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The Right to Confrontation after *Crawford v. Washington*: A 'Continental European' Perspective

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Abstract

The judgment of the US Supreme Court in Crawford v Washington represents a significant development in the law of evidence in the United States. The judgment itself sets out a less than complimentary view of the evidential and procedural laws of continental Europe. This article aims, through an examination of the jurisprudence of the European Court of Human Rights, to assess the accuracy of this view and to offer a comparative analysis of the confrontation principles in Europe and the United States.

KEYWORDS: Confrontation, Article 6 ECHR

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Introduction

While the judgment of the US Supreme Court in *Crawford v Washington*[1] has been praised by commentators as 'important'[2] and the 'most significant evidence decision in a number of years',[3] the judgment itself propagates a less than complimentary view of the criminal procedure laws of continental Europe. The Supreme Court uses the perceived failings of the European 'inquisitorial' model to reinforce the legitimacy of its own approach. This methodology will be challenged through an assessment of the accuracy of the Supreme Court's view of the confrontation principles in Europe. An examination of this judgment and the jurisprudence of the European Court of Human Rights in Strasbourg will enable both a comparative overview of the effectiveness of the various protections, and an examination of whether the guarantees in the respective jurisdictions can be said to have a common aim and be based on similar justifications.

A 'continental European' approach to the right to confrontation?

The judgment in *Crawford* makes several (mainly critical) references to the 'continental civil law' and its 'notorious' condoning of private examinations by judicial officers. The 'continental law' is left undefined and thus takes on a rather shadowy role, the embodiment of a procedure which is to be avoided at all costs. Before embarking on a consideration of the right to confrontation from a 'continental European' perspective, it is necessary to make a few preliminary observations. First, it is by no means self-evident that there is in fact such a thing as a 'continental European' approach to the right to confrontation or indeed to criminal procedure law more generally. A relatively common method used in analysing and comparing the procedural rules of different jurisdictions is to rely on the distinctions between the so-called inquisitorial and accusatorial traditions.[4] This is not always satisfactory as it necessarily requires the making of broad generalisations, and frequently

[1] *Crawford vWashington*, 124 S. Ct. 1354 (2004).

[2] Chermerinsky, E., 'Court Bars Out-of-Court "Testimonial" Statements', 40 *Trial* 82 (July, 2004).

[3] Treadwell, M.T., 'Evidence', 55 *Mercer Law Review* 1219 (2004). It has also been more negatively received, particularly by those representing the interests of victims and vulnerable witnesses, who fear that it undermines the special legislative provisions enacted to protect them. See eg *Snowden v State of Maryland*, Md. Ct. Spec. App., No. 2933 (April 5, 2004), a case involving child sex abuse, where the Court ordered a re-trial, as the social worker's testimony about interviews with the child victims was held, following Crawford, to violate the confrontation clause. See Hudson, D.L., 'New Clout for the Confrontation Clause', *A. B. A. Journal* 3/17 (2004) E-Report 1.

[4] Eg Harding, C., Fennell, P., Jörg, N. and Swart, B., *Criminal Justice in Europe* (Oxford: Clarendon, 1995).

provides a rather stereotypical, and often inaccurate, representation of the respective laws.

Even the terminology used highlights the potentially problematic nature of the 'two models' approach. The term inquisitorial, for instance, is not only burdened with negative preconceptions but is also, as Nijboer notes, representative of a system which no longer exists.[5] These difficulties are compounded by the fact that the procedural laws of the 'continental' legal systems differ substantially from each other. According to the stereotypical view of the 'inquisitorial' system, the criminal proceedings are largely reliant on the file, there is little or no immediacy and only a limited role for the trial hearing. In Germany, however, which is frequently used as the inquisitorial part of a comparison, oral proceedings allowing for direct confrontations between accused and witnesses at trial are not uncommon. This is also the case in Scandinavian countries like Denmark and Norway. It is difficult to see therefore how such countries could be said to be representative of the stereotypical continental European approach to criminal procedure.[6] Another important factor is that procedural laws are constantly evolving. The Italian criminal procedure system, which underwent a wide-ranging review at the end of the nineties, provides a rather dramatic example of how a system can develop in a relatively short period of time. Although the Italian reforms were apparently inspired by American procedural law, many of the traditional features were retained.[7] The categorisation of countries as belonging to one model or the other is thus very complex and it is often difficult to ascertain the advantages brought about by such a classification.

