

**IN DEFENCE OF DEFENCE RIGHTS:
THE NEED FOR COMMON RULES OF
CRIMINAL PROCEDURE IN THE EUROPEAN UNION**

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The phenomenon of globalization and the expansion of EU mobility rights have been a catalyst for cross-border crime and a driving force for Member State cooperation in the field of criminal law. This paper argues broadly that EU mechanisms which facilitate Member State cooperation in criminal investigations and prosecutions have problematic consequences for EU citizens and the functioning of the EU as an independent legal order. A comprehensive approach to criminal justice that balances the need to cooperate in combating crime and the need to respect the defence rights of suspects is necessary. In particular, for EU defence rights to be practical and effective, EU law must buttress the right of access to legal counsel and legal aid.

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I. INTRODUCTION

Imagine you are a citizen of the European Union (the ‘EU’) who travels to France, a neighbouring Member State, to participate in a peaceful protest against global warming. While exercising your EU-wide rights to freedom of movement¹, expression² and assembly³ a riot breaks out. Despite your peaceful demeanour, the police arrest you, along with everyone else who appears to be a protester. Communicating with the police is a challenge because you do not speak French. You are unable to obtain information on

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¹ Charter of Fundamental Rights of the European Union [2010] OJ C83/389 (EU Charter), art 45.

² *ibid*, art 11.

³ *ibid*, art 12.

the charges against you or on how long you will be in police custody. The police ask you questions without providing you with an interpretation or an opportunity to contact a lawyer. What are your options? Can you expect to enjoy the same defence rights that apply upon arrest in your country of nationality or residence? Do you have a right to be informed of the reasons for your detention in a language you understand? Do you have a right to legal counsel before participating in police interrogations? Do you have a right to free legal assistance if you cannot afford a lawyer?

Laws recently implemented by the EU address only some of these questions. The phenomenon of globalization and the expansion of EU mobility rights have been a catalyst for cross-border crime and a driving force for Member State cooperation in the field of criminal law. In the past decade, legislative developments in the EU have established several mechanisms that facilitate Member State cooperation with a view to enhancing security through the prevention and combating of cross-border crime. Such mechanisms also aim to enhance accountability within the EU by preventing persons with criminal charges or convictions, in a particular Member State, to escape justice by fleeing to another Member State. Member States acknowledge that defence rights are foundational to the development of the EU as an area of freedom, security and justice; however, the legal framework for defence rights at the EU level remains inadequate.

This paper argues broadly that EU mechanisms currently available to facilitate Member State cooperation in criminal investigations and prosecutions have problematic consequences for EU citizens and the functioning of the EU as an independent legal order. A comprehensive approach to criminal justice that balances the need to cooperate in combating crime and the need to respect fundamental rights is necessary. In particular, for EU rights to be practical and effective, the EU must buttress the right of access to legal counsel and legal aid. Defence rights, in the context of this paper, refer to rights that are necessary for criminal processes to be fair and just. This includes the right to a fair trial, the right against self-incrimination, the right to be informed of the reasons of arrest or detention, the right to remain silent and the right of access to legal counsel. Criminal proceedings refer broadly to all stages of the criminal justice process, including early pre-trial investigations by police.

II. GLOBALIZATION AND MOBILITY: FUEL FOR CROSS-BORDER CRIME

Globalization is a phenomenon that is generally understood as the

‘growing interconnectedness of the nations of the world’.⁴ An example of globalization is the ever-increasing openness in trade and movement of people, goods, services, and communication since the end of the Cold War. By-products of this openness and mobility include opportunities for serious cross-border crime and the international mobility of criminals.⁵ The intensity of contemporary migrant flows makes it difficult for Member State authorities to identify irregular migrants and the perpetrators of serious organized criminality, such as human trafficking, at external EU border controls.⁶ Since the development of ‘wide-body jumbo jets’ and airline deregulation in the 1970s, the number of air passengers worldwide has risen at a rate of approximately 5% per year and airfares have significantly decreased.⁷ This increase in the capacity and accessibility of air travel, in conjunction with EU policies that break down internal barriers to the movement of people, has contributed to a rise in organized criminal activity, such as human trafficking.⁸ Traffickers transport victims from their country of origin directly to destination countries using low cost airlines.⁹ The abolition of checks at internal borders in the EU with the Schengen *acquis* reduces the chance of detecting such criminal activity.¹⁰

Member States recognize human trafficking is a serious issue.¹¹ EU citizens who fall victim to human trafficking suffer grave human rights abuses. Human trafficking also poses serious security threats to Member States and the EU through links to organized crime, drug trafficking, corruption and terrorism. Specifically, criminal groups use the proceeds of human trafficking to fund and recruit people to engage in other criminal activities,

⁴ United Nations Office on Drugs and Crime, ‘The Globalization of Crime: A Transnational Organized Crime Threat Assessment’ (United Nations 2010) 29, <http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf> accessed 21 December 2013.

⁵ EUROPOL, ‘EU Serious and Organized Crime Threat Assessment (SOCTA) 2013’ (European Police Office 2013) <<https://www.europol.europa.eu/sites/default/files/publications/socta2013.pdf>> accessed 21 December 2013.

⁶ UNODC, ‘The Globalization of Crime’ (n 4) 29.

⁷ *ibid* 30.

⁸ EUROPOL, ‘EU Serious and Organized Crime Threat Assessment’ (n 5) 16.

⁹ EUROPOL, ‘Knowledge Product: Trafficking in Human Beings in the European Union’ (European Police Office 2011) 7.

¹⁰ EUROPOL, ‘EU Serious and Organized Crime Threat Assessment’ (n 5) 16.

¹¹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1 (HT Directive).

such as terrorism.¹² The United Nations estimates that human trafficking generates ‘tens of billions of dollars in profits for criminals each year’.¹³

Like air travel, transport by sea has rapidly expanded in recent years in ways that facilitate serious organized criminality. According to the UNODC, between 1996 and 2007, the volume of goods transported worldwide increased from roughly ‘332 million tons to 828 million tons’.¹⁴ This sharp increase in trade facilitates the flow of illicit drugs and sub-standard counterfeit goods.¹⁵ ‘Violence, public health issues, a high number of deaths and feelings of insecurity are all linked to the trade in drugs’¹⁶ and counterfeit goods pose health and safety risks for consumers.¹⁷

Communications technology has also rapidly developed, creating novel opportunities for cross-border crime. Notably, the Internet provides a global marketplace for illicit activities while allowing unprecedented anonymity. This has revolutionized traditional crimes such as child pornography and sexual exploitation.¹⁸ Through the Internet, criminals are able to target victims remotely, anywhere in the world, and obscure offences by concealing their real identity and important personal characteristics, such as age.¹⁹

III. CROSS-BORDER CONSENSUS: TRANSNATIONAL CRIME NECESSITATES A TRANSNATIONAL RESPONSE

The phenomenon of globalization and the implementation of EU mobility rights have intensified security concerns and fuelled Member State

¹² EUROPOL, ‘EU Terrorism Situation and Trend Report’ (European Police Office 2013) 11, 18 and 29 <https://www.europol.europa.eu/sites/default/files/publications/europol_tesat2013_lr_o.pdf> accessed 21 December 2013.

¹³ ‘Human Trafficking FAQs’ (UNODC, 2013) <<http://www.unodc.org/unodc/en/human-trafficking/faqs.html>> accessed 21 December 2013.

¹⁴ UNODC, ‘The Globalization of Crime’ (n 4) 30.

¹⁵ EUROPOL, ‘EU Serious and Organized Crime Threat Assessment’ (n 5) 22.

¹⁶ *ibid* 19.

¹⁷ *ibid* 22.

