

Securing Defence Rights in Transnational Proceedings

Wade, Marianne

DOI:

[10.1163/15718174-23022065](https://doi.org/10.1163/15718174-23022065)

License:

Other (please specify with Rights Statement)

Document Version

Peer reviewed version

Citation for published version (Harvard):

Wade, M 2015, 'Securing Defence Rights in Transnational Proceedings', *European Journal of Crime Criminal Law and Criminal Justice*, vol. 23, no. 2, pp. 145-169. <https://doi.org/10.1163/15718174-23022065>

[Link to publication on Research at Birmingham portal](#)

Publisher Rights Statement:

Checked for eligibility: 11/08/2015. Published version at
DOI: 10.1163/15718174-23022065

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

Securing Defence Rights in Transnational Proceedings

By Marianne L. Wade¹

Abstract:

This paper identifies and analyses problems and weaknesses standing in the way of the provision of an effective defence in transnational criminal proceedings. Drawing upon some key findings of the EuroNEEDs study, it extrapolates results from that examination of EU criminal justice as valid for all transnational justice settings. It is argued that the failure to recognise legally the difference between national and transnational proceedings leads to a lacuna. Transnational criminal law and justice mechanisms are recognised as developed above all as tools of repressive criminal procedure leaving individuals facing them stripped of their constitutional identities and corresponding protective rights. It is argued that those creating transnational criminal law and justice mechanisms must recognise and provide for a more balanced system to avoid such contexts acting as constitutional loop-holes and to ensure the provision of defence rights and procedural safeguards in such proceedings.

Key words:

Defence rights, transnational criminal law, transnational criminal justice, EU criminal justice, procedural safeguards, constitutional guarantees, EuroNEEDs.

I. Introduction

The current trend in European criminal justice is undoubtedly prosecution focused. Despite the considerable efforts undertaken on defence rights in accordance with the Roadmap² developed to implement the relevant part of the Stockholm programme³, the past years have seen vital parts of access to lawyer rights – particularly legal aid – set aside.⁴ Quite apart from classic arguments over sovereignty concerns, such proposals fail because they are regarded as requiring budgetary commitments from the member states.⁵

Nevertheless, it seems important to stress from the outset, that its subject matter – securing defence rights in transnational proceedings carried out within the EU context – is no more an unreachable pipe-dream than was the idea of an EU-wide effective arrest warrant before the EAW Framework Decision introduced that much praised mutation of mutual legal assistance in 2001.

The article 6 jurisprudence of the European Court of Human Rights leaves us in no doubt that the fair trial rights it intends to protect can only be satisfied where there is equality of arms. Criminal justice

¹ This paper is based on a presentation made to the Challenges of Transnational Investigations hosted by the Institute of Judicial Administration, School of Law, University of Birmingham and co-funded by the Hercule Programme of the European Commission in March 2013. A full conference report is available at:

<http://www.birmingham.ac.uk/research/activity/ija/news/2013/challenges-transnational-investigations-report.aspx>

² Resolution of the Council of 30th November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01) O.J. 4.12.2009 C 295/1.

³ Notices from the European Union Institutions, Bodies, Offices and Agencies. European Council. The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01) O.J. 4.5.2010. C 115/1.

⁴ A full overview of progress made under the Roadmap can be found on the pages of the European Criminal Bar association: http://www.ecba.org/content/index.php?option=com_content&view=article&id=360:roadmap-stockholm&catid=65:procedural-safeguards&Itemid=44 Note under the separate “legal aid” category the evolution of measure C including the decoupling to legal aid from it.

⁵ So e.g., Baroness Ludford at a European Parliament panel on defence rights in the EU, October 2012. This argument, however, becomes less credible upon closer reflection. Given the importance now attached to the notion of EU citizenship by the Treaties - see e.g. article 20 TFEU – such grounds for non-progress in liberty enhancing measures become problematic when contrasted with the member states’ ability to commit resources to e.g. the European arrest warrant and indeed the availability of Union funds for criminal justice mechanisms – see e.g. Eurojust’s Legal Service’s “Report on Joint Investigation Teams (JITs) and Eurojust’s JITs funding 2/2011 1 February – 30 April 2011” which reports on the second funding programme (HOME/2009/ISEC/FP/C2-000000576), available at: www.nij.bg/FileHandler.ashx?folderID=153&fileID=1954 (last accessed 18.06.2014).

See the current Eurojust “Call for Proposals for Financial Assistance to Joint Investigation Teams” 2014/4 available at: http://www.eurojust.europa.eu/doclibrary/JITs/JITs%20funding%20application%20procedure/JITs%20Funding%20Call%20for%20Proposals%202014-4/JITsFunding_call-for-proposals-2014-4_EN.pdf (last accessed 18.06.2014).

developments within the context of the European Union have long been subject to criticism that they sideline defence rights as well as the structural position of the defence in such cases. At heart, these criticisms naturally bear the accusation that action within the EU context is thus undermining such protected rights. The status quo as reported above would appear to confirm such criticism.

Few would deny that the criminal justice related developments associated with the Area of Freedom Security and Justice thus far are strongly marked by matters of executive priority and thus prosecution interest. In a large-scale empirical project to explore the factual problems associated with European cases – the EuroNEEDs study, I thus set out also to determine the experiences and position of the defence in such cases. This paper draws upon and analyses these research results. In a first section, the key EuroNEEDs results are briefly presented. The paper then goes on to reflect more broadly on what the securing of defence rights means within the context of EU and broader transnational criminal law. The traditional means of providing for defence work are contrasted with the framework, nature and reality of criminal justice in transnational contexts and the resulting mismatch and problems explored. In a final section a number of steps to ensure better rights protection are considered.

II. The EuroNEEDs Study and Key Results

The EuroNEEDs project was an independent academic study was carried out by the author at the Max Planck Institute for Foreign and International Criminal Law. It was co-financed by the Hercule Programme of the European Commission and only feasible due to the work of a large project team. It was a comparative study entailing interviews were conducted with 132 prosecutors and 60 defence lawyers in 18 EU member states as well as practitioners working within OLAF, at Europol and Eurojust. Practitioners were questioned as to the challenges they face when investigating and prosecuting cases with a European dimension.

It may plausibly be argued that the EU – as a supra-national instance – has interests beyond the collective concerns of the member states. In relation to crimes against its budget, the EU's interests may, in some cases, even be contrary to those of member states. In relation to cross-border crime, the EU has sought to make provision for comprehensive investigation and prosecution of these,⁶ often significantly boosting the reach of member state action to ensure a different quality of investigation and prosecution. The legitimacy of EU action in such contexts – as opposed to work by any other institution negotiating trans-national treaties – is lent particularly by the specific nature of the EU. As a supra-national governance level providing for the free movement of goods, persons, products and capital,⁷ it plausibly facilitates criminal activity of different sorts. The member states and EU institutions are committed to ensuring these freedoms are not abused.⁸ The project design consequently features a presumption that the EU bears a particular responsibility for combatting crimes it facilitates as a community; it must seek to protect the legitimacy and to avoid the abuse of its fundamental principles.

