



PROCEEDINGS OF THE CONFERENCE

**EUROPEAN CRIMINAL LAW IN THE GLOBAL CONTEXT:**

**VALUES, PRINCIPLES AND POLICIES**

(Abstracts)

Coimbra, 30-31 March 2017 | University of Coimbra

Org.: Pedro Caeiro

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INSTITVTO ·IVRIDICO  
FACULDADE DE DIREITO  
UNIVERSIDADE DE COIMBRA

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**FCT** Fundação para a Ciência e a Tecnologia  
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INSTITVTO ·IVRIDICO

*Project:*  
*Societal Challenges, Uncertainty and Law*  
*(UID/DIR/04643/2013) | INSTITUTO JURÍDICO*  
*RG 6 – Crisis, sustainability and citizenship(s)*

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## **EDITION**

Instituto Jurídico  
Faculdade de Direito da Universidade de Coimbra

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## **ISBN**

978-989-8787-96-5

The Conference was partly funded by FCT – Fundação para a Ciência e a Tecnologia, I.P., in the ambit of the Project “Societal challenges, uncertainty and law” (UID/DIR/04643/2013).

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# PROGRAMME OF THE CONFERENCE

*Thursday, 30 March*

## OPENING SESSION

*Constança Urbano de Sousa* | Minister of Home Affairs  
*Sofia Colares Alves* | Head of the European Commission Representation in Portugal  
*João Gabriel Silva* | Rector of the University of Coimbra  
*Amílcar Falcão* | Vice-Rector for R&D  
*Rui de Figueiredo Marcos* | Dean of the Faculty of Law  
*Rui Moura Ramos* | President of the Instituto Jurídico  
*Anne Weyembergh* | Coordinator of ECLAN

## KEY-NOTE SPEECH

Chair: *Rui Moura Ramos* | President of the Instituto Jurídico

9.30 European criminal law in the international context: challenges and perspectives  
*John Vervaele* (Universiteit Utrecht / College of Europe) | President of the Association  
Internationale de Droit Pénal (AIDP)  
- Reaction: *Pedro Caeiro* (Universidade de Coimbra)

## PANEL I • VALUES

Chair: *José C. Vieira de Andrade* | Coordinator of Research Group 6 (Instituto Jurídico)

10.15 Citizenship and criminal law  
*André Klip* (Universiteit Maastricht)  
- Reaction: *Sabine Gless* (Universität Basel)  
11.00 Discussion  
11.15 Coffee-break

Chair: *Sofia Colares Alves* | Head - Representation of the European Commission

11.30 Privacy and crime prevention  
*Paul De Hert* (Vrije Universiteit Brussel)  
- Reaction: *Gerard Conway* (Brunel University London)

12.15 Fundamental rights and punishment: is there an 'EU perspective'?  
*Anabela Miranda Rodrigues* (Universidade de Coimbra)  
- Reaction: *Adán Nieto Martín* (Universidad de Castilla-La Mancha)  
13.00 Discussion

## PANEL II • PRINCIPLES

Chair: *João Conde Correia* | Senior Prosecutor

15.00 Extraterritorial jurisdiction in criminal matters under European and international law  
*Martin Böse* (Universität Bonn)

- Reaction: *Frank Zimmermann* (Ludwig-Maximilians-Universität München)

15.45 Transforming the *ne bis in idem* principle into a fundamental right in the EU

*Katalin Ligeti* (Université du Luxembourg)

- Reaction: *Anne Weyembergh* (IEE / Université Libre de Bruxelles)

16.30 Discussion

16.45 Coffee-break

Chair: *Patrícia Godinho Silva* | FATF Legal Assessor; Lawyer - Securities Market Commission

17.00 Anti-money laundering, terrorist financing and terrorism

*Alexandra Jour-Schroeder* (Acting Director Criminal Justice, DG-Justice and Consumers, European Commission)

Reaction: *Manuel Cancio Meliá* (Universidad Autónoma de Madrid)

17.45 Discussion

18.00 End of the first day

### *Friday, 31 March*

## PANEL III • POLICIES

Chair: *Maria João Antunes* | President of the Instituto de Direito Penal Económico e Europeu

9.00 Restrictive measures

*Jørn Vestergaard* (Københavns Universitet)

- Reaction: *Anna Bradshaw* (PhD; Partner at Peters & Peters, London)

9.45 Criminalising migration?

*Valsamis Mitsilegas* (Queen Mary University of London)

- Reaction: *Nuno Piçarra* (Universidade Nova de Lisboa)

10.30 Discussion

10.45 Coffee-break

Chair: *João Silva Miguel* | Head of the Centro de Estudos Judiciários

11.00 Is mutual recognition a viable general path for cooperation?

*Helmut Satzger* (Ludwig-Maximilians-Universität München)

- Reaction: *Robert Roth* (Université de Genève)

11.45 Discussion

## CLOSURE

8

Chair: *Luís Pais Antunes* | Managing Partner - PLMJ, RL

12.00 Concluding remarks

*Robert Kert* (Wirtschaftsuniversität Wien)



## Editorial

1. The Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra (University of Coimbra Institute for Legal Research – <http://ij.fd.uc.pt>) and the European Criminal Law Academic Network (ECLAN – [www.eclan.eu](http://www.eclan.eu)) have joined forces to organise the international conference *European Criminal Law in the Global Context: Values, Principles and Policies*, which took place in Coimbra in 30-31 March 2017.

Established in 2004 at the initiative of Professor Anne Weyembergh (ULB-IEE), ECLAN is a network of researchers and academics engaging in EU criminal law across thirty-two countries. It aims at developing academic research and training in the field by facilitating collaboration and synergies between universities and research centres, and its pool of experts take part in several projects funded by the European Commission. ECLAN also organises conferences and edits publications, hosts a summer school and a PhD seminar on the EU area of criminal justice and publishes a newsletter dedicated to recent developments in the field.

The Instituto Jurídico, founded in 1911, has been re-established in 2013 as a Unit of R&D under the new Statutes of the Faculty of Law. The scientific activity of the Institute is organised across three thematic lines, split in seven research groups. The Conference was promoted by the research group Crisis, Sustainability and Citizenship(s) (RG 6), led by Professor José Carlos Vieira de Andrade, which intends to draw up a normative framework of reference for the various dimensions involved in the reform of the State, in the current context of shared or “late” sovereignty, with a view to anticipating the implications of such reform for traditional legal methodology.

2. The Conference was part of a wider event, which included the IJ / ECLAN Symposium *The European Public Prosecutor’s Office*<sup>1</sup>. It brought together more than thirty participants, among practitioners,

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<sup>1</sup> <[https://ij.fd.uc.pt/eventos/ij/2017/events\\_mars2017.html](https://ij.fd.uc.pt/eventos/ij/2017/events_mars2017.html)>.

researchers and stakeholders specialised in European criminal law. More than 160 people from 27 nationalities / provenances registered to attend, including students and professionals coming from abroad, allowing for the presentation of diverse views on the proposed topics, followed by lively debates.

The purpose of the Conference was to address the interaction between European criminal law and international law and bodies, and the way in which the former might influence or be influenced by the latter.

As the title suggests, the Conference was structured in three panels:

- The first dealt with the values involved in the pairs citizenship / criminal law; privacy / crime prevention; and fundamental rights / punishment.
- The second discussed the principles underlying extraterritorial jurisdiction, *ne bis in idem* and mutual recognition.
- The third engaged with the policies regarding anti-money laundering, terrorist financing and terrorism, restrictive measures and criminalisation of migration.

It is expected that the papers of the Conference will be published in an edited volume in the near future<sup>2</sup>. Meanwhile, it seems appropriate to publish the abstracts that the speakers made available to us.

**3.** The organisation benefitted from the funding provided by Fundação Portuguesa para a Tecnologia (FCT) for the project “Societal challenges, uncertainty and law” (UID/DIR/04643/2013) developed by the Instituto Jurídico (2014-2017). It also benefitted from the generous sponsorship of the Representation of the European Commission in Portugal, the legal firm PLMJ, RL, and the Instituto de Direito Penal Económico e Europeu. Therefore, special thanks are due, respectively, to Ms. Sofia Alves, Mr. Luís Pais Antunes and Prof. Maria João Antunes, without whose personal commitment the organisation of such an event would not have been possible.

We also thank the European Commission, the legal firm Peters&Peters (London) and our sister universities Brunel University

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<sup>2</sup> The publication of the proceeds of the Symposium on the EPPO is also scheduled for 2018.

London, Københavns Universitet, Ludwig-Maximilians-Universität München, Queen Mary University of London, Universität Basel, Université Libre de Bruxelles, Université du Luxembourg and Wirtschaftsuniversität Wien for having covered the travel and / or hotel expenses of some of the speakers.

Finally, grateful acknowledgments are due to: Ms. Céline Cocq, who was there from the very beginning, for her constant support; Dr. Inês Godinho and Ms. Ana Pais, for their kind assistance in the general inception of the event; Ms. Ana Rita Nunes and Ms. Vera Almeida, for having taken excellent care of the administrative issues; Ms. Ana Paula Silva, for her help with the design and the execution of the conference materials; and the Master's students André Ribeiro, Bruno Carvalho, Carolina Carvalho, Rui Caria and Tiago Andrade for their enthusiastic and tireless help.

Coimbra, September 2017.

