Should the European Court of Human Rights Treat the Anonymous and the Absent Witness Equally? The Application of the Same Three-Step Test

Candan Yılmaz*
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Abstract:
The 'right to (cross)-examination' is regulated in Article 6(3)(d) of the European Convention on Human Rights (ECHR). However, this right is not absolute and can, under circumstances, be limited. This is notably the case when evidence given by anonymous or absent witnesses is presented in court.

In the prominent *Al-Khawaja and Tahery* judgement, the European Court of Human Rights (ECtHR) listed three principal requirements which was later called the three-step test for the admissibility of testimonies of absent witnesses. Although the situation generated by the admission as evidence of testimonies by absent witnesses and by anonymous witnesses differs, the ECtHR appears to have gradually applied the same test to both types of testimonies to assess whether their admissibility violates the defence rights under Article 6(3)(d) ECHR.

Even though the three-step test is important, the ECtHR has contradictory judgments on the admissibility of evidence by absent and anonymous witnesses. This study will thus analyse and evaluate this judicially-created test by discussing the differences between anonymous and absent witnesses.

1 Introduction

The European Convention on Human Rights (ECHR), adopted in 1950 and entered into force in 1953, was a reaction to the serious human rights violations that Europe witnessed during the Second World War.[1] The ECHR provides and protects predominantly civil and political rights and, most importantly, human rights. Currently, Article 6 ECHR has become the essential standard for determining the fairness of criminal proceedings in Europe.[2]

According to Article 6 ECHR

* MA, LLM. PhD candidate at the University of Groningen. E-mail: <c.yilmaz@rug.nl>. ORCID ID: <https://orcid.org/0000-0001-7944-9019>. This article is the updated and improved version of the author's LLM thesis titled 'The Application of the Same Three-Step Test by the European Court of Human Rights to the Anonymous and the Absent Witness*: Should They Be Treated Equally?'* presented to Maastricht University in 2019. This research was funded by the Republic of Türkiye.

1 David Harris and others, *Law of the European Convention on Human Rights* (Oxford University Press 2018) 3.

2 Sarah Summers, *Fair Trials* (Hart Publishing 2007) xix.

> 3. Everyone charged with a criminal offence has the following minimum rights: (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Article 6(3)(d) ECHR is called 'the right to (cross)-examination', and the scope of this provision only interests the persons who are charged with a criminal offence.

The right to cross-examination is a 'minimum right' that is necessary to prepare and conduct the defence and to guarantee that the accused is able to defend themselves equally with the prosecutor.[3] This provision is also called 'the right to confrontation'[4][5], because a defendant has the right to challenge, examine, and cross-examine a witness against themselves.[6]

Thus, Article 6(3)(d) ECHR is considered to be crucial for the adversarial nature and fairness of a criminal trial,[7] and widely regarded as fundamental.[8] The essence of the problems in which Article 6 (3)(d) is relevant is that a witness could not be examined in a proper and effective way. The practical limitations in the opportunities of testing the witness are anonymous and/or absent witnesses.[9] Those exemptions should be scrutinised carefully in order not to jeopardise the defence rights. It has been, thus, stated that witness testimony is the most problematic part of the right to challenge the evidence.[10] In this article, the restrictive effect of admitting statements of an anonymous witness or an absent witness at a criminal trial, its impact on the rights of the defence, and the European Court of Human Rights' (ECtHR) approach to this issue will be discussed.

In general, the accused must be granted the right to examine the witness against themselves in every trial.[11] However, as given, this right can be limited. If testifying at a criminal trial with their identity revealed at an open trial poses a serious risk for a witness, several safety precautions could be taken in order to shield the witness from harm. Even in the most powerful States, bringing justice to everyone is difficult since the people who witnessed crimes are generally afraid for their or their families' lives which, in turn, makes them reluctant to provide opposing evidence. If the result of acts or threats is the silence of a witness who is the only potential evidence, it would allow the perpetrators to act with

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3 Adrian Keane and Paul McKeown, *The Modern Law of Evidence* (Oxford University Press 2012) 277; Harris and others (n 1) 467.

4 The Sixth Amendment to the Constitution of the United States of America provides that 'in all criminal prosecutions, the accused shall enjoy the right […] to be confronted with the witnesses against him'. See 'Sixth Amendment' (*Cornell Law School Legal Information Institute*) <https://www.law.cornell.edu/constitution/sixth_amendment> accessed 9 January 2024; Ian Dennis, 'The Right to Confront Witnesses: Meanings, Myths and Human Rights' (2019) 4 Criminal Law Review 265. '[…] international human rights instruments do not refer to a right of "confrontation" as such. Article 6 of the ECHR and art. 14 of the International Covenant on Civil and Political Rights (ICCPR) both state that the defendant has a right to examine witnesses against him. This right may conveniently be called a right of challenge, entitling a defendant to cross-examine witnesses against him as to their credibility and reliability. Confrontation in the first two forms will normally imply a right of challenge also, but the converse is not true'.

5 Dennis (n 4) 256. '[…] although there is universal acceptance that some right to confrontation exists, there is little consensus as to its scope. Accordingly, any idea that there is a single unified right of confrontation with a generally agreed content would seem to be a myth'.

6 Stefano Maffei, *The Right to Confrontation in Europe: Absent, Anonymous and Vulnerable Witnesses* (Europa Law Publishing 2012) 4.

7 H L Ho, 'Confrontation and Hearsay: a Critique of Crawford' (2004) 8(3) *International Journal of Evidence & Proof* 147.

8 Dennis (n 4) 266.

9 *Asani v the former Yugoslav Republic of Macedonia* App no 27962/10 (ECtHR, 01 May 2018) [36].

10 Koen Vriend, *Avoiding a Full Criminal Trial* (Springer 2016) 37.

11 Christoph Grabenwarter, *European Convention on Human Rights: Commentary* (Beck/Hart 2014) 161, para 145.

impunity. Therefore, granting witnesses anonymity or allowing them to not be present at trial are measures needed to shield the witness identity from the public or from the other parties at trial. However, accepting their evidence could establish a threat to the defence rights.[12]

There are some measures that could be taken in order to guarantee their safety. For instance, bringing the anonymous witness to the courtroom in disguise, using a pseudonym, giving evidence behind screens or in a different room with a sound link or video link connection with distortion, or allowing the defence to submit written questions[13] to the investigating judge. The defence should be prohibited from asking questions about their identity or asking anything that might identify them.[14] Not knowing who is giving the evidence against them is an important limitation when it comes to producing counterevidence or to assess the credibility and reliability of the witness. For example, the witness may have their own reasons for making a false statement. Furthermore, not knowing the identity, not seeing the witness' facial expressions or gestures, and not hearing their voice, makes it harder to assess the credibility of the witness.

There are, also, types of being absent, since this unavailability could have a myriad of reasons ranging from death, physical or mental incapacity to illness, travel or disappearance.[15] Protection of the well-being and privacy of the witness, especially in sexual abuse or child molestation cases,[16] can be another reason. Apart from those types of absent witnesses, there are privilege-granted persons by law, such as spouses, fiancées, and close relatives of the accused who do not have to testify or give evidence to incriminate their relatives. In addition, co-defendants, who used their right to remain silent and their right against self-incrimination, are also accepted as absent witnesses.[17] For instance, in the case of *Vidgen,*[18] the co-accused in the case invoked their right to remain silent as a protection against self-incrimination. Furthermore, certain professions also have the privilege, such as lawyers, doctors, and psychologists.

Given the limitations, sufficient counterbalancing factors are needed to make sure that the defence has the opportunity to compensate these handicaps under which they laboured, and the sufficiency of the factors should be determined in correspondence with the level of the anonymity and/or the type of being absent.

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12 Yvonne McDermott, *The Right to a Fair Trial in International Criminal Law* (PhD Thesis at NUI Galway, August 2013) 89-90 <https://aran.library.nuigalway.ie/handle/10379/3947> accessed 9 January 2024.

13 Some inquisitorial jurisdictions recognise testimonies of witnesses upon written questions submitted by the defence, while in common law jurisdictions, oral questions addressed at trial are allowed. For more information see Janet Ainsworth, 'Legal Discourse and Legal Narratives: Adversarial versus Inquisitorial Models' (2015) 2(1) Language and Law 1-11.

14 Keane and McKeown (n 3) 157.

15 *Murtazaliyeva v Russia* App no 36658/05 (ECtHR, 18 December 2018) (Dissenting Opinion of Judge Pinto de Albuquerque) [57].