¹⁸ UNODC, ‘The Globalization of Crime’ (n 4) 31.

¹⁹ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L 335/1 (Directive on sexual abuse and exploitation of children), preamble recitals 3 and 19. See also EUROPOL, ‘EU Serious and Organized Crime Threat Assessment’ (n 5) 7, 15 – 16.

cooperation in criminal law.²⁰ This is evident in a series of EU communications, action plans and legislative developments that articulate a commitment to strengthening the EU as an area of justice, freedom and security – that is, an area in which the free movement of persons is ‘assured in conjunction with appropriate measures relating to the prevention and combating of crime’.²¹ With a view to militating against the deleterious effects of mobility rights already in place to facilitate the development of the EU as an economic union, the Maastricht Treaty brought aspects of criminal law within the ambit of EU power.²² The Treaty of Amsterdam explicitly established the EU as an area of freedom, security and justice.²³

The Tampere Conclusions illuminate that a fundamental purpose of the Treaty of Amsterdam was to ensure that EU citizens could enjoy the right to move freely within the EU in conditions of security and justice:

The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgments and decisions should be respected and enforced throughout the [EU], while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved.²⁴

With a view to achieving the objective of developing the EU as an area of

²⁰ Valentina Bazzocchi, ‘The European Charter of Fundamental Rights and the Area of Freedom, Security and Justice’ in Giacomo Di Federico (eds), *The EU Charter of Fundamental Rights From Declaration to Binding Instrument* (Springer 2011) 191; See also Sandra Lavenex and William Wallace, ‘Justice and Home Affairs’, in Helen Wallace, William Wallace and Mark Pollack (eds), *Policy Making in the European Union* (OUP 2005) 460-461.

²¹ Consolidated Versions of the Treaty of the European Union [2002] OJ C325 (TEU), art 2; Council Presidency Conclusions Tampere European Council 15-16 October 1999 [1999] (Tampere Conclusions); Council The Hague Programme: Strengthening Freedom, Security and Justice in the European Union 13 December 2004 [2004] OJ C53/1 (Hague Programme); Council The Stockholm Programme — An open and secure Europe serving and protecting citizens, 4 May 2010 [2010] OJ C115/01 (Stockholm Programme).

²² Treaty of the European Union [1993] OJ C191 (Maastricht Treaty), art K.I.(7) and (9).

²³ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1 (Treaty of Amsterdam).

²⁴ Tampere Conclusions (n 21) para 5.

freedom, security and justice,²⁵ the Tampere Conclusions called on EU institutions and Member States to ‘reinforce the fight against serious organized and transnational crime’²⁶ and to step up co-operation between Member States when investigating,²⁷ prosecuting²⁸ and defining crime.²⁹

In response to the terrorist attacks in New York and Washington D.C. on 11th September 2001, and in Madrid on 11th March 2004, the Hague Programme reaffirmed the need to deepen police and judicial cooperation in order to address emerging security challenges, such as the threat of terrorism.³⁰ A few years later, in 2009, the Lisbon Treaty radically restructured the architecture of the EU in a way that brought criminal law under full EU control.³¹ Specifically, the Lisbon Treaty made criminal law an area of shared competence between Member States and the EU.³² As such, to the extent that the EU exercises its competence in a particular area of criminal law Member States will lose competence.³³ The Lisbon Treaty also repealed Article 34 of the TEU, which previously blocked the application of direct effect to Framework Decisions on police and judicial cooperation in criminal matters.³⁴ Moreover, the Lisbon Treaty explicitly gave the EU competence to establish common rules of criminal procedure through the implementation of directives.³⁵ Accordingly, under the contemporary legal framework, the EU has clear power to act in relation to criminal law and procedure. Any EU law that relates to criminal law or procedure and satisfies the conditions for direct effect will be immediately binding on Member States, without further formality, and be available for individuals to invoke in national courts.³⁶

IV. A PREDOMINATELY PROSECUTORIAL AGENDA

While a general intention to balance the need to safeguard security with the need to respect fundamental rights appears in all EU communications,

²⁵ *ibid* introduction.

²⁶ *ibid* paras 40 – 50.

²⁷ *ibid* paras 43 – 45, 49.

²⁸ *ibid* paras 46, 49.

²⁹ *ibid* para 48.

³⁰ Hague Programme (n 21).

³¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01 (Lisbon Treaty).

³² Treaty on the Functioning of the European Union (Consolidated version 2012) OJ C 326/01 (TFEU), art 4(2)(j).

³³ *ibid* art 2(2).

³⁴ Treaty of Amsterdam (n 23), art 34.

³⁵ TFEU (n 32), art 82(2).

³⁶ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR I.

action plans and legislative developments that relate to criminal law, the operation of the EU criminal justice mechanisms reveal a focus on security and a predominately prosecutorial agenda. The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (the 'EAW Framework Decision') provides the strongest example.³⁷ The EAW Framework Decision replaced the extradition system with the objective of increasing efficiency in conducting criminal prosecutions and executing custodial sentences and detention orders.³⁸ The EAW Framework Decision explicitly affirms the need to ensure respect for defence rights,³⁹ yet it removed protective barriers built into the former extradition system with a view to introducing 'speed and a considerable element of automaticity'.⁴⁰ A report by the Commission illuminates several shortcomings of the EAW system with respect to fundamental rights, including:

[N]o entitlement to legal representation in the issuing state during the surrender proceedings in the executing state; detention conditions in some Member States combined with sometimes lengthy pre-trial detention for surrendered persons and the non-uniform application of a proportionality check by issuing states, resulting in requests for surrender for relatively minor offences that,

³⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (EAW Framework Decision), Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decision 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909 JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decision rendered in the absence of the person concerned at the trial [2009] OJ L81/24.

³⁸ *ibid* EAW Framework Decision, art 1(1).

³⁹ *ibid* EAW Framework Decision, art 1(3).

⁴⁰ Debbie Sayers, 'The European Investigation Order: Travelling without a 'roadmap'' (2011) Centre for European Policy Studies, 3 <<http://www.ceps.be/book/european-investigation-order-travelling-without-roadmap>> accessed 17 December 2013; see also, EAW Framework Decision (n 37), Preamble paras (1) and (5). See Also Commission, 'Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' COM (2011) 175 final, 3: Prior to the introduction of the EAW system, the average surrender time of requested persons was on average one-year. Under the EAW system, between 2005 and 2009, the average surrender time of a requested person who consented to their surrender was 14 – 17 days and the average surrender time for those who did not consent was 48 days. Arguably, this efficiency suggests the EAW is an operational success. However, efficiency must not come at the expense of respect for the fundamental rights of EU citizens.

in the absence of a proportionality check in the executing state, must be executed.⁴¹

The Court of Justice of the European Union (the 'CJEU') has upheld the legality of the EAW Framework Decision and confirmed that Member States are obliged to act on an EAW,⁴² yet its transposition into the national law of Member States remains controversial with respect to fundamental rights.⁴³

In addition to the EAW, a series of legislative developments facilitate Member State cooperation with respect to storing and gathering of data, information, intelligence and evidence for criminal investigations.⁴⁴ To

⁴¹ *ibid* 6.

⁴² Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECR I-3633, paras 52-53.

⁴³ Craig and de Burca (n 36) 950.