## Opening speech by the Dean of the Faculty of Law

Magnificent Vice-Chancellor of the University of Coimbra  
Minister of Home Affairs of Portugal  
President of the Institute for Legal Research  
Coordinator of the European Criminal Law Academic Network  
Esteemed Professors and Colleagues  
Distinguished Guests  
Dear Students  
Ladies and Gentlemen:

Please allow me a few words. On behalf of the Faculty of Law, I want to welcome you to our Faculty and to the University of Coimbra, the oldest University in Portugal and one of the oldest in the world.

Legal studies have existed in Portugal since the foundation of the University during the reign of King Dinis. According to the tradition, the *Studium Generale* was established by a Royal Charter in the thirteenth century. However, the decisive moment in the eyes of the rest of Europe is generally taken to be the confirmation coming from Pope Nicholas IV in the form of a Papal Bull. The Bull, *De Statu regni Portugaliae*, contained an explicit reference to the teaching of Canon Law and Roman Law. Graduates would have *ubique, sine alia examinatione, regendi liberam potestatem*, and would be thus qualified to teach in any part of the Christian world.

As you can see, we are an institution full of history but necessarily devoted to knowledge. Academically and scientifically we can also say that our University, our precious Faculty of Law and our Professors have a vast scientific reputation, which is also recognized in the most important and independent external rankings and reports.

Ladies and Gentlemen,

The International Conference on “European Criminal Law in the Global Context: Values, Principles and Policies” is co-organized by the Legal Institute for Legal Research and by ECLAN (European Criminal Law Academic Network), which has Professor Pedro Caeiro as the Portuguese contact point and as a member of its Management

Committee. A word of recognition and congratulation is due to my dear friend, Professor Pedro Caeiro, who bears the main responsibility for the organization of this international Conference.

ECLAN and the Legal Institute jointly address the complex and difficult problems posed to criminal law in the context of a globalized society. These problems must be considered in different levels, as announced by the programme of this conference. The main difficulties are clearly evident when trying to balance two paradoxical interests: the criminal law as an instance of State sovereignty and, on the other hand, the demands of a global world where universal interests require the “reconstruction” of new answers restrictive of the State power.

This is clearly delineated in the structure of the Conference, which is based upon three major sessions: *Values, Principles and Policies*.

The *Values* are dealt with under a dualistic point of view: the citizen and the criminal law; privacy and security; fundamental rights and punishment.

The *Principles* address problems such as extraterritorial jurisdiction or the *ne bis in idem* principle, of enormous importance.

The *Policies* regarding the criminalization of migration and the cooperation between states are the topic of the third session.

This is a very ambitious and challenging programme which suits very well a Faculty full of history and devoted to knowledge.

Ladies and Gentlemen,

as Luís António Verney, an illustrious and enlightened great figure of Portuguese culture said, “it is always possible to think better”.

According to the Ecclesiastes, there is a time for everything. Now, it is time to conclude.

To the prestigious guest speakers, to the participants, who, from near and far, have gathered for this important International Conference, I would like to extend my warmest welcome and congratulations.

In a classical Roman style, *omnibus gratias plurimas*.

*Professor Rui de Figueiredo Marcos*

## Speech by the Coordinator of ECLAN

Minister Urbano de Sousa  
Vice-Rector of the University of Coimbra  
Dean of the Faculty of Law  
President of the Instituto Jurídico  
Dear Pedro, dear Colleagues, dear Friends:

It is a great pleasure to be present here in this wonderful city of Coimbra and on this historical university campus for the opening of our 2017 ECLAN Annual conference.

The European Criminal Law Academic Network was established in December 2004 and Pedro Caeiro was among its “founding fathers”. Since then, we have often spoken about organising an event in Coimbra during spring.

Thanks to Pedro and to the Instituto Jurídico, that project became reality and I would like to tell you how grateful we all are for having organised this. I speak here of course also in the name of the two other ECLAN Coordinators and in the name of all ECLAN contact points. We would also like to thank the Law Faculty of the Coimbra University for hosting our annual conference.

The programme seems excellent to me. So I am looking forward to listening to all the speakers. I wish you all a very interesting and fruitful conference.

*Professor Anne Weyembergh*

**KEY-NOTE SPEECH  
AND REACTION**

# EUROPEAN CRIMINAL JUSTICE IN THE GLOBAL CONTEXT: CHALLENGES AND PERSPECTIVES

*John Vervaele*

I am convinced that at the end of this conference we could quote the very famous Portuguese writer, Fernando Pessoa, who said in one of his writings: “O valor das coisas não está no tempo que elas duram mas na intensidade com que acontecem. Por isso existem momentos inesquecíveis, coisas inexplicáveis e pessoas incomparáveis”. So what Pessoa was saying and that I think would be a good quote at the end of the conference is “The value of the things is not the time they last but the intensity with which they occur. This is why there are unforgettable moments, there are inexplicable things and incomparable persons”.

1. I have been asked to speak about “European criminal justice in the international context: challenges and perspectives”.

I have to start with the institutional political context because we could read this title as something that is over. We all know that there is a strong discourse of back to the nation states, back to national identity, back to national sovereignty, back to national borders, the national territory, and of course, to national people. All this is a dream of a sort of national state, like Eden, Adam and Eva. I think, of course, all this is a dream because nation states and sovereignty of nation states and national territory are all social constructs – they always have been. In fact, the globalisation we have been living through the last decades will not be stopped and cannot be stopped by this view of national sovereignty discourse or nationalism. And the EU has a fundamental role in this process: as Paul Magnette has put it, “L’Europe est un régulateur de la globalisation”. Europe is a regulator of globalization. Indeed, the construction of the EU is about



functional territoriality, functional authority, translated into norm setting, policy development and enforcement of these policies. This functional territoriality is to be seen in the internal market and in the area of freedom, security and justice. These are shared areas of common interest with also shared sovereignty. Be it as it may, this is a fundamental transformation of national territoriality and authority. This is the political and institutional framework within which European Criminal Justice should be understood.

2. European criminal justice is a composite of the domestic criminal justice systems, including national constitutional values, the criminal justice of the European Union, and also the elements of criminal justice stemming from the conventions of the Council of Europe (in substantive, procedural and cooperation matters), together. When authority is transferred to another level, when sovereignty is shared on another level, the different types of jurisdiction are also shared: the jurisdiction to prescribe, let's say the power to legislate, the jurisdiction to enforce, indicative of European enforcement agencies (Europol, Eurojust and maybe tomorrow the EPPO), but also jurisdiction to adjudicate, since European courts deal with many criminal cases in a most relevant way.

It should be noted that the normative fabric provided by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union ensures that this sharing of sovereignty takes place in the context of a legal order with values: the whole construction of the area of freedom security and justice is developed within the rule of law.

3. If we look at this area of freedom, security and justice the first dimension we find is harmonisation (mostly substantive law, but also, to some extent, procedural law). The second one is about horizontal cooperation (mutual legal assistance and mutual recognition). The third one is about the development of European enforcement agencies. The fourth one is much less known to most of us: it is the external dimension of the area of freedom, security and justice. The latter dimension is not only about traditional judicial cooperation agreements with third countries: it is also about externalising harmonisation, cooperation and the intervention of the European agencies.

There is a need for harmonisation policies aimed at protecting values that the EU views as universal or global. Think about the protection of the environment against the ecocide and other common public goods, as well as the prohibition of the death penalty. Indeed, in the current situation, there seems to be a serious risk of over-criminalisation, which is reinforced by the general security agenda developed by other international *fora* such as the United Nations.

At the procedural level, and despite some recent legislative initiatives, there is still a lot to be done, especially in the field of gathering of evidence and procedural safeguards.

The same goes for the institutional level, where we find problems of non-cooperation between the European agencies and between them and the national authorities.

4. Finally, the interaction between the area of freedom security and justice and the global context is still at its very beginning. Some steps have of course been taken, like, eg., the attempts to export the European perspective and values to the negotiations on anti-terrorism policies and TFTP at the international level, the agreements on PNR, the internalization in Europe of the law on restrictive measures. However, and in spite of the existing legislation, many European measures are actually not enforced outside the European space: that is the case, eg., of the conditions for the import of exotic wood, illegal and unreported fishing, blood diamonds, as well as, from a different point of view, data protection. The same difficulties with the enforcement regime apply, for example, to the export of dual use items. Moreover, in the context of a globalised market, it is clear that the EU is not on the same page as other leading stakeholders regarding the prevention and punishment of serious violations of tax law and financial law.

5. In conclusion, it can be said that the foregoing considerations show that, in several instances, the effectiveness of European criminal justice depends on a swift and active integration in the international context.

The most visible problems are certainly the enforcement issues, but there is still much to be done in terms of drafting common

criminal justice standards – values, principles and policies – with third states that enter into various kinds of partnerships with the EU, and, indeed, the international community as a whole.

*John Vervaele* (1956) is full time professor of economic and European criminal law at Utrecht Law School (the Netherlands) and professor of European criminal law at the College of Europe in Bruges (Belgium). He is since September 2014 President of the oldest word organization for criminal justice (AIDP). His scholarly work is dealing with collar crime and fraud and European criminal law and procedure. The main topics in his research field are: enforcement of Union law; criminal law and procedure and regional integration; criminal procedure and procedural safeguards. He has realized a lot of research in these areas, both for Dutch Departments and European Institutions and worked as well as a consultant for them. He is regularly teaching as visiting professor in foreign universities, in Europe, the US, Latin America and China. He has widely published on OLAF, European enforcement agencies and the European Public Prosecutor's Office. As an expert he has been or is involved in the procedural preparation of the EPPO-file (Green Paper), the impact assessment of the PIF-Directive, the Eurojust evaluation and the evaluation of the OLAF 2013 regulation.