16 *Şandru v Romania* App no 33882/05 (ECtHR, 15 January 2014). In that case, the minor victim who was allegedly raped was confronted with her alleged aggressor [61]. Because a minor can easily be affected emotionally and psychologically by testifying at a public hearing about being a victim of a sexual crime, the District Court could have taken special cautions to protect the victim, while protecting the defence rights [64]-[66]. Unlike in *Gani v Spain* 61800/08 (ECtHR, 09 September 2013), in *Şandru* the domestic court could not provide procedural safeguards for the defence, which led to a violation of Article 6(1) and Article (3)(d) of the ECHR.

17 Maffei (n 6) 49-53.

18 *Vidgen v the Netherlands* App no 29353/06 (ECtHR, 10 October 2012) [42].

In *Al-Khawaja and Tahery*, the ECtHR observed that, 'while anonymous and absent witnesses are not identical, the two situations are not different in principle',[19] because each of them results in a potential difficulty for the exercise of the rights of the defence. In general, this implies that every defendant has the right to know and confront their accusers and the witnesses to their suspected crime, as well as being able to challenge the evidence that was provided against them while mounting a defence.

Several cases regarding the inability to challenge the testimony of anonymous and/or absent witnesses are brought before the ECtHR. In the prominent *Al-Khawaja and Tahery* judgement, the ECtHR set out three overarching requirements, which will be unfolded and explained later. To briefly mention, the ECtHR created the three-step test in order to assess the testimonies of both anonymous and absent witnesses whether they violate the defence rights under Article 6(3)(d) ECHR; (1) the 'good reason' for non-attendance, (2) the 'sole or decisive' rule, and (3) the 'counterbalancing factors'. These standards for the evaluation of the evidence have been criticised because the ECtHR has applied them inconsistently. This situation is defined as the most significant deficiency in the case law of the ECtHR to date, since there are obvious signs that the right to confrontation is easily sacrificed against seemingly competing interests, and it is stated that the ECtHR law does not take this essential right as seriously as necessary.[20] Even though this statement is too firm, the inconsistencies in the application of the three-step rule are incontrovertible.[21]

The central research question of this study is the same as its title: Should the ECtHR treat the anonymous and the absent witness equally? To answer this question properly, certain questions must first be addressed: What are the differences between absent and anonymous witnesses and to what extent do they limit the defence rights? How did the ECtHR develop the three-step rule? To what extent does the ECtHR apply the same three-step test to both anonymous and absent witnesses?

This article is divided into four main sections to provide a better discussion. After this introduction, Section 2 provides, firstly, the definitions of the notions 'anonymous witness', 'absent witness', and 'anonymous absent witness' according to the ECtHR case law; then deliberates on balancing fair trial rights and the admissibility of absent and anonymous witness testimonies. Furthermore, the 'three-step test' is discussed, and each step will be individually but shortly examined. In Section 3, the ECtHR's approach to the absent and anonymous witness are scrutinised, and simultaneously, the differences between the absent witness and anonymous witness are unfolded. Eventually, in Section 4, the final review is expressed, and the answer to the main research question is sought in the light of the explanations given in the previous sections.

2 Balancing fair trial rights and the admissibility of absent and anonymous witness testimonies

To be able to start the discussion it is important to provide, first, the definitions. According to ECtHR case law, a person whose statements are introduced as evidence, but who does not give an oral statement in court, is also regarded as a witness.[22] A co-accused[23] and

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[19] *Al-Khawaja and Tahery v the United Kingdom* App no 26766/05 and 22228/06 (ECtHR, 15 December 2011) [127]; also repeated in *Bakır v Turkey* App no 2257/11 (ECtHR, 11 October 2020) [31]; *Süleyman v Turkey App no* 59453/10 (ECtHR, 17 November 2020) [62].

[20] Maffei (n 6) 109.

[21] Even the Grand Chamber of the ECtHR itself accepts the inconsistencies. See *Schatschaschwili v Germany* App no 9154/10 (ECtHR, 15 December 2015) [111]-[113].

[22] *Kostovski v Netherlands* App no 11454/85 (ECtHR, 20 November 1989) [40].

[23] *Lucà v Italy* App no 33354/96 (ECtHR, 27 May 2001) [41].

experts[24] who give evidence are also considered to be witnesses. Even though the ECtHR case law lacks a clear definition, in *Lucà v Italy*, it is stated that

> where a deposition may serve to a material degree as the basis for a conviction, then, irrespective of whether it was made by a witness in the strict sense or by a co-accused, it constitutes evidence for the prosecution to which the guarantees provided by Article 6 §§ 1 and 3 (d) of the Convention apply.[25]

The aforementioned clearly shows that the term 'witness' has an 'autonomous' meaning in the Convention system,[26] as do other terms mentioned in the ECHR.

In general, the accused must be granted the right to examine the witness against them in every trial.[27] However, this right can be limited as briefly given above. The next explanations will focus, in turn, on these two categories of witnesses whose evidence might endanger the rights of the defence.

2.1 Absent witness

The 'absent witness' could be defined as the witness whose out-of-court testimony is used by the court to determine the guilt or innocence of the defendant because the witness is absent when called upon to testify at the trial.[28] Out-of-court witness testimonies are often unsworn and in the absence of the defendant or their counsel.[29] The ECtHR has not provided any definition for the notion of the absent witness. However, absent witnesses are called 'unavailable witnesses'[30] and their testimony is named as 'untested witness evidence'[31] in the ECtHR case law.

2.2 Anonymous witness

The 'anonymous witness' is defined as the person who provides evidence and whose identity is shielded from the accused and the defence counsel by measures taken by the domestic courts.[32] In the concept of anonymous witness, especially the difficulty between the necessity to protect the society and the rights of the defence are balanced.[33] In the

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[24] 'Recommendation No R(97)13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence' (10 September 1997) R(97)13 para 1: '[w]itness means any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition also includes experts as well as interpreter'.

[25] *Lucà v Italy* (n 23) [41].

[26] ibid; *Engel and Others v the Netherlands* App no 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (ECtHR, 08 June 1976) [81]; *Vidal v Belgium* App no 12351/86 (ECtHR, 22 April 1992) [33]; Maffei (n 6): '[a]utonomous interpretation is necessary in order to prevent Member States from circumventing their obligation under the ECHR. To take a simple example, if national definitions were allowed to prevail, classification of a certain offence as "disciplinary" or "administrative" at the domestic level would result in the immediate surrender of the guarantees afforded by Article 6(3) to "criminal" defendants'.

[27] Grabenwarter (n 11) 161, para 145.

[28] Maffei (n 6) 49.

[29] ibid.

[30] *Murtazaliyeva v Russi*a (Dissenting Opinion of Judge Pinto de Albuquerque) (n 15) [57].

[31] See *Issa and Others v Turkey* App no 31821/96 (ECtHR, 30 March 2005) [79]: 'the Court cannot attach any decisive importance to the video footage since this is untested and at most circumstantial evidence'; *Schatschaschwili v Germany* (n 21) [123]; *Tău v Romania* App no 56280/07 (ECtHR, 23 July 2019) 9.

[32] Gert Vermeulen, Wendy De Bondt and Yasmin Van Damme, *EU Cross-Border Gathering and Use of Evidence in Criminal Matters: Towards Mutual Recognition of Investigative Measures and Free Movement of Evidence?* (Maklu 2010) 141; Maffei (n 6) 55.

[33] Simone Lonati, 'Anonymous Witness Evidence before the European Court of Human Rights: Is It Still Possible to Speak of Fair Trial?' (2018) 8(1) European Law Review 121.

ECtHR case law, however, it has an autonomous meaning. In the case of *Papadakis v the former Yugoslav Republic of Macedonia*, the witness, whose identity remained undisclosed to the defence and his legal representatives, was a sworn police officer, but the applicant knew the mentioned officer's physical appearance, yet not the real name.[34] Since the applicant met the agent at least once, the Court stated that 'despite the protection of the witness's identity, the Court does not consider that he was to be regarded anonymous within the meaning of the Court's case-law'.[35] The ECtHR reiterates the same approach in *Dončev and Burgov v the former Yugoslav Republic of Macedonia*.[36]

It should be noted that the witness anonymity is criticised under the justice system. The jury, which is entitled to examine the evidence in adversarial systems, does not know the name, occupation, or address of the anonymous witnesses,[37] while, in inquisitorial systems, the investigating judge knows the identity of the witness. According to *Van Mechelen and Others* and *Kostovski*, the statement of an anonymous witness must have been taken down by a judge who is aware of the identity of the witness. However, there is no mention of the jury.[38] This leads to inequality between the systems on the same subject.