⁴⁴ See Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45 (Framework Decision on Freezing of Property). To prevent the destruction, transformation, moving, transfer or disposal of evidence, this framework decision establishes rules to facilitate, and in certain cases mandate, Member State cooperation in the recognition and execution of freezing orders in its territory issued by a judicial authority of another Member State. See also, Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54 (Directive on data retention): As a reaction to the acts of terrorisms in Madrid in 2004 and London in 2005, this Directive mandates blanket retention of non-content traffic and location communications data for six months to two years - to ensure that the data is available for the purpose of the investigation, detention and prosecution of serious crime. See also, Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union [2006] OJ L386/89: This decision establishes rules to facilitate and in certain circumstances mandate the exchange of 'existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations'. Interestingly, a proportionality check is built into the article to ensure only information and intelligence deemed 'relevant and necessary' must be provided. Refer also to Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1: This decision (the Prüm Decision) requires Member States to establish national DNA analysis files and fingerprint identification systems for the purpose of criminal investigations. See also, Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the Purpose of Obtaining Objects, Documents and Data for Use in Proceedings in Criminal Matters [2008] OJ L350/72: This decision provides a tool for Member

further simplify, integrate and expand Member State cooperation in obtaining evidence for criminal cases with cross-border dimensions, the European Parliament and the Council have proposed the implementation of a European Investigation Order (the 'EIO').⁴⁵ The EIO would

replace all the existing instruments in this area, including the Framework Decision on the European evidence warrant, covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal⁴⁶

without adequate contemplation of ramifications for defence rights.

The EIO is clearly a prosecution mechanism that prioritizes the need for efficiency in criminal processes over the need to promote defence rights.⁴⁷ While the EIO may effectively address the need for Member State authorities to access relevant evidence in a timely way, it 'provides no competence for the defence to apply for evidence'.⁴⁸ Further police cooperation in criminal investigations can occur under the EIO without the knowledge of the suspect and largely in the absence of judicial oversight or control.⁴⁹ Furthermore, many specific protections necessary to ensure the fairness of criminal proceedings are missing, such as guarantees that witnesses and suspects receive access to legal advice and that interviews are tape-recorded.⁵⁰

The need for EU-wide 'minimum standards' of procedural law to enhance defence rights has been anticipated since the Tampere Conclusions in 1999,⁵¹ yet EU legislative developments fail to provide effective and practical defence rights. In 2000, the Commission recommended the adoption of 'conterminously protective measures' to balance cooperation in criminal processes, including 'mechanisms for safeguarding the rights of [...] suspects' and 'the definition of common minimum standards necessary

States to obtain objects, documents and data for use in certain criminal proceedings.

⁴⁵ Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal, [2010] OJ C165/22.

⁴⁶ *ibid* preamble and para 6.

⁴⁷ *ibid* preamble and paras 11-13.

⁴⁸ Sayers (n 40) 8.

⁴⁹ *ibid*.

⁵⁰ *ibid* 16.

⁵¹ Tampere Conclusions (n 21) para 37.

to facilitate the application of the principle of mutual recognition'.⁵² Despite such recommendations, the legislative agenda thus far has developed largely without the establishment of minimum standards or protective measures. While the recent implementation of directives that affirm the right to interpretation and translation and the right to information in criminal proceedings represent crucial first steps, more comprehensive measures are necessary. In particular, common minimum standards with respect to the right to legal advice and legal aid are essential to the development of the EU as an area of freedom, justice and security.

V. MUTUAL RECOGNITION: THE CORNERSTONE OF COOPERATION

As a result of difficulty in reaching political consensus on common rules of criminal law, the principle of mutual recognition is the cornerstone of police and judicial cooperation between Member States. Mutual recognition provides a procedural tool for Member State cooperation without requiring Member States to harmonize their substantive law.⁵³ For example, the EAW system requires Member States to recognize and execute arrest warrants issued by other Member States without establishing common definitions for criminal offences.⁵⁴ The EAW operates according to definitions set out in the law of the issuing Member State.⁵⁵ Similarly, the Directive on data retention establishes EU-wide obligations to retain certain traffic and location communications data for the purpose of the investigation, detention and prosecution of serious crime, as defined by Member States in national law.⁵⁶ Member States also retain the power to define the procedures and conditions for gaining access to retained data.⁵⁷ More recent directives reflect an effort to establish common definitions and penalties for certain serious crimes – human trafficking and sexual abuse of children – which are particularly sensational, pose security threats and cause egregious harm and necessitate unique protections for victims.⁵⁸

Despite a trend towards deeper cooperation in the area of criminal law, Member States remain hesitant to harmonize rules of criminal procedure

⁵² European Commission Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters [2001] OJ C12/10, 10, parameters 3 and 4.

⁵³ Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Law Matters in the European Union' (2006) 43 CML Rev 1277, 1279.

⁵⁴ *ibid* 1283.

⁵⁵ EAW Framework decision, arts 2(1) and (2).

⁵⁶ Directive on data retention, art 1.

⁵⁷ *ibid*, art 4.

⁵⁸ HT Directive; Directive on Sexual Abuse and Exploitation of Children.

as a result of a fear that harmonization will bulldoze important differences between the adversarial and inquisitorial criminal justice traditions.⁵⁹ Under the adversarial model, criminal proceedings are ‘built around a contest between parties’ during which defence lawyers play an active role in ensuring protection for suspects’ rights.⁶⁰ Conversely, in the inquisitorial model, criminal proceedings are built around an active investigation by State authorities whereby a particular judicial authority supervises the treatment of suspects and defence lawyers play a subordinate role.⁶¹ Member States with inquisitorial traditions view recommendations to implement common rules of criminal procedure as an imposition of the adversarial tradition across Europe.⁶² This view stems from a controversial assumption that adversarial and inquisitorial traditions represent irreconcilable approaches to criminal justice.

An alternative view posits that legal traditions are evolving and overlapping entities that continually rub against each other and borrow values, beliefs and practices:⁶³

Rather than classifying contemporary jurisdictions in Continental Europe as being inquisitorial in attitudes and practices, it would be more accurate to say that they have been primarily ‘shaped by’ the ‘inquisitorial tradition’ [...] Contemporary practice is ‘mixed’ or ‘moderately inquisitorial’.⁶⁴

According to this view, legal traditions are best understood as sites of ‘ideological conflict’ that are ‘invented and reinvented through debate and dialogue.’⁶⁵ The fluidity of information across jurisdictional borders in Europe makes limiting and controlling debate between and within legal traditions impossible. Arguably, the ‘adversarial’ and ‘inquisitorial’ binary is ‘vague’ and ‘inconsequent’ because jurisdictions combine features of both traditions.⁶⁶

⁵⁹ Steward Field, ‘Fair Trials and Procedural Tradition in Europe’ [2009] 29:2 OJLS 365, 368.

⁶⁰ *ibid.*

⁶¹ *ibid.* 368.

⁶² Jacqueline Hodgson, ‘EU Criminal Justice: The Challenge of Due Process Rights within a Framework of Mutual Recognition’ (2012) 37 NCJ Intl L & COM Reg 307, 309.

⁶³ Patrick Glenn, ‘Comparative Legal Families and Comparative Legal Traditions’ in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2008).

⁶⁴ Field (n 59) 371.

⁶⁵ *ibid.* 370.

⁶⁶ Sarah Summers, *Fair trials: the European Criminal Procedural Tradition and the European Court of Human Rights* (Hart Publishing 2007), 5.

