

Defence Rights

International and European Developments

Gert Vermeulen (ed.)

Jean Flamme
Kenneth Gallant
Caroline Morgan
Taru Spronken
Christine Van den Wyngaert
Gert Vermeulen
Mikhail Wladimiroff

Defence Rights
International and European Developments

Defence Rights

International and European Developments

Gert Vermeulen (ed.)

Jean Flamme

Kenneth Gallant

Caroline Morgan

Taru Spronken

Christine Van den Wyngaert

Gert Vermeulen

Mikhail Wladimiroff



Maklu

Antwerpen | Apeldoorn | Portland

Defence Rights. International and European Developments
G. Vermeulen (ed.)
Antwerpen | Apeldoorn | Portland
Maklu
2012

138 pag. – 24 x 16 cm
ISBN 978-90-466-0571-4
D/2012/1997/76
NUR 824



© 2012 Gert Vermeulen & Maklu-Publishers

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or other-wise without the prior permission of the publisher and the authors.

Maklu-Publishers

Somersstraat 13/15, 2018 Antwerpen, Belgium, info@maklu.be
Koninginnelaan 96, 7315 EB Apeldoorn, The Netherlands, info@maklu.nl
www.maklu.eu

USA & Canada

International Specialized Book Services

920 NE 58th Ave., Suite 300, Portland, OR 97213-3786, orders@isbs.com, www.isbs.com

Table of Contents

| | |
|---|-----------|
| Preface and Acknowledgements | 9 |
| The Rome Statute after a decade of enforcement. A critical evaluation | 11 |
| MIKHAIL WLADIMIROFF | |
| I. Introduction | 11 |
| II. The court in context | 11 |
| III. Defence counsel in context | 13 |
| IV. General observations | 14 |
| V. A supranational court | 16 |
| VI. Getting used to the system | 17 |
| VII. Disclosure | 18 |
| VIII. Witness protection | 19 |
| IX. Specific challenges | 19 |
| X. The right to prosecute | 21 |
| Independent bars in international criminal courts and tribunals | 23 |
| KENNETH S. GALLANT | |
| I. Introduction | 23 |
| II. The ICC needs a bar | 23 |
| A. What do we mean by a bar? | 24 |
| B. Bars are creations of their own legal systems, organizing lawyers as appropriate to that system | 26 |
| C. Missing elements in the international criminal court, and how a bar might fill them | 26 |
| D. Reasons for having a bar specific to international tribunals | 28 |
| III. How a bar might be created for the ICC | 30 |
| The fundamental right to a full and fair defence before the ICC. On the confines of common law and Roman-German Law: an analysis | 33 |
| JEAN FLAMME | |
| I. Introduction | 33 |
| II. A 'sui-generis' system, accusatorial but with inquisitorial elements: a good choice ? | 34 |
| III. The need and obligation for defence to investigate the case | 38 |
| IV. The right to counsel and the legal aid, powers of the Registrar | 43 |
| V. The list of counsel and the powers of the registrar | 44 |
| VI. 'In-house' counsel, a dangerous experiment | 46 |

| | |
|--|----|
| VII. Language lost in translation, a cultural nightmare | 48 |
| VIII. The principle of free choice of counsel, an inconvenient truth | 49 |
| IX. Absence of jurisdiction on corporate bodies | 50 |
| X. Conclusion | 50 |

Victims before international criminal courts.

Some views and concerns of an ICC trial judge 53

CHRISTINE VAN DEN WYNGAERT

| | |
|--|----|
| I. Introduction | 53 |
| II. Victims at the ICC | 56 |
| A. Victim Status in General | 56 |
| B. Victims' Participation in Proceedings | 58 |
| C. What Participatory Rights do Victims Have? | 60 |
| D. Reparations | 62 |
| III. Some views and concerns | 63 |
| A. Victims and the Truth Finding Process | 63 |
| B. Victims and the Rights of the Accused | 64 |
| C. Is the Participatory Regime Meaningful for Victims? | 64 |
| D. How Meaningful Can Reparations Be? | 65 |
| E. Equal Access to Justice? | 67 |
| F. Is the System Sustainable? | 68 |
| IV. Final observations | 69 |

The EU Procedural Rights Roadmap.

Background, importance, overview and state of affairs 73

CAROLINE MORGAN

| | |
|---|----|
| I. Introduction | 73 |
| II. Background | 73 |
| III. Importance | 76 |
| IV. Overview of the Procedural Rights Roadmap: State of affairs | 77 |
| V. Conclusion | 80 |

Effective Defence.