It is explicated that there are three forms of anonymous witnesses.[39] The first category of this type of witnesses is mainly, but not exclusively, undercover police officers,[40] who have met with the accused while investigating.[41] Therefore, their anonymity is 'limited'; this means that the judge shall not disclose the identity of the witness, and if necessary, shall take measures to preclude the disclosure of the identity.[42] The second category includes witnesses who fear for their or their family's lives, health, or safety.[43] They are

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34 *Papadakis v the former Yugoslav Republic of Macedonia* App no 50254/07 (ECtHR, 26 May 2013) [90].

35 ibid.

36 *Dončev and Burgov v the former Yugoslav Republic of Macedonia* App no 30265/09 (ECtHR, 12 June 2014) [51].

37 Ruth Costigan and Philip A Thomas, 'Anonymous Witnesses' (2000) 51(2) Northern Ireland Legal Quarterly 326, 333.

38 *Van Mechelen and Others v the Netherlands* App no 21363/93, 21364/93, 21427/93, 22056/93 (ECtHR, 23 April 1997) [40]; *Kostovski v the Netherlands* (n 22) [43].

39 A Beijer and A van Hoorn, 'Report on Anonymous Witnesses in the Netherlands' in E H Hondius (ed), *Netherlands Reports to the Fifteenth International Congress of Comparative Law* (Intersentia 1998) 523-548 <dspace.library.uu.nl/bitstream/handle/1874/43921/b25.pdf> accessed 9 January 2024.

40 *Van Mechelen and Others v the Netherlands* (n 38) [56]. The ECtHR decided that the police officers are different from victims and witnesses because they owe a general duty of obedience to the State and they have links with the prosecution, hence, they cannot use the anonymity in every case, it should be exceptional. The ECtHR made it clear that police are 'ordinary' citizens and this judgement resulted in much commotion. See Beijer and van Hoorn (n 39) 530-532.

41 See Jill E B C van Voorhout, 'Intelligence as Legal Evidence: Comparative Criminal Research into the Viability of the Proposed Dutch Scheme of Shielded Intelligence Witnesses in England and Wales, and Legislative Compliance with Article 6 (3) (d) ECHR' (2006) 2(2) Utrecht Law Review 119, 140: '[w]hilst every use of shielded and anonymous witness testimony restricts fundamental defence rights, three aspects which mutually affect each other and that are inherent to this construction increase restrictions even further: (a) the general non-disclosure of intelligence and information concerning the officer's identity, (b) the duty of secrecy, and (c) the mandatory consent of the officer before the transcript is submitted to the defence'.

42 Beijer and van Hoorn (n 39) 548: '[t]his means that the judge does not disclose the witness's identity and, where necessary, takes measures to prevent his identity from being disclosed, such as making the witness unrecognisable by means of make-up or a disguise, or making eye contact impossible between the accused and the witness. These measures do not prevent direct questioning of the witness or an appearance at the trial'.

43 *Doorson v the Netherlands* App no 20524/92 (ECtHR, 26 March 1996) [70]. According to this case, if the life, liberty or security of a witness or a victim is at stake; taking special measures of protection by the Member State is not a possibility, but an obligation, according to the Article 8.

generally granted 'complete'[44] anonymity. The last category is comprised of witnesses who appear in police reports by providing information without providing their identity. Being informants, they are not properly examined as a witness; they only provide some information to the police. For that reason, the evidence that is provided by an informant could be used only in cases where the defence is not willing to examine the witness.[45] Therefore, the second category of anonymous witnesses could be considered to be of the utmost importance.

2.3 Anonymous absent witness

Anonymous witnesses could also be absent occasionally, and their earlier statements could be admitted into evidence.[46] In such a case, the limitation to the right to examine the witness and the right to confrontation reaches its depths.[47] In the ECtHR case law, there have been a few cases that have dealt with anonymous-absent witnesses, such as *Kostovski,*[48] *Van Mechelen and Others,*[49]*, Windisch,*[50] *Saïdi,*[51] *Lüdi,*[52] *Scholer,*[53] *Süleyman,*[54] and *Çongar and*

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[44] Beijer and van Hoorn (n 39) 548: '[t]his may mean that the defendant, his counsel or both are denied access to the hearing. For reasons of fairness the legislature has stipulated that the Public Prosecutor may not be present either when the defence is denied access. The examining magistrate gives the absent defendant, counsel and public prosecutor the opportunity to present the questions they wish to ask by telecommunication or – alternatively – in writing'.

[45] Beijer and van Hoorn (n 39) 532.

[46] According to the Legal Guidance of Hearsay of The Crown Prosecution Service: '[w]hatever the reason for the absence of the witness, the statement of a witness who is both absent and anonymous will not be admissible under section 116 of the Criminal Justice Art'. See 'Hearsay' (Crown Prosecution Service) ≤https://www.cps.gov.uk/legal-guidance/hearsay> accessed 9 January 2024.

[47] Maffei (n 6) 60.

[48] *Kostovski v the Netherlands* (n 22) [18]: '[t]he anonymous witnesses themselves were not heard at the trial. Contrary to a defence submission, the official reports drawn up by the police and the examining magistrates on the hearings of those witnesses were used in evidence'.

[49] *Van Mechelen and Others v the Netherlands* (n 38) [14]: '[t]he Regional Court convicted the accused of attempted manslaughter and robbery with the threat of violence. The evidence identifying the applicants as perpetrators of these crimes was constituted by the statements made before the trial by the anonymous police officers, none of whom gave evidence before either the Regional Court or the investigating judge'.

[50] *Windisch v Austria* App no 12489/86 (ECtHR, 27 September 1990) [3]: '[t]he applicant complains under Article 6 para. 3 (d) of the Convention that the Regional Court convicted him exclusively on the basis of evidence given by two anonymous witnesses who were not heard by the Court and whom he had no opportunity to examine'.

[51] *Saïdi v France* App no 14647/89 (ECtHR, 20 September 1993) [44]. The testimonies of the drug users who desired to remain anonymous 'constituted the sole basis for the applicant's conviction, after having been the only ground for his committal for trial. Yet neither at the stage of the investigation nor during the trial was the applicant able to examine or have examined the witnesses concerned. The lack of any confrontation deprived him in certain respects of a fair trial'.

[52] *Lüdi v Switzerland* App no 12433/86 (ECtHR, 15 June 1992): '[i]n order to preserve the anonymity of the undercover agent, the court declined to call him as a prosecution witness' [n 16]; '[i]n this case the person in question was a sworn police officer whose function was known to the investigating judge. Moreover, the applicant knew the said agent, if not by his real identity, at least by his physical appearance, as a result of having met him on five occasions' [49]; '[…] the concern to preserve the undercover agent's anonymity derived from the need to continue with the infiltration of drug-dealing circles and protect the identity of informers' [45].

[53] *Scholer v Germany* App no 14212/10 (ECtHR, 18 December 2014) [52]: '[t]he witnesses were thus both absent from the applicant's trial and anonymous in the sense that their true identity was unknown to the defence, the applicant having met the witnesses in person under their false identities'.

[54] *Süleyman v Turkey* (n 19) [101]: '[…] considering that the applicant had suffered a particularly serious restriction in terms of his ability to properly and fairly test the reliability of the evidence given by witness X as a result his being both "absent" and "anonymous" within the meaning of its case-law under Article 6 § 3 (d) of the Convention […]'.

Kala.[55] The main question in those cases was about whether the anonymous-absent witness' testimony had been corroborated. It has been claimed that if supporting evidence had been presented, the ECtHR would have probably held that there has been no violation of Article 6(1) read in conjunction with Article 6(3)(d).[56]

It should be underlined that in the mentioned cases, the ECtHR did not treat the anonymous absent witnesses as a distinct category of witnesses. The Court, however, discerns no effective procedural safeguards to compensate for the absence of the anonymous witness.[57] Therefore, providing the opportunity to submit written questions cannot be not regarded as a sufficient safeguard to counterbalance the limitation faced by the defence in exercising its fundamental right to examine the witness, in case of an anonymous absent witness.[58]

The Court in *Hayward* has found that reading out the testimony of an anonymous absent witness at trial does not violate Article 6(3)(d) ECHR if the testimony does not play a decisive role.[59] However, this decision has been criticised because it suggests that the Member States are not expected to ensure the attendance of anonymous witnesses, even though it is repeatedly requested by the accused when the conviction is not solely or decisively based on their testimony.[60] As the anonymous absent witness is the combination of two categories of witnesses that pose different limitations on the defence rights, the ECtHR should approach and examine it with utmost scrutiny.