Whether defence rights are unique to adversarial systems or a component of a system of universal rights that transcends all models of criminal justice remains a contentious issue.⁶⁷ A series of cases illustrate that the European Court of Human Rights (the 'ECtHR') has adopted a view that a common set of defence rights emerge out of the constitutional traditions of the Council of Europe Member States.⁶⁸ Although Member States generally agree procedural fairness concepts, such as equality of arms and judicial impartiality, apply during the trial stage of criminal proceedings,⁶⁹ Member States dispute the importance and scope of the right to legal counsel in the early pre-trial investigation stages of criminal proceedings.⁷⁰ At the heart of this dispute is divergence in understandings of the role of the defence lawyer, prosecutor, and judge. In Member States with broadly adversarial systems, such as the United Kingdom, Ireland, Cyprus and Malta, the prosecution and defence lawyers are responsible for conducting investigations and presenting evidence to argue their case. Police interrogations may be tape-recorded and defence lawyers may be present, however, police officers are not typically subject to external supervision.⁷¹ In the absence of external supervision, the right to legal counsel provides a counter balance to the power inherently held by the State, which puts the defence at a disadvantage *vis-à-vis* the prosecution. Conversely, in Member States with broadly inquisitorial systems, such as France, Belgium, Greece, Germany and the Netherlands, defence lawyers play a subordinate and passive role during investigations as judges play an active role.⁷² Judicial authorities have overall responsibility for the investigation of both incriminating and exculpatory evidence. Arguably, this authority provides external supervision of police and protects the fundamental rights of suspects; therefore, the right to legal counsel is not essential to ensure a fair trial.⁷³ Judicial authority provides an alternative means to ensure that police did not use coercive tactics to obtain confessions.⁷⁴

VI. DEFENCE RIGHTS: ESSENTIAL TO THE EU LEGAL ORDER

Contemporary EU laws that facilitate Member State cooperation in the investigation and prosecution of cross border crimes rest on a problematic

⁶⁷ Hodgson (n 62) 311.

⁶⁸ Field (n 59) 368. See also description of cases below.

⁶⁹ *ibid*, 372 – 373.

⁷⁰ Jacqueline Hodgson, 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective' (2011) 14 *New Crim L Rev* 611, 638.

⁷¹ *ibid* 636.

⁷² *ibid* 637.

⁷³ *ibid* 637.

⁷⁴ *ibid* 638.

assumption that all Member States act in compliance with the defence rights set out in the Charter and the ECHR. Throughout this section, it is important to keep in mind that the CJEU hears complaints of violations of EU law and its decisions bind Member States of the EU. The ECtHR hears petitions that allege violations of the ECHR and its decisions apply to the Member States of the Council of Europe but are not directly binding under EU law. The ECHR is not a legal instrument formally incorporated into EU law.⁷⁵ The CJEU recently affirmed that EU law ‘does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine conclusions to be drawn by a national court’ where the ECHR is in conflict with a rule of national law.⁷⁶ Nonetheless, the ECHR influences EU law⁷⁷ and CJEU competence to apply the ECHR, directly as EU law, is on the horizon.⁷⁸

The Charter explicitly sets out defence rights, which are binding on Member States when they are implementing EU law. Article 47 provides a ‘right to an effective remedy and to a fair trial’.⁷⁹ A fair trial requires a public hearing within a reasonable time by an independent and impartial tribunal previously established by law with the ‘possibility of being advised, defended and represented’.⁸⁰ Article 47 goes on to specify ‘legal aid shall be made available to those who lack sufficient resources’ where such aid is ‘necessary to ensure effective access to justice’.⁸¹ Article 48 guarantees respect for ‘the rights of the defence’ of all persons charged with a criminal offence.⁸² Article 51 limits the scope of application of the Charter to Member States ‘when they are implementing EU law’.⁸³

The implications of this limitation and the situations in which the Charter applies to ‘Member States’ (in)actions’ in the context of defence rights is unclear. Citing a series of CJEU case law, the Explanations on Article 51 of the Charter set out an expansive definition of the ‘requirement to respect fundamental rights’ as being ‘binding on Member States when they act in

⁷⁵ Case C-617/10, *Aklagaren v Hans Akerberg Fransson*, [2013] (not yet reported) (*Akerberg*) para 44.

⁷⁶ *ibid.* See also Case C-571/10, *Servet Kamberaj v Istituto per L’Edilizia Sociale della Provincia Autonoma di Bolzano, Giunta della Provincia Autonoma di Boizano, Provincia Autonoma di Bolzano* [2012] ECR I-0000, para 62.

⁷⁷ TEU, art 6: The ECHR is a source of inspiration for the general principles of EU law; see EU Charter, art 52(3): ‘The CJEU must give provisions of the Charter modeled on provisions of the ECHR similar meaning’.

⁷⁸ TEU art 6(2): ‘The Lisbon Treaty mandates EU accession to the ECHR’.

⁷⁹ EU Charter, art 47.

⁸⁰ *ibid* art 47.

⁸¹ *ibid* art 47.

⁸² *ibid* art 48.

⁸³ *ibid* art 51(1).

the scope of Union law'.⁸⁴ The CJEU recently gave teeth to this expansive definition in the case of *Akerberg*.⁸⁵ However, *Akerberg* concerns the prohibition of double jeopardy – that is, punishing persons who have already been punished for the same act through different proceedings⁸⁶ – in the context of tax offences.⁸⁷ The extent to which the conclusions and the approach of the CJEU in *Akerberg* are generalizable and applicable in the context of defence rights set out under Article 47 and 48 of the Charter is not crystal-clear. A narrow reading of *Akerberg*, which limits its application to its specific facts, is possible.⁸⁸ On such a reading, the CJEU has 'plenty of room' to adopt a more restrictive approach when it irons out the meaning of 'implementing EU law' in future cases.⁸⁹ Consequently, the implementation of directives under Article 82(2) of the TFEU that explicitly require Member States to implement defence rights under EU law is necessary to ensure the effective and practical enforcement of Article 47 and 48 of the Charter.⁹⁰

Moreover, the extent to which the CJEU has jurisdiction to rule on and enforce minimum standards of criminal procedure remains unclear.⁹¹ Article 276 of the TFEU carves out an explicit limitation on CJEU jurisdiction with respect to oversight of police operations:

In exercising its powers regarding the provisions of Chapters 4 [Judicial cooperation in criminal matters] and 5 [Police cooperation] of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities

⁸⁴ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/32 (Explanations) Article 51.

⁸⁵ *Akerberg* (n 75) para 19-22. See also John Morihn, 'Akerberg and Melloni: what the ECJ said, did and may have left open' (*Eutopia Law*, 14 March 2013) <<http://eutopialaw.com/2013/03/14/akerberg-and-melloni-what-the-ecj-said-did-and-may-have-left/>> accessed 17 December 2013.

⁸⁶ The prohibition of double jeopardy falls under EU Charter, art 4.

⁸⁷ *Akerberg* (n 75) para 14.

⁸⁸ Morihn (n 85).

⁸⁹ *ibid.*

⁹⁰ European Commission, 'Commission Staff Document Impact Assessment Accompanying the Proposal for a Directive on the European Parliament and of the Council on the Right of Access to a Lawyer and of Notification of Custody to a Third Person in Criminal Proceedings' [2011] SEC(2011) 687, 18 (Impact Assessment).

⁹¹ Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, 'Effective Criminal Defence in Europe' (Intersentia 2010) 12.

incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.⁹²

The implementation of EU rules of criminal procedure under the rubric of Article 82(2) of the TFEU may indirectly or progressively permit the CJEU to play a role in safeguarding defence rights across Europe.⁹³

The ECtHR has jurisdiction to review the validity or proportionality of acts by police and other law-enforcement services when considering allegations that relate to defence rights, however, the enforcement mechanisms of the ECtHR are notoriously weak. The number of ECtHR orders not fully respected by Member States after more than five years grew by approximately 28% between 2010 and 2011.⁹⁴ The number of repetitive cases⁹⁵ and repeat violations⁹⁶ is also alarming and indicative of the systemic weakness of ECHR enforcement.

The enforcement mechanisms of the CJEU are stronger than those of the ECtHR. The Commission has authority to bring claims against Member States before the CJEU for failure to fulfill obligations under EU law, including any directives on defence rights. A finding that the laws of a particular Member State are in breach of EU law will require that Member State to bring its laws into compliance and the CJEU may impose financial penalties for failure to do so.⁹⁷ No similar mechanism exists to ensure compliance with the decisions of the ECtHR.