The Letter of Rights and the Salduz-directive 81

TARU SPRONKEN

| | |
|---|----|
| I. Introduction | 81 |
| II. Rights of suspects and defendants within Europe: the European Convention on Human Rights | 82 |
| III. Challenges the Strasbourg system faces | 82 |
| IV. What to do about the gap in European human rights protection? | 84 |
| V. EU policy on procedural rights of suspects and defendants: background and recent developments | 85 |

| | |
|--|------------|
| VI. The Lisbon Treaty | 87 |
| VII. The Roadmap on procedural rights | 89 |
| VIII. Measure B: Information on Rights and Information about the Charges | 90 |
| IX. Research Project: An EU-Wide Letter of Rights | 92 |
| X. Directive on the right to information in criminal proceedings | 96 |
| XI. Research Project: Effective Criminal Defence in Europe | 96 |
| XII. The research questions | 97 |
| XIII. Five major themes | 98 |
| XIV. Measure C Right to Legal Advice and Legal Aid | 99 |
| XV. Cross-border cooperation and effective criminal defence | 101 |
| XVI. Conclusion | 102 |
| Prisoners' rights in the EU & procedural rights in the context of EU cross-border gathering & use of evidence in criminal matters | 105 |
| GERT VERMEULEN | |
| I. Context | 105 |
| II. EU prisoners' rights | 108 |
| A. Introduction | 108 |
| B. Problem analysis | 110 |
| C. Flanking measures needed | 119 |
| D. Conclusion | 128 |
| III. Procedural rights in the context of EU cross-border gathering & use of evidence | 129 |
| A. Evidence gathering | 129 |
| B. Free movement of evidence | 135 |

Preface and Acknowledgements

'Ubi iudicia deficiunt incipit bellum', Grotius said. Where the methods of justice cease, war begins. If justice is the highest virtue, than defence rights are of the greatest importance not only on a national scale, but also on an international scale. The growing internationalisation and Europeanisation of criminal procedures create new and additional challenges to traditional defence rights, struggling in this era of recession and populism.

Hence, the Ghent Bar Association, as part of its bicentennial celebration, the Bar Association of The Hague, hosting the International Tribunal for the Former Yugoslavia and the International Criminal Court (ICC), and Ghent University, conducting lead research on international and European criminal policy, have joined their forces by exploring and addressing these challenges during an international conference, entitled 'Defence Rights: International and European Developments', held in Ghent on 23 November 2012, of which the current volume is the conference book.

This book, as the conference, has a double focus: defence rights before the ICC respectively EU defence rights.

Whereas international criminal tribunals, especially the ICC, should play an exemplary role when it comes to the right to fair trial and adequate access to a lawyer, reality proves to be troublesome. This book addresses key issues in this respect: what is the *status questionis* of the defence position and procedural rights before international criminal tribunals, more specifically the ICC? Has the Rome statute lived up to its expectations after a decade of its application? Can defence before international tribunals keep functioning without a Bar Association? What are the needs for such a defence to be adequate, knowing that it balances on the borderline between the Anglo-Saxon legal system and ours? What lessons can be learnt from this? What about victims' rights, unexplored territory for international criminal law?

At the same time, defence and procedural rights are developing as a result of different EU Directives which have been or are now being negotiated. This is of major importance to every penalist, even in strictly national cases. This book informs about and critically assesses the entire EU 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings'. The EU Directive on the right to interpretation and translation in criminal proceedings and the anticipated proposal on special safeguards in criminal procedures for suspected or accused persons who are vulnerable (especially children, the mentally ill and the mentally disabled) pass in review. Also the EU-Directives on the right to information in criminal procedure and on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (Salduz-Directive), which are about to revolutionize traditional domestic criminal procedural law, are thoroughly assessed. Further, the book addresses the impor-

tant implications and challenges for the legal position of detainees as a result of the recent Framework Decision on the mutual recognition of custodial sentences and measures involving deprivation of liberty. Finally, awareness is raised with respect to the future challenges of procedural rights in the framework of cross-border evidence gathering and admissibility.

Neither the organisation of the international conference, nor the publication of this conference book would have been possible without the input and dedication of many, including all speakers, panellists and authors. The organisers express their particular gratitude to Mr Jean Flamme, member of the Gent Bar Association and an eminent international defence lawyer, for initiating the entire process, to Mr Bas Martens, for embodying the The Hague Bar Association in the organizing committee throughout the preparation process, and to the *Gandaius* institute for continuing education of the Faculty of Law of Ghent University (in particular Mr Erik Krijnen), for supporting and facilitating the organisation of the conference. The organizers extend their thanks to Mr Bram Van Acker (Ghent Bar Association) and Mr Bob Kaarls (The Hague bar Association) as well as to Dr. Wendy De Bondt, for their assistance in practical matters relating to the conference respectively this conference book.