Despite the difficulties associated with the traditional two-models methodology in relation to comparative criminal procedure law, this does not mean that a comparative analysis of the subject is impossible. Developments precipitated by the European Court of Human Rights (the Court) mean not only that the two models categorisation has become even less relevant, but also that it is increasingly possible to talk of a 'European' approach, to at least part of criminal procedure, ie that part which regulates the rights of, or guarantees afforded to, a person charged with a criminal offence. The European Convention on Human Rights (the Convention) has been signed by every European country and has substantially influenced the procedural laws of the member states. The effect of the Convention requirement on witness confrontation has been particularly evident.

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[5] He suggests that the inquisitorial system can only be viewed as a 'historical archetype': Nijboer, J.F., 'Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective', 41 *American Journal of Comparative Law*, 299 at 303 (1993).

[6] Ibid.

[7] For an informative critique of these developments, see Grande, E., 'Italian Criminal Justice: Borrowing and Resistance', 48 *American Journal of Comparative Law* 227 (2000).

The Court has had to address the differences which exist between the different European legal systems in order to try and enforce common standards in the field of procedural rights. An examination of the Convention jurisprudence and the manner in which the Court tries to regulate and reconcile the legal systems of the member states, provides the basis for an analysis of the fundamental differences between procedural systems and as such offers a viable alternative to the two models approach. It is important to stress that this methodology is not based on the belief that the jurisprudence of the Court is leading to one unified system of criminal procedure; the rights of the accused are after all just one small, though admittedly important, part of a procedural system. Rather it is based on the belief that by examining the jurisprudence it is possible to identify common and recurring themes, free from the culturally specific terms which normally cloud comparative criminal procedure law.

The Court has encountered particular difficulties in regulating the law of evidence, and while these have partly been a result of its limited competence – in particular its reluctance to act as a court of fourth-instance[8] – they have also arisen as a result of differences in the legal systems of the member states. It is not uncommon, for instance, to read statements to the effect that there is no such thing as 'rules of evidence' in continental Europe.[9] While the veracity of this statement is open to doubt, it is nevertheless clear that some fundamental differences do exist. One distinguishing feature which is at least partially responsible for such claims is the doctrine of 'free proof' (*die freie Beweiswürdigung*; *libre appréciation des preuves légales*; *libero apprezzamento delle prove*) which is common (albeit in varying degrees[10]) to many legal systems.[11] This means that the judge is allowed, or even required, to take all available evidence into consideration in determining the guilt or

[8] eg *Schenk v Switzerland*, judgment of 12 July 1988, Series A no 140.

[9] Eg South African Law Commission, Discussion Paper 102 (Project 107) Sexual Offences, at 12.11.3.1.4.

[10] See eg Pradel, J., 'Criminal Evidence' in Nijboer, J.F. and Sprangers W.J.J.M. (eds), *Harmonisation in Forensic Expertise* (Leiden: Thela, 2000).