Moreover, the ECtHR is currently facing major challenges in managing its caseload. Long delays in delivering judgments - a result of the inability of the ECtHR to manage its 'ever-increasing wave of applications' - negatively affects the legitimacy of the Court.⁹⁸ The number of cases pending before the ECtHR in 2011 was 10,689, which represents an

⁹² TFEU, art 276.

⁹³ Hodgson (n 70) 614.

⁹⁴ Council of Europe, 'Execution of Strasbourg Court Judgments: Considerable Progress but Concern about Major Structural Problems' Press Release DC042 (2012).

⁹⁵ Council of Europe, 'Supervision of the Execution of Judgment and Decision of the European Court of Human Rights' Annual Report 2011 (2012), 34 (Council of Europe Annual Report 2011).

⁹⁶ Ed Cape (n 91) 12.

⁹⁷ TFEU, art 260. See also Sonja Boelaert, 'European Union Courts' in Chiara Giorgetti (ed), *The rules, practice, and jurisprudence of international courts and tribunals* (Martinus Nijhoff 2012) at 424-425.

⁹⁸ Kanstantsin Dzehtsiarou and Alan Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' (2011) 12:10 German LJ 1708, 1709.

increase of roughly 8% compared to 2010.⁹⁹ While the CJEU has a special procedure to hear complaints on an urgent basis where the applicant is in custody, the ECtHR has no similar procedure.¹⁰⁰

An Impact Assessment by the European Commission explicitly raises the concern that the ECHR fails to guarantee adequate protection of defence rights:

Abstractly, one could assume that the existence of an ECtHR body of case-law which interprets the ECHR provisions may lead to progressive acceptance of those common standards by all Member States. However, reliance on decisions of the ECtHR (even when they constitute settled case-law, which may take years) at best promotes piecemeal and *ad hoc* pressure to reform national practice rather than a comprehensive and consistent development of EU-wide procedures to ensure compliance with fair trial rights.¹⁰¹

Defence rights are set out in Article 5 and 6 of the ECHR.¹⁰² Article 5 guarantees the right to liberty and security of person and prohibits unlawful detention and arrest.¹⁰³ Article 6 of the ECHR provides minimum rights for anyone charged with a criminal offence, which includes: the right to be informed promptly, in a language he or she understands and in detail, of the nature and cause of the accusation against him or her; to have adequate time and facilities to prepare his or her defence; to defend oneself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.¹⁰⁴

ECtHR jurisprudence significantly expands the rights guaranteed under Article 6 of the ECHR. For example, in 2008 the Grand Chamber of the ECtHR issued a ground breaking decision in the case of *Salduz v. Turkey*, which set a strong precedent that establishes the right to legal representation applies during pre-trial investigations.¹⁰⁵ The Court recognized the vulnerability of suspects to 'abusive coercion' during the investigation stage of criminal proceedings.¹⁰⁶ The Court went on to find

⁹⁹ Council of Europe Annual Report 2011 (n 95) 34.

¹⁰⁰ *ibid* 12.

¹⁰¹ Impact assessment (n 90) 19.

¹⁰² European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Eur TS 5 (ECHR) arts 5 – 6.

¹⁰³ *ibid*, art 5.

¹⁰⁴ *ibid*, art 6.

¹⁰⁵ *Salduz v Turkey* App no 3691/02 (ECtHR, 27 November 2008)

¹⁰⁶ *ibid* para 53.

that this vulnerability threatens the fundamental right of suspects to a fair trial and ‘can only be properly compensated for by the assistance of a lawyer’.¹⁰⁷ When a European State fails to provide access to a lawyer at this early stage, the defence rights of the accused of suspect are ‘irretrievably prejudiced’¹⁰⁸ and the State may be found in violation of the ECHR, unless ‘compelling reasons’ justify the restriction on access to a lawyer.¹⁰⁹

The case law of the ECtHR highlights significant variance in the extent to which Member States comply with defence rights and diversity in the ways that Member States achieve compliance.¹¹⁰ In determining violations of Article 6 of the ECHR, the ECtHR accepts a ‘margin of appreciation’ - space to manoeuvre in structuring their justice systems - in order to respect the divergent legal traditions of Member States.¹¹¹ On several occasions, the ECtHR has observed that the positive obligations in Article 6 of the ECHR give Member States wide discretion with respect to the choice of the means to ensure respect for defence rights.¹¹² For example, in the context of the right to legal aid, the case of *Quaranta v. Switzerland* explicitly reiterates that Member States ‘enjoy considerable freedom in the choice of the means of ensuring that their legal system satisfies the requirements of Article 6.’¹¹³ The task of the ECtHR is ‘to determine whether the method chosen by them in this connection leads to results which, in the cases which come before it, are consistent with the requirements of the ECHR’.¹¹⁴

This variance in compliance with defence rights among Member States highlights the need to establish uniform minimum standards of criminal procedure to ensure practical and effective protection for the defence rights of EU citizens.¹¹⁵ The operation of the EAW directly exposes EU citizens to unfamiliar criminal processes:

¹⁰⁷ *ibid* para 54.

¹⁰⁸ *ibid*.

¹⁰⁹ *ibid* para 55.

¹¹⁰ For several examples see Dovydas Vitkauskas and Sian Lewis-Anthony, ‘Right to a Fair Trial under the European Convention on Human Rights (Article 6)’ (*Interights*, 2009) <<http://www.interights.org/document/106/index.html>> accessed 17 December 2013.

¹¹¹ Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (CUP, 2006) 251.

¹¹² ‘The Margin of Appreciation’ (*The Lisbon Network, Council of Europe*) <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp> accessed on 17 December 2013.

¹¹³ *Quaranta v. Switzerland* (1990) Series A No 205, paras 30 and 34 -35.

¹¹⁴ *ibid*.

¹¹⁵ Hodgson (n 70) 635.

By recognizing and executing a decision by another Member State, the guarantees of the criminal law of the executing Member State are challenged, as the limits of the criminal law become uncertain. This may lead to the worsening of the position of the individual... compromising well-established constitutional protection in the executing of State and thus challenge the relationship between the individual and the States created on the basis of citizenship and territoriality.¹¹⁶

Moreover, amalgamating diverse criminal proceedings, using a 'mix-and-match' approach disrupts procedural integrity and makes determinations of whether, overall, a particular person has experienced a violation of his or her defence rights complex and difficult to ascertain.¹¹⁷ In cases involving cross-border crime, information and evidence may be drawn from multiple Member States where procedural rules differ. In certain circumstances, the application of mutual recognition in criminal law effectively turns the original rationale of mutual recognition, born in the Single Market context, 'upside down' by making individuals the object rather than the subject of mobility rights.¹¹⁸ A fundamental purpose of mutual recognition in the context of the single market is to facilitate rights to free trade and movement, which promotes the health of the economy and access to employment, goods and services. A core purpose of mutual recognition in the criminal field is to limit freedom and restrict mobility in order to enhance accountability for cross-border crime. Essentially, 'the basic point of difference' between the single market and criminal law is that the single market 'is interested in the distribution of well-being' whereas 'the business of criminal law is meting out suffering.'¹¹⁹

In addition to the having deleterious effects for particular persons, egregious violations of defence rights or simply variance in their scope and application erodes mutual trust between Member States and undercuts the functioning of the EU. Mutual trust among Member States is necessary for mutual recognition to function smoothly, particularly in the area of criminal law. The reality that diversity among systems undermines trust is demonstrated in the series of cases where the legality of the EAW was at issue.¹²⁰ Courts in Poland, Cyprus, Germany and Italy grappled with

¹¹⁶ Mitsilegas (n 53) 1288.