2.4 Historical background of the 'three-step' test

As previously cited, an anonymous or absent witness could pose a serious threat to defence rights, primarily the right to (cross)-examination. In general, all of the evidence must be produced at a public hearing in the presence of the accused, according to ECtHR case law and Article 6 ECHR. As a general rule, Article 6(3)(d) ECHR cannot not be interpreted as a requirement that all questions are to be put forward directly by the defence. However, in every case, an adequate and proper opportunity to challenge and examine the witness should be given to the accused.[61]

Article 6(3) ECHR must be read together with Article 6(1) ECHR, because they both require the Contracting States to take positive steps to allow the accused to examine witnesses against them.[62] In cases where a defendant is not allowed to examine or have examined witnesses against them, the fairness as a whole will certainly be harmed. When

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55 *Çongar and Kala v Turkey* App no 62013/12 and 62428/12 (ECtHR, 18 January 2022) [12]: '[f]urthermore, the Court discerns no effective procedural safeguards capable of compensating for the absence of the anonymous witness'.

56 Maffei (n 6) 100.

57 *Çongar and Kala v Turkey* (n 55) [12].

58 ibid.

59 *Hayward v Sweden* App no 14106/88 (ECtHR, 6 December 1991) 22.

60 Maffei (n 6) 101.

61 *Vronchenko v Estonia* App no 59632/0 (ECtHR 9, 18 October 2013) [55].

62 *Trofimov v Russia* App no 1111/02 (ECtHR, 02 May 2009) [33]; *Sadak and Others v Turkey (No. 1)* App no 29900/96, 29901/96, 29902/96 and 29903/96 (ECtHR, 17 July 2001) [67].

the majority of breach cases are taken into consideration, [63] it will be seen that the ECtHR always[64] decided on Articles 6(3) and 6(1) ECHR together.

It is worth revealing that assessing the properness of the admission of a witness statement is not a task of the ECtHR. As the Court has consistently held, the admissibility of evidence is principally an issue for criminal procedural regulations of the national legal systems and, as a general rule, it is for the national courts to assess the evidence before them;[65] however, determining whether the proceedings as a whole were fair when the evidence obtained from anonymous and absent witnesses is used for a conviction is.

In the ECtHR case law, several cases have been concerned with the inability to challenge the testimony of anonymous witnesses. The *Kostovski* (1989) case was the first important case dealing with the statements of anonymous witnesses. In this case, the witnesses had not been heard in court and the witnesses' statements had been taken down (in writing only) in the absence of both the accused and his counsel. This meant that there was no opportunity at all for the defence to question the witnesses. Hence, the ECtHR held that there had been a violation of Article 6(1) and (3)(d) ECHR.

In *Van Mechelen and Others*, the Court set strict requirements that were retrieved from the *Kostovski* judgement: if the identity of the anonymous witness remains shielded to the defence, then the judge who takes the statement must be aware of the identity of the witness and the reasoned opinion of the judge on the witness' reliability and the reasons for remaining anonymous have to be explained in the official report. In addition, the defence has to be provided, in some way, with the opportunity to examine the witness or put questions to the witness. According to the same judgement, a written document which includes the statement of an anonymous witness may be used as evidence,

> if (a) the defence has not at any stage of the proceedings asked to be allowed to question the witness concerned, and (b) the conviction is based to a significant extent on other evidence not derived from anonymous sources, and (c) the trial court makes it clear that it has made use of the statement of the anonymous witness with caution and circumspection.[66]

This rule was actually created for anonymous witness evidence in 1989 and repeated in 1997, however the Court evolved its judgement, in the *Al-Khawaja* case in 2011, into having the same three-step test for both absent and anonymous witness evidence.

To better comprehend this development, the prominent Grand Chamber's *Al-Khawaja and Tahery* judgement must be elaborated on. The case was a combination of two different applications against the United Kingdom. In the *Al-Khawaja* case, the accused was charged with indecent assault and one of his accusers died before the trial phase began, therefore the accuser's statement which was given to the police was read to the jury.[67] In *Tahery*, the defendant had been convicted for wounding with intent to commit grievous

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[63] *Avaz Zeynalov v Azerbaijan* App no 37816/12 and 25260/14 (ECtHR, 22 April 2021); *Bonev v Bulgaria* App no 60018/00 (ECtHR, 08 September 2006); *F and M v Finland* App no 22508/02 (ECtHR, 17 October 2007); *Gabrielyan v Armenia* App no 8088/05 (ECtHR, 10 July 2012); *Kostovski v the Netherlands* (n 22); *Lucà v Italy* (n 23); *Lüdi v Switzerland* (n 52); *Schatschaschwili v Germany* (n 21); *Vasilyev and Others v Russia* App no 38891/08 (ECtHR, 22 September 2020); *Yagublu and Ahadov v Azerbaijan* App no 67374/11 and 612/12 (ECtHR, 30 January 2020). In all of these cases, the ECtHR held that there was a violation of Articles 6(3)(d) and 6(1) of the Convention together.

[64] On the contrary, in *Kornev and Karpenko v Ukraine* App no 17444/04 (ECtHR, 21 January 2010) the ECtHR held that there was only a violation of Article 6(3)(d) ECHR.

[65] *Kostovski v the Netherlands* (n 22) 39; *Doorson v the Netherlands* (n 43) 67; *Van Mechelen and Others v the Netherlands* (n 49) 50; *Saïdi v France* (n 51) 43.

[66] *Van Mechelen and Others v the Netherlands* (n 49) [40]: *Kostovski v the Netherlands* (n 22) [43].

[67] *Al-Khawaja and Tahery v the United Kingdom* (n 19) [3].

bodily harm, based on the evidence of a witness who was frightened to testify in court.[68] Those two cases, which were held together, were concerned with absent witnesses with different reasons for absence. In this joint *Al-Khawaja and Tahery* judgement, the Court set out three overarching requirements. First, there had to be a good reason for being absent.[69] Second, a conviction based solely or decisively on the statement of an absent witness could only be compliant with Article 6 ECHR if; third, there are sufficient counterbalancing factors, including providing strong procedural safeguards, to let a fair and appropriate assessment of the evidence. The ECtHR, in its following judgments, consistently underlined and reiterated those principles.

In *Schatschaschwili* the application of Article 6(3)(d) ECHR was about not being granted the opportunity to examine absent victims/witnesses who refused to attend the hearing relying on medical certificates which indicated that 'they were in an unstable, post-traumatic emotional and psychological state'.[70] In this judgement, the three steps which were set in *Al-Khawaja and Tahery* were reiterated with the name 'three steps of the *Al-Khawaja* test'. Subsequently, the test started to be known as the *'Al-Khawaja* test' or 'three-step test'.[71] In *Schatschaschwili*, the Grand Chamber also clarified the three-step test, stressing that the lack of good reason for non-attendance of a witness does not, by itself, automatically equate to the unfairness of the trial,[72] thus the Court shall go on considering the other steps of the test. After the *Al-Khawaja and Tahery* judgement, the ECtHR started to apply the same test to the testimonies of both anonymous and absent witnesses,[73] in order to assess whether they violate the defence rights under Article 6(3)(d) ECHR,[74] even though *Al-Khawaja and Tahery* was not about anonymous witnesses. As will be discussed later, this application may pose an issue.

It is important to mention that in 2021, the ECtHR extended the application area of the three-step test, by accepting that the same rule applies when the witness was not absent, anonymous, or *per se*, but the accused was denied the opportunity to confront the witness.[75] Therefore, when witnesses do appear in court, but neither the accused nor their counsel can examine them, the *Al-Khawaja* test is, still, applicable.[76] In other words, the Court accepted the fact that absence of the witness equals the inability to examine the witness for any reason.

In addition, the ECtHR also ruled recently that invoking the right to remain silent does not automatically mean that the accused will not examine the witness. Therefore, the Court considers that an accused's right to cross-examine witnesses against them cannot be conditioned on their waiving of the right to remain silent.[77]

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68 *Al-Khawaja and Tahery v the United Kingdom* (n 19).

69 While summarising *Al-Khawaja and Tahery* (n 19), the ECtHR states in *Lučić v Croatia* App no 5699/11 (ECtHR, 27 May 2014) [73] and in *Štefančič v Slovenia* App no 18027/05 (ECtHR, 25 January 2013) [37]: 'the Court should first examine the preliminary question of whether there was a good reason for admitting the evidence of an absent witness, keeping in mind that witnesses should as a general rule give evidence during the trial and that all reasonable efforts should be made to secure their attendance […]'. Hence, according to the ECtHR, the intended and desired testimony has to be taken from a witness who is ready before the court to give evidence orally.