## REACTION TO “EUROPEAN CRIMINAL JUSTICE IN THE GLOBAL CONTEXT: CHALLENGES AND PERSPECTIVES”

*Pedro Caeiro*

1. Most research on European criminal law (ECL) revolves around what could be called the *internal* dimension of the topic, ie., the specific features of this relatively new branch of criminal law, namely its particular relationship with the criminal law systems of the Member States. This approach was consistent with the stage of “minimum ECL” (basically, the *Corpus Iuris / Eurodelikte* model) that existed until the Treaty of Amsterdam: criminal law was seen as a mere additional tool for the protection of the state-like “institutional legal interests” of the European Community / European Union (the budget and the integrity of EU bodies), as well as the “functional legal interests” embedded in or generated by European policies concerning the internal market. The idea was, then, to protect the EC / EU against fraud, corruption and economic crime.

As neither the EC nor the EU enjoyed a specific competence to pass instruments entailing criminal law provisions (or so it was believed until the notorious ruling of the Court of Justice of the European Union (CJEU) in *Commission v. Council* (2005)), the protection of those interests by means of the criminal law was to be conveyed through the action of the Member States and assimilation was the key concept.

2. The Treaty of Amsterdam fundamentally changed the landscape. In the first place, the competence to harmonise the domestic laws on terrorism, organised crime and trafficking in drugs meant an extension of the responsibility of the EU to the protection of

interests that are not primarily linked to the European institutions or to the internal market, namely the *public peace* that should inhere to an area of freedom, security and justice. In the second place, and most importantly, the Treaty endowed the EU with (*sui generis*) prescriptive jurisdiction over criminal matters. From then on, the EU became a holder of (a limited form of) the *ius puniendi* in the global context and, consequently, an autonomous actor in the field.

Eventually, the Treaty of Lisbon strengthened such role by bringing the legislative procedure applicable to the instruments on criminal law in line with the common rules (namely, majority vote in the Council and constitutive participation of the European Parliament). Additionally, the Treaty widened the material scope of the EU legislative competence on criminal matters, specifying other legal interests as possible candidates to a European penal protection and thus calling for a more ambitious criminal policy programme. Today, such programme includes several aspects of social life that are not necessarily tied to the EU as a proto-State, but rather to the EU as a common project of shared values and expectations. Pursuant to this project, it might be necessary to have similar definitions of offences such as terrorism, sexual exploitation of women, drugs and arms trafficking and computer crime, as well as similar sanctions applicable to those crimes.

Indeed, that evolution is consistent with a more general, contemporary pattern, where (legislative and / or adjudicative) powers over criminal matters are conferred upon (or claimed by) non-state entities as a means of fulfilling their duties.

Becoming a global player in the field of the criminal law and criminal policy entails two consequences. On the one side, the EU is subject, like the states and other entities, to certain international rules, bodies and agencies; on the other side, the opportunity is created for it to contribute to the improvement of the criminal law institutions worldwide.

The aim of this Conference is, precisely, to look out of the window of traditional European criminal law.

3. As John Vervaele has noted, the general background of the Conference raises several topics of interest and countless questions.

**3.1.** In the first place, which is the current role of citizenship in criminal law? Is it (only) a particular set of rights and duties bound by the tie of nationality? Or has it evolved into a value of “variable geometry” which can impact, for instance, the rules on jurisdiction (eg., validating the assertion of jurisdiction over extraterritorial offences committed by foreigners who are EU citizens), or the duties embodied in international cooperation (see, eg., the decision of the CJEU in *Petruhhin*)? Is this evolution confirmed by the *Melloni* doctrine and the replacement of national rights and liberties standards with less demanding European ones, which ultimately results in a reconfiguration of citizenship, also for the purposes of punishment? Conversely, what implications are there for citizenship in *Aranyosi / Caldaru*, which can actually lead to protecting a national of a Member State against the penal system of that Member State – or otherwise to a positive discrimination, by national authorities, of nationals who are under European protection? Do the answers to those questions provide useful indications on how criminal law might be redefining the distinction between citizen and alien?

Turning to the tension between fundamental rights and punishment, does the EU already have a set of criteria for deciding on whether a given conduct should be criminalised, or on the establishment of sanctions and the goals they should serve? Is it possible to draft an actual European criminal policy programme that, inasmuch as it is not idiosyncratic to a particular state, aspires to a higher level of rationality and can serve as an inspiration for a global model?

Finally, how does the EU perspective on the protection of privacy reflect on international cooperation against crime with third countries, especially on cross-border data requests?

**3.2.** Multi-located offences have brought new challenges to the doctrine of jurisdiction in criminal matters. According to the Treaty on the Functioning of the European Union, the EU has the duty to prevent and solve conflicts of jurisdiction. Is there a consistent policy

regarding jurisdiction at the European level? Does it conform to international law?

Two fundamental principles of ECL seem paramount for the global context: transnational *ne bis in idem* and mutual recognition. Concerning the former, a single principle seems to emerge in the EU area, embodying the case law of the Luxembourg and Strasbourg Courts. Springing from a fundamental right, how does it impact the cooperation with third states, namely, the requests for extradition (*Schottböfer & Steiner*) and for the transfer of proceedings? Does the ECJ's case-law on the elements of the principle somehow influence the case-law of the ECtHR, which in turn affects some third states?

Does international law set any limits to mutual recognition, namely those that derive from the right to legal certainty, or are the states free to dispense with any obstacles to cooperation at their sovereign will? Is mutual recognition “exportable” to other political environments as a means of enhancing judicial cooperation at large? Should the adoption of the principle be encouraged in the relations between Member States and third states?

**3.3.** In the field of restrictive measures, and even if they do not belong within criminal law *stricto sensu*, has the EU been able to influence directly the process through which the United Nations have shaped them? Which features characterise the “Europeanisation” of UN restrictive measures? Does the current European regime comply with international duties and, at the same time, with EU standards on fundamental rights?

In the last few years migration and migrants became a global issue at many levels. Is EU law compatible with the international standards of human rights in this area? Can the EU play a leading role in drafting policies that do not limit themselves to the callous criminalisation of migration?

**4.** As John Vervaele points out in his speech, the ‘transformation of national territoriality and authority’ inherent to European integration impinges not only upon the internal relations between Member States and the EU, but also on the external relations between

Member States and the EU, on one side, and third countries, international bodies and the international community at large, on the other side. Such a transformation brings significant changes to the field of the criminal law, as I have tried to illustrate with the inventory of questions assembled above. It is expected that this Conference may unfold new research paths that can ultimately bring up some plausible constructions and answers.

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# PANEL I

VALUES

## DIGITAL LAW ENFORCEMENT BEYOND BORDERS AFTER *LOTUS*.

FOUR RECENT COURT CASES ON DIRECT ACCESS  
REQUESTS BY EU POLICE AND CRIMINAL JUSTICE  
AUTHORITIES TO ELECTRONIC EVIDENCE HELD IN  
THIRD COUNTRIES

*Paul De Hert*

The Belgian Yahoo! Case is a pertinent example of the complexity surrounding cross-border data requests. The case concerns US-based service provider Yahoo! and Belgian law enforcement authorities, which in 2007/2008 ordered Yahoo! to disclose data such as IP addresses and subscriber information belonging to several email accounts hosted by the service provider.

Another recent ruling from Belgium concerns the Microsoft subsidiary Skype. In similar fashion to the Belgian Yahoo! Case a Belgian investigator directed a request cross-border, this time to Skype established in Luxembourg.

In the so called Microsoft Ireland Case, federal prosecutors in the Southern District of New York sought a warrant for search and seizure of information belonging to an email account hosted by Microsoft. Microsoft produced all relevant non-content data, which were hosted on servers based in the US, but went on and tried to vacate the warrant concerning the disclosure of content data, which were hosted on a server abroad in Ireland.

More recently a US federal magistrate judge ordered Google in February 2017 to comply with two warrants aimed at the production of foreign-stored emails. Google had previously refused to comply with the warrants issued in August 2016, relying on the rationale established in the Microsoft Ireland Case.

Where do these judgements, often in favour of the law enforcement authorities, point at? Are they case driven? Necessity breaks law? Are they respectful of international law and the 1927 *Lotus* judgement by the International Court of Justice? How would sovereignty translate in an arrangement when negotiated with more distance, for instance when drafting international instruments? A short discussion of a Data Protection Directive, the EU 2000 Mutual Legal Assistance Convention, the Cybercrime Convention and the Investigation Order Directive may offer useful guidance to understand *Lotus* in the 21st century.

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## FUNDAMENTAL RIGHTS AND PUNISHMENT: IS THERE AN EU PERSPECTIVE?

*Anabela Miranda Rodrigues*

1. The relationship between fundamental rights and punishment is a necessary one.

Punishment is the limitation of fundamental rights, but it is in the name of the protection of fundamental rights that punishment is legitimised (the “security” function of the criminal law).

Conversely, fundamental rights limit punishment against potential abuse (the “liberty” function of the criminal law).

This is how the principle of proportionality of criminal intervention, in its broader sense, is expressed (see art. 52 (1), of the Charter of Fundamental Rights – CFR): the *ultima ratio* nature of the criminal law and the prohibition of excessive punishment. Consequences of this principle are the refusal of the death penalty and the acceptance of imprisonment for serious offences, the execution of which should pursue rehabilitation goals.