[11] See eg Switzerland: BGE 115, 1989, iv 259E.9, Hauser R.and Schweri, E. *Schweizerisches Strafprozessrecht* (Basel: Helbing and Lichtenhahn, 2002) § 54 N. 1 and Schmid, N. *Strafprozessrecht* (Zurich: Schulthess, 2004), N. 2.3; Austria: EvBl 1975/180, Seiler, *Strafprozessrecht* (Vienna: WUV Universitätsverlag, 2003) N 431; France: Art. 427 of the Code of Criminal Procedure (CPP); Portugal: Article 125 of the Code of Criminal Procedure; Belgium: Article 154 of the Code of Criminal Procedure (CPP); Germany: § 261 of the Code of Criminal Procedure (StPO) – 'Über das Ergebnis der Beweisaufnahme entscheidet das Gericht nach seiner freien, aus dem Inbegriff der Verhandlung geschöpften Überzeugung'- see also Rudolphi, Frisch, Paeffgen, Rogall, *Schlüchter* and Wolter, *Systematischer Kommentar zur Strafprozessordnung und zum Gerichtsverfassungsgesetz* (Neuwied: 2001, Hermann Leuchterhand) vol. 2, 779, § 53 et seq.

innocence of the accused. A second major difference is that in many procedural systems,[12] witnesses are not, or not exclusively, examined in person at trial. Following the police investigations, it is quite common for the accused to be questioned by an investigation judge or examining magistrate, who will then organise and supervise 'confrontations' between the accused and the witnesses. The accused and/ or defence counsel have the chance to put questions to the witnesses and a verbatim transcript of the confrontation hearings goes into the file, which is then passed on to the judge. This mechanism means that witnesses are often only heard at trial in exceptional circumstances.

The combination of these two factors makes it immediately apparent that any discussion of issues such as admissibility or even hearsay[13] will be extremely difficult. If witnesses are examined by an investigating authority and challenged by the defence during the 'pre-trial' and their testimony submitted to the court in a file, it is difficult to conceive of a role for the hearsay rule. Similarly, if the judge is able, or indeed expected, to take all the available evidence into account in determining the charge, there is no room for a doctrine of admissibility. Neither of these terms are particularly useful in a comparative context, because they are too culturally specific, too dependent on a particular type of legal system. This does not mean that an examination of different legal systems is impossible, but it does mean that extreme care is required in determining the level at which the comparison is to be made. The fact that *Crawford v Washington* has been described as 'a new test for the admissibility of hearsay',[14] and 'a new conceptual framework for the admission of hearsay evidence by the prosecution',[15] makes it clear that an examination of the case from a non-US specific perspective will be challenging, if not exceedingly problematic. In order to facilitate such an analysis, the jurisprudence and the methodology of the Court will be examined for insights as to if and how these difficulties have been resolved.

The Convention jurisprudence on the right to confrontation

The Court has only managed to retain its universal scope by refusing to be drawn into discussions involving such loaded terms. It frequently insists that admissibility of evidence is 'primarily a matter for regulation by national law

[12] For example in France, Austria and many Swiss Cantons.

[13] Hearsay can be defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted': see Fed. R. Evid. 801(c).

[14] Uelmen, G.F., 'Preserving Crawford Objections', 28 *Champion* 46 (July 2004).

[15] Cohen, N.P. and Paine, D.F., 'Crawford v. Washington: Confrontation Revolution', 40 *Tennessee Bar Journal* 22 (May 2004).

and as a general rule it is for the national courts to assess the evidence before them'.[16] It has, moreover, resisted all attempts to induce it into either criticising or praising the hearsay rule per se, holding instead that neither the refusal to admit hearsay evidence,[17] nor its admission,[18] constitutes a violation of Article 6. This is not to say that an accused in either of these cases will have no recourse to the Court, but rather that the alleged violation will be considered from the perspective of the Convention principles. Thus the failure of the prosecution or investigation authorities to pass evidence to the Court, could potentially violate the right to adversarial proceedings,[19] while the use of witness evidence which the defence has not been able to challenge directly, could violate the principles set out in Article 6 (3)(d). This provision states that everyone charged with a criminal offence has the right:

> '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'.

The first part of this provision guarantees, albeit in somewhat vague terms, the right to confrontation. There is no express guidance as to the extent of the guarantee or as to the manner in which it ought to be applied and so the Strasbourg authorities have had considerable leeway in determining its scope.