70 *Schatschaschwili v Germany* (n 21) [118].

71 The general principles regarding absent witnesses have been restated and summarised in *Seton v the United Kingdom* App no 55287/10 (ECtHR, 12 September 2016) [58]-[59]; also, recently in *Chernika v Ukraine* 53791/11 (ECtHR, 12 March 2020) [41].

72 *Schatschaschwili v Germany* (n 21) [113].

73 ibid.

74 *Ellis and Simms v the United Kingdom* App no 46099/06 and 46699/06 (ECtHR, 10 April 2012) [75].

75 *Fikret Karahan v Turkey App no* 53848/07 (ECtHR, 16 March 2021) [42].

76 ibid [38].

77 *Keskin v the Netherlands App no* 2205/16 (ECtHR, 19 January 2021) [55].

According to the latest version of the three-step test, the questions that are addressed in each case are: 1. Whether there had been a 'good reason' for the witnesses' non-attendance; 2. Whether the witness statements had been 'sole or decisive' evidence; and, if yes, 3. Whether there had been adequate 'counterbalancing' measures. Steps of the three-step test should be examined one by one.

2.5 Elements of the 'three-step' test

2.5.1 The 'good reason' for non-attendance

In order to admit the testimony of an absent witness as evidence, the preliminary question of whether there is a good reason for absence of the witness should first be examined.[78] The ECtHR uses different wordings while examining this criterion; good reason for the witness's absence,[79] good reason for non-attendance of a witness,[80] good reason for the failure to have the witness examined,[81] or an interesting one, good reason for the rejection of the applicant's request to hear the witness.[82] The essence is that there must be a good reason for the limitation of the rights of the defence.

For the good reason rule, the Court in *Al-Khawaja and Tahery* stated that there can be a number of reasons why a witness may not attend the trial. When it comes to being absent based on the fear of repercussions, it requires close examination by the trial court. In order to excuse a witness from testifying at court by reason of fear, the trial court must be convinced that all available alternatives would be inappropriate or impractical, such as witness anonymity and any other special measures.[83] According to the judgement, if there is an opportunity to become anonymous for a witness who has a reason to fear, then the trial court cannot decide that the absentee has admissible grounds. Hence, it could be interpreted that having an anonymous witness is more acceptable for a fair trial.

The court must have legitimate factual or legal grounds not to secure a witness's attendance at trial.[84] The reasons could be death,[85] fear,[86] health grounds,[87] or a witness unreachability[88] including their detention abroad.[89] For absent witnesses, if the impossibility of examining the witnesses or having them examined is because they are missing, the authorities must make a reasonable effort to secure their presence.[90] In *Trofimov*, the ECtHR indicated that if a witness is serving prison time at the time his attendance is required at court, not making any effort in that respect cannot amount to a *good reason* for absence, since the court has the full authority to transfer detainees to courtrooms.[91] The absence of the witness in the State where the proceedings are being

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78 *Ter-Sargsyan v Armenia* App no 27866/10 (ECtHR, 27 January 2017) [46]; *Rudnichenko v Ukraine* App no 2775/07 (ECtHR, 11 October 2013) [104].

79 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [61].

80 *Ter-Sargsyan v Armenia* (n 78) [47[; *Keskin v the Netherlands* (n 77) [63]; *Al-Khawaja and Tahery v the United Kingdom* (n 19) [119]; *Adayev v Russia* App no 10746/08 (ECtHR, 08 November 2016) [19].

81 *Rudnichenko v Ukraine* (n 78) [104].

82 *Vronchenko v Estonia* (n 61) [57].

83 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [120]-[125].

84 *Schatschaschwili v Germany* (n 21) [119].

85 *Mika v Sweden* App no 31243/06 (ECtHR, 27 January 2009) [37].

86 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [120]-[125].

87 *Bobeş v Romania* App no 29752/05 (ECtHR, 09 October 2013) [39]-[40]; *Vronchenko v Estonia* (n 61) [58].

88 *Schatschaschwili v Germany* (n 21) [139]-[140].

89 *Štefančič v Slovenia* (n 69) [39].

90 *Karpenko v Russia* App no 5605/04 (ECtHR, 24 September 2012) [62]; *Damir Sibgatullin v Russia* App no 1413/05 (ECtHR, 24 September 2012) [51]*; Pello v Estonia* App no 11423/03 (ECtHR, 10 December 2007) [35]; *Bonev v Bulgaria* (n 63) [43] *Lucčić v Croatia* (n 69) [79]-[80].

91 *Trofimov v Russia* (n 62) [36].

conducted is not in itself a sufficient reason to justify their absence at trial;[92] nor is the fact that the witness resides in another part of the same country.[93] In addition, the Court stated in *Al-Khawaja and Tahery* that 'before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable'.[94] In *Süleyman v Turkey,* the *mutatis mutandis* approach is taken after *Al-Khawaja and Tahery*. According to the judgement,[95] when the anonymous witness was summoned to give oral evidence before a court other than the trial court, the ECtHR will assess also whether there are good reasons for the witness not to attend the trial and admitting the witness's evidence.

2.5.2 The 'sole or decisive' rule

The second step is examining whether the witness' statement was sole or decisive evidence in the case. The origin of the sole or decisive rule is found in *Unterpertinger*.[96] In this judgement, the Court stated that if a conviction is solely or 'mainly' based on untested witness evidence, there must be a good reason for not being able to question the witness, otherwise the defence rights would be 'unduly' restricted.[97] If there is no good reason to justify being unavailable and the conviction is based solely or decisively on unavailable witness's testimony, a violation of Article 6(3)(d) ECHR occurs.[98] Later, the Court set out almost the same decision in *Lucà* by stating that when an untested witness testimony is used as sole or decisive evidence for a conviction and when the accused does not have the opportunity to examine the witness, that practice is incompatible with the guarantees the ECHR provides.[99]

After those judgments, the Court in *Al-Khawaja and Tahery* made it clear that 'sole' means the only evidence against the accused, and 'decisive' 'should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case'.[100] The ECtHR additionally noted that if 'the untested evidence of a witness is supported by other corroborative evidence',[101] the examination of being decisive is tied to the strength of the supportive evidence. Hence, 'the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be treated as decisive'.[102]

In academia, it was claimed that while the sole or decisive rule is still vague, the vagueness is not that challenging after the ECtHR has accepted that where the hearsay evidence is strong, the sole or decisive rule can be overruled.[103] Although this issue will be discussed later, it could be claimed that the rule remains vague because of the ECtHR's varying judgments.

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92 *Gabrielyan v Armenia* App no 8088/05 (ECtHR, 10 July 2012) [81].
93 *Faysal Pamuk v Turkey* App no 430/13 (ECtHR, 18/01/2022) [51]-[58].
94 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [125].
95 *Süleyman v Turkey* (n 19) [66].
96 ibid [128].
97 *Unterpertinger v Austria* (1986) Series A no 110 [33].
98 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [128].
99 *Lucà v Italy* (n 23) [40].
100 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [131]; *Puljić v Croatia* App no 46663/15 (ECtHR, 08 October 2020) [26].
101 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [131].
102 ibid.
103 Mike Redmayne, 'Hearsay and Human Rights: *Al-Khawaja* in the Grand Chamber' (2012) 75(5) The Modern Law Review 865, 870.

In light of the *Horncastle No. 1* decision of the Supreme Court of the United Kingdom, the Grand Chamber in *Al-Khawaja and Tahery* considered the sole or decisive rule again.[104] As a result, the Grand Chamber decided that neither the application of the sole or decisive rule in an inflexible manner, nor ignoring it entirely would be correct.[105] Where a conviction is based solely or decisively on untested witness evidence, the ECtHR must subject the proceedings to the most searching scrutiny.[106]

The question that should be asked by the Court is whether there are sufficient counterbalancing factors, including measures that permit a fair and proper assessment of that evidence. In *Al-Khawaja and Tahery*, the ECtHR departed from its *Lucà* judgement by accepting that sufficient counterbalancing factors could prevent the finding of a violation in case of decisive witness evidence.[107] This issue will be addressed under the following title.