This paper aims at analysing the terms in which European criminal law respects the aforementioned principle at the sanctions level.

2. In the construction of the punitive system, the European Convention of Human Rights (ECHR), as interpreted by the European Court of Human Rights (ECtHR), is paramount. The compromise with the respect for human rights, present since the foundation of the EU, gained strength and consistency with the adoption of the CFR, which has direct implications for the design of the European punitive system.

**3.** The two main features of the criminal sanctions system of the EU are the primacy of imprisonment and the principle of effective protection (criminal sanctions should be “effective, proportionate and dissuasive”). However, it is questionable whether such principles conform to the prohibition of excessive punishment.

**3.1.** The Communication from the Commission 2011 (COM (2011) 573 final) alerts the European lawmaker for the need to take into consideration the principle of proportionality of penalties (art. 49 (3) CFR), and thus provide for other types of penalties. Notwithstanding, most EU instruments on criminal law provide only for imprisonment.

The generalized use of imprisonment is a symptom of the absence of a stand, by the EU, on the grounds and purposes of punishment. Although the Green Books of 2004 and 2011 are a sign of concern with the issue, they do not fill this gap.

**3.2.** Until now, no EU legal instrument has provided for life imprisonment.

It is true that European law does not prohibit such penalty explicitly. However, it is debatable whether life imprisonment is compatible with art. 4 of the Charter, which enshrines the prohibition of inhumane punishment and the rehabilitation goals it should serve.

**3.3.** The abstract gravity of the imprisonment sanctions set in the EU acts should also comply with the principle of proportionality of the penalties (art. 49 (3) CFR).

The European provisions on sanctions do not follow an established model which accommodates the principle of proportionality and the respect for the internal coherence of the domestic punitive systems. For several reasons, indicating the abstract gravity of the prison penalties by setting a given minimum duration of imprisonment (a merely “quantitative” method) is not satisfactory.

**4.** The punitive system of the Union is still guided by the idea that criminal sanctions must be “effective, proportionate and dissuasive”.

4.1. This qualification of sanctions is connected to the principle of assimilation. It was a palliative formula, intended to remedy the lack of competence of the European Community over criminal matters.

Today, the European lawmaker makes use of the formula “effective, proportionate and dissuasive” criminal sanctions when legislating in areas over which he has actual competence. As a consequence, one allows for the development of an overly punitive system in the EU.

4.2. The jurisprudence of the Court of Justice on the control of proportionality of criminal sanctions shows the concern of limiting excessive punishment when enforcing EU law (case *El Dridi*).

5. To conclude, one should note that the punitive system of the EU has a positive distinctive mark: it is a space free of the death penalty and, most of all, today it has the conditions to export abolitionism to third countries (art. 19 (2) CFR).

Moreover, it is a system in which repressive goals still seem to prevail over rehabilitation. Notwithstanding, there are some positive developments in the area of judicial cooperation, which impact the configuration of the punitive system (eg., the adoption of the Framework Decisions on the supervision of probation measures and alternative sanctions (2008/947/JHA) and on custodial sentences or measures involving deprivation of liberty (2008/909/JHA)).

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REACTION TO  
“FUNDAMENTAL RIGHTS AND PUNISHMENT:  
IS THERE A EU PERSPECTIVE?”

*Adán Nieto Martín*

1. Maybe because I am in Portugal, the words of my dear colleague Anabela have made me feel *saudade*. This feeling cannot be expressed in any other language; it is a mood, or maybe a state of mind, somewhere in between sorrow and melancholy. This feeling of *saudade* comes from the little success in real life of fundamental rights, aside from scholarly works on criminal law, when it comes to stopping the wave of massive use of criminal law that we now have to confront.

Criminal law scholars of my generation, at least in countries such as Spain, Italy and maybe Portugal or Germany too, grew up thinking that the Constitution and constitutional courts were going to be a strong weapon against legislative irrationality. In particular, we all had great expectations in the proportionality principle. Anabela already said it. As the German Constitutional Court stated the principle in its famous *Apotheken Urteil*, proportionality comprised the foundations of the Enlightenment regarding criminal law.

However, having regard to the numerous possibilities of this principle, I become very disappointed with constitutional case law. There have been many more losses than wins in Spain, France, Germany, the United Kingdom and even Italy.

We can be a little more optimistic thanks to the case law of supranational courts, but let's not get too excited. As we all know, the ECtHR has applied the proportionality principle as it is “necessary in a democratic society.” Its case law is bittersweet, due to the massive and sometimes inexplicable application of the “scope for national discretion”.

2. The CJEU has firmly applied the proportionality principle many times. It has done so concerning criminal law provisions which fall far from the scope of morality. In most cases these were rules on ancillary criminal law (*Nebenstrafrecht*), which punished very specific violations; for instance, food law violations. However, when delivering these judgments, the CJEU was not concerned with preserving the foundations of criminal law. Rather, it did not want any State to jeopardize the construction of the internal market and basic freedoms.

At this point we must decide whether we should continue to rely on the proportionality principle or rather find other foundations to ground the constitutional review of criminal law. Moreover, this would entail providing the core principles of criminal law with an autonomous constitutional foundation not subject to the proportionality test.

From the outset, I consider that the proportionality principle should still have a prominent role. Accordingly, we must focus on the notion of “permissiveness” or “deference” in order to set some boundaries thereon. The underlying idea that judges must be somewhat permissive or condescending vis-à-vis legislative bodies is laid on various foundations. First, legislative bodies represent the population, and that gives it a certain degree of scope for discretion or appreciation. Second, it is worth noting, particularly regarding the ECtHR, that the national legislator is better placed than the European judge to assess the need of the relevant measure, since the latter is closer to the issue. The third foundation concerns the lack of empirical data confirming the effectiveness of criminal law provisions.

Whereas the first two foundations seem appropriate, the third one is unreasonable, because the lack of empirical basis is not really something unavoidable.

Therefore, a new kind of constitutional judgments should be created. These rulings would have to make the constitutionality of the provisions dependent on the provision of data regarding their effectiveness within a given time period. In sum, permissiveness should be limited to those cases where, in spite of the significant effort by the legislator to ground the suitability and the need for a criminal law provision, it is unable to provide conclusive empirical data.



Moreover, in addition to furthering the proportionality principle, I believe we should focus on providing autonomy to certain basic principles of criminal law.

A good example of the positive outcome that could be expected from splitting criminal law principles from the proportionality principle can be found in the *ne bis in idem* principle.

3. The principle of proportionality of penalties could also become independent from the proportionality principle. In fact, EU law is encouraging this independence. If this principle was not independent, Article 49(3) of the Charter would be a mere specification of Article 53.

The role to be played by the principle of proportionality of penalties differs from the role of the proportionality principle. Its main purpose is to ensure that the penalty reflects the seriousness of the punishable conduct and the offender's guilt. Therefore, the principle requires that there must not be any fixed penalties, as the CJEU has rightly pointed out in the *Urban* case. It also requires that, when assessing the penalty, the seriousness of the conduct should be a red line for considerations regarding the offender's personality. On the basis of these ideas, there should be no room for lifelong sentences, since they are fixed penalties, and when they are flexible their duration depends on the potential threat posed by the offender, and not on the seriousness of the offence.

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# PANEL II

## PRINCIPLES

# EXTRATERRITORIAL JURISDICTION IN CRIMINAL MATTERS UNDER EUROPEAN AND INTERNATIONAL LAW

*Martin Böse*

Various international treaties and EU legislative measures provide for extraterritorial jurisdiction in order to avoid impunity and to prevent the perpetrator from escaping justice. However, establishing extraterritorial jurisdiction is likely to trigger conflicts of jurisdiction and to give rise to legal uncertainty about the applicable criminal law.

A closer look at the concepts of jurisdiction and the rules on extraterritorial jurisdiction in international treaties and EU law reveals that the interest in effective transnational law enforcement on the one hand, and fundamental rights of the individual on the other can be reconciled by addressing them on different levels, namely jurisdiction to prescribe and jurisdiction to adjudicate and to enforce. As a rule, jurisdiction to prescribe should be limited to territorial jurisdiction. On the basis of an international consensus, recourse to universal jurisdiction may appear appropriate whereas extraterritorial jurisdiction on the basis of active and passive personality should be established only in exceptional cases. In contrast, jurisdiction to adjudicate and to enforce that is exercised over crimes committed abroad is less problematic insofar it is based upon the principle of vicarious jurisdiction and forms part of the general framework of mutual legal assistance in criminal matters.

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## TRANSFORMING THE *NE BIS IN IDEM* PRINCIPLE INTO A FUNDAMENTAL RIGHT IN THE EU

*Katalin Ligeti*

The entry into force of the Lisbon Treaty marks a significant change in the status and scope of the *ne bis in idem* protection in the EU's Area of Freedom, Security and Justice. Article 50 CFR defines *ne bis in idem* as an individual right which is now guaranteed by primary EU law. Article 50 CFREU stipulates: No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

The provision is clearly based on the wording of Article 4 of Protocol 7 of the ECHR, but contains in addition an extended territorial scope. The protection offered by Article 50 may apply in different legal contexts: the *ne bis in idem* may be triggered where there is an attempt to start successive trials or sanctions within the same jurisdiction, and also applies where different jurisdictions duplicate trials or sanctions as a consequence of parallel proceedings. Differently from provisions of secondary EU law, such as Article 54 CISA or provisions in mutual recognition instruments or treaties dealing with legal assistance that apply in the transnational context only, primary EU law now provides for *ne bis in idem* protection in cases that affect a single Member State, if the application of EU law is concerned. This also means that with the entry into force of the CFR, the *ne bis in idem* protection has become a legal patchwork.