The study, however, equally regards EU citizenship as a core feature of the post-Lisbon EU, and therefore also conceptualised the work of defence lawyers as central to criminal justice. Consequently, the study also investigated in how far the jurisdictional borders within the Union may impede defence work as usually foreseen within criminal justice systems. Key aspects of this part of the study are relevant to the argument of this article.⁹

The first clear finding is that the very fact of transnational evidence gathering opens up concerns that defence rights and procedural safeguards will be less well catered for, as prosecutors do not appear to feel the same sense of responsibility for securing, or indeed the ability to secure, them in such scenarios.¹⁰ The level of rights enforced will depend strongly on the forum in which any activity takes place. Given the enormous

⁶ E.g. via Europol analysis, Eurojust support, joint investigation teams etc.

⁷ See Barnard, C. *The Substantive Law of the EU: the Four Freedoms* (Oxford: Oxford University Press, 2013).

⁸ See e.g. Carrera, S. *An Assessment of the Commission's 2011 Schengen Government Package: Preventing abuse by EU Member States of freedom of movement?* (Brussels: Centre for European Policy Studies, No47/March 2012) pp. 1-28.

⁹ It is not possible to present these results except in a very abbreviated manner here. A report of these results can be found on the website reporting upon the conference at which the presentation - upon which this paper is based - was made. See Wade, M. *Securing Defence Rights in Transnational Proceedings - Central EuroNEEDs Results* (Birmingham, 2015) available at: <http://www.birmingham.ac.uk/research/activity/ija/news/2013/challenges-transnational-investigations-report.aspx>

¹⁰ See results relating to questions on ensuring adherence to procedural safeguards, Wade (2015) op cit.

variation in regulation, safeguards and rights across the EU,¹¹ this clearly means the level of defence rights factually secured will also differ greatly. Even at a very basic level, the mere trans-nationality of such proceedings creates significant hurdles for the defence. Where a case involves countries with similar standards, the factual problem will be less prominent. As Hodgson points out, European proceedings are currently a lottery: "Safeguards for the accused vary across jurisdictions, according to the roles and responsibilities of other legal actors at various points in the process – some are stronger during the investigation, others at the trial hearing. A defendant may have the best, or the worst, of both worlds."¹²

This challenge is evident in other insights provided by the EuroNEEDs study. Defence lawyers indicate clearly that they feel the equality of arms to be compromised in European cases.¹³ A majority of 63 % responding that the defence is disadvantaged in international cases as opposed to ones involving national institutions only.¹⁴

Perhaps more concerning than the feeling of disadvantage in European cases is the apparent despondency demonstrated by the defence lawyers interviewed by the EuroNEEDs study.¹⁵ Often a kind of "anything might help" attitude was evident reflecting just how desperate defence lawyers feel the status quo to be. As a consequence, defence practitioners demonstrated a surprisingly high level of support for almost all potential remedies suggested. 32% for example support the idea of a European public prosecutor supervising coercive measures, 55% a defence network (not only 25% a supra-national defence instance) whilst 63% support an approximation of law. These contrasted interestingly with the respective views of prosecutors.¹⁶ It is noticeable that defence lawyers generally display greater readiness to endorse reform proposals than prosecutors. This would appear to support the notion that they perceive a more urgent need for change than their prosecutorial colleagues.

A fundamental difference in the experiences and perceptions of prosecutors and defence lawyers is further highlighted by 70 % of responding prosecutors denying the emergence of a parallel criminal justice system to deal with European cases, but only 57 % of their defence colleagues doing the same.¹⁷ This is perhaps indicative of defence lawyers finding such cases so difficult to handle, they feel as if they are on terra nova. Clearly as only defence lawyers are left feeling this way, this may impact upon the level playing field required for an equality of arms to exist.

The belief of approximately one third of all national prosecutors interviewed that mutual recognition (the "cornerstone" of European co-operation) measures generally disadvantage the defence is particularly interesting. The largest proportion reporting recognising difficulties (11%) did so only at a theoretical level. Intriguingly, however, 9% testify to finding European cases easier to handle than purely domestic ones. In other words, they experience the defence as less able to mount opposition to their cases.¹⁸

This is surely as strong a signal of a weakened defence as there can be; it is difficult to imagine a clearer indication of the defence being side-lined than this final point and it must act as a serious warning that effective defence is endangered in trans-nationalised proceedings. That prosecutors should notice and record this fact – even a relatively small proportion of them – is intriguing. Normally one would anticipate that transnational cases are generally more difficult to handle so lacking pressure from the defence leading to

¹¹ See Wade, M. *Developing a Criminal Justice System within the European Union* (Brussels: European Parliament, 2014) and Ligeti, K. *Toward a Prosecutor for the European Union. Volume 1* (Oxford: Hart Publishing, 2012).

¹² Hodgson, J. S. 'Safeguarding Suspects' Rights in Europe: A Comparative Perspective', *New Criminal Law Review*, 14 (4), (2011), p. 620.

¹³ The study utilised the concept of "European cases" intending to indicate such cases as of a scale and nature meaning they should be viewed as of equal concern to all European citizens and tax-payers. These pertain particularly to crimes victimizing the EU (usually compromising its financial interests) and certain types of transnational crimes. Where a closer definition of the latter was required by the study, reference was made to trafficking human beings, drug smuggling and corruption. For this reason, in what follows reference will be made to European cases in relation to study results but international cases when transnational contexts more broadly are being discussed.

¹⁴ See figures 1 and 2 and their analysis in Wade (2015) op cit.

¹⁵ See figure 3 and analysis in Wade (2015) op cit.

¹⁶ See figures 10, 11 and 12 and their analysis in Wade (2015) op cit.

¹⁷ See figures 4 and 5 and their analysis in Wade (2015) op cit.

¹⁸ See figures 6, 7, 8 and 9 and their analysis in Wade (2015) op cit.

such statements must be taken as very significant indeed. This strongly confirms the defence claims highlighted above that they lack tools or the requisite status to act effectively in these cases.

III. The Problems faced by Defence Practitioners

The EuroNEEDs study was conducted as an exploration of European criminal law. As such, its results logically relate to the very specific context of proceedings taking place within the EU influenced by the institutions and mechanisms established in that context during the past 15 years of criminal justice co-operation.¹⁹ These reflect considerable advancement in the field of criminal justice co-operation with mechanisms such as the EAW perhaps best described as mutations of mutual legal assistance. These results are thus to be associated with a very particular context. Nevertheless, certainly as far as the problems faced by defence practitioners are concerned, it is suggested that in their core these are similar to those faced by defence lawyers in all transnational proceedings, perhaps in a more starkly obvious way. Problems are caused on the one hand by the mere fact of a case involving more than one jurisdiction or legal framework, clearly a common feature of any trans-nationalised proceedings. Particular problems are caused by the level of informality marking the work of EU prosecutors and investigators. This is formally encouraged by mutual recognition instruments (above all the EAW) specific to the EU. Nevertheless, even the EU context features this special level of trust only to a point; experiences with the EAW have also sewn mistrust.²⁰ Joint investigation teams, specialist anti-terrorist, drug and human trafficking combatting supra-national organisations, Interpol, liaison magistrates, etc. are available in broader transnational settings and will provide for less formal exchange in these too. Although instruments of mutual recognition, particularly the EAW, are specifically attacked as undermining human rights because they do away with traditional hurdles (such as double criminality) and have been used inappropriately, it would seem that where this criticism arises legitimately, such problems can often be associated with the ease (and indeed inappropriateness of use). They have become the focus of attention because they represent a step forward in cooperation and problems associated with this more generally become accentuated.²¹ For this reason, it is submitted that a certain level of extrapolation is possible for the provision of defence in trans-nationalised proceedings more broadly from these EU-based findings.