Despite earlier indications to the contrary,[20] the Court has made it clear there is no requirement that 'in order to be used in evidence statements of witnesses should always be made at a public hearing in court'. It has held that the use in evidence of statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6 'provided the rights of the defence have been respected'.[21] These rights have been interpreted as requiring that the accused be given '"an adequate and proper" opportunity to challenge and question a witness against him either at the time the witness was making his statement or at some later stage of the proceedings'.[22] The

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[16] See among many authorities, *A.M. v Italy*, judgment of 14 December 1999, § 24.

[17] See eg *Blastland v United Kingdom*, Application no. 12045/86 (1987) 52 DR 273: the applicant had complained that evidence of a third party to the police implicating another person had been excluded on the basis that it was hearsay.

[18] *Trivedi v United Kingdom*, Application 31700/96, decision of 27 May 1997.

[19] *Edwards v United Kingdom*, judgment of 16 December 1992, Series A no. 247-B.

[20] See eg *Barberà, Messengué and Jabardo v Spain*, judgment of 6 December 1988, Series A no. 146, § 78: in principle all evidence should be produced in the presence of the accused at a public hearing with a view to adversarial argument.

[21] *Kostovski v Netherlands*, judgment of 20 November 1989, Series A no. 166, § 41.

[22] *Unterpertinger v Austria*, judgment of 24 November 1986, Series A no. 110, § 31.

Strasbourg authorities have made it clear that there is no absolute right for the defence to question every witness who makes adverse statements against him or her. The restrictions on the guarantee arise from the use of the innocuous-sounding term 'adequate and proper' which introduces an element of discretion. Far from raising the standard required by the provision, these words have enabled the application of a lower standard. Instead of endorsing the mandatory requirement that the defence be able to confront all prosecution witnesses, the Court has restricted the guarantee by holding that there will only be a violation of the Convention where the applicant's conviction is based 'solely'[23] or 'to a decisive extent'[24] on untested witness statements.

The Court's terminology is instructive. It forbids the 'use' of untested evidence and refers to stages of 'the proceedings' - the word 'trial' is conspicuously absent. Prohibiting the 'use' of untested evidence allows the Court to sidestep the problems associated with the concept of admissibility. Clever terminology cannot, however, prevent difficult issues from surfacing. One particular problem concerning evidence which is 'admitted' but not 'used', is that it is difficult to ascertain whether the conviction has actually been based on evidence which apparently was not used. Even though the transcripts of the witness statements may not be 'used' in the determination of the verdict, they will still be included in the file which the judge uses to determine the charge. Thus it is possible that the judge will in any case 'use' the evidence in determining the guilt of the accused, but will simply not openly admit this. These concerns are exacerbated by the system of 'free proof' which leaves the judge considerable discretion in determining whether the standard of proof is such as to reach the level required for a conviction.

This is a difficult problem to solve. One obvious way would be to prevent the inclusion of untested evidence in the file, but the sole and decisive test means that a judicial authority would have to examine the evidence in advance to determine the importance of the evidence. This is likely to be time-consuming, expensive and impractical. An alternative would be to state that any witness testimony which the prosecution wants to use is decisive and requires that the defence have the chance to confront the witness. Untested evidence could automatically be withheld from the file. This would however necessarily introduce an element of 'admissibility', which would be difficult, or even impossible, to reconcile with the principle of free proof. Although this may prove problematic it is important to note that the principle of free proof is not always absolute and some jurisdictions have rules which enable evidence to be removed from the file. The criminal procedure code of the Canton of

[23] *Saïdi v France*, judgment of 20 September 1993, Series A no. 261-C, § 44.

[24] See eg *Kostovski v Netherlands*, judgment of 20 November 1989, Series A no. 166§ 44. In *Asch v Austria*, judgment of 26 April 1991, Series A no. 203, § 30 the contested statement did not constitute 'the only evidence'. See to similar effect, *Artner v Austria*, judgment of 28 August 1992, Series A no. 242-A, § 24.