Although Article 50 CFR is a primary source of Union law, it co-exists with Article 54 CISA, and Article 4 of Protocol 7 ECHR. This raises questions as to the hierarchy of norms, but, moreover, also as to the scope and rationale of the *ne bis in idem* protection. The fact

that the *ne bis in idem* in Article 4 of Protocol 7 ECHR has a domestic application only and Article 50 CFR an application within the scope of EU law, which can be domestic, transnational and/or supranational, does not mean that there is not a similar right with a similar function. It follows from the fundamental right character of *ne bis in idem* that the EU transnational protection against double jeopardy as laid down in Article 54 CISA and developed by the CJEU in more than a dozen decisions needs to interact with human rights norms.

This paper elaborates this interaction and identifies a growing converging towards a uniform *ne bis in idem* principle. However, recent case law of the ECtHR, namely the case of *A and B v Norway* raises doubts whether convergence can be achieved. Moreover, it is outlined how this case constitutes a setback for the emergence of a uniform fundamental right and fundamental right as such.

*Katalin Ligeti* teaches European and international criminal law as well as economic and financial criminal law. Her research is primarily focused on police and judicial cooperation in criminal matters, comparative criminal procedure and international criminal law. She has published widely on criminal policy, victim protection, juvenile justice, financial crime, organized crime, corruption, terrorism, internal security and procedural safeguards. She is program director of the LLM in European Economic and Financial Criminal Law at the University of Luxembourg. Professor Ligeti is Vice-President of the International Association of Penal Law (AIDP), co-coordinator of the European Criminal Law Academic Network (ECLAN) and ECLAN Contact point for Hungary. She has previously participated as an expert in a number of European Commission impact assessment studies, as well as being called on for her expertise by several European Parliament committees, the OECD and the International Criminal Tribunal for the former Yugoslavia (ICTY). Professor Ligeti has been recently appointed to the European Commission Expert Group on EU criminal law policy.

REACTION TO  
“TRANSFORMING THE *NE BIS IN IDEM* PRINCIPLE  
INTO A FUNDAMENTAL RIGHT IN THE EU”

*Anne Weyembergh*

This reaction will be structured in four different points:

- A first observation about the pending cases before the Court of Justice of the EU (CJEU);
- A second observation concerning the relations/interaction between the CJEU and the European Court of Human Rights (ECtHR);
- A third remark on the need for the EU legislator to intervene in the field;
- A fourth remark relating to the need to better define/delineate the outlines of administrative law/sanctions and criminal law/sanctions.

1. *The pending cases*

There are interesting cases pending before the CJEU which concern the *ne bis in idem* principle. Three are especially linked to the issues raised in the case *A and B v. Norway*, namely *Orsi* (C-217/15), *Baldetti* (C-350/15) and *Menci* (C-524/15).

In the three cases, the main question is to know under what conditions the *ne bis in idem* principle applies when the laws of some Member States make it possible to combine administrative and criminal penalties to punish non-payment of high amounts of VAT. The three cases concern the Italian legislation, which indeed authorises such combination.

The facts of the *Orsi* and *Baldetti* cases are very similar to each other. As legal representatives of two different undertakings, *Orsi* and

Baldetti had both been imposed an administrative penalty in the sum of 30 % of the unpaid VAT amount. But criminal proceedings were then initiated for non payment of VAT by the undertakings. In the course of those criminal proceedings, both Orsi and Baldetti challenged the measure ordering the precautionary seizure of their assets. In both cases, the Tribunale di Santa Maria Capua Vetere referred an identical preliminary question to the Court of Justice. The Court decided to join them. The question is to know whether the Italian provision is compatible with Art. 50 of the Charter in conjunction with Art. 4 of Protocol 7 to the ECHR, in so far as it permits to combine tax penalties and criminal penalties to punish the same offence.

The conclusions of the Advocate-general Campos Sanchez-Bordona were delivered on 12 January 2017.

Referring to the case-law of the Court of Strasbourg and particularly to *Pirttimäki v. Finland*, he considers that the first condition (identity of persons) is not satisfied: the tax penalty had been imposed on the two legal persons whereas the criminal proceedings had been brought against the respective legal representatives of the companies. So, he considers it unnecessary to examine the two other conditions. It remains to be seen whether the Court will follow these conclusions.

What about the *Menci* case? A request for a preliminary ruling had also been introduced by an Italian Tribunal (Tribunale di Bergamo) in the context of criminal proceedings brought against Luca Menci because of the offences committed in the area of VAT, for which a definitive administrative penalty had already been imposed on him. This case was first joined to the *Orsi* and *Baldetti* cases but later on, after Strasbourg judgement in *A and B v. Norway*, disjoined and, in view of the importance of the latter, moved/reassigned from the 4th Chamber to the Grand Chamber. The oral phase in *Menci* was also reopened. So, this is all procedural mechanics but quite symptomatic of the importance of the *A and B v. Norway* Strasbourg judgment and of its potential impact on the CJ case-law.

## 2. *Interaction between the two European Courts*

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When comparing the Strasbourg case-law with the CJEU rulings, it appears that the latter gives an interpretation that is more favourable to the individuals' rights than the former.



This is in a way astonishing because, usually, one expects to see the CJEU focusing and being driven by efficiency concerns and the Strasbourg Court focusing and being driven by human rights protection concerns.

The field of the *ne bis in idem* principle shows that this vision has become a caricature.

Via its recent case-law, the CJEU has somehow engaged itself in some sort of change of attitude, as a real constitutional Court. This is visible in the field of mutual recognition, particularly on the European arrest warrant (see *Caldararu and Aranyosi*), and in the field of data protection/data retention (see *Digital Rights Ireland* (C-293/12) of 2014).

A clear link can also be made here with Opinion 2/13 where the CJEU considered the draft agreement on the accession of the EU to the ECHR incompatible with the autonomy of the EU legal order.

In a way, the evolution of the case law of the CJEU towards a deeper human rights protection and a better conciliation of efficacy and protection of individuals' rights is necessary to legitimise the autonomist vision of the CJEU, and more generally to legitimise the autonomy of EU law.

### 3. *The need for the EU legislator to intervene in the field*

The case law of the CJ is very rich but does not render superfluous a EU legislative intervention. The latter could pursue the 3 following objectives:

- “codifying” the Court’s case law;
- providing answers to questions that remain unanswered, for instance, regarding the identity of the person;
- updating and modernising the principle of *ne bis in idem* so as to put it in line with the EU’s present objectives and level of legal integration, namely in what concerns the potential derogations laid down in Art. 55 CISA (*Kossowski* case).

In fact, EU law has considerably evolved since the Greek proposal for an EU act in 2003; additionally, there seem to be important divergences between the case-law of the CJEU and the ECtHR, as Katalin

Ligeti has shown. Regrettably the Stockholm Programme<sup>1</sup> made no reference to such initiative, and the same goes for the 2014 strategic guidelines of the European Council<sup>2</sup>. And, for the time being, nothing has been announced by the Commission in the field.

4. *Last but not least, and very briefly, my fourth remark.*

It concerns the lack of clarity of the dividing line (some even speak of a “structural blur”<sup>3</sup>) between criminal and administrative sanctions. I will not have the time to enter this debate. I will refer here to one of ECLAN edited volumes: “Do labels still matter? Blurring boundaries between administrative and criminal law”. Let me just say that the current situation, in which it is to the different courts to rule on the precise dividing line between both types of sanctions, creates a very high level of legal uncertainty. Indeed variations are to be noticed in the European case-law. The uncertainty it creates looks increasingly unjustifiable, as the choice for the administrative or criminal nature of the sanctions may have considerable consequences in terms of the level of procedural guarantees. So, a reflection is urgently needed on how to limit such legal uncertainty.

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<sup>1</sup> European Council, *The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens* [2010] OJ C 115/1.

<sup>2</sup> Conclusions of the European Council, EUCO 79/14.

<sup>3</sup> P. Caeiro, “The influence of the EU on the ‘blurring’ between administrative and criminal law”, in Francesca Galli / Anne Weyembergh, *Do Labels still Matter? Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU*, Ed. Univ. Bruxelles, 2014, p. 175.