¹¹⁷ Hodgson (n 70) 619.

¹¹⁸ Steve Peers, 'Mutual Recognition and Criminal Law: Has the Council Got It Wrong?' (2004) 41:5 CML Rev 5, 24.

¹¹⁹ Nico Keijzer, 'The Fate of the Dual Incrimination Requirement', in Elspeth Guild and Luisa Marin (eds), *Still not Resolved? Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers 2009) 72.

¹²⁰ Refer to the judgment of the Polish Constitutional Tribunal, P 01/05, 27 April

determining whether the European Framework Decision on the EAW conflicted with constitutionally entrenched procedural protections that apply in the context of extradition.¹²¹ In Germany, the majority of the Federal Constitutional Court found that the German legislature was to blame for not making adequate use of the margin of appreciation to transpose the EAW in a way that reconciles with the German Constitution.¹²² Courts in Cyprus and Poland ordered amendments to their respective constitutions to accommodate the EAW.

The CJEU has upheld the legality of the EAW and confirmed that Member States are 'in principle obliged to act on an EAW', yet the application of mutual recognition in the field of criminal law without uniform and adequate defence rights remains a contentious issue.¹²³ In *Advocaten voor de Werld VAW*, a reference for a preliminary ruling by the Arbitragehof in Belgium, the claimant alleged that Article 2(2) of the Framework Decision on the EAW was contrary to the principle of legality because it listed vague categories of 'undesirable conduct', rather than the particular legal definitions of offences, for which Member States could execute an EAW, irrespective of whether the particular offence for which the EAW was issued existed in their domestic law.¹²⁴ The CJEU found that Article 2(2) of the Framework Decision did not conflict with the principle of legality because it 'does not seek to harmonize the criminal offences' or their penalties. The offences 'continue to be matters determined by the law of the issuing Member State' which must 'respect fundamental rights and fundamental legal principles' enshrined in EU law.¹²⁵ This conclusion did not fully tackle the root of the claimant's argument or acknowledge the issue of variance in the extent to which and the ways in which Member States exercise respect for defence rights.

2005; Berg, 18 July 2005 2 BvR 2236/04; Bundesgesetzblatt Jahrgang 2006 Teil I n. 36, 25 Juli 2006; *Att-Gen of the Republic of Cyprus v Konstantinou* [2007] 3 CMLR 42; Decision of the Czech Constitutional Court, 3 May 2006, No. Pl. US 66/04.

¹²¹ Oreste Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems' (2008) 9:10 German L J 1313, 1314; See also Andrew Sanger, 'Force of Circumstance: The European Arrest Warrant and Human Rights' (2010) 6 Democracy and Security 42.

¹²² *Judgment of the Second Senate of 18 July 2005*, 2 BvR 2236/04, 'European Arrest Warrant Act case', online (in English) at: <http://www.bverfg.de/en/decisions/rs20050718_2bvr223604en.html> accessed 17 December 2013.

¹²³ Craig and de Burca (n 36) 950.

¹²⁴ Case C-303/05 *Advocaten voor de Werld VZW v LEden van de Ministerraad* [2007] ECR I-3633, paras 52-53.

¹²⁵ *ibid.*

More recently, in the case of *Stefano Melloni v. Ministerio Fiscal*, a preliminary ruling from the Tribunal Constitucional (Spain), the CJEU found that a controversial provision of the EAW Framework Decision relating to the grounds for the non-execution of an EAW is compatible with the defence rights set out in the Charter. The request concerned the execution of an EAW issued against Mr. Melloni by Italian authorities for the purpose of executing a custodial sentence rendered by judgment *in absentia* – where he did not appear for trial.¹²⁶ The Spanish court sought guidance on the interpretation and validity of Article 4a(1) of the EAW Framework Decision, which sets out situations where a Member State may refuse to execute an EAW in context of decisions rendered *in absentia*.¹²⁷ Citing its case law as well as the case law of the ECtHR, the CJEU found that the provision is compatible with the defence rights guaranteed by the Charter.¹²⁸ Specifically, while the ‘right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute’ – an ‘accused may waive that right of his own free will’ under certain conditions.¹²⁹ If an accused is ‘informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so’, his or her absence at trial does not constitute a violation of the right to a fair trial.¹³⁰ Against this backdrop, the CJEU found the EAW Framework Decision sufficiently lays down the situations in which persons named on an EAW can be deemed to have waived the ‘right to be present at trial’ and respects contemporary human rights standards.¹³¹

Defence rights are on the EU agenda and increasing in strength across Europe. With a view to fostering cooperation among Member States in efforts to curb serious cross border crimes, a roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings was implemented.¹³² This roadmap provides a step-by-step approach for ensuring respect for ECHR standards and their uniform application across Member States. The first step, Measure A, calls for the adoption of a directive on translation and interpretation in criminal proceedings whereby suspects or defendants who do not speak the language used in criminal proceedings or have hearing or speech

¹²⁶ Case C-399/11, *Stefano Melloni v Ministerio Fiscal* [2013] (not yet reported), paras 1 – 2.

¹²⁷ EAW Framework Decision, art 4a(1).

¹²⁸ *Melloni* (n 126) paras 47 – 54.

¹²⁹ *ibid* para 49.

¹³⁰ *ibid*.

¹³¹ *ibid*, para 52.

¹³² European Council, ‘Resolution of the Council of 30 November 2009 on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings’ [2009] OJ C295/1 (Roadmap).

impairments can understand what is happening and make himself or herself understood.¹³³ The second step, Measure B, focuses on the right accused to information on defence rights (the letter of rights) and information about the nature and cause of an accusation against him or her.¹³⁴ The third step, Measure C, calls for an act to ensure the effective implementation of the right to legal advice and the right to legal aid 'to ensure full equality of access to the aforementioned right to legal advice'.¹³⁵ Measure D calls for mechanisms to ensure access to communication with relatives, employers and consular authorities, and special safeguards for vulnerable persons. The roadmap was ultimately incorporated into the Stockholm Program (2010 – 2014) and adopted by the European Council on 10/11 December 2009, as a five-year framework work plan for EU action from 2010 – 2014.¹³⁶

Directives on Measures A and B of the roadmap have been adopted. Exercising competence under Article 82(2) of the TFEU, the EU Parliament and Council adopted Measure A of the roadmap by implementing the Directive on the rights to interpretation and translation in criminal proceedings in September 2010.¹³⁷ Measure B has also been adopted through the implementation of the Directive on the right to information in criminal proceedings in March 2012.¹³⁸ This EU law ensures that all persons subject to criminal proceedings in any Member State receive a 'Letter of Rights' which lists the basic defence rights available during criminal proceedings in a language that the person understands.¹³⁹ The Letter of Rights contains practical details on rights such as the right to remain silent, to a lawyer, to be informed of the charge, to interpretation and translation in any language for those who do not understand the language of the proceedings, to be brought promptly before a court following arrest, and to inform someone else about the arrest or detention. This will help 'safeguard against miscarriages of justice,' facilitate the mutual recognition of judicial decisions and improve

¹³³ *ibid* 3.

¹³⁴ *ibid* 3.

¹³⁵ *ibid* 3.

¹³⁶ European Council, 'Notices from European Union Institutions, Bodies Offices and Agencies The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C115/1, 10. See also Ed Cape et al (n 91) 11.

¹³⁷ Directive 2010/64/EU of 20 October 2010 of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings [2010] OJ, L 280/1.

¹³⁸ Directive 2012/13/EU of 22 May 2012 of the European Parliament and of the Council on the Right to Information in Criminal Proceedings [2012] OJ L142/1.