If an effective defence is to be possible, a context of fairness secured by procedural rights is required. Fundamental to that is the requirement of equality of arms between prosecution and defence.²² The EuroNEEDs results highlight some problems relating to this latter, central principle.²³ Defence lawyer interviewees further expressly point to the problems caused by the accommodation of informal decision-making on particularly prosecutors' behalf. Decisive points during an investigation and leading up to the lodging of charges are discussed by international groups of investigators and prosecutors and conclusions drawn based upon their collective judgement of what is appropriate. In formal, legal terms, however, only a decision by a national authority (e.g. to search premises or to lodge charges) is made and will be reviewable, if the rules of that jurisdiction allow it, only as such. In other words, legally the trans-national nature of such decisions is nowhere to be seen. Where proceedings are steered and deeply affected by decisions (such as forum) for which prosecutors cannot be held (comprehensively) accountable, clearly a defence lawyer has no legal point onto which to anchor his or her work. Given the fundamental fact in transnational proceedings that these will be conducted with greater distance to those individuals affected by them, this is a particular problem: prosecutors are much less likely to feel they owe a duty to those they make decisions about (whilst there is considerable evidence demonstrating that prosecutors feel such a duty to citizens or residents of their

¹⁹ See Klip, A. *European Criminal Law* (Cambridge: Intersentia, 2012) and Satzger, H. *International and European Criminal Law* (Munich: C.H.Beck, 2012).

²⁰ See Albers, P., Beauvais, P., Bohnert, J.-F., Böse, M., Langbroek, P. Renier, A. and Wahl, T. *Towards a Common Evaluation Framework to Assess Mutual Trust in the Field of EU Judicial Cooperation in Criminal Matters* (Copy on file with author, 2013)

²¹ One may also note that by preventing the abuse of freedom of movement across the EU such mechanisms help to protect other human rights.

²² Equality of arms is a well established element of the right to a fair trial - see N. Mole and C. Harby *The Right to a Fair Trial: A Guide to the Implementation of Article 6 ECHR* (Strasbourg: Council of Europe 2006), p. 46 et seq. and ECtHR *Dombo Beheer v The Netherlands*, 27.10.1993, Application no. 14448/88.

²³ See Wade (2015) op cit.

jurisdictions²⁴). In other words, informal decisions are made about subjects more likely stripped of any characteristic of meaning to those making such decisions whilst defence lawyers are left with few footholds to gain insights into proceedings (and decision-making during their course) let alone to perform their usual role.

III.a. A Brief Reflection on the Equality of Arms

Whilst there is not scope to explore the meaning of the equality of arms fully in this paper, it is nevertheless important to reflect briefly upon what it means in such contexts. Fundamentally the idea is, of course, that the defence and prosecution face each other on a level playing field. This is traditionally imbued with the greatest import in the trial context although in transnational contexts the question is whether certain points in the investigation do not also require consideration. These contexts are, however, interesting for other reasons too.

Clearly the majority of defence lawyers interviewed by the EuroNEEDs study feel disadvantaged in European cases. The above statistics do provide some basis to believe this to be particular to European criminal law given the presence of mutual recognition instruments in that context. However, one might well expect the defence to complain of inequality when facing highly specialized prosecutors, especially working in networks across borders something, which does not occur only at the EU level. A closer look at both prosecutorial and defence responses, also indicates that there are further nuances to this scenario, however.

Amongst the defence lawyers interviewed, there is also a significant minority who do not feel disadvantaged and who feel well placed to cope with European cases. Occasionally there are also astonished and frustrated statements by prosecutors to be heard in their additional comments; accounts of them chasing highly potent perpetrators across borders, always one step behind. These statements require further exploration and that one proceeds with caution. There can be little doubt that we are examining a context in which the idea of an equality of arms is appropriate. Criminal justice is an acrimonious matter, especially when dealing with the more serious criminal phenomena associated with transnational and the European criminal law context. Prosecutors and defence lawyers present different sides, perhaps not of a battlefield but certainly of a very controversial context. Moreover, their words should be recognized as part of such a setting, especially when relating to the respective other side. Nevertheless, there are doubtless also powerful perpetrators involved in these fields of criminal activity. The crime of choice in European cases currently the focus of reform proposals such as the EPPO, is massive financial fraud against "state" (namely the EU's) coffers. Given what we know about fraud and similar white-collar crime,²⁵ it would be extremely strange not to anticipate the participation of powerful and wise criminal actors. The next associated truth with this profile of socio-economically powerful suspects, is that they can afford good defence lawyers. Good, well-resourced defence lawyers are naturally capable of working in international networks – indeed, it is precisely the quality of network clients pay for - and with great efficiency. It requires no stretch of the imagination to imagine prosecutors hampered and disadvantaged when facing such scenarios.

There is certainly evidence in the EuroNEEDS data of such differences between defence lawyers and their experiences. This is clearly a more subtle point relating to an equality of arms argument, albeit a different perspective on this. Where a network of professionals is well resourced, knowledgeable and feels at home in the international context, this is a powerful force to contend with. One which can see state powers challenged and stretched to their limits and indeed beyond. The central point to remember is that European criminal justice mechanisms were created to ensure that prosecutors have international networks to rely upon and even, if necessary, increasingly powerful, supra-national institutions to support them in their work, to help create specific, specialized networks or teams and to hurry components along if necessary. No action at the European level has been taken to ensure defendants can rely upon such networks. Access to those defence networks, which exist, or creation of them is plausible only for those who have the financial resources to pay for them. And thus our consideration of equality of arms in the criminal justice context leads us to a brutal, if almost banal and certainly incurable, truth about inequality of arms more broadly. The rich are at an

²⁴ See Albers et al (2013) op cit.

²⁵ See e.g. Friedrichs, D. *Trusted Criminals: White Collar Crime in Modern Society* (Belmont: Wadsworth Cengage Learning, 2010) p. 329 et seq. Seminal: Sutherland, E.H. 'White-Collar Crime' *American Sociological Review* Vol. 5, No.1, February 1940, pp. 2-10.

advantage. The problem is that this reality is currently being magnified by our governments in European and other trans-national contexts. The inequality of arms in European criminal justice cases currently disadvantages the impecunious suspect. That surely is not what the European Union was intended to achieve?