# IS MUTUAL RECOGNITION A VIABLE GENERAL PATH FOR COOPERATION?

(COMMENTED STRUCTURE AND CONCLUSION-DRAFT)

*Helmut Satzger*

1. *Traditional meaning of mutual recognition in judicial cooperation in criminal matters in EU law*

2. *Historical background within EU law*

3. *Mutual recognition as a paradigm change in judicial assistance? – invented and (only) used by the EU?*

a) Trends in traditional judicial assistance going in the direction of mutual recognition (German Constitutional Court in relation to fundamental rights in extradition cases, US-American “rule of non-inquiry”)

b) Example of the intra-Nordic extradition starting at the end of the 1950s

c) The MERCOSUR Arrest Warrant and the “Treaty on the simplification of extradition” between Argentina, Brasil, Spain and Portugal

d) Cooperation of States Parties with the ICC on the basis of the Rome Statute

e) Summary

4. *The principle of mutual recognition in various legal areas of the law and the respective trends*

a) Judicial assistance in criminal matters (developments after EAW)

b) Civil law

- c) Administrative law (recognition of administrative acts and legislation)
- d) Trends common to all areas where mutual recognition is applied to a certain extent

5. *Main characteristics of the concept of mutual recognition, its preconditions, advantages and points of criticism*

6. *Interpretation of mutual recognition as a flexible (“waiver-”) concept*

On the one hand mutual recognition does not replace harmonisation. It does, however, rely on it in so far as it is necessary to create a sufficient and viable basis for “mutual trust”. On the other hand, mutual recognition does not imply a strict and all-encompassing positive acceptance of different national standards. It may rather be considered a “waiver-concept”: the executing state waives its (sovereignty based) control power and - to a certain extent - does not apply its own (possibly stricter) national standards. The degree of waiver does, however, not necessarily amount to 100%. Rather, it depends on the quantity of “mutual trust” which pre-existed or which has been created by international instruments, especially harmonising acts. According to this understanding all limitations of mutual recognition and grounds for refusal in EU framework decisions and directives thus do not constitute exceptions to the principle of mutual recognition but rather concretise its specific form and degree in the respective context.

7. *Conclusion*

Mutual recognition as such is not “bad” or “good”. Additionally there is not just “one” form of mutual recognition. It is a rather flexible concept which is adaptable to a variety of very different circumstances. It can be either applied in a nearly “pure” form (as in federal states with one – centralised - criminal law and one criminal procedure), but it can also be applied with very many exceptions in order to respect the (more or less important) ordre public and the rights of individuals under the law of the executing state. The degree of mutual recognition acceptable to a state will to a large extent

depend on how much “mutual trust” exists or is built by harmonising or international instruments.

The easiest scenario is likely one in which there are nearly no significant differences regarding the applicable law – as is the case in most federal states or in autonomous systems such as the one created by the Rome Statute. Mutual recognition seems to be a most natural consequence under these circumstances. Similar are cases in which merely minor differences remain. Particularly if the states concerned are considered part of the same “legal family”, share the same legal tradition, legal mentality and values, if they all accept a comparable set of fundamental rights, have a common history and perhaps even a similar language. In these instances, the objective basis for mutual trust – essential precondition for any mutual recognition - may be applied, even without any limitations and (public policy) provisos.

In contrast, if the remaining differences are considerable and/ or if legal systems are partly or fully incomparable, if their history, language and legal tradition differ considerably, mutual recognition will necessarily presuppose “complementary” factors in order to provide for a sound basis for applying mutual trust. These additional elements may be built by harmonising legislation. Beyond that, however, legal practice and reality in the respective jurisdictions have to be taken into account. Criminal proceedings have to be based on the rule of law, the respect for a common set of fundamental rights must be guaranteed and the outcome of those proceedings must be predictable.

Even though mutual trust may be fostered by the measures indicated, trust cannot simply be built, it has to be earned. No one – even not the EU - can simply “postulate” that trust has to exist and has to last forever. Rather, it is a dynamic process. The legal and factual situation in all states concerned must be observed continuously. Should new and/or unforeseen events occur, the basis for mutual trust may diminish or even break away. For example cases in which for whatever reason, a state does not comply with the fundamental guarantees or if a state undergoes a constitutional crisis. An *ordre public* proviso can provide a solution for this situation. Even though it may be argued that the situation within the EU is rather stable things may change quickly – as can be observed in the current developments in Hungary or Poland. Thus a (narrowly defined) *ordre public* proviso

especially in relation to extreme fundamental rights violations should seriously be considered. It is a flexible outlet and as such not at all outdated.

Whether a higher degree of mutual recognition, converging to a pure (100%) form of mutual recognition is an objective of the future European Union can only be answered once the European Union itself is able to define what its aim shall be: a federal state, a loose form of confederation or something in between. Especially nowadays – with Brexit, anti-European governments in power in some Member States and the rise of nationalistic parties in many countries in Europe – it is far from clear where the Union’s path may lead. As some propositions by leading politicians (e.g. by Juncker, Hollande) point in the direction of a Europe of various speeds, the degree of mutual recognition could and probably will vary within the European Union.

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# PANEL III

## POLICIES

## RESTRICTIVE MEASURES

*Jørn Vestergaard*

*Restrictive measures in the fight against terrorism:  
Are these regimes just? Are they efficient? Are they needed?*

These are the basic themes and questions to be dealt with in this session.

A brief account of the history of restrictive measures and targeted sanctions will be offered with a focus on EU implementation of UNSC resolutions 1267 and 1390, and the generic UNSC resolution 1373, respectively. The essence of the jurisprudence of the European courts will be highlighted, in particular by drawing upon basic findings in the *Kadi* cases and the *People's Mojahedin Organization of Iran v Council* (PMOI) cases. While acknowledging that courts have demonstrated ability and willingness to protect the rule of law, blacklisted individuals and organisations are still deprived of certain fundamental rights. The procedural rights of the targeted parties therefore remain relatively weak and do not provide the necessary basis for challenging decisions concerning the freezing of assets and financial means.

A discussion will be initiated regarding the present status of legal safeguards for affected individuals and entities targeted by restrictive measures on suspicion of being associated with terrorist activities. In particular, it will be maintained that despite fundamental improvements with regard to upholding the rule of law there is still a need for developing European law in the protection of individual freedom and legal safeguards, e.g. by articulating with greater precision rules on the right to be heard, standards of proof required for the maintenance of restrictive measures, and the extent to which evidence must be subject to disclosure.



Reactions to the presentation from an experienced practitioner's point of view by the designated commentator will undoubtedly qualify the discussion among conference participants.

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## REACTION TO “RESTRICTIVE MEASURES”

*Anna Bradshaw*

These observations are put forward by way of a reaction, from a practicing lawyer’s perspective, to a question posed by Professor Vestergaard in a discussion paper, following his critique of the practices of the UN Sanctions Committee as a manifestation of subjective, arbitrary ‘Kadi Justiz’ in international law. If I have understood Professor Vestergaard correctly, he asks whether an anti-money laundering modality, in combination with some sort of mutual recognition system between EU states and other democratic states, could be a workable alternative to restrictive measures. In this connection, he draws on Professor Cameron’s earlier suggestion that existing criminal law measures against terrorism financing should be relied on in preference to applying restrictive measures to terrorism.

Having represented a number of individuals and entities subject to restrictive measures (EU sanctions), I share Professor Vestergaard’s concerns about the human rights deficit inherent in the UN’s sanctions regime, both substantive and procedural. The EU’s implementation of UN sanctions and its own, autonomous, sanctions regime is an improvement in relative terms: there is a requirement to notify the targets of restrictive measures of their listing, a right to administrative review by the Council and recourse to the Court of Justice of the EU (CJEU). These procedural protections have significant limitations, however; many of which have been catalogued in the course of a recent in-depth inquiry into the legality of EU sanctions conducted by a committee of UK’s House of Lords<sup>1</sup>. Worryingly, a number of

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<sup>1</sup> House of Lords, European Union Committee, 11th Report of Session 2016-17, ‘The legality of EU sanctions’, available at: <https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/102/102.pdf>

these limitations are of recent vintage: the procedural amendments to deny the applicant access to ‘secret’ evidence put before the court, the increasing practice of re-listing following a successful challenge and the ever-broadening grounds for listing.

To this litany I add a further concern: the lack of constraints on the use to which restrictive measures can be, and have been, put. The problem is best illustrated by stepping outside the counter-terrorism context, looking instead at the ‘misappropriation sanctions’ adopted by the EU to assist fledgling regimes in the wake of the Arab Spring onwards; most recently in respect of Ukraine in 2014. Although the ultimate aim is to further the EU’s Common Foreign and Security Policy (CFSP) recognised objectives, the method employed here is to support third country criminal proceedings to recover misappropriated State assets. The adoption of restrictive measures in this context is ‘supportive’ precisely because an EU administrative asset freeze is more effective than conventional mutual legal assistance in giving effect to a third country criminal asset freeze – in no small part, because it circumvents the procedural safeguards which otherwise would have applied. Indeed, in at least one instance restrictive measures have been adopted in circumstances where a request for mutual legal assistance in criminal matters had already been made by the third country but denied because it did not meet the necessary prerequisites for such assistance.

As a result, the EU’s adoption of misappropriation sanctions risks perpetuating related third country human rights violations and other abusive features of the third country proceedings that they are intended to support; running directly counter to the CFSP objectives being pursued. Yet the CJEU has consistently refused to find that misappropriation sanctions fall outside the scope of the powers conferred under the CFSP, or that EU sanctions are in substance criminal measures capable of attracting the same procedural safeguards.

The solution might instead lie in the EU developing strengthened criminal and civil asset freezing measures, to be adopted and applied at EU level in support of third country criminal or civil asset recovery proceedings, as an attractive alternative to reliance on administrative asset freezes imposed by way of sanctions.

*Anna Bradshaw* is a partner at Peters & Peters Solicitors LLP (London). She advises on a broad range of white-collar crime and financial sanctions cases, and has represented

suspects and witnesses in a number of high-profile investigations, prosecutions and non-conviction based asset recovery proceedings. Anna's financial sanctions experience spans contentious instructions as well as non-contentious compliance advice. She has represented both individuals and corporates in legal challenges brought against targeted financial sanctions, including the first UK judicial review of the implementation of EU sanctions as well as a number of annulment applications brought in the EU General Court. Anna holds a doctorate in anti-money laundering regulation, and taught public law and human rights law at the University of Westminster before going into private practice. She has been a member of the Law Society's EU Committee since 2011 and has given evidence to Parliamentary select committees on a number of topics related to EU criminal law. Anna also sits on the committee of the Fraud Lawyers Association, and is a member of the Society of Legal Scholars.