2.5.3 The 'counterbalancing factors'

The final step is examining whether there were sufficient counterbalancing factors. The ECtHR accepts that, even if there is a good reason for a witness to be absent, not having any 'counterbalancing factors' to compensate for the difficulties caused by the admission of the untested testimony as evidence causes a violation of Article 6(3)(d) of the ECHR.[108] The Grand Chamber underlined that counterbalancing factors must permit a fair and proper assessment of the reliability of the evidence.[109] When a domestic court had approached an untested witness testimony with caution, the ECtHR accepted this approach as an important safeguard, if the domestic court noted in its decision that it was aware that the untested statement carries less weight.[110]

In addition, the ECtHR stated that if the evidence of the absent or anonymous witness had a very important influence over the outcome of the trial, in other words, if it was sole or decisive, it does not automatically cause a breach of Article 6(1); however it could jeopardise the defence rights and safeguard measures, therefore, should be taken to achieve a balance between the rights of the defence and the importance of the evidence presented.[111] The Court reiterated in 2021 that when an untested evidence carries significant weight since there is little or no direct evidence to incriminate; sufficient counterbalancing factors are required to compensate for the consequential difficulties caused to the defence by its admission.[112]

The ECtHR also reiterates that these counterbalancing factors must serve a fair and appropriate assessment of the reliability of the evidence.[113] In cases where there is a witness who cannot be questioned at trial, significant safeguards should be offered to the defence, for example: providing an opportunity to put questions indirectly or in writing,[114] to give

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[104] Adam Jackson, 'Hearsay Evidence which is the 'Sole or Decisive' Evidence upon which a Conviction is Based and Compliance with Article 6 of the European Convention on Human Rights: Horncastle and Others v The United Kingdom (App. No. 4184/10)' (2015) 79(2) The Journal of Criminal Law 92.

[105] *Al-Khawaja and Tahery v the United Kingdom* (n 19) [146].

[106] ibid [147].

[107] ibid [147], [165].

[108] *Adayev v Russia* (n 80) [19].

[109] *Schatschaschwili v Germany* (n 21) [114].

[110] ibid [126].

[111] ibid [106].

[112] *Dodoja v Croatia* App no 53587/17 (ECtHR, 24 June 2021) [44]; See also, *Al-Khawaja and Tahery v the United Kingdom* (n 19) [161].

[113] *Schatschaschwili v Germany* (n 21) [125].

[114] ibid [129]; *Ellis and Simms v the United Kingdom* (n 74) [74].

their own version of the events, to cast doubt on the credibility of the witness[115] with finding motives for lying,[116] to point out inconsistencies and incoherencies,[117] to warn the jury about the need to approach the statement with care,[118] or to show in court the video footage of the absent witness interrogation at the investigation phase.[119] For evidence given by anonymous witnesses, the defence needs to be granted the opportunity at any stage of the proceedings to confront and question the witness[120] or to test the reliability of the witness.[121]

However, the examples provided by the Court are not exhaustive, thus for every case, the ECtHR could assess any counterbalancing factor used whether it was sufficient enough to safeguard the defence rights. Hence, the 'counterbalancing factors' rule can be adapted to every single case for both anonymous and absent witnesses. For example, when a defendant has the opportunity to give their own version of the events and to cast doubt on the credibility of an absent witness; cannot solely be regarded as a sufficient counterbalancing factor in order to compensate for the handicap under which the defence laboured.[122] Furthermore, domestic courts must provide sufficient reasoning when rejecting the arguments raised by the defence.[123] In this respect, the ECtHR has not been ready to accept a solely formal examination of the shortcomings in the questioning of witnesses by the domestic higher courts, when their reasoning could be seen as an attempt to validate the wrongful procedure instead of providing the applicant with any counterbalancing factors to compensate for the handicaps under which the defence had to face because of not being able to examine a witness.[124]

The ECtHR doubts whether any counterbalancing factors would be sufficient to justify the untested statement which was sole or decisive evidence for a conviction.[125] In addition, the Court determines whether the proceedings as a whole were fair, because the requirement of sufficient counterbalancing factors must be fulfilled 'not only in cases in which the evidence given by an absent witness was the sole or the decisive basis for the applicant's conviction'.[126] The overall fairness of the proceedings includes an examination of both the importance of the untested evidence for the case and of the counterbalancing measures taken to balance the handicaps with which the defence was confronted.[127]

When the ECtHR is convinced that there is no good reason for absence or anonymity, and in addition, when such testimonial evidence retrieved from an anonymous or absent witness is used solely or decisively to reach the conviction, the Court does not find it necessary to examine further to search whether there are sufficient counterbalancing factors.[128] The reason is that the ECtHR applies the three-step rule literally step by step, and if the results of the first and second steps are cumulatively unsatisfactory, the Court

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115 *Asani v the former Yugoslav Republic of Macedonia* (n 9) [52].
116 *Ellis and Simms v the United Kingdom* (n 74) [74].
117 *Schatschaschwili v Germany* (n 21) [131].
118 *Horncastle and Others v the United Kingdom* App no 4184/10 (ECtHR, 16 March 2015) [142].
119 *Dimović and Others v Serbia* App no 7203/12 (ECtHR, 06 May 2019) [62].
120 *Şandru v Romania* (n 16) [67]-[68]; *İshak Sağlam v Turkey* App no 22963/08 (ECtHR, 10 October 2018) [51]; *Asani v the former Yugoslav Republic of Macedonia* (n 9) [52]; *Lučić v Croatia* (n 69) [82]-[84].
121 *Kostovski v the Netherlands* (n 22) [43]; *Cabral v the Netherlands* App no 37617/10 (ECtHR, 28 November 2018) [37].
122 *Palchik v Ukraine* App no 16980/06 (ECtHR, 02 March 2017) [47]-[48].
123 *Prăjină v Romania* App no 5592/05 (ECtHR, 7 January 2014) [58].
124 *Al Alo v Slovakia* App no 32084/19 (ECtHR, 10 February 2022) [65].
125 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [37].
126 *Schatschaschwili v Germany* (n 21) [116].
127 *Gani v Spain* (n 16) [41]; *Doorson v the Netherlands* (n 43) [76]; *Visser v the Netherlands* App no 26668/95 (ECtHR, 14 February 2002) [47].
128 *Visser v the Netherlands* (n 127) [50]-[52].

concludes that the proceedings as a whole were not fair, and stops before considering the third step.

Thirteen years after the *Visser* case, the Court in *Horncastle and Others* held that according to the facts of the case, there was a good reason for the absence/anonymity of the witness but that the evidence was neither sole nor decisive for the conviction, and thus the ECtHR stopped the test before considering the third step, by jumping to the conclusion that there had been no violation of Article 6(1) and 6(3)(d).[129] In other words, when the ECtHR ruled that when the absent or anonymous witness evidence is not used solely or decisively to reach a verdict, there is no need to analyse counterbalancing factors to assess whether the absence or the anonymity of the witness was compensated to the defence by the domestic court. Having an absent or anonymous witness on a case, as already mentioned several times above, is a limitation on the defence rights, and thus must be counterbalanced. Thus, the test should be considered as a whole, and thus, the third step should not be omitted. Counterbalancing factors considered appropriate should, obviously, differ cases where the evidence was used solely or decisively and cases where not being used in such a manner. Nevertheless, a compensating factor should always be provided for the defence when there is a good reason for a witness to be absent and/or anonymous. At the end, as the ECtHR always reiterates that three interrelated steps of the test should be taken together to determine whether the criminal proceedings, as a whole, are fair.[130] In instances in which the counterbalancing factors are absent, there simply cannot be overall fairness.

In addition, reaching out absent witnesses should also be accepted among counterbalancing factors. If the authorities had tried to find the whereabouts of missing witness, but could not,[131] this should not be enough to accept the testimony solely or decisively to reach a conviction. Ultimately, it is the State's duty to take positive steps to ensure fair trial. Moreover, just one attempt should not be considered as a counterbalancing factor, although it might be accepted as a good reason for absence, because if the witness is not found, the defence did not have the opportunity to challenge the evidence. When it comes to cases where the witness's unavailability is caused by death, serious illness, or where they are co-defendant in the case and invoke their privilege against self-incrimination, or being the privilege-granted persons by law, there is no possible sufficient safeguard measure to be found which could balance the handicap.[132] Therefore, the ECtHR should approach the cases with absent witnesses with utmost scrutiny. If the Court finds convictions that are based solely or decisively on testimonies of an unreachable witness who is not examined by the defence are compliant with Article 6 ECHR, then that is contrary to the overall fairness of a trial, regardless of which counterbalancing factors are taken.