III.b. The Structures of Defence Provision

The majority of defence lawyers questioned by the EuroNEEDS study are experts who have dealt with mechanisms and institutions related to criminality of, at most, moderate seriousness. A very significant minority – reflecting the pool also interviewed on the prosecutorial side – are experts dealing in financial crime, sometimes working in larger firms. Not entirely surprisingly, the experiences of these groups of defence practitioners are diverse. It is crucial to recognise that defence lawyers are practitioners with a range of professional interests. One of those is also to sustain themselves and, at least in some cases, to profit-maximise.

Given that defence lawyers are organised entirely differently to other criminal justice practitioners and as such subject to greater structural diversity, it is perhaps not surprising that they do not speak with one voice. There is clearly at least a section of this group of practitioners with a clear interest in objecting to any state interference in the structuring of defence work currently performed by an elite well paid to do so. Unquestionably, there are sound, philosophical reasons to object to state involvement in and potential influence over defence work. It is, however, also important to recognise that there are also pecuniary interests in reserving such work for private firms. As long as member states fail to recognise that there may be specific reasons not to respect this organic state within transnational proceedings, the equality of arms debate in such contexts must be recognised as complex.

III.c. Legal Classification of Trans-national Criminal Justice Activity

The threat to the equality of arms stems, above all, from the fiction that the European level – legally and institutionally; like all other transnational contexts – „adds no value.“ This is extraordinary given that European institutions tend to strive above all to justify their existence via value added. Legally, however, the member states force us to the fiction that they do not. As evaluated by the Court of Justice of the EU in the so-called OLAF case law,²⁶ control rests with member state authorities because only they can finally decide whether to instigate criminal proceedings or not. Whilst this is undoubtedly true, this leaves us with a legal result that an investigation instigated, co-ordinated and run via meetings at Eurojust or Europol are no different to “normal,” national investigations run locally.

This cannot, however, really be allowed to stand. The European Convention on Human Rights (ECHR) case-law consistently sees the European Court of Human Rights (ECtHR) evaluating the fairness of any given process as a whole.²⁷ The ability of the defence to participate and be heard at various stages during proceedings provides a balance and equality of arms as we currently accept it.²⁸ Investigations run at the European level are currently marked by informality of decision-making²⁹; praised by prosecutors and investigators (understandably) for allowing them to work swiftly and efficiently. The problem is obvious from a defence perspective, however. Prosecutors and investigators can make decisions about the entire run of an investigation, up to and including the forum in which to pursue a prosecution, entirely amongst themselves. Evidence will be gathered in a number of states, coercive measures imposed and overall jurisdiction decided according to decisions made by national prosecutors working together, probably weighing a number of factors and interests entirely informally. The defence is left at best only able to contest the result of such deliberations reflected only in the decision of a single national prosecutor in accordance to

²⁶ For exploration of this point see Allegrezza, S. and Agostini, B. *Judicial Supervision of Criminal Investigative Measures in the European Context*, Paper delivered at conference referenced in fn. 1, unpublished paper on file with author. Wade, M. ‘Judicial Control: The CJEU and the Future of Eurojust’ *ERA Forum* (2013) 14:201–214, p. 206 et seq. and Wade, M. ‘General Principles of Transnationalised Criminal Justice? Exploratory Reflections’ *Utrecht Law Review*, Volume 9, Issue 4 (2013) 165–183, p. 170 et seq.

²⁷ See e.g. McBride, J. *Human Rights and Criminal Procedure* (Strasbourg: Council of Europe Publishing, 2009), p. 243

²⁸ See N. Mole and C. Harby op cit., p. 46 et seq.

²⁹ Indeed a recent review by the European Parliament determined that Eurojust for example tend to strive for informal decisions even where they have formal powers to impose a decision.

the rules on judicial review of that particular jurisdiction. This will often not reflect the nature or complexity of the process behind this decision. Indeed, in transnational contexts, particular provision for informality appears to have been made (or at least no reason for formality recognised). As one defence lawyer interviewed comments, when requesting information explaining the grounds for a decision e.g. as to court jurisdiction, the response will invariably be „Eurojust is not obliged to enter the basis of this decision in the file.“³⁰ Defence needs in this regard have been forgotten even in relation to the most basic; that for information, let alone in connection with possibly being heard on the subject. Seen from this perspective, it is hardly astonishing that some defence lawyers feel they face an entirely different criminal justice system when working in a trans-national context.

III.d. Transnational Criminal Law as Repressive Criminal Procedure

This status quo is entirely understandable if one recognises transnational criminal justice mechanisms, institutions and in the European case procedures as developing from state desire to co-operate in criminal justice matters. The mechanisms developed are driven by legitimate state interest in (effective) prosecution. As Boister points out in his seminal text on the subject, this usually means that such contexts are dominated by ideas of criminal law and punishment held by dominant states with the broader context ignored.³¹ Transnational criminal law, and European criminal justice as a particular form of it, are systems based on a prosecution focused, repressive view of criminal justice.

Another way of seeing transnational criminal justice mechanisms is as an attempt to ensure investigators and prosecutors can overcome the conventional boundaries of their jurisdictions. The very point is that the identity of the perpetrator, including his or her nationality, becomes of lesser importance as a trans-nationalised investigative machinery gets under way and the logic of that ‘system’³² takes over to ensure the suspect is charged and brought to justice before the appropriate court – wherever that may be – as dictated by the rationale of the set-up used. From a governance and criminal justice administration point, this is logical and all well and good.

Undeniably, however, the individual subject to such investigations is not changed by any trans-national setting framing them; he or she retains his or her identity and is indeed likely to attach some importance to it. An individual will retain his or her nationality and the expectation that any criminal process will retain the characteristics of the Constitution associated with it. His or her perception of what constitutes criminal behaviour will be informed primarily by his or her national legislative context. A suspect or “person of interest” to an investigation will usually have expectations of defence rights and procedural guarantees, which accompany it, and any ensuing trial formed by what constitutes the norm in their domestic legal system. A number of European Union Member States including France, Italy and the Netherlands, for example, grant their suspected citizens a right to investigate their own cases in parallel to the police.³³ European and transnational criminal law pay little heed to this right. It is expected by a significant number of the subjects of their investigations nevertheless. The logic of transnational criminal justice as a state need driven phenomenon naturally ignores such features. If criminal justice at this level is to adhere to the tradition of bearing both a sword and shield function, this is, however, a point requiring urgent attention. These arrangements after all aim to achieve justice; this is far more than just the efficient fulfilment of a (collective) executive desire to prosecute and punish – and it is famously something, which must not only be achieved but also perceived as such.³⁴

III.e. The Individual Rights-holder and Transnational Criminal Justice

³⁰ Interview on file with author.

³¹ Boister, N. ‘Transnational Criminal Law’ *European Journal of International Law* (2003) 14, no. 5, pp. 958-959.

³² There is no denying that the transnational and European contexts feature only skeletal or fledgling systems, nevertheless, these cooperative contexts do feature important common assumptions to facilitate cross-border workings of domestic criminal justice authorities, which lend them a different character.