# ANTI-MONEY LAUNDERING, TERRORIST FINANCING AND TERRORISM

*Alexandra Jour-Schroeder*

## 1. *Overall Context*

“We want to map out the challenges and opportunities ahead of us and present how we can collectively choose to respond.” - The Commission White Paper on the Future of Europe: Scenarios for the EU27 by 2025.

## 2. *“Game Changers” – Terrorist Attacks in the EU – The Panama Papers and EU Reply*

- The European Agenda on Security (2015/16);
- The European Commission Action Plan to Fight Terrorist Financing (2016);
- The European Commission response to the Panama papers (2016).

## 3. *The EU Counter-Terrorism Directive*

- Final act signed on 15 March 2017;
- Scope: offences related to travelling for terrorist purposes outside the EU (foreign terrorist fighters); recruitment and training for terrorist purposes; spread of terrorist propaganda, including on the internet; funding to commit terrorist offences;
  - Common sanctions;
  - Assistance to victims of terrorism and their family members.

#### 4. *The EU Directive to Criminalise Money Laundering (CMLD)*

COM Proposal of December 2016:

- Minimum rules concerning the definition of money laundering (including self-laundering);
- More effective investigations;
- Implementing international obligations, as the Warsaw Convention and relevant recommendations from the FATF.

#### 5. *Mutual Recognition of Freezing and Confiscation Orders*

COM Proposal of December 2016:

- Facilitation of confiscation in cross-border situations;
- Recovered assets can be used for the compensation of victims, where national legislation allows for it.

#### 6. *The Preventive EU Framework (4.AMLD/5.AMLD)*

##### a) 4th/5th EU Anti Money Laundering Directive

4th AMLD is a preventive instrument:

- Main aim is to protect the Union financial system against money laundering and terrorist financing while minimising the burden on legitimate business;
- Main building blocks: identification of customers, proxies, and beneficial owner; ongoing monitoring; obligation to report suspicious transactions; record keeping; supervision and cooperation; staff protection; sanctions.

COM 2016 proposal for targeted amendments to the 4th AMLD, tackling both the financing of terrorism and the need for increased corporate transparency.

##### b) EU Framework on Cash Controls

100.000 cash control declarations are submitted annually by persons carrying 10.000 Euro or more into or out of the EU (total amount declared up to 70 billion EUR).

Issues addressed by December 2016 COM proposal:

- smuggling of cash in post and freight consignments;
- inefficient information exchange between authorities;

- the use of other stores of value, such as gold, anonymous prepaid cards;
- the inability by competent authorities to act on cases where amounts lower than 10.000 EUR are found but indications of criminal activity exist.

*Alexandra Jour-Schroeder* – a German national – is Director for Criminal Justice heading the European Commission’s Criminal Law Directorate. Her Directorate is in charge of developing and monitoring EU criminal law – for example to strengthen procedural rights for suspects or to criminalise EU fraud. The Department is responsible to set up a European Public Prosecutor’s Office. One of its priorities is to fight financial crime. Alexandra Jour-Schroeder has large experience in EU criminal law having headed several departments on EU criminal law and financial crime since 2011. She works for the European Commission since 20 years in various assignments including private offices of various EU Commissioners.

# REACTION TO “ANTI-MONEY LAUNDERING, TERRORIST FINANCING AND TERRORISM”

*Patrícia Godinho Silva\**

## 1. *Introduction*

1.1. It is reassuring to see that the European Commission is so committed to fight money laundering, terrorist financing and terrorism and that it is a high priority in the EU.

1.2. In this respect, it seems that the Commission White Paper on the Future of Europe is an opportunity to open a wide-ranging debate with citizens on how Europe should progress in the years to come including in what concerns the counter-terrorism matters.

1.3. Also the European Agenda on Security which purports to launch a broad strategic approach on very different aspects, including taking further measures to improve the fight against terrorism financing, is another good sign that the EU can bring added value to support the Member States in ensuring security.

1.4. Money laundering and terrorist financing pose a clear risk to the integrity, proper functioning, reputation and stability of the financial system. Accordingly, there must be effective measures to address these risks and threats.

1.5. Money laundering and terrorist financing are international problems and the effort to combat them should be global.

1.6. Money laundering and terrorist financing are frequently carried out in an international context; measures adopted at national or even at Union level must take into account international coordination and cooperation.

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\* The opinions expressed in this commentary are those of the author and do not necessarily coincide with those of the Portuguese Securities Market Commission.



## 2. *Commentary*

2.1. The measures adopted by the European Union in this field should be compatible with other actions undertaken in international fora (such as the UN, FATF, Moneyval, WB) and the Union must avoid overlapping measures, otherwise such measures will have very limited effect.

2.2. The adoption of the 4th Anti-Money Laundering Directive in May 2015 was an important step in improving the EU's efforts to combat the laundering of money and to counter the financing of terrorist activities.

2.3. The 4th AML Directive adopted a risk-based approach (in line with the FATF Recommendation 1<sup>1</sup>), which, in short, means “less risky situations justify less intrusive procedures”.

2.4. This (as stated by the FATF) will ensure that measures to prevent or mitigate money laundering and terrorist financing are appropriate with the risks identified and this should be an essential foundation to efficient allocation of resources.

2.5. The proposed amendments to the 4th AML Directive also announced in the Commission Action Plan (on 2 February 2016) may, however, raise some concerns in relation to:

(i) the implementation of these amendments, which will require further changes of legislative acts that are being amended just now, therefore making the transposition process complex and (possibly) inconsistent;

(ii) the proposed amendment to Article 2 of the 4th AML Directive, which seems to be heading to a rule-based approach instead of a risk-based approach – thus deviating from the FATF recommendations and shrinking the margin given to Member States to extend the scope of this Directive in whole or in part (see Article 4 of the 4th AML Directive), in accordance with their risk-based assessment;

(iii) the opinion of the European Data Protection Supervisor (Opinion 1/2017 of 2 February 2017<sup>2</sup>), which states that the Commission “seems to have foregone a proper proportionality assessment and have opted for «blanket measures»”;

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<sup>1</sup> Available at [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) on the website of the Financial Action Task Force (FATF).

<sup>2</sup> Available at [https://edps.europa.eu/sites/edp/files/publication/17-02-02\\_opinion\\_aml\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/17-02-02_opinion_aml_en.pdf).

(iv) the challenges posed by the registers of beneficial owners of legal persons and of trusts and also registers of banking accounts, as provided for in the 4th AML Directive and also in the proposed amendments, bearing in mind that one of the goals is to ensure an efficient interconnection of national beneficial ownerships registers.

2.6. Finally, the Commission must be aware of de-risking practices by financial institutions, as it is a fact that some banks are no longer offering financial services to entire categories of customers that they associate with higher money-laundering risk (money transmitters, charities and fintech companies are among the sectors particularly affected by banks de-risking, and we understand that some banks are also withdrawing from providing correspondent banking services). This can frustrate AML/CFT objectives and may not be an effective way to fight financial crime and terrorism financing, as it pushes higher risk transactions out of the regulated system into more opaque and informal channels that become harder to monitor.

### 3. *Conclusion*

The European Commission is strongly committed to fight money laundering, terrorist financing and terrorism.

The actions completed and the ongoing work of the European Commission clearly show that this is a priority, but, to be effective, the cooperation and the coordinated response from all actors involved – be it the Member States, third countries, institutions or agencies at a global level – are needed.

Not diminishing of course the relevant work that has been done by the European Commission it is also important to avoid overlapping work with other international fora and also not to rush the implementation of some measures for the sake of consistency and to assure the effectiveness of all these actions.

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presidency of the EU (2007). She works in the litigation department of the Portuguese Securities Market Commission. She also works as legal expert with the FATF and she is currently participating in the evaluation of the AML / FCT system of the SAR of Macao (China).

CRIMINALISING HUMANITARIANISM.  
THE CRIMINALISATION OF MIGRATION BETWEEN  
EUROPEAN UNION AND INTERNATIONAL LAW

*Valsamis Mitsilegas*

The presentation explored the evolution of the criminalisation of migration in the law of the European Union, viewed in the context of international law in the field. The focus has been on two main aspects of the use of substantive criminal law: the establishment of offences on human or migrant smuggling; and the establishment of offences on irregular entry, transit and stay. As regards the criminalisation of human smuggling, criminalisation in European Union law is strikingly broader than criminalisation in international law. The Smuggling Protocol to the UN Convention on Transnational Organised Crime (the Palermo Convention) views human smuggling explicitly within the context of organised crime and criminalises smuggling only if committed for the purposes of financial or other material gain. European Union law goes much further than this criminalisation. The long-standing elliptical EU legal framework set out by a combination of first and third pillar law adopted with minimal scrutiny in the form of a Directive and a Framework Decision on the facilitation of irregular entry, transit and residence contains a catch-all criminalisation which does not require the element of financial gain. This means in practice that Member States can criminalise humanitarian action by individuals or NGOs as human smuggling. The potential of EU law to lead to over-criminalisation in this context is evident, especially in the current political climate of targeting and stigmatising NGOs for their humanitarian interventions to save lives in the Mediterranean.