Bern in Switzerland, for example, has a provision which enables witness statements which have been obtained through the use of violence, compulsion, threats, promises or fraud to be removed from the files.[25] The Court has, however, opted for a considerably less radical solution. It has interpreted Article 6 (1) as requiring that detailed reasons be given for decision, the implication being that this reasoning provides a guarantee that only legitimate evidence is used in determining the verdict.

Interestingly the jurisprudence seems to indicate that there is no room for specific categories of exception from the right to confrontation which are often found in domestic procedure codes, for instance in cases where the witness dies,[26] becomes mentally ill or lives abroad. In *AM v Italy*, the Court found that there had been a violation as the domestic courts had convicted the applicant solely on the basis of statements made by the witness in the US before the trial, despite the fact that the applicant had never been confronted with the witness. In *Unterpertinger v Austria*, the two victims (the wife and step-daughter of the accused), relying on a privilege in national law, legitimately refused to testify, and their earlier statements were read out in court. This was held to constitute a violation of the provision as the national court had based the conviction mainly on these statements and the applicant had had no chance during the proceedings to question either of them. The Court seems to employ a similarly strict approach in relation to the victims of sexual offences. In *PS v Germany*, the applicant was accused of having sexually abused an eight year-old girl. He did not at any stage in the proceedings have the opportunity to question her, or have her questioned by a judge, and thus there was held to have been a violation of Article 6 (3)(d).[27]

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[25] Art. 56 Gesetz über das Strafverfahren (StrV) vom 15. März 1995 (Kanton Bern):

> 1. Zum Erwirken von Aussagen und Auskünften sind Zwangsmittel, Gewaltanwendung, Drohungen, Versprechungen, Täuschungen und eingebende Fragen sowie Mittel, welche die Denkfähigkeit oder Willensfreiheit einer Person beeinträchtigen können, untersagt.
> 2. Auf unzulässige Weise erwirkte Aussagen sind nichtig und aus den Akten zu entfernen.
> 3. Die vom Gesetz vorgesehenen Zwangsmassnahmen bleiben vorbehalten.

[26] In *Garner v United Kingdom*, Application 38330/97, decision of 26 January 1999 (death of defence witness, no violation as statements had been admitted). In *Ferrantelli and Santangelo v. Italy*, judgment of 7 August 1996, Reports 1997-III, 950, §52 the prosecution witness died before the applicants had been confronted with him, but there was no violation as the Court was satisfied that there was other evidence supporting the applicant's conviction.

[27] See also *Verdam v Netherlands*, Application 35253/97, decision of 31 August 1999 (where there was no violation as the conviction was deemed to have been based on other evidence and not solely on the statements of the victim). The Commission has accepted that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of defence. Cf. *Baegen v. the Netherlands*, Report of 20

Thus it would seem that if the witness testimony is decisive for the conviction, the accused must be given the opportunity to question, or have questioned, the witness.

Crawford revisited

A closer look at *Crawford* reveals that it need not be interpreted as imposing new criteria for the admissibility of hearsay. In fact, what the majority, following Judge Scalia, actually held was that: 'Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation'.[28] This statement is considerably more neutral and lends itself to a broader understanding than an interpretation from a purely American legal perspective.

The judgment contains two principal limitations. First it does not apply to non-testimonial statements. Although testimonial is not fully defined, the judgment makes it clear that this includes statements made during police interrogations and during preliminary hearings. It is arguable that this is a less demanding test than that enforced by the Strasbourg authorities, as the latter would seem to prohibit any untested decisive witness evidence (provided it is decisive), irrespective of whether it is testimonial or not. Although statements made before the investigating and prosecuting authorities are by far the most important in the context of criminal proceedings, the case of the *State of Nebraska v Vaught*[29]demonstrates that this distinction is nevertheless relevant. In this case it was held that statements of a child victim to a doctor in which the alleged perpetrator was identified, were not testimonial and thus did not fall within the scope of the principle set out in *Crawford*. This highlights a potential weakness in the Supreme Court's decision in that it seems to confuse the issues of admissibility and confrontation. The right to confrontation is not violated by the admission of previous statements of the victim, but by the accused's lack of opportunity to confront the victim as to the accuracy of these statements. It is not adequately explained why an accused has the right to challenge statements made to the police, but not to a doctor.