3 Scrutinising the ECtHR's approach: should they be treated equally?

After providing the definitions of the absent witness, the anonymous witness, and the absent anonymous witness, and explaining the ECtHR's three-step test, in this Section, problematic components of the explanations delivered above will be underlined to initiate

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[129] *Horncastle and Others v the United Kingdom* (n 118) [151].

[130] *Schatschaschwili v Germany* (n 21) [118]; *Avaz Zeynalov v Azerbaijan* (n 63) [115].

[131] *Isgrò v Italy* App no 11339/85 (ECtHR, 19 February 1991) [32].

[132] For a similar approach see *Al-Khawaja and Tahery v the United Kingdom* (Joint Partly Dissenting and Partly Concurring Opinion) (n 19) 61-71.

discussion, with an effort to avoid repetition. The first issue to be elaborated on is the creation of the rule and the second is the differences between absent and anonymous witnesses. To conclude Section 3, the ECtHR's application of the three-step test will be critiqued.

3.1 Creation of the rule

The first issue to be discussed is the creation of the rule by the ECtHR. As illuminated above, the *Kostovski* judgement can be accepted as the first case that started the path to the creation of a three-step rule. The judgement, delivered in 1989, was on anonymous witness evidence. In *Van Mechelen and Others* in 1997, the Court again reiterated its opinion on anonymous witnesses. Later, in *Al-Khawaja and Tahery* in 2011, the Court set out the three-step rule, and in 2015, confirmed the three-step rule in its *Schatschaschwili* judgement. Nevertheless, in the two last-mentioned decisions were not on anonymous witnesses, but absent witnesses. The Court, however, has never mentioned that this rule was originally created for the absent witness or the anonymous witness or for both. However, over time, the ECtHR began to apply this rule to both types of the witnesses[133] without mentioning it straightforwardly, or underlining this feature of the rule, directly.

The ECtHR also applies the three-step test as an automatic rule in each and every case in which a violation of Article 6(3)(d) ECHR is brought forward,[134] without revaluating the rule. The Court has always followed the same order to examine; (i) whether there was a good reason for non-attendance,[135] (ii) whether the evidence was sole or decisive, and (iii) whether there were sufficient counterbalancing factors;[136] as if it were a solid rule from written law that requires a strict application. Therefore, it can be stated that the three-step rule is now an automatic rule for the ECtHR.

In *Stafford*, the ECtHR holds that; 'while the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law'[137] This can be an explanation of why the Court applies the same rule every time without questioning it.[138] The main argument for upholding the principles of foreseeability and legal certainty is setting standards to upgrade the quality of justice of the Contracting States' legal systems. However, the ECtHR further stated in the very same

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[133] *Ellis and Simms v the United Kingdom* (n 74) [75].

[134] See, *Asani v the former Yugoslav Republic of Macedonia* (n 9] [38]-[53]; *Balta and Demir v Turkey* App no 48628/12 (ECtHR, 23 June 2015) [40]-[62]; *Cabral v the Netherlands* (n 121) [32]-[38]; *Çongar and Kala v Turkey* (n 55) [10]; *Dimović and Others v Serbia* (n 119) [50]-[64]; *Faysal Pamuk v Turkey* (n 93) [45]-[48]; *Horncastle and Others v the United Kingdom* (n 118) [136]-[151]; *İshak Sağlam v Turkey* (n 120) [42]-[55]*; Kostovski v the Netherlands* (n 22) [38]-[45]; *Lučić v Croatia* (n 69) [73]-[88]; *Palchik v Ukraine* (n 122) [40]-[52]; *Rastoder v Slovenia* App no 50142/13 (ECtHR, 28 February 2018) [57]-[66]; *Rudnichenko v Ukraine* (n 78) [103]-[110]; *Seton v the United Kingdom* (n 71) [60]-[70]; *Schatschaschwili v Germany* (n 21) [110]-[165]; *Štefančič v Slovenia* (n 69) [38]-[47]; *T.K. v Lithuania* App no 14000/12 (ECtHR, 12 June 2018) [95]-[97]; *Tău v Romania* (n 31) [54]-[68]; *Ter-Sargsyan v Armenia* (n 78) [48]-[57]; *Van Wesenbeeck v Belgium* App no 67496/10, 52936/12 (ECtHR, 18 September 2017) [96]-[112]; *Vronchenko v Estonia* (n 61) [55]-[66]; *Ziberi v North Macedonia* App no 2166/15 (ECtHR, 06 June 2019) [31]-[43].

[135] According to *Avaz Zeynalov v Azerbaijan* (n 63) [114]: "whether (i) there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements in evidence'.

[136] According to *Schatschaschwili v Germany* (n 21) [107]: '(iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair'.

[137] *Stafford v The United Kingdom* App no 46295/99 (ECtHR, 28 May 2002) [68].

[138] See Dennis (n 4) 271 for an affirmative view which claims that the ECtHR has been correct in insisting on this requirement of the compatibility of absent or anonymous evidence with the defendant's right to examine witnesses against him.

paragraph that 'a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement'.[139] One could claim that the automatic feature of the test, which was implicitly added after the creation of the rule, might cause the judges of the ECtHR feel like they are bound by the Court's previous judgments, even though they are not bound legally.

All persons are equal before the law and are entitled to equal protection under the law and that therefore there is an argument to be made for strictly applying the same rules with an eye on foreseeability and legal certainty.[140] Numbering the three-step rule, automatically one after the other,[141] and examining every case by strictly applying the same test, restrains the ECtHR's breadth. This automatic attitude towards the anonymous and the absent witness cases may even harm the Court's dynamic and evolutive approach, even though one may claim that the Court is trying to educate domestic courts by applying the same rule strictly, to show them the way so as to assess the admissibility of absent and/or anonymous witness, and to fulfil its goal to achieve maximum respect for the ECtHR in the domestic systems. If the test was created differently for absent and anonymous witnesses, then this opinion actually could be supported better. Thus, the judges of the ECtHR should not feel bound by the old cases and rules created ages ago, and they should feel free to evolve and improve[142] it for the better over time.

As a result, it can be said that the three-step rule is not created to be applied to the testimonies of both absent and anonymous witnesses. It is not set as an automatic rule, either.

3.2 Differences between absent and anonymous witnesses

The second issue to be discussed is the differences between these types of witnesses. As explained shortly above, the absent and anonymous witnesses are quite different when it comes to how they can potentially limit the defence rights and because of those differences. The ECtHR rightfully noted in *Al-Khawaja and Tahery* that 'while anonymous and absent witnesses are not identical, the two situations are not different in principle',[143] since they result in a potential difficulty for the defence rights. Generally, this infers that every defendant has the right to know and confront their accusers and the witnesses to their alleged crime, and to be able to challenge the evidence provided against them. The right to confrontation includes challenging the probity, credibility, truthfulness, and reliability of the witness, as well as having the witness orally examined.[144]

Despite stating that they are not different in principle, the Court also gave the main distinction between them in *Ellis and Simms*; absent witnesses cannot be subjected to an examination by defence,[145] at least not during the trial. However, in contrast with anonymous witnesses, absent witnesses' identity will be known, therefore their possible

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[139] *Stafford v The United Kingdom* (n 137).

[140] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(111) art 7.

[141] For the decision-making model, which is created from the ECtHR case law, see Bas Wilde, 'Summary: Silent Witnesses: The Right to Examine Prosecution Witnesses in Criminal Cases (Article 6 para 3 (d) ECHR)' in Bas Wilde (ed), *Stille getuigen: Het recht belastende getuigen in strafzaken te ondervragen (artikel 6 lid 3 sub d EVRM)* (Denventer 2015) 643, 644.

[142] See Ergul Çeliksoy, 'Overruling "the Salduz Doctrine" in Beuze v Belgium: The ECtHR's Further Retreat from the Salduz Principles on the Right to Access to Lawyer' (2019) 10(4) New Journal of European Criminal Law 1-21.

[143] *Al-Khawaja and Tahery v the United Kingdom* (n 19) [127]; also repeated in *Bakır v Turkey* (n 19) [31].

[144] *Al-Khawaja and Tahery v the United Kingdom* (n 19) 127.