³³ Wade, M. ‘Part III – Present National Criminal Justice Structures, II.C.1.e.bb. – Active Participation in the Investigative Stage’, in Sieber, U. and Wade, M. *Structures of European Criminal Justice – Volume 1: Central Findings* (Berlin: Duncker and Humblot, in press).

³⁴ Cases such as that of Andrew Symeou and a multitude of others documented by Fair Trials International – see the Justice in Europe Campaign – available at: <http://www.fairtrials.org/campaigns/eu-defence-rights/justice-in-europe/> – contribute to a growing perception that EU justice mechanisms do not achieve justice. How damaging this can be to any such “system” is easily recognisable in the current UK protocol 36 opt-out debate.

Particularly the situation pertaining to European criminal law highlights this gulf between citizen and transnational criminal justice level. The EU context demonstrates that even successful,³⁵ frequently used instruments such as the EAW are subject to significant criticism for disproportionate use potentially endangering the human rights of suspected individuals (see supra). So much so in fact, that the EAW has become the chief bone of contention for British politicians leading calls for the UK to withdraw from criminal justice mechanisms at this level.³⁶ The difficulties faced in negotiating vital aspects of the Roadmap provisions (see supra) only underline the fragile nature of even this more robust transnational criminal justice forum. The European Union is currently able to criminalise acts, can facilitate arrest, the surrender of individuals and their trial and imprisonment in a foreign country. It is not, however, able to effectively secure translation rights,³⁷ let alone provide individuals with the access to a lawyer they legitimately expect across the same territory.³⁸ These latter matters should improve in time given that a number of legislative instruments have been introduced aiming to tackle deficiencies in these areas.³⁹ Only time will tell whether the sluggish implementation so far will nevertheless result in effective provision. However, the delay between the introduction of the EAW and these measures alone, clearly demonstrates that we are dealing with a system, which allows prosecutors to run before defence practitioners are provided with the tools to allow them even to walk.

Specific doubts have been voiced concerning the European arrest warrant because of the position it is increasingly demonstrated as placing citizens in. Citizens imprisoned or detained using the European arrest warrant are increasingly being demonstrated as routinely deprived of their basic criminal justice rights and left extremely vulnerable by their linguistic isolation in foreign detention alone. Surrender following trials in absentia leads not infrequently to long prison sentences being enforced without the surrenderee (who is frequently raising significant evidential or procedural arguments) afforded the retrial promised to the surrendering state.⁴⁰ Clearly, these citizens' rights (to present their case at trial) are not sufficiently protected by the Member States in the course of criminal justice pursued via European criminal law; despite these nations' sovereign claims that this is the case. If promises, which should secure these rights, are routinely broken without consequence such statements ring hollow. Furthermore, the ECHR does not provide sufficiently strong standards to ensure that even such relatively simple rights provision is factually secured. Transnational law, whilst not featuring several of the mechanisms, which contribute to the efficiency of the European arrest warrant,⁴¹ is likely marked by precisely the same lacuna. European law and transnational criminal law inherently bear the potential to endanger individual rights both in relation to substantive and procedural matters. Given that EU criminal justice and transnational criminal law are designed only to ensure the perpetrators of crimes are not able to evade justice, any potential they bear to create injustice raises sensitive issues as to their rationale. Argument concerning such matters goes to the core *raison d'être* of such set ups and severely undermines the legitimacy of these bodies of law and the institutions implementing them.

³⁵ COM (2011) 175 Final. Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Brussels 11.4.2011.

³⁶ Boffey, D. 'Theresa May faces Tory backlash over retaining European arrest warrant' *The Observer* (11 May 2013).

³⁷ Legislated for as measure A of the Roadmap discussed above – see http://ec.europa.eu/justice/criminal/criminal-rights/right-translation/index_en.htm and Fair Trials International *Defence Rights in Europe* (London, 2012) <http://www.fairtrials.org/publications/defence-rights-in-europe-the-right-to-interpretation-and-translation-in-criminal-proceedings/> – but according to Fair Trials International only implemented by 50% of member states one month past the implementation deadline (October 2013).

³⁸ See e.g. Heard, C. and Mansell, D. 'The European Arrest Warrant: The Role of Judges when Human Rights are at Risk' *New European Criminal Law Journal* (2011 no. 2) pp. 133-147 and http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm.

³⁹ See Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

⁴⁰ See e.g. Fair Trials International *Defence Rights in Europe* (London, 2012) available at:

<http://www.fairtrials.net/publications/policy-and-campaigns/defence-rights-in-the-eu-report/>.

⁴¹ Above all, the fundament of mutual recognition and the absence of the double criminality requirement for a broad category of crimes ensures the EAW particular efficiency.

The traditional binding of criminal justice processes to nation states means they are set within particular constitutional contexts. The protective nature of many mechanisms within national criminal justice processes stems from precisely this. It is this setting which defines the relationship between executive and citizen; individuals' expectations of how they will be treated and allowed to (inter-)act during such processes will be deeply marked by this. Transnational criminal justice, as mentioned above, seeks to alleviate the handicaps caused to cross-border investigation by the binding of criminal justice agents to any given nation state's territory. In so doing, transnational and particularly European criminal law should be recognised as placing investigators and prosecutors on a different jurisdictional platform extending their reach and, to a certain extent, jurisdiction beyond the nation state. This 'supranationalisation' of criminal justice agents and certain key activities occurs in isolation and out of context, however. Critical commentary on the mechanisms, which provide for this levitation demonstrate that these areas of law have resulted in criminal justice agents unfettered by their usual constitutional context.⁴² Unsurprisingly the individuals subject to their decisions are in turn exposed to unacceptable threats to their constitutional rights. Thus we find ourselves facing a situation in which procedural guarantees and defence rights are all too plausibly undermined as highlighted by the EuroNEEDs results explored above. Above all the access to remedies is made extremely difficult; as highlighted by Klip, even where criminal charges are brought against an individual, it will be extremely difficult to muster any evidence of rights infringements committed multi-laterally. Furthermore, many investigations will not end in a trial meaning that anyone suffering rights infringements during their course will be deprived even of a potential venue to which to complain about them. Such rights violations nevertheless remain potentially serious and the failure to provide for any redress a considerable source of injustice.⁴³

For the criminal justice context, the basic problem relates to an individual's rights to insist upon the rights he or she holds in his or her usual constitutional setting; the expectation he or she legitimately places upon his or her government as to his or her participatory and defence rights in the course of criminal proceedings. In any transnationalised context, adopting the defence perspective, our concern must thus be any right to assert or insist upon such rights – or at least equivalent protection – where the executive of his or her nation state assigns powers impacting upon such rights to another governance level.

There is currently, quite explicitly, however, no acknowledgement of a system and thus not of a potential to systematically change the relationship between governance level and the individual thus governed by the enhanced powers of supra-nationalised criminal justice networks. Given the collective boost provided to member state criminal justice authorities, however, unease at treating such investigations as legally the same creature as one run by national authorities alone is surely justified.