Didier Goeminne, Dean, Ghent Bar Association

Ernst van Win, Dean, The Hague Bar Association

Gert Vermeulen, Professor of International and European Criminal Law, Director Institute for International Research on Criminal Policy (IRCP), Ghent University

The Rome Statute after a decade of enforcement

A critical evaluation

*Mikhail Wladimiroff**

I. Introduction

International law is a sexy topic these days. An impressive number of institutions, that administer international or supranational justice or deal with related issues, have seen daylight. It is striking that an unusual large number of them are based in The Hague. The arrival of international lawyers, paralegals and interns has a fertilisation effect on the legal practice, is an economic boost for the City of The Hague and it triggered all kinds of academic activities in the area. No wonder that the Mayor of The Hague echoes the former Secretary-General Boutros Boutros-Ghali in calling The Hague the Legal Capital of the World.¹ And no wonder that the Bar of The Hague is happy to celebrate the 10th anniversary of the International Criminal Court (ICC) together with the Bar of Gent with a conference on international and European developments of Defence Rights. The anniversary is perhaps not the right occasion to put questions about expectations or to do a reality check of the impact of the court. It is too early to explore achievements and failures, or to discuss prospects. The activities of the court are still in progress and open to improvement. This paper discusses the first steps of the newborn court from the perspective of a defence counsel.

II. The court in context

The first serious call for an internationalized system of justice came from the 1919 Treaty of Versailles and envisaged an ad hoc international court to try the Kaiser and German military leaders of World War I. No such trials were ever held, but the efforts following World War II, were more successful as the Nuremberg and Tokyo Tribunals were set up to try the leaders of the Axis. Following these trials the International Law Commission (ILC) studied the possibilities of creating a more permanent international judicial organ for the trials of persons charged with crimes committed during armed international conflicts. In the early 1950s the ILC had drafted a statute for such organ, but due to the Cold War, efforts of

* Defence Counsel, member of the Bar of the Supreme Court of the Netherlands at The Hague, the Bar of the ICTY, ICTR, STL and ICBA. A summary of this paper is presented at the international conference Defence Rights: International and European Developments in Gent on 23 November 2012.

¹ Boutros Boutros-Ghali called The Hague the legal capital of the United Nations on the occasion of the fifth anniversary of the ICC on 27 November 2007.

bringing the matter further or even establishing a court were unsuccessful until the Yugoslav crisis. In the same time of the establishment of the ad hoc tribunals for Yugoslavia and Rwanda by the Security Council, the General Assembly of the United Nations instituted an Ad Hoc Committee on the establishment of a permanent international criminal court, followed by a Preparatory Committee, resulting in a Diplomatic Conference and the adoption of the Rome Statute in 1998. A new court was created that year but not yet born; that happened four years later in 2002 when 60 states had ratified the Statute.

As a concept international justice may date back generations, but the institutions that underpin it are still in their infancy. The first trial before the International Criminal Tribunal for the former Yugoslavia (ICTY) was the Tadi case² that started in 1995 and the first trial before the International Criminal Tribunal for Rwanda (ICTR) was the Akayesu case³ that started in 1996. In 2002 the ICC began with very low expectations and little support from the major world powers. Three of the five veto-holding members of the Security Council – the United States, Russia and China – had refused to subject themselves to its jurisdiction. Despite this, the ICC investigated seven situations: Democratic Republic of the Congo leading to five cases with six individuals⁴, Central African Republic with one case against Bemba⁵, Uganda with one case with four indicted individuals⁶, Sudan with five cases against seven indicted individuals⁷ including president Al-Bashir, Kenya with two cases against four individuals⁸ and indictments against two individuals⁹, Libya with three indicted individuals including president Muammar Gaddafi¹⁰ and Ivory Coast with one case against former president Gbagbo¹¹. The office of the prosecution performs preliminary investigations in Afghanistan, Georgia, Guinea, Columbia, Honduras, Korea, Nigeria and Mali. The court issued 20 arrests warrants, but only 5 individuals are presently in the custody of the court, the others are released, at large or waiting transfer to the court. The first trial before the ICC was the Lubanga case that began in 2009; seven years after

² The Prosecutor v. Duško Tadi.

³ The Prosecutor v. Jean-Paul Akayesu.

⁴ The Prosecutor v. Thomas Lubanga Dyilo, The Prosecutor v. Germain Katanga and Mathieu Ngunjolo Chui, The Prosecutor v. Bosco Ntaganda, The Prosecutor v. Sylvester Mudacumura and The Prosecutor v. Callixte Mbarushimana, who was released after confirmation of his charges were denied.