[145] *Ellis and Simms v the United Kingdom* (n 74) [74].

motives to lie could be found.[146] On the contrary, the defence cannot gather any information about anonymous witnesses' identities, backgrounds, and motives, and hence there is a lack of ability to prove their reliability, credibility, and their motives, which could be vindictive, untruthful, or erroneous.[147] For this reason, the ECtHR defined this problem as 'an almost insurmountable handicap'.[148] Despite the challenge this presents, the defence would, still, have the opportunity to (cross)-examine the witness.[149]

In *Asani,* the Court stated that the application of the same consistent approach to both types of witnesses is unsurprising.[150] However, bearing in mind that different types of witnesses cause different challenges to the defence; it is actually possible to find it surprising. It is a fact that the Court approaches every case uniquely, however it does not mean that the Court differentiate its approach, knowingly and willingly, towards anonymous and absent witnesses. It should not be forgotten that there is also a combination of these witness types: the anonymous-absent witness, the ECtHR should approach this issue, as being on thin ice.

3.3 Critique of the test

The three-step test, which was created to evaluate the anonymous and/or absent witness evidence, has been criticised for inconsistent application;[151] since it may undermine the validity of the standards set by the Convention.[152] Even the Court itself admits that there are inconsistencies in the application of the rule.[153] As it is stated also above, this situation is defined as the most significant deficiency in the case law of the ECtHR to date, as there are clear signs that the right to confrontation is easily sacrificed against seemingly competing interests.[154] Even if this statement is too bold, the inconsistencies in the application of the three-step rule are incontrovertible.[155]

In the application of the first step, which is searching for a good reason for the absence or the anonymity of a witness,[156] there is no exhaustive list of good reasons set by the ECtHR, as it should be. According to the type of the witness and the features of the case, the Court decides whether the reason is good enough. For the third step, which is called counterbalancing factors, there is no exhaustive list of factors either. The only necessity is that the counterbalancing factors applied in the case must permit a fair and appropriate assessment of the testimony of an absent or anonymous witness.[157] Therefore, it could be claimed that the ECtHR applies the first and third steps of the rule, differently in each case, as it should. It allows the ECtHR to be dynamic and evolutive.

When it comes to the sole or decisive rule, there are some inconsistent decisions, as shortly stated above. The *Al-Khawaja and Tahery* judgement initially set out the three-step

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146 Also repeated in *Süleyman v Turkey* (n 19) [63].
147 *Kostovski v the Netherlands* (n 22) [42]; *Bakır v Turkey* (n 19) [33].
148 *Windisch v Austria* (n 50) [28].
149 ibid [74]; *Bakır v Turke*y (n 19) [34].
150 *Asani v the former Yugoslav Republic of Macedonia* (n 9) [36].
151 Laura Hoyano, 'What is Balanced on the Scales of Justice?' (2014) 4 Criminal Law Review 22.
152 Bettina Weisser, 'The European Convention on Human Rights and the European Court of Human Rights as Guardians of Fair Criminal Proceedings in Europe' in Darryl Brown, Jenia Turner and Bettina Weisser (eds), *The Oxford Handbook of Criminal Process* (Oxford University Press 2019) 89-113, 112.
153 *Schatschaschwili v Germany* (n 21) [111]-[113].
154 Maffei (n 6) 109.
155 *Schatschaschwili v Germany* (n 21) [113].
156 See the suggestions for the development of the case law on good reason rule: Stephanos Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff 1993) 201.
157 *Asani v the former Yugoslav Republic of Macedonia* (n 9) [41]; *Schatschaschwili v Germany* (n 21) [125].

rule. The Court points that the second rule should not be applied in a very stringent manner. According to the ECtHR, thus, if the testimony of untested witness is used solely or decisively to reach the decision of conviction, it does not automatically result in a breach of the fair trial,[158] since the sole or decisive rule should be applied with serious scrutiny but allowing a certain flexibility.[159]

The ECtHR also stated that if a conviction is solely or decisively based on an absent witness's testimony, this conviction could be compliant with the right to a fair trial if sufficient counterbalancing factors are taken into account by the domestic court.[160] Which means that the dangers of admitting such evidence would constitute a very important factor to balance in the scales and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards.[161] Thus in each case, the Court should evaluate whether the counterbalancing factors were sufficient enough and assess fairness of the case, when an absent and/or anonymous witness testimony is used solely or decisively to reach a verdict.

However, a conviction solely or decisively based on reading the written testimony of an absent witness, even if there are counterbalancing factors, should not be compatible with Article 6(3)(d) ECHR.[162] The Court stated that the domestic court, which accepts the testimony of an absent witness as evidence, should show that they are aware this statement carries less weight because of the inability to (cross)-examine the witness.[163] However, the question remains: how can a testimony carry less weight, but at the same time lead to a conviction solely or decisively?

A similar approach is taken by Judges Sajó and Karakaş in their Joint Partly Dissenting and Partly Concurring Opinion of *Al-Khawaja and Tahery*.[164] According to the Judges, where there is testimony of an absent witness who is not examined by the defence, no procedural safeguards can effectively counterbalance this handicap, because the defence rights will be restricted to an extent that is incompatible with the right to a fair trial. As a result, the Court should turn back to *Doorson* judgement in which it concluded that 'even when "counterbalancing" procedures are found to sufficiently compensate the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements'.[165] This decision should be applied to the untested testimonies of both anonymous and absent witnesses in order to protect the accused from being convicted based on sole or decisive evidence, which is untested. Because of the danger of the admission of such testimony solely or decisively to reach the conviction decision, it would constitute a very important issue.[166]

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158 *Ter-Sargsyan v Armenia* (n 78) [46]; *T.K. v Lithuania* (n 134) [95].

159 *Şandru v Romania* (n 16) [59]; *T.K. v Lithuania* (n 134) [95].

160 *Al-Khawaja and Tahery v the United Kingdom* (n 19) [147].

161 *T.K. v Lithuania* (n 134) [95].

162 Just as how it was set in *Lucà v Italy* (n 23) [40].

163 *Schatschaschwili v Germany* (n 21) [126]; *Al-Khawaja and Tahery v the United Kingdom* (n 19) [157]; *Puljić v Croatia* (n 100) [29]. These cases state that 'where statements by witnesses whom the defence has had no chance to examine before or at trial underpin the conviction in a decisive manner, the disadvantage is of such a degree as to constitute in itself a violation of Article 6 which no procedural safeguards can effectively counterbalance'.

164 See *Al-Khawaja and Tahery v the United Kingdom* (n 19) 61-71.

165 *Doorson v the Netherlands* (n 43) [76].

166 *Gani v Spain* (n 16) [42].

4 Conclusion

In Section 1, four questions were posed: What are the differences between absent and anonymous witnesses and to what extent do they limit the defence rights? How did the ECtHR develop the three-step rule? To what extent does the ECtHR apply the same three-step test to both anonymous and absent witnesses? Should the European Court of Human Rights treat the anonymous and the absent witness equally?

As previously cited, according to the ECtHR, anonymous witness and absent witness are not identical, yet they are not different in principle.[167] The Court also provided the main difference between absent and anonymous witness; the absent witnesses cannot be subjected to an examination by defence[168] and it is a major challenge for the defence. It could be argued which one is more challenging: providing the defence with the opportunity to put questions to an anonymous witness; or knowing the identity of an absent witness and instead of questioning them, being able to research the background and investigate the credibility and motives of them. As the anonymous absent witness is the combination of two categories of witnesses that pose different restrictions to the defence rights, it should be approached with utmost scrutiny by the ECtHR. However, the Court appears to have failed to underline the fundamental distinctions between these three different notions.

Several cases in the ECtHR case law have dealt with the challenges of anonymous witnesses and absent witnesses; *Kostovski*, *Van Mechelen and Others*, *Al-Khawaja and Tahery,* and *Schatschaschwili* judgments were discussed above, chronologically. The ECtHR, over time, has formulated the following three-step test for the assessment of untested witness evidence that has been complied with under Article 6(3)(d): 1. Whether there had been a 'good reason' for the witnesses' non-attendance; 2. Whether the witness statements had been 'sole or decisive' evidence; and, if yes, 3. Whether there had been adequate 'counterbalancing factors'. As it has been previously highlighted that this judicially-created test has been used as an automatic test to evaluate the testimony of the absent witness, the anonymous witness, and the anonymous absent witness; even in cases where the defence was denied the opportunity to confront the witness.

Consequently, a nuanced distinction in the application of the Court's three-step test to distinguish between absent witnesses, anonymous witnesses, and anonymous absent witnesses would be more appropriate. Moreover, the ECtHR should underline the differences between anonymous witness, absent witness, and also anonymous absent witness to recognise the varying challenges that the defence faces. This acknowledgement would also be relevant when applying the third step of the test; the counterbalancing factors.

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[167] *Al-Khawaja and Tahery v the United Kingdom* (n 19) [127].
[168] *Ellis and Simms v the United Kingdom* (n 74) [74].