The jurisprudence of the European Court of Human Rights suggests that in cases like *Vaught*, reliance on such evidence would result in a violation of the provision. The determination of whether the statements could legitimately be used would depend entirely on whether they were deemed to be the sole or decisive evidence against the accused, irrespective of whether they were made to a policeman or a doctor. Although it is incredibly difficult

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October 1994, § 77, Eur. Court HR, Series A no. 327-B, p. 44, *Slobodan v. Netherlands*, Application 29838/96, decision of 15 January 1997.

[28] *Crawford v Washington*, 124 S. Ct. 1354 (2004).

[29] No. S-02-1480 July 9, 2004, 268 Neb. 316, 682 N.W.2d 284, Neb., Jul 09, 2004.

to determine from the Court's jurisprudence what constitutes 'decisive' witness evidence, it is nevertheless instructive to examine some of the relevant case-law. In *AM v Italy*, where the accused in a rape case was unable to question either the victim, the victim's parents or his therapist, there was held to be a violation as these statements were deemed to be the evidence 'that formed the basis of his conviction'.[30] Similarly in *PS v Germany*[31], the Court found a violation of the provision where the applicant's conviction for sexually abusing a young girl was found to be based on her (untested) statements to the police and statements made by her mother and a police officer in court. In *SN v Sweden*[32] which also involved child sex abuse, the victim's statements were also held to be decisive – despite other evidence in the form of statements from the child's mother and school teacher. In *Verdam v Netherlands*,[33] the applicant had been convicted of raping four women. He complained that he had not had the chance to confront two of the women. The Court, in declaring the application inadmissible, ruled that the applicant's conviction of the rape of two women did not rest solely on their statements. Instead '[a] number of leads, with which [the victims] had provided the police, had been followed up and had resulted in supporting evidence being available to the trial courts which corroborated the accounts of [the victims]'. The supporting evidence referred to in this case consisted of evidence relating to the applicant's physical appearance, the car he was driving and the fact that all four women had identified him from a series of police photographs. The Court thus held that the applicant's conviction was not based 'to a decisive extent' on the victims' statements to the police. In *N.F.B. v Germany*,[34] which again involved sexual abuse, the victim became unwell after the investigation phases and was deemed unfit to attend the trial hearing. The application was held to be inadmissible as the applicant's defence lawyer was able to question the victim on three occasions during the pre-trial hearing and as the court had not relied exclusively on the victim's evidence; it also acted on the basis of statements by numerous experts and witnesses who had been heard at the trial, a psychological report, and more than a hundred letters that the victim had sent to her psychotherapist, in which she described the sexual abuse from which she had suffered.

The second main limitation of the judgment in *Crawford* is that it does not apply to statements made by a witness who, despite reasonable efforts on the part of the government to ensure his or her attendance, is unavailable,

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[30] *A.M. v Italy*, § 28.

[31] Application 33900/96, judgment of 20 November 2001.

[32] Application 34209/96, ECHR 2002-V.