⁵ The Prosecutor v. Jean-Pierre Bemba Gombo.

⁶ The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.

⁷ The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, The Prosecutor v. Abdel Raheem Muhammad Hussein, and The Prosecutor v. Bahar Idriss Abu Garda, who was released after confirmation of his charges were denied.

⁸ The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, The Prosecutor v. Francis Kirimi Muthaura and Uhuru Migai Kenyatta.

⁹ Henri Kiprono Kosgey and Mohammed Hussein Ali. The charges were not confirmed.

¹⁰ Muammar Mohammed Abu Minyar Gaddafi, Seif Al-Islam Gaddafi and Abdullah Al-Senussi. Muammar Gaddafi was killed by his opponents in Libya.

¹¹ The Prosecutor v. Laurent Gbagbo.

the court began actual life in 2002, and was concluded by a verdict in March 2012. Presently seven cases are ongoing or pending for confirmation before the court.

A track record of three years can hardly be a sufficient time to evaluate the functioning of a court. It would be naïve to believe that in ten years, a nascent and exceptional international court would have been able to meet all the demands of a proper court. Just as Rome was not built in a day, the Rome system still needs time to grow. On the other hand it could be argued that any court of law should start only once it has everything in place. Moreover, The ICC can adopt some issues litigated before the Nuremberg and Tokyo tribunals and even more issues litigated before the ad hoc tribunals. The law applied by the ICC may be a procedural novelty, but in accordance with article 21 of the Rome Statute it also applies law that has been shaped by other international courts. Despite differences in law the functioning of the ICC on procedural topics can be compared with the practices of the ICTY and ICTR. For all these reasons, the observations expressed in this paper reflect the characteristics of particular issues, preferred directions of developments and specific challenges, rather than firm opinions on the basis of in-depth research.

III. Defence counsel in context

The ICC regulations contain quality requirements for defence counsel to be admitted. To start with counsel should be admitted to the practice in a State or alternatively is a law professor, and has a certain experience in criminal law, some idea of international law, and speaks one of the working languages of the court. A defendant can appoint, or when indigent be assigned, anyone who meets these requirements. The upside is that the defendant can get legal representation of his own choosing, or if indigent, the widest possible choice. Considering the importance and magnitude of the interests involved, the leading principle should be that no lower quality-standards for defence counsel should be accepted as compared to prosecutors and judges. It will be a challenge for the ICC to avoid that counsel does one case and returns to his domestic work. Like the Prosecution, the Defence must accumulate specialist knowledge, because there is a serious need for a professional tableau of experienced defence counsel. The usual view is to have counsel from both common and civil law jurisdictions in one defence team to be able to address the challenges of international law most effectively, though practice has shown that experienced teams from only one of these jurisdictions may be effective as well. Professional skills and in depth experience with international proceedings, more specifically exhaustive knowledge of the case law and the day to day practices, is needed to match, or even better to top, the experience of the Prosecution.

It is very helpful to be a smooth courtroom operator with smart skills in grilling witnesses, but this is not enough. The occurrence of events in a case requires superior skills to anticipate and address all kinds of issues of procedural law. This requires more than careful preparation and an exhaustive knowledge of the relevant

case law; it also requires the ability to deal in a creative way with legal issues where the rules are silent. What is needed is the ability to step back from its domestic legal system to deal with issues from a different perspective. As articulated in the Rome Statute, one has to do more than look to statutes and rules of procedure and evidence. Where appropriate, one has to study applicable treaties, principles, and rules of international law, including the established principles of international law of armed conflicts. When necessary one has to endeavour upon a more comparative approach by looking at general principles of law deriving from national legal systems, especially, as appropriate, national laws of States that would normally exercise jurisdiction over the crime. All this comes with the proviso that findings must not be inconsistent with internationally recognized norms and standards. The best defence teams have a competent and experienced lead counsel who is able to run the show, to structure the strategy, to manage the members of the team, to lead the legal engineering, and to take care of the most important witnesses and experts. It is understood that lead counsel must have a good record of accomplishment and speaks the language of the court. Others in the team will be full time co-counsel, able to assist and, when necessary, replace lead counsel.

The selection of the right candidates to join the defence team is a crucial element in ensuring that all defence issues are professionally dealt with.