Within the European Union, investigations can currently be lent strong support by OLAF, Eurojust and Europol who, within the logic of their mandates, appear above all as service institutions for the domestic criminal justice agencies of the member states. These European institutions facilitate an overview of criminal phenomena, unprecedented and unachievable by any domestic agency,⁴⁴ they coordinate and guide, advise and facilitate the achievement of consensus amongst international groups of investigators and prosecutors.⁴⁵ They provide vital expertise and sometimes even operational support to ensure the successful investigation and bringing to justice of highly mobile and dangerous criminals. This is a result of member states' recognition that their investigative agencies and prosecutors require enhanced intelligence;⁴⁶ that

⁴² Thus, see e.g. the apparent release of EAW use from the principle of proportionality usually of constitutional rank in EU member states – European Commission (2011) op cit.

⁴³ See Klip, A. (2012), p. 464.

⁴⁴ Europol – e.g. TE-SAT 2012: Europol *EU Terrorism Situation and Trend Report* (The Hague: Europol 2012) available at <https://www.europol.europa.eu/sites/default/files/publications/europoltsat.pdf> and Europol *Trafficking Human Beings in the European Union* (The Hague: Europol, 2011), available at: <https://www.europol.europa.eu/sites/default/files/publications/trafficking-in-human-beings-in-the-european-union-2011.pdf>. For OLAF e.g. OLAF *The OLAF Report 2011* (Brussels: European Commission, 2012) p. 27 et seq. Available at http://ec.europa.eu/anti_fraud/documents/reports-olaf/2011/olaf_report_2011.pdf.

⁴⁵ See Eurojust *Annual Report 2011* (The Hague: Eurojust 2012), p. 15 et seq. available at: <http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202011/Annual-Report-2011-EN.pdf>

⁴⁶ See articles 7 of the Europol Decision - Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) L-121/37, and 13 of the Eurojust Decision - Council Decision 2009/426/JHA of 16

investigations and prosecutions with cross-border elements are dependent upon co-ordination⁴⁷ and that specialist legal expertise (e.g. in relation to the financial regulations of the EU) may be required to ensure their success⁴⁸. The very existence of Europol and Eurojust attest to the fact that national agencies cannot necessarily handle transnational proceedings.

IV.f. The Reality of Transnational Criminal Justice and the Need for Correction

The reality of criminal justice pursued in transnational settings, is, however, that decisions of great impact for constitutional rights are made. In fact, in these settings, decisions routinely made as merely administrative in domestic settings, carry entirely different ramifications. For example, a decision determining or changing jurisdiction within a domestic context will not be recognised as affecting the legal position of an individual. Such a decision will usually involve the transfer of a case from one court to another in the interests of justice – also the defendant's – it is a matter concerning the proper administration of justice, no more. It is therefore not a matter for legal debate; a decision rightly left in the hands usually of a single judge who is deemed adequately equipped to consider all relevant factors. A hearing of the accused is not usually foreseen.

When placed in the context of a trans-national prosecution, i.e. at a supra-national level, however, such a change takes on entirely other dimensions. A defendant likely has considerable concerns relating to where he will be tried when a variety of jurisdictions is possible. The language of proceedings, the likelihood of bail, detention conditions and factual circumstances that individual becomes exposed to will all change enormously, depending upon whom a cooperating group of prosecutors decide to entrust with bringing a case to justice.⁴⁹ The individual, however, remains powerless to influence, let alone challenge any such decision. Eurojust – and any other facilitating institution – is formally regarded, at most, as the venue in which such decisions are taken. Legally the decision is one of the member state authority, which lodges charges. Consequently, the supra-national body involved cannot be held accountable by the individual affected by its activity, however significant it might be. Where such a decision is made, however, via e.g. a conference at Eurojust, this formally domestic decision has potentially been very significantly influenced by the other member states' representatives who make up this supra-national entity. The legitimate desire of an individual to influence and even dispute the decision-making process is more than obvious. The reasonable expectations of an individual to at least be heard where his or her interests are affected in such a manner is legally (and likely factually) ignored in such circumstances because our legal perspective has not adapted to this reality. Decisions relating to forum are of even greater concern due to the spectre of potential forum shopping by supra-national institutions. Where prosecutors are left with a choice of forum and can elect to bring charges in a jurisdiction in which convictions are more easily achieved, the potential for an effective defence is strongly side-lined.⁵⁰

The need to adapt our legal and political perception also becomes apparent in relation to positive rights. A number of EU member states endow the defence and in some cases citizens themselves with a right to carry out an investigation on their own behalf. A jurisdiction which allows investigations piggybacking on the main police one – even if such rights are highly aspirational – undeniably disadvantages its citizens when provision is made for transnational criminal investigations which foresee no such thing. There are many

December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime L-138/14.

⁴⁷ Thus the role ascribed to Eurojust: “to stimulate and improve the coordination, between the competent authorities of the Member States, of investigations and prosecutions in the Member States” article 3(1)a and “to improve cooperation between the competent authorities of the Member States” article 3(1)b of the Eurojust Decision - Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA), OJ L 63/1, 06.03.2002.

⁴⁸ Thus the creation of OLAF – see e.g. article 2(5)c of Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (1999/352/EC, ECSC, Euratom) and see OLAF (2012), pp. 27 and 29.

⁴⁹ Because although the Eurojust Decision (article 7(2) of the amended Eurojust Decision) confers powers to the College to make binding decisions as regards jurisdiction, it tends not to exercise these, allowing for informal decision-making see European Parliament *The Future of Eurojust* (Brussels: European Parliament 2012) pp. 96 and 100, available at: <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=73791>.

⁵⁰ See e.g. Ambos, K. *Internationales Strafrecht*, 3rd ed. (Munich: Beck, 2011), p. 561. He discusses differences in admissibility of evidence as tempting in forum shopping terms, offences with extremely low conviction thresholds – such as s. 57 of the British Terrorism Act 2000, which requires only reasonable suspicion, naturally only, strengthen such argument.

arguments against allowing individuals investigative rights in transnational settings, citizens may nevertheless feel deeply disadvantaged in comparison to the expectations they have of criminal justice as informed by their domestic rights situation. Exceptional cases such as that of the Lawrence family in the UK (who brought a private prosecution in an attempt to bring their son's murderers to justice thus reopening a case, which still occupies the British justice system 15 years later) show the importance such rights can bear.⁵¹ If such issues are not explicitly dealt with in framing the workings of any kind of criminal justice mechanism at a transnational level, citizens whose expectations are disappointed cannot but be expected to feel cheated and to seek discussion of such mechanisms as unjust and illegitimate. This is problematic because compliance with a system is increased when it is viewed as legitimate but also, in the case of transnational systems, because if they are viewed as illegitimate, they can be undermined (as for example is currently true of EU criminal justice. There political opponents of the supra-national level are utilising examples of injustice perpetuated by EU criminal law mechanisms, to undermine the standing of the EU altogether).