¹³⁹ Commission, 'EU-Wide Right to Information at Arrest is Now Law' (Press Release) IP/12/575, 7 June 2012 <http://europa.eu/rapid/press-release_IP-12-575_en.htm> accessed 17 December 2013.

police and judicial cooperation in the area of criminal law.¹⁴⁰

Another millstone for defence rights in the EU is within reach. The Commission put forward a Draft Directive to pave the way for the adoption of the right to legal counsel (Measure C – Part 1 - without legal aid) and the right to communicate upon arrest (Measure D). The Council of the EU adopted a problematic approach to the Draft Directive and amendments that diluted the right to legal counsel as well as the remedies available for persons who establish a violation.¹⁴¹ Subsequently, the Civil Liberties, Justice and Home Affairs Committee (LIBE) of the European Parliament adopted an approach that called for stronger protection of defence rights. After nine trilogue meetings - institutionalized informal meetings containing representatives of the Council, European Parliament, and Commission to facilitate inter-institutional compromise – an agreement was reached in the form of a compromise text for the Draft Directive. The full House of the European Parliament has accepted the compromise text¹⁴² and the Permanent Representatives Committee of the Council (Coreper) has endorsed it.¹⁴³ To enter into force as EU law, the Council must formally approve the compromise text.

The Draft Directive is a breakthrough in achieving effective and practical EU-wide defence right. In many ways, the Draft Directive concretises standards set by the ECtHR. Notably, the compromise text explicitly addresses a common situation where authorities in Member States interrogate persons as ‘witnesses’, not as formal ‘suspects’, in order to avoid the application of the right of access to a lawyer.¹⁴⁴ This affirms the

¹⁴⁰ *ibid.*

¹⁴¹ European Council, ‘Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest’ Revised text [2012] ST 10908/12 (Council Draft Directive).

¹⁴² Commission, ‘Another Landmark of the Procedural Rights Agenda Has Been Met: European Parliament Adopts Commission Proposal on Access to a Lawyer’ Memo/13/772, 9 September 2013 <http://europa.eu/rapid/press-release_MEMO-13-772_en.htm> accessed 17 December 2013.

¹⁴³ European Council, ‘Coreper Confirms Agreement on the Directive on the Right of Access to a Lawyer’ (Press Release) 236 10495/13, 4 June 2013 <<http://register.consilium.europa.eu/pdf/en/13/st10/st10495.en13.pdf>> accessed 17 December 2013.

¹⁴⁴ Position of the European Parliament adopted at first reading on 10 September 2013 with a view to the adoption of Directive 2013/.../EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (EP-PE TCI-

decision of the ECtHR in the case of *Brusco v. France*, which establishes that all persons whether *de facto* suspects or accused persons are entitled to the procedural rights guaranteed under Article 6 of the ECHR.¹⁴⁵ In the initial approach and amendments to the Draft Directive by the Council, this explicit extension of procedural protections to *de facto* suspects was absent. Similarly, unlike in the initial approach of the Council, the compromise text mandates that persons subject to an EAW have a right of access to a lawyer in both the issuing Member State and the executing Member. This right to ‘dual representation’ is necessary for the proper functioning of the EAW as an institution.¹⁴⁶

With respect to remedies, the compromise text of the Draft Directive affirms the decision of the ECtHR in the case of *Salduz v. Turkey*, which establishes that statements or evidence made by a suspect ‘obtained in breach of his right to a lawyer’ cannot form the basis of a conviction at trial.¹⁴⁷ In *Salduz* that ECtHR also found that the absence of a lawyer for persons in police custody irretrievably affects defence rights¹⁴⁸ – ‘neither assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings’ cures such a defect.¹⁴⁹ The compromise text reflects this view that suspects or accused persons must receive early access to a lawyer, without delay, before police investigations or a deprivation of liberty.¹⁵⁰ A problematic aspect of the initial amendments of the Council was the creation of a concept of an ‘official interview’ to narrow the range of situations where a person may qualify for the right of access to a lawyer.¹⁵¹ This concept effectively enables authorities in Member States to question a suspect or accused persons in the absence of a lawyer simply by calling the interrogation an unofficial interview. In the absence of a broad and clear definition of ‘official interview’, such a concept is inconsistent

COD(2011)0154) (Compromise text); Art 2(3) and Preamble recital 21. See also European Criminal Bar Association, Amnesty International, Open Society Justice Initiative, Fair Trials International, Irish Council for Civil Liberties, Justice, ‘Joint briefing on the Directive on the Right of Access to a Lawyer in Criminal Proceedings and the Right to Inform a Third Party upon Deprivation of Liberty’ (*European Criminal Bar Association*, 2013) 4 <http://www.ecba.org/extdocserv/20130415_jointNGObriefindMeasureC.pdf> accessed 17 December 2013: ‘[...] calling a suspect by another name, such as ‘witness’ or ‘person of interest’ is a common tactic used by police in many Member States to avoid providing suspects with their due fair trial rights.’

¹⁴⁵ *Brusco v France* App no 1466/07 (EctHR, 14 October 2010)

¹⁴⁶ ECBA 2013 (n 144) 6.

¹⁴⁷ *Salduz v Turkey* (n 105) para 55.

¹⁴⁸ *ibid*, para 62.

¹⁴⁹ *ibid*, para 58

¹⁵⁰ Compromise text (n 144) art 3(2).

¹⁵¹ Council Draft Directive (n 141) recitals 31 to 34 and art 9.

with *Salduz*.¹⁵² Considering the initial purpose of the Draft Directive was to expand the right of access to a lawyer in the pre-trial phase of criminal proceedings, derogations from the standards set by the case law of the ECtHR would be alarming.

The compromise text also defines the role of defence lawyers in a way that brings EU law up to par with standards set by the ECtHR. In the case of *Dayanan v. Turkey*, the ECtHR establishes that a defence lawyer must be present and able to participate fully during pre-trial interrogations: ‘the accused be able to obtain the whole range of services specifically associated with legal assistance’, including a ‘discussion of the case, organization of the defence, collection of evidence and preparation for questioning’.¹⁵³ The compromise text buttresses this requirement by explicitly stipulating that the right of access to a lawyer must entail a right for suspects or accused persons ‘to meet in private and to communicate with the lawyer representing them’¹⁵⁴ and ‘a right for their lawyer to be present and participate effectively when questioned’.¹⁵⁵

Civil society organizations view aspects of the compromise text as ‘a real success’, yet highlight shortcomings and gaps that persist in the legal framework for defence rights at the EU level.¹⁵⁶ The most significant concern is the gap with respect to the right to legal aid. The compromise text of the Draft Directive largely ignores the reality that the implementation of a right to access a lawyer is not feasible without simultaneous rights to access legal aid for persons who do not have the resources to afford a lawyer. This gap will permit systemic violations of defence rights to continue. Legal aid is ‘the Achilles’ heel’ of several criminal justice systems in the EU – ‘the right to legal aid is not reliably guaranteed in many Member States and it definitely does not ensure effective access to the right to legal advice as demanded in the Road Map’.¹⁵⁷

¹⁵² ECBA 2013 (n 144) 5-6.

¹⁵³ *Dayanan v Turkey* App no 7377/03 (ECtHR, 13 October 2009)

¹⁵⁴ Compromise text (n 144), art 3(a).

¹⁵⁵ *ibid* art 3(b).

¹⁵⁶ ‘ECBA – LIBE Vote on Directive on Access to a Lawyer – 19 June 2013’ (*European Criminal Bar Association*, 18 June 2013) <http://www.ecba.org/extdocserv/20130619_ECBA_PressRMeasC.pdf> accessed 17 December 2013. The European Criminal Bar Association (ECBA), for example, highlights deficiencies in the compromise text with respect to minor offences and derogations.