[33] Application 35353/97, decision of 31 August 1999

[34] *N.F.B. v Germany* Application 37225/97, decision of 8 October 2001.

provided that the accused had a 'prior-opportunity' to cross-examine the witness. This test appears similar to that applied by the Court in that it endorses the possibility of witness examination before the trial hearing. It could be seen as stricter than the European test in that the latter does not require the government to attempt to ensure the attendance of the witness at trial if the accused has already had the opportunity to confront or have the witness confronted in the pre-trial phase. However, again an examination of the relevant jurisprudence suggests that this is not necessarily the case. In *Snowden v State of Maryland*,[35] which involved sexual abuse of a child under the age of 12, the Maryland Court of Special Appeals ruled that Maryland's 'tender years' statute,[36] which allowed a child complainant's hearsay statements to be admitted without requiring the child to either testify at trial or be unavailable, violated the confrontation clause. It is notable however, that this statute differed from those in the majority of other states and the court even notes that it was unique in allowing the admission of hearsay irrespective of whether the child testified or not. The case of *Blanton v State of Florida*[37] is more indicative of the likely scope of the provision. In this case the District Court of Appeal of Florida held that where a victim was unavailable to testify due to his or her psychological condition and providing that the accused had had an earlier opportunity to depose the victim, there was no violation of the confrontation clause through the admission of statements made by the victim to the police.

Conclusion

The US Supreme Court and the European Court of Human Rights seem to have a similar stance in relation to many of the principles of confrontation. Both insist that the aim of the right to confrontation is to ensure that the accused has an opportunity to challenge the evidence against him or her and both endorse the potential for cross-examination to occur before the trial hearing and outwith the presence of the decision maker.[38] These similarities are somewhat at odds with the claims in *Crawford* that the differences between the common law and the civil law provisions governing confrontation lie in the reliance of the former on oral, direct and adversarial procedure:

[35] 156 Md.App. 139, 846 A.2d 36.

[36] Md. Code Ann. Crim. Proc. § 11-304.

[37] No. 5DO3-3143, June 18, 2004, 2004 WL 1799760 (Fla.App. 5 Dist.), 29 Fla. L. Weekly D1470.

[38] *Crawford v Washington*, loc. cit.; *Unterpertinger v Austria*, judgment of 24 November 1986, Series A no. 110.

> 'English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers.'[39]

This claim is somewhat undermined by the fact that the judgment goes on to place substantial restrictions on these traditional principles first by concluding that statements which the defence have been able to challenge before trial are acceptable if the witness subsequently becomes 'unavailable' and second through the exclusion of non-testimonial statements from the remit of the decision. Rather than concentrating on principles such as immediacy and orality, the judgment seems more concerned with distinguishing the law from 'the principal evil at which the Confrontation Clause was directed… the civil-law mode of criminal procedure'. More specifically, the judgment stresses that the constitutional text, 'like the history underlying the common-law right of confrontation', 'reflects an especially acute concern with a specific type of out-of-court statement', namely those made to government officers. This is explained on the basis that the 'involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.' The legitimacy of the distinction between testimonial and non-testimonial evidence, in particular, seems thus to be based on a mistrust of the prosecution and investigation authorities.

While it is important to carefully regulate testimonial evidence, this is not in itself an argument for excluding non-testimonial evidence from the remit of the confrontation provision. The Supreme Court notes that although 'the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object'. The emphasis thus seems to move from ensuring 'live testimony in court subject to adversarial testing' to ensuring instead that the accused can test statements which may have been contaminated by those involved in investigating and prosecuting the case. This is undoubtedly one important part of the right to confrontation, but by no means the only aspect. The importance of enabling an accused to challenge all the evidence against him or her, irrespective of how it was obtained, is undoubtedly an important, if not the central, element of the guarantee and there is a danger that this broader aim could be undermined if too much emphasis is placed on the need to control government officers.

An interesting difference between the Supreme Court's approach and that of the Court has little to do with promoting adversarial procedure but is rather characterised by the reluctance of the former to rely on judicial discretion in ensuring that the principles are upheld. The judgment in

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[39] *Crawford v Washington*, loc. cit. at II A

Crawford[40] emphasises that the judiciary cannot, or perhaps should not, be trusted with ensuring the fairness of trials:

> 'The framers… knew that judges, like other governmental officers, could not always be trusted to safeguard the rights of people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands. By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.'