Where possible they will, of course, seek legal recourse from any court accessible to them. A domestic court will likely find itself strongly challenged when asked to balance constitutional rights with international Treaty obligations. Any international court must fear a caseload spiralling out of control both in terms of volume and demand for expert understanding of component state constitutions. There can be little question that such matters should be dealt with by the legislature in framing transnational criminal justice mechanisms rather than left for potential conflict later. The making of good law for transnational contexts therefore demands that those making such laws – i.e. concluding treaties – recognise themselves as a legislature with corresponding duties as are usually found in domestic systems.⁵² As long as provision for transnational criminal justice occurs on an ad hoc, executive-driven basis, there is unlikely to be any adequate provision for the defence or any other participant in the criminal justice process, which is not readily championed by representatives of government or criminal justice agencies. The European Parliament is arguably already driving relevant EU processes in this direction as it takes up its legislative role post-Lisbon.⁵³ If provision is to be made for adequate defence provision for all individuals who face criminal proceedings as these increasingly become transnationalised, the way in which such law is conceptualised and made must change more broadly.

These legal settings expose individuals to investigations, which by their nature should perhaps be regarded as a different animal. Decisions within them bear potential to affect an individual and his or her rights and interests in a magnified manner. The risks to liberty are greater but the provision for rights lesser. The rights and expectations individuals have will invariably be factually rendered less important as their ability to assert them diminishes and so the disjunctive between citizen (with legitimate, rights-based expectations) and governance level (the supra-national organisation associated with mechanisms or legislation, which fail to provide for these rights) will increase. The fact is that rights and safeguards are strongly related to the domestic processes of member states. As criminal proceedings which interfere significantly with rights (and which traditionally require safeguards of them to be in place) are shifted to another governance level, logically these rights and safeguards must receive similar treatment if they are not to lose all meaning. It is inconceivable that citizens agree to membership of supranational organisations or entities in order for their rights to be undermined.⁵⁴ The (criminal justice-related) Euroscepticism currently gripping many across Europe can often be seen as vocalisation of precisely this problem (or at least clever political manipulation of it). It is submitted, that the need to conceptualise transnational criminal justice work differently is a general need. In some cases, the failure to conceive rights anew in the EU and other transnational contexts is likely to

⁵¹ See BBC *Stephen Lawrence Murder: A Timeline of how the Story Unfolded* (London: BBC, 2014) available at <http://www.bbc.co.uk/news/uk-26465916>

⁵² For an overview of legislative processes to create criminal law and criminal procedure law see Wade, M. 'The Present Criminal Justice Structures at the National Level - Part 1.A.: Sources of Criminal Law' in Sieber, U. and Wade, M. *Structures of European Criminal Justice – Volume 1: Central Findings* (Berlin: Duncker and Humblot, in press).

⁵³ In accordance with the ordinary legislative procedure defined in article 289 TFEU.

⁵⁴ Indeed, in the EU context this is in breach of the Treaties. Articles 2 and 6 of the TEU state that the EU is bound by the rule of law and "the constitutional traditions common to the member states."

challenge the feeling and perception of justice and fair process not only in the eyes of any suspect or individual directly affected by such a case but also in society more broadly.⁵⁵

Ultimately, such a situation will result in courts being asked to remedy legal situations in order to secure an individual's rights simultaneously placing them at the centre of what should be a political decision. It is simply untenable for the executive to expose its judiciary to such a sensitive political and diplomatic position. As Hassemer asserts, courts must in such situations demand that their foreign equivalents and criminal justice colleagues provide guarantees that certain rights and assurances will be given and are lent factual meaning (such as a retrial in which the surrenderee can actively participate).⁵⁶ They cannot step down from their primary duty to guarantee an individual his or her constitutional context and any executive would be wise to avoid a scenario in which its representatives end up requesting that a court do so.

IV. Securing Safeguards and Defence Rights

Within the EU context, the need to include a conception of rights at that level has often been argued as unnecessary because all member states are also signatories to the ECHR. Clearly, the drafting of the Charter of Fundamental Rights of the European Union (hereafter the Charter) demonstrates that a majority of member states are not ultimately convinced by this argument. Nevertheless, it remains Europe's central rights statement and may be drawn upon also for the broader Council of Europe setting. This in itself is also the source of significant portions of transnational criminal justice legislation for its signatory states.⁵⁷

In some cases the Convention indeed provides a legal path to determining common values within the broader European context and therefore for demanding specific rights protection mechanisms, also in transnational criminal proceedings. Constitutional values and such rights statements are, after all, the basis for procedural safeguards and defence rights. These can clearly only be provided for if any transnational setting agrees not only upon the terms for common prosecution but also a common values basis. In some cases, the European Human Rights Court has determined very specific protections as resulting from these. The case of *Salduz v Turkey*⁵⁸ for instance has provided a clear requirement of access to legal advice during police custody as a concretisation of fair trial rights unless exceptional circumstances speak against allowing such access.⁵⁹ A strong line of case law upholds the complete prohibition of torture or degrading treatment or punishment clearly demonstrating this as a common value.⁶⁰ ECHR case law is further instructive in determining more detailed principles flowing from such fundamental principles, for example, when a charge must be viewed as criminal or several concrete requirements of the principle of equality of arms.⁶¹

The Court, however, operates post facto and in relation to cases of all manner. Its work is not specific to cases of relevance to the nitty-gritty of criminal justice systems cooperating closely in transnationalised settings. Ultimately even amongst the EU Member States, there is such divergence in rights standards flowing from constitutional values⁶² that it would be illusionary to expect the ECHR, even via the jurisprudence of the Strasbourg Court, to provide a sufficiently tight system of rights protection to accompany transnationalised processes even in this specific setting. Clearly, this problem only increases with the jurisdictional area of transnational criminal law.

⁵⁵ See e.g. the Justice in Europe Campaign of Fair Trials International <<http://www.fairtrials.org/campaigns/eu-defence-rights/justice-in-europe/>>.

⁵⁶ Hassemer, W. 'Strafrecht in einem europäischen Verfassungsvertrag' *ZStW* 116 (2004) 2, pp. 304-319, p. 318. Note, however, Fair Trials International's reports that such assurances are given but often not respected – see FTI (2012).

⁵⁷ Not least the 1959 European Convention on Mutual Assistance in Criminal Matters (available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>) as well as a multitude of specialist conventions relating e.g. to terrorism, drug-smuggling, human trafficking, cybercrime, etc.

⁵⁸ See ECtHR (Grand Chamber) judgment of 27 November 2008, *Salduz v Turkey*, appl. no. 36391/02, [2008] ECHR 1542.

⁵⁹ Para. 55 of the judgment

⁶⁰ *Chahal v United Kingdom*, [1996] ECHR 54; *Saadi v Italy*, [2008] ECHR 179 and indeed *Othman (Abu Qatada) v United Kingdom*, [2012] ECHR 56.

⁶¹ See e.g. Trechsel, S. *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) pp. 36 et seq. and pp. 94 et seq.

⁶² See Carrera, S., De Somer, M., Petkova, B. 'The Court of Justice of the European Union as a Fundamental Rights Tribunal', CEPS Paper in *Liberty and Security in Europe*, no. 49/August 2012, p. 5.