¹⁵⁷ ‘ECBA Touchstones – Minimum Standards for the Right to Legal Aid (Measure C part 1)’ (*European Criminal Bar Association*, 25 June 2013) <http://www.ecba.org/extdocserv/projects/legalaid/20130625_ECBA_TouchstonesLegalAid.pdf> accessed 17 December 2013.

A primary challenge to procedural justice in the EU is that defence lawyers receive poor rates of pay and police or courts appoint lawyers without adequate experience in criminal law.¹⁵⁸ Remuneration for defence lawyers who work on legal aid mandates varies widely within the EU and the expenditure of Member States on legal aid suggests that compliance with the right to legal counsel set out in the Draft Directive will be an issue.¹⁵⁹ Moreover, low pay rates and fixed fee systems - which are typical characteristics of legal aid systems in the EU - have deleterious effects on the quality of legal services. A fixed and inadequate legal aid fee system effectively forces lawyers to allocate less time to client contact and case preparation.¹⁶⁰ Lawyers may accept plea bargains to avoid lengthy trials or 'cherry pick' less complex and more profitable cases.¹⁶¹ Such outcomes undermine the concept of equality before the law.

Another concern is variation in the timeliness of the appointment of legal aid across Member States. Germany, for example, provides a system of 'mandatory defence' for suspects and accused persons typically available only at the trial stage of criminal proceedings.¹⁶² No legal aid is available to facilitate access to legal counsel at the earlier stages, such as questioning, evidence gathering or a deprivation of liberty prior to a formal arrest warrant. In Poland, through a lengthy process, judges appoint legal aid lawyers for persons who are not able to pay for legal services.¹⁶³ Such processes may contribute to violations of the standard set by the ECtHR

¹⁵⁸ For an analysis of the UK, Germany and Hungary see Ed Cape (n 91), 4, 6, and 9.

¹⁵⁹ Council of Europe, 'Report of the European Commission for the Efficiency of Justice (CEPEJ) European Judicial Systems' [2010] 34: 'A 23% average increase in four years can be underlined in Europe [between 2004 and 2008]. There are, however, major gaps between states or entities. Some states, previously very active in financing access to justice, have sustained such major efforts (Belgium, Iceland, Ireland). Other states having just recently implemented legal aid systems still hold, perhaps modest but often key, commitments and should be encouraged to follow such path (Azerbaijan, Bulgaria, Moldova, Romania). Some states or entities seem no longer able to uphold the level within their systems that are (and remain) the more generous of all and are forced to cut budgets (UK-England and Wales, UK-Scotland, Norway, UK-Northern Ireland). Likewise, important reductions in legal aid budgets are recorded in Hungary and Slovakia.'

¹⁶⁰ Vicky Kemp, 'Transforming Legal Aid: Access to Criminal Defence Services' (2010) Legal Services Research Centre 114 - 115 <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices_29092010.pdf> accessed 17 December 2013.

¹⁶¹ *ibid* 116.

¹⁶² ECBA, 'Legal Aid Touchstones' (n 157).

¹⁶³ *ibid*.

in *Salduz*, which requires that suspects receive access to a lawyer from the first interrogation by police.¹⁶⁴

The ECHR establishes that persons must have a right to legal aid in situations that satisfy the ‘means test’ (he or she is not able to pay for legal counsel) and the ‘merits test’ (the interest of justice require that the person receives legal counsel).¹⁶⁵ Although Member States may choose different tools for the implementation of the means and merit test, Member States must adopt an approach that ensures decisions of whether a person qualifies for legal aid is not arbitrary. Currently, according to the ECBA ‘only a bare majority of EU Member States have a legal aid merits test, and there is a considerable variation as to the content and meaning of the means tests.’¹⁶⁶

Concretising minimum standards for legal aid at the EU level is essential to ensure EU citizens receive effective defence rights. In the absence of such standards, the right to legal assistance effectively remains illusory. Although a complete harmonization of legal aid rules would likely be extremely complex and politically challenging, certain minimum standards are achievable and necessary. Of particular importance and within the realm of political possibility are minimum standards with respect to the quality of legal aid services, the timeliness of an appointment of legal aid, and the prevention of arbitrariness in establishing eligibility for legal aid.

Directives that reinforce defence rights echo the EU policy objective of creating an area of freedom, security and justice, set out in the TEU.¹⁶⁷ Article 2 of the TEU makes the intrinsic link between freedom, security and justice and the free movement of persons explicit and highlights that the fight against crime should not be at the expense of the free movement of persons. For that freedom to be exercised, EU citizens must be able to rely on the criminal justice systems of all Member States. Similarly, the smooth functioning of cooperation in the area of criminal law to curb cross-border crime requires that authorities in Member States trust that the criminal justice systems of other Member States treat all persons fairly, in accordance with contemporary human rights standards. Common minimum rules of criminal procedure on the right of access to legal counsel and legal aid at the EU level has potential to increase both respect for defence rights and confidence in the criminal justice systems of Member States across Europe. This will, in turn, foster a climate of mutual

¹⁶⁴ *Salduz v Turkey* (n 105) para 55.

¹⁶⁵ ECHR art 6(3)(c).

¹⁶⁶ ECBA, ‘Legal Aid Touchstones’ (n 157).

¹⁶⁷ ECHR, art 2.

trust and enhance efficient judicial cooperation. Legal aid in particular has broad benefits for the functioning of a criminal justice systems as meaningful legal assistance may 'reduce the length of time suspects are held in police stations and detention centres' as well as the 'prison population, wrongful convictions, prison overcrowding and congestion in courts'.¹⁶⁸

VII. CONCLUSION

Variance in Member State compliance with the ECHR reveals a clear need to enhance the protection of defence rights for all persons subject to criminal proceedings in Europe. In the absence of adequate protection, EU citizens will continue to suffer systemic violations of their rights. This will, in turn, have deleterious effects on mutual trust among Member States, undermine cooperation and disrupt efforts to achieve EU policy objectives. Access to effective defence rights in criminal proceedings is necessary to ensure that the EU is an area where commitments to freedom, security and justice are genuine.

While the implementation of the Directive on the rights to interpretation and translation in criminal proceedings and the Directive on the right to information in criminal proceedings represent significant steps towards the development of effective defence rights in Europe, more robust protection of the right of access to legal counsel is necessary. In particular, the right of access to legal counsel will remain insufficient unless EU institutions and Member States implement, interpret, and apply directives relating to criminal procedure and defence rights in ways that respect contemporary human rights standards set by the ECtHR. Moreover, the right to legal counsel is ineffective without an accompanying right to legal aid.

In an era of ever-increasing globalization, Member States must 'resist tendencies to treat security, justice and fundamental rights in isolation'.¹⁶⁹ Member States must adopt a 'coherent approach' to criminal justice that recognizes security and justice 'go hand in hand' and effectively balances the need to combat transnational crime and the need to respect

¹⁶⁸ Marion Isobel, 'Arrest Rights Brief No 3: The Right to Legal Aid' (2013) Open Society Justice Initiative, para 8 <<http://www.opensocietyfoundations.org/sites/default/files/arrest-rights-template-legal-aid-20130412.pdf>> accessed 18 December 2013.

¹⁶⁹ Commission, 'Delivering an Area of Freedom, Security and Justice for Europe's Citizens Action Plan Implementing the Stockholm Programme' COM (2010) 171 final 2-3.

fundamental rights.¹⁷⁰ The development of EU mechanisms to facilitate cooperation in criminal investigations and prosecutions requires the development of mechanisms that ensure defence rights are effective and practical.

¹⁷⁰ *ibid* 3.