The scepticism demonstrated towards judicial discretion is in stark contrast to the approach of the Court in Strasbourg which has a tendency to cast the trial judge in the role of the 'ultimate guardian of the fairness of the proceedings'.[41] Despite adopting a relatively rigorous approach to the right of the accused to be assisted by a lawyer, it has nevertheless proven reluctant to release the trial judge from his or her obligations towards ensuring the fairness of the proceedings. The role of the judge is not limited to protecting the accused, but also includes an element of responsibility both for protecting the rights of others involved in the proceedings and for ensuring the accuracy of the verdict. While the Court has made it clear that its primary mandate is towards the accused in the criminal proceedings, it has also shown some understanding for the position of victims and vulnerable witnesses, and has endorsed alternative means of cross examination providing that the rights of the defence have also been respected.[42]

There is undoubtedly a fine line between determining whether the contested evidence is decisive for the conviction and determining whether there is enough evidence to meet the required standard of proof. This reflects too the more activist role which is attributed by the Court to the trial judge, a trait which has a greater affiliation to systems which employ the doctrine of free proof. Although the ECHR does not require the judge to adopt a fact-finding role, he or she is expected to do more than simply act as an arbiter between defence counsel and the prosecutor.[43] Just as it is difficult to dispel the impression that the Court's decision in determining whether or not there has been a violation of the right to confrontation depends on whether it believes that there is enough evidence to prove that the applicant committed

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[40] *Crawford v Washington*, loc. cit. at 1363.

[41] *Cuscani v United Kingdom*, no. 32771/96, 24 September 2002, § 39. In this case the Court held that there had been a violation of the applicant's right to an interpreter, even though counsel had told the judge that he was confident that they could 'make do and mend'. The trial judge ought to have intervened.

[42] Including televised cross examination and other methods. See *Doorson v Netherlands*, judgment of 26 March 1996, Reports 1996-II, 446.

[43] On the different roles and responsibilities of the judge in Europe, see Doran, S. and Jackson, J. (eds.), *The Judicial Role in Criminal Proceedings* (Oxford: Hart, 2000).

the alleged crime, the role of the judge in the domestic proceedings becomes connected to the determination of the sufficiency of the evidence. He or she, according to the Court, must determine how important the evidence is and the impact which it is likely to have on the fairness of the conviction. This position explains to some extent the sole and decisive test which essentially expresses the Court's reluctance to sanction the exclusion of reliable but untested evidence of minor – though presumably not wholly negligible – importance. This can be interpreted as introducing into the otherwise resolutely neutral surroundings of criminal procedure law precisely that overt balancing requirement which the Supreme Court is at pains to avoid. In view of the difficulties which the European Court of Human Rights has had in enforcing a consistent test for determining when an accused must be given the opportunity to challenge adverse witness testimony, these concerns are not without foundation. In this sense, *Crawford* can also be read as advocating clearer, more consistent legal guarantees in place of the less predictable judicial self regulation employed by the Court in Strasbourg.

Insofar as the distinction between testimonial and non-testimonial evidence represents an attempt to set out clear legal rules, it is to be applauded. The essence of this distinction however – based as it is on a dated and ultimately erroneous view of the law of criminal procedure in continental Europe – can only be characterised as arbitrary and thus unsatisfactory. Although great emphasis is placed in the judgment on the importance of oral and immediate procedure, this is undermined by the Supreme Court's fixation with the framers' intentions and an out of date conception of the confrontation law in Europe. While the Court in Strasbourg confines the right to confrontation by restricting its scope to 'decisive' witness evidence, the Supreme Court uses the distinction between testimonial and non-testimonial statements and a test of unavailability to limit the applicability of the right. The right of an accused to challenge all adverse witness evidence directly in front of the judge responsible for determining the charge is undoubtedly an important part of criminal procedure, but it seems that in spite of all the rhetoric neither the Supreme Court nor the European Court of Human Rights is able, or willing, to uphold this principle.