The inertia of EU institutions to align EU law with international law sits at odds with the development of EU criminal law in other

areas of regulating the movement of people: EU criminal law on trafficking in human beings has been revised on a regular basis, including via the adoption of a ‘Lisbonised’ Directive in 2011. The European Commission has recently declined to revisit EU criminal law on human smuggling – including limiting the scope of criminalisation to expressly exclude humanitarian action from its scope – with little concrete evidence justifying this choice. A first class opportunity for the Union to decriminalise has thus been lost. The paper also focused on the related aspect of EU law on the criminalisation of irregular entry, transit and stay. International law does not explicitly allow State Parties to the Palermo Convention to criminalise such conduct within the context of human smuggling, although the Protocol appears to leave a degree of leeway to States in terms of their domestic criminalisation policies.

The European Union has not criminalised irregular entry, transit or stay as such. However, its institutions have had to react to criminalisation efforts at national level. In a series of important judgments, including the seminal ruling in *El Dridi*, the CJEU has placed limits to domestic criminalisation of migrant conduct on the basis of the principle of effectiveness of EU law, in this case the Return Directive. The presentation focused on the evolution and nuances of CJEU case-law in the field, highlighting the reach and limits of what I called the ‘protective function’ of EU law regarding migrants. The presentation proceeded to reflect on the fundamental criminal law questions posed by EU responses to the criminalisation of migration flows, including what is the legal interest protected by criminalising human smuggling and irregular entry, transit and stay, where is the harm in such conducts and the extent to which criminalisation as currently designed has a preventive or a deterrent effect, in order to tackle the broader question: why criminalise?

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the European Parliament, the European Commission, national governments and parliaments and NGOs on EU Justice and Home Affairs Law and Policy. Specialist Adviser to House of Lords EU Committee for their inquiry on FRONTEX.

REACTION TO  
“CRIMINALISING HUMANITARIANISM.  
THE CRIMINALISATION OF MIGRATION BETWEEN  
EUROPEAN UNION AND INTERNATIONAL LAW”

*Nuno Piçarra*

1. When discussing the criminalisation of migration, it seems more than ever opportune to begin by recalling the provision of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, which sets out a general limitation to the criminalisation, by the Contracting States, of the illegal entry and presence in their territories of a certain kind of migrants. In fact, Article 31(1) of the Convention reads: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

2. It should also be recalled that there are no provisions of EU law requiring the Member States to introduce criminal law sanctions related to migration except in two very specific issues (smuggling and trafficking in migrants, as well as hiring irregular migrants), none of them directed at migrants as such. Consequently, EU law does not require the Member States to provide for the application of criminal sanctions to third-country nationals who are irregular migrants because they do not (or no longer) fulfil the conditions for entry, stay or residence in that territory. Article 5(3) of Regulation 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) requires the Member States, “without prejudice to the exceptions provided

for in paragraph 2 or to their international protection obligations”, to introduce penalties, in accordance with their national law, for the unauthorized crossing of external borders at places other than border crossing points or at times other than the established opening hours. “These penalties shall be effective, proportionate and dissuasive”, but they do not need to be of criminal nature.

3. The Schengen Borders Code makes an explicit link with Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals “in accordance with fundamental rights (...) as well as international law, including refugee protection and human rights obligations” (the so-called “Returns Directive”). According to Article 13(1) of the Schengen Borders Code, a person who has crossed a border illegally and who has no right to stay in the territory of the Member State concerned shall be apprehended and made subject to the procedures provided for by Directive 2008/115. The ECJ has already had the occasion to clarify in general terms that the directive does not preclude the law of a Member State from criminalising the illegal stay of a third-country national as an offence and from laying down penal sanctions to deter and prevent such an infringement of the national rules on residence. In fact, Directive 2008/115 concerns only the return of illegally staying third-country nationals in a Member State and is thus not designed to harmonise in their entirety the national rules on the stay of foreign nationals.

4. However, several Member States do criminalise the entry and the presence in their territory of third country nationals who do not (or no longer) fulfil the conditions of entry as set out in Article 5 of the Schengen Borders Code, or other conditions for entry, stay or residence in those Member States. That being so, the ECJ has been recurrently requested to interpret Directive 2008/115 – particularly in the light of the realisation of the aims pursued by it and of its effectiveness – in order to ascertain the compatibility with that directive of four types of national provisions of criminal law related to migration. The first type permits a sentence of imprisonment to be imposed on a third-country national solely on the ground of the irregularity of his/her situation in the territory of a Member State. The second type allows for a sentence of imprisonment to be imposed on a third-country national to whom the return procedure established by



Directive 2008/115 has been applied and who is staying illegally on the territory of the Member State without a justified ground for non-return. The third type penalises illegal stays of third-country nationals in a Member State by means of a fine which (i) may be replaced by an order of expulsion or home detention, or (ii) precludes the removal from the national territory, since removal is ordered only where there are additional aggravating factors. Finally, the fourth type of provisions of national criminal law related to migration permits a sentence of imprisonment on an illegally staying third-country national who, after having been returned to his/her country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that State in breach of an entry ban.

5. The ECJ has consistently based its case-law on the principle according to which Member States may not apply criminal law rules which are likely to undermine the application of the common standards and procedures established by Directive 2008/115 and thus to deprive that directive of its effectiveness. Consequently, it has accepted two situations in which Directive 2008/115 does not preclude the imposition of a sentence of imprisonment on a third-country national on the grounds of an illegal stay: (i) where the return procedure established by Directive 2008/115 has been applied by a Member State and the national is staying illegally in its territory with no justified ground for non-return; (ii) where the return procedure has been applied and the person concerned re-enters the territory of that Member State in breach of an entry ban. Furthermore, the ECJ's case-law has accepted the imposition of a fine on an irregular third-country national, provided that such fine may only be replaced by an expulsion order.

6. It is to some extent ironic, as well as a sign of the times, that Directive 2008/115, which has raised so much criticism since its adoption – not totally unfounded –, has become a brake to the power of the EU Member States to criminalize migration, although on very specific grounds which do not consider primarily the migrants as such.

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of Free Movement of Workers and Social Security Coordination (MoveS) and of the Management Board of the European Agency for Fundamental Rights (FRA); member of the former Framework for Permanent Concertation of the Schengen Agreements and of the former K.4 Committee of the EU Council.

# CLOSURE

## CONCLUDING REMARKS

### EUROPEAN CRIMINAL LAW IN THE GLOBAL CONTEXT: VALUES, PRINCIPLES AND POLICIES

*Robert Kert*

1. Looking at criminal law in the global context, there are three layers:

- the national states, which originally saw criminal law as an expression of their sovereignty and where criminal law provisions developed;
- the European Union; and
- the international level with a number of different players.

2. Domestic criminal justice systems will still remain important. Neither European law nor international law will completely replace national criminal law. The EU criminal law is very strongly influenced by international law, even if international law contains mostly obligations for the States, not for the EU.

3. The following tendencies can be observed:

- the EU receives international law and faces challenges in the implementation of international law;
- the EU and EU bodies are developers of legal principles;
- the EU creates new instruments or develops legal instruments within the EU.

4. Regarding criminal law, the EU faces the following challenges and difficulties in a globalised world:

- There are not only common interests, but also common values in Europe. These common values are necessary e.g. for the

development of new legal instruments in the field of criminal law and for mutual recognition which is based on mutual trust. Even if there are common values and common standards in Europe, it is difficult to find common provisions. On a global level there are much more obstacles since values differ.

- There are differences between the criminal law systems developed in the national states. To find common standards between Member States is a challenge (e.g. different general parts of the criminal law and different sanctioning systems).

- Whereas there is an over-regulation in substantive law in the EU, in procedural law there is still a lack of harmonisation. This is somehow an expression of “our system is the best”, but is also caused by different legal traditions in the Member States.

- Substantive and procedural law should be developed together, as substantive law cannot be enforced without procedural law.

- The EU should not only transfer its values and principles to the global level, but should also visualize its policies and values. This could be a means to become a more important player on the global level.

- The EU as the whole world faces difficult challenges due to serious terrorist attacks that threaten our core values. It is important that in a fight against terrorism substantial values of the EU and of the Council of Europe are not undermined by the strong wish to prosecute terrorists and to prevent terrorist attacks. The role of criminal law and criminal procedure in this context must be rethought and the EU could and should play an important role in this process.

- Europe is a strong market and should use this position to impose conditions for access. This is a possible way to bring Europe’s values to a global level and protect common global values. This might concern environment, but also human dignity. EU could play a role as possible regulator of globalization and develop instruments to bring European values on a global level.

- Values cannot only be transferred by means of criminal law, but also by means of administrative law and civil law. Therefore, an interaction between these areas is needed.

- In relation to a globalised world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. The Union’s action on the international scene shall be

guided by the principles which have inspired its own creation, development and enlargement.

*Robert Kert* is Professor for criminal law and criminal procedure at the Vienna University of Economics and Business and Head of the Institute for Austrian and European Economic Criminal Law at this University. His research focuses on sanctioning law, European criminal law, white collar crime and economic criminal law, fiscal penal law, administrative penal law and diversion. He has participated as an expert in many comparative projects on behalf of the European Commission and other European institutions which dealt with various questions of European criminal law. Robert Kert is contact point for Austria in the European Criminal Law Academic Network (ECLAN) and Member of the ECLAN Management Committee.