *Sica v. Romania*, Application no. 12036/05, Judgement 9 July 2013.

87 See, for example, *McGlynn v. The United Kingdom*, Application no. 40612/11, Judgement 16 October 2012.

88 See *Nikolitsas v. Greece*, Application no. 63117/09, Judgement 3 July 2014, margin no 38; *Tseber v. the Czech Republic*, Application no. 46203/08, Judgement 22 November 2012, margin no 62.

89 For some examples of measures aiming to counterbalance the lack of confrontation, see *Prajina v. Romania*, Application no. 5592/05, Judgement 7 January 2014; *ECtHR, Brzuszczynski v. Poland* (fn. 83). For the guarantee consisting in showing in court the video recordings of the statements made by the absent witnesses in order to allow the parties to observe the witnesses' demeanour and form their opinion as to their reliability, see *Chmura v. Poland*, Application no. 18475/05, Judgement 3 April 2012; *Autronic A.G. v. Switzerland*, Application no. 12726/87, Judgement 10 January 2012.

90 See *S. Buzzelli, R. Casiraghi, F. Cassibba, P. Concolino, L. Pressacco,* (fn. 4), p. 231 et seq.

91 See *Rozuecki v. Poland*, Application no. 32605/11, Judgement 11 September 2015, margin no 56.

«The Grand Chamber further noted that while the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since each results in a potential disadvantage for the defendant. The underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. This principle requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings»[92].

In *Sarkizov and others v. Bulgaria*, it was concluded that a conviction based to a decisive extent on the deposition of an anonymous witness whom the defence has never had the chance to examine will not result in a breach of the Convention if, firstly, the absence and anonymity were justified by the need to protect the safety of the witness and, secondly, if suitable measures counterbalancing the limitations to the defence were applied[93]. With reference to the latter, in particular, the anonymous witnesses were questioned at the pre-trial stage before a judge. Immediately after the interviews, the applicants and their lawyers were given the opportunity to put questions to those witnesses and to cast doubt on the credibility of their testimony. However, they expressly refused to put questions and could therefore be considered as having waived their right to challenge these statements. The applicants, who were represented by lawyers, should have been aware that the testimony thus obtained could be used as evidence by the courts.

In *Pesukic v. Switzerland*[94], the applicant submitted that his criminal conviction by verdict of the Jury Court of the canton of Zurich was to a decisive extent based on the testimony given by the anonymous witness X. According to the applicant, the other evidence referred to in the judgment might, at the most, prove that the applicant was residing in Switzerland at the time the victim had been shot, but did not allow any conclusions as to the circumstances of the criminal act. The applicant further submitted that counsel for the defence had not been able to question the anonymous witness properly. In particular, the defence did not have an adequate possibility to impeach the witness's credibility, either by receiving answers to a number of relevant questions (see paragraph 11, above) or by having the possibility of direct confrontation. The applicant further pointed out that only the court, but not the defence, had the possibility to directly observe the witness when giving testimony. The situation was thus comparable

92 *ECtHR*, *Rozuecki v. Poland* (fn. 91), margin no 53; *Ellis, Simms and Martin v. The United Kingdom*, Application no. 46099/06 and 46699/06, Judgement 10 April 2012, margin no 78.

93 See *Sarkizov and others v. Bulgaria*, Application no. 37981/06, 38022/06, 39122/06, and 44278/06, Judgement 17 April 2012, margin no 57, in which the Court verified these two requirements also with reference to a non-decisive anonymous deposition.

94 See *Pesukic v. Switzerland*, Application no. 25088/07, Judgement 6 December 2012, margin no 46.

to that adjudicated by the Court in the case of *Van Mechelen*, in which the Court found a violation of the applicant's Convention rights.
The Court noted in this context that the trial court was well aware of the necessity of counterbalancing the restrictions imposed on the defence by the hearing of the anonymous witness. It enumerated the following measures taken in order to safeguard the rights of the defence. Firstly, the witness had not been examined by the regional prosecutor, but by the president of the court. Secondly, the identity of X had been confirmed by the police officer in charge of the investigation and had been known to the regional prosecutor and to the president of the court. Thirdly, the police officer and the regional prosecutor gave testimony about X's reputation, his criminal record and credibility. Furthermore, X had been interrogated before the complete court and all persons participating in the decision-making process could gain a personal impression of the witness and of his reaction to the questions put to him. Lastly, the jury court took into account that under the case law of the European Court of Human Rights, as applicable at the relevant time, a conviction could not be exclusively based on testimony given by an anonymous witness. Consequently, the jury court did not rely on X's submissions with regard to the immediate circumstances of the crime.
Having regard to the above considerations and, in particular, to the careful examination by the domestic courts, the Court considered that, notwithstanding the handicaps under which the defence laboured, there were sufficient counterbalancing factors to conclude that the circumstances under which the anonymous witness X was heard did not result in a breach of Article 6 § 1 read in conjunction with Article 6 § 3 (d).
Lastly, in the case *Rozumecki v. Poland*[95], the applicant complained invoking Article 6 § 3 (d) of the Convention that his criminal conviction had been based to a decisive degree on statements given by anonymous witnesses whom he could not properly examine during the hearing. He submitted in this context that during the first trial against him he could not be present during the examination of the witnesses, only his lawyer being allowed to take part in the hearing. Moreover, both during these proceedings and in the retrial proceedings the defence was only allowed to participate in the questioning of witnesses via sound-link and could not observe their reactions. Without knowing the identity of the witnesses, the defence could not effectively challenge their credibility. With regard to the procedural safeguards available in the present case, the Court further noted that during the retrial the anonymous witnesses were heard before the complete court and that all persons participating in the decision-making process could gain a personal impression of the witnesses and of their reactions to the questions put to them. Both the applicant and his defence lawyer were allowed to participate in the hearing via audio-link. Although the defence was prevented from observing the witness' demeanour under direct questioning, they were thus able to put questions to the witness via a sound-link, which the witness answered as long as he did not risk betraying his identity.