A further source of imprecision is the so-called margin of appreciation⁶³ applied by the Court when interpreting whether or not a state's rights-securing mechanisms comply with the Convention. The Court's deference to executives' judgements in difficult situations means that the ECHR and its jurisprudence will not always provide for clear standards. The Strasbourg Court looks at rights in situations in which they are tested rather than to make a concrete declaration of the norm. Not surprisingly, this leads to an imprecision or watering down of the standards set.⁶⁴ This ensures that the idealistic Convention has provided a forum for the race to the bottom.

Even beyond such considerations, the problem is that the unfairness of transnationalised criminal proceedings will stem often from the process as a whole and the incompatibility of procedural protection systems with each other. Each step of any process may well be Convention compliant because it is within the realm of what the Court accepts or rather part of a process, which the Court views as fair overall, nevertheless the combination of parts of different states' processes may result in unfairness. Thus, for example, a citizen whose procedural rights are breached during the investigation in jurisdiction A would have redress in that jurisdiction through the exclusion of any product of the breach as evidence in a trial against him. If, however, he is surrendered for trial in jurisdiction B this protection would be lost if jurisdiction B allowed all evidence to be admitted no matter what its origin (as is the case e.g. in Sweden, which places great trust in the judicial evaluation of evidence probity). Such differences in procedural stages are entirely Convention acceptable because protection simply has to be provided in a balanced way within the logic of a country's procedure (and Sweden for example has far higher protective standards to ensure investigative actions such as wire-tapping are carried out legally as they occur. The logic of the Swedish system is, however, lost when a suspect is tried there having been wire-tapped in another Member State).⁶⁵ This is the legal lottery referred to above.

Values determined under the ECHR – recognised as a relatively strong human rights instrument - are therefore subject to interpretation within the specific setting as well as to the margin of appreciation. Demanding that ECHR jurisprudence develop specific mechanisms of protection suitable for ensuring rights are respected in proceedings across a number of jurisdictions is asking too much. The ECHR was, after all, not conceived of as a mechanism to regulate co-operation or harmonisation. Even where the Court can develop specific requirements – as it has done e.g. in the case of *Salduz v Turkey*, it cannot do so at a rate which keeps pace with the evolution of transnational criminal justice.

If one accepts that transnationalised criminal justice processes may need to be viewed as legally different, it is not difficult to imagine that rights protection within them may also require specialised instruments. The central point is to recognise such proceedings as part of a whole, which is transnational in nature. Within the EU context, the drafting of the Charter provides an interesting opportunity. Its advent into Union law alone demonstrates that the Member States felt a need for standards more concrete than those offered by the ECHR. As the European Court of Justice embraces its role as the Charter's guarantor, Article 47 – which confers a right to an effective remedy upon anyone whose rights and freedoms (as guaranteed under Union law) have been violated by an executive power – provides significant potential to allow such procedures to be adjudicated with the necessary transnational perspective. Only time will tell what is made of this opportunity.

Effective rights protection cannot, however, be achieved by awaiting court jurisprudence determining common values. The better approach is to ensure that repressive transfers of power to the European and other transnational criminal justice contexts are accompanied by an appropriate, rights-securing setting. Only when governments recognise that they cannot, for example, view an arrest warrant in isolation and that if they legislate for arrests to become effective across borders, they must also look to liberty-securing mechanisms around them, provision for criminal justice be achieved transnationally.

⁶³ See e.g. Marks, S. 'Civil Liberties at the Margin', 1995 *Oxford Journal of Legal Studies* 15, no. 1, pp. 69-95.

⁶⁴ For example, the seemingly concrete requirement that a detainee is informed immediately of the facts forming the basis of the charge against him or her was watered down by the case of *Fox, Cambell and Hartley v United Kingdom* [1990] ECHR 18, especially Para. 41.

⁶⁵ See Berling, G. 'The Criminal Justice System in Sweden' in Sieber, U. and Wade, M *Structures of European Criminal Justice - Volume 4* (Berlin: Duncker and Humblot in press).

Securing procedural guarantees and defence rights in transnational criminal justice settings such as that of the EU requires political and legal recognition that such processes must be acknowledged as part of a system. The aim of that system must further be recognised as criminal justice. On this basis, such systems must be analysed to determine what constitutes neuralgic points in such proceedings. This is what transnational criminal law thus far tends to do for the prosecution. The need to do the equivalent and to consider the defence perspective is hopefully now apparent. Without fundamental recognition of the prosecutorial slant of such systems thus far and the urgent need to correct this, no progress can be made.

Even if this is achieved, much work remains. The EU context demonstrates all too clearly the divergence of procedural safeguards and defence rights to be found in cooperating nation states. There is no getting around the need to determine core values held by all in criminal proceedings. Any legislature providing for transnational criminal justice must also identify the procedural guarantees and defence rights considered vital by all citizens within the area whose law it is reforming. Where some citizens stand to lose rights which may be regarded as sensitive by some but not all, there is further potential to explore whether functional equivalents can be achieved so that such a loss can be ameliorated. Another alternative is, of course, to imbue the transnational justice level with the highest rights standards. Failing that, any governance level depriving citizens of rights will have to answer to them for that one way or another. The path taken so far in transnational proceedings, namely simply to ignore the potential for injustice and thus to allow fundamentally legitimate mechanisms to fall into disrepute is clearly counter-productive as demonstrated by current attempts to dismantle EU criminal justice co-operation. In order to protect what currently works in transnational proceedings it is vital to address the imbalances that characterise them. First and foremost, this requires recognition that an effective defence is an important tool to ensuring justice is done.

Above all, the effective provision for defence rights and procedural guarantees surely requires an assignment of institutional responsibility for overall fairness. Doubtlessly court oversight and review responsibilities must be provided for. Fundamentally, however, it is asserted that the changing character of prosecutors and investigators working with transnational mechanisms and with or in such institutions must be recognised as different. Where such practitioners – no matter what their usual day job - are factually working as European (or in other transnational contexts as servants of that governance level) practitioners, they must be identified as such. Thus any member state investigator may find him or herself as representing e.g. the European executive and any prosecutor may find him or herself as a quasi-judicial European practitioner. Recognition of this status must in turn bring with it clarity that this changes their duties and the usual terms of their office. In such functions, they owe a duty of care to those they make decisions about. Such practitioners are usually required to take an oath of office in which they swear loyalty to the citizens and the constitution of their jurisdiction. Where the latter expands, so must their responsibilities. It cannot be that suspects – and indeed increasingly victims – are rendered anonymous and “rightless” in transnational settings when such proceedings factually expose them to greater, not lesser risks to their rights. This is an intolerable fiction, which citizens should not accept. Within the EU, the notion of EU citizenship and the Charter of Fundamental Rights of the European Union⁶⁶ should give a foothold from which to argue this legally; the problem is to be found and requires recognition and remedy in other transnational contexts too, however.

⁶⁶ (2010/C 83/02) OJ 30.03.2010 C 83/391