95 See *Rozumecki v. Poland* (fn. 90), margin no 57 s.

In conclusion, only the absence of strong procedural guarantees, which secure the fairness of the trial and enable a proper assessment of the reliability of the decisive deposition, shall thereby entail a breach of Article 6(1) and (3)(d) of the Convention[96].

11. Conclusions

The most recent decisions issued by the European Court are rather unsatisfactory. We are faced with yet another concerning step backward in the guaranteed right to confrontation, which, especially in the case of anonymity, does not seem acceptable. Before the abovementioned overruling, the Court did not allow statements made by anonymous witnesses to – solely or to a decisive extent – ground the judicial reconstruction of the fact, permitting their use, at the most, as ancillary elements. Today, the European judges seem to settle for much less, accepting the exclusive or decisive use of evidence taken without confrontation, when said evidence is counterbalanced by strong procedural guarantees.

While agreeing with the need to protect the rights of persons other than the accused in criminal proceedings, and the pressing need to safeguard the witnesses' safety, when in danger, and preserve the source of evidence and its results, it is hard to understand what counterbalancing procedures could actually compensate for all that the accused has been denied by having the witness' identity kept secret.

Contrary to the European Court's opinion, the issues arising in connection with the use of absent and anonymous witnesses in terms of the potential disadvantages caused to the accused's defence cannot be put on the same level. For obvious reasons: revealing the source of incriminating statements to the accused is a founding and core element of the principle of confrontation[97]. A deposition or any other incriminating statement may be maliciously untruthful or simply incorrect and the defence will be left with little chances to make the truth come to light without the correct information required to assess the witness' reliability. The reliability of the witness may be put in doubt not only by pointing out the inaccuracies in his/her deposition, but also by challenging his/her moral integrity, reputation and interest compared to that of the other parties in the proceedings[98]. The ban on any questions regarding the witness' identity, place of residence or profession, not to mention any enquiries on the witness' prior relationship with the accused and the victim, deprives the defence from the possibility to

96 See *Moumen v. Italy*, Application no. 3977/13, Judgement 23 June 2016. See also *Papadakis v. Former Yugoslav Republic of Macedonia*, Application no. 34083/13, Judgement 26 February 2013, with reference to a case in which an *agent provocateur* was heard, during the trial, in a protected area, anonymously and with no audiovisual connection to the accused and his counsel, who was only given the possibility, later on, to read the transcripts and submit written questions to the witness.

97 For a detailed analysis on the guarantee of confrontation see *G. Giostra*, Contraddittorio (principio del). II) Diritto processuale penale, in *Enc. giur.,* vol. IX, Agg. 2001, p. 8 s.

98 As also acknowledged by *Garofolo v. Switzerland*, Application no. 4380/09, Judgement 2 April 2013, margin no 56; *Aigner v. Austria*, Application no. 28328/03, Judgment 10 May 2012, margin no 43.

reveal situations or reasons based on which the witness could be considered "prejudiced, hostile or unreliable". Only the accused – and defence counsel as his/her representative – may be aware of prior specific reasons that may lead a witness to lie, and it will be impossible to expose said witness without knowing his/her identity. The very essence of confrontation depends on the disclosure of the identity of the author of incriminating statements to the accused and to his/her counsel[99]: it is not sufficient that this information be disclosed to the prosecutor or to the court, as the defence would not be able to exercise any control over it. Just as much as it does not seem appropriate to regard the fact that a witness has been heard before the court without the defence counsel being able to take part in the examination and ask questions on the witness' identity or past, as a suitable counterbalancing factor against the decisive use of the anonymous deposition.

Likewise, hiding the witness' appearance – a precaution often applied in anonymous depositions – prevents the counsel from observing the witness' demeanour and reactions (including facial expressions) during the deposition. This issue may, perhaps, be deemed circumscribed in light of the modern computer technology used to alter images and voices, allowing to show extensive parts of the witness' body while preserving the secrecy of his/her identity, but it is clear that even this type of examination will never be as effective for the defence as the physical presence of the witness.

All there is left to do, therefore, is decide whether, in general, anonymous incriminating statements may be tolerated in the context of proceedings that still aspire to be defined as "fair" or if, on the contrary, the reasons of the legal culture must prevail over those of need[100].

Having said this, if one must really acknowledge the usefulness of anonymous statements in determining the judicial truth on certain offences and upon specific conditions, the only option is to restore the compromise solution adopted by the Court before its overruling on absent witnesses, namely the rule based on the sole and decisive role of anonymous statements in a conviction. In other words: confine the use of anonymous depositions within specific boundaries, which the public interest may not overstep; when the element is decisive, there is no balancing test that can be tolerated under the Convention.

99 For the statement on the fact that only the knowledge of the witness' identity allows the defence to effectively challenge the witness' credibility see *ECtHR, Sica v. Romania* (fn. 83), margin no 73.

100 See *M. Miraglia*, Spunti per un dibattito sulla testimonianza anonima, Diritto penale contemporaneo (DPC), 30 december 2011.