IV. General observations

The challenge of an international criminal court is to bring justice both to the victims and to the accused by administering uncompromised fair justice where national bodies may fail to do so. A failure to show an indisputable impartiality to the conflict and to meet the highest standard of fairness within a trial will only fuel new hatred and further retaliation, if not more public outcry for convictions at any costs. The fairness of trials before international courts is debated fiercely. The concept of fair trial is a first generation human right and is considered to be essential to a democratic society. The right to a fair trial is internationally enshrined in the International Covenant¹², alongside with the regional instruments on human rights.¹³ The digest of fair trial principles has become international customary law and is reflected in the Statutes of the international courts. The core of fair trial issues is not really a matter under debate, but rather how the concept of fair trial is applied in the legal system in which it functions. Norms of due process of law cannot be applied in all jurisdictions in the same way because features of fair trial may not be the same in all legal systems. They differ, as the dynamics of legal system are not the same due to the different character of the proceedings. What may be right in one system may turn out to be unfair in the other. So the mere declaration that specific norms of due process are applicable

¹² The International Covenant on Civil and Political Rights of 1976.

¹³ The American Declaration of Rights and Duties of Man of 1948, the European Human Rights Convention of 1950, the American Convention on Human Rights of 1969 and the African Charter on Human and Peoples Rights of 1981.

is not enough. International criminal lawyers will therefore explain that the concept of fair trial is ambiguous and should be understood in the context of the system in which it operates. For this reason it is more important to analyse the way norms are applied in the legal system at hand. The vulnerability of a new legal system may well be that the Rules of Procedure and Evidence look right but may in practice function in an unfair way.

A problem of international prosecutions is that they have not primarily emerged from the need to administer justice but from the firm belief that perpetrators of international crimes, that are believed to be the most heinous ones, should be prosecuted at all costs. The eagerness of the media, politicians and some NGO's to expect convictions, not merely fair proceedings, puts pressure on international trials. The popular perception is that an acquittal is a failure. For the sake of justice and fairness mature criminal justice systems are inspired to prevent justice being merely an instrument of revenge or of executive action. Many checks and balances are incorporated to achieve fairness in the criminal proceedings. Unlike international proceedings, most domestic criminal justice systems have taken generations to evolve. Domestic trials are subject to the scrutiny of the society they serve and those taking part are accountable for their conduct. The courts are situated within the State of their jurisdiction and are responsible for applying standards to all aspects of social behaviour. Those that come before it are part of the same society as the court. Within most legal systems the Defence is an entity acknowledged to have a substantial role in the criminal process, not least to ensure that the innocent are acquitted and that the sentence passed is appropriate. No proper criminal justice system puts its faith solely in the prosecutor to get things right, or in the judges to understand perfectly the points for both sides in every case. In other words the principle of the rule of law does not only depend on the way on which investigative, prosecutorial and ad judicatory institutions fulfil their duties, but also on the proper fulfilment by defence counsel of his duties.

The mapping and the structure of the role of the Defence in a legal system have a considerable influence on the functioning of rights of the defendant. When defendants do not play an active role during the trial, or have no right of direct audience – except when being called as a witness in one's own case – defence counsel should be awarded with more rights as compared to his colleague practising law under a strictly inquisitorial system. It should be emphasised that rights conferred to the Defence cannot be separated from the duties counsels have to perform. These Siamese twins – rights and duties – are the tools of a defence counsel to be able to deal with all kinds of trial preparation, to perform his tasks in the courtroom and to deal with other matters outside of the actual trial. Like the Statute and the Rules of the ad hoc tribunals, it is striking that the Defence is only mentioned within the context of the court in passing, as an option for an accused where the interests of justice so require¹⁴, safe the obligation of the Registrar to provide appropriate

¹⁴ The notorious cases of Milošević and Šešelj before the ICTY have shown what the implications are if no defence counsel is in place.

assistance to someone wanting to self-represent.¹⁵ The role of the counsel is not clearly set out and hardly any guiding is provided. The ICC procedural law is silent on the right of a defence to summon witnesses. In contrast with the prosecution, the defence cannot seek the assistance of the authorities of Member States, or the assistance of international bodies like Interpol. To say it bluntly: everyone outside of the courtroom can simply ignore the defence counsel. Efforts of delegations to the Preparatory Committee to repair this flaw of the Statute in proposing a section of the Rules of Procedure and Evidence to address specifically the independent status and procedural rights of the Defence failed.¹⁶

Despite lessons to be learned from the ICTY and ICTR experience, the legal system of the ICC deals with matters of the Defence as a part of the tasks of the Registry.¹⁷ Lack of institutional standing undermines the work of the Defence outside of the courtroom, for example when doing discovery on foreign territory. A proper regulation and status of the Defence is more than a matter of subjective interest of the defendant, but also an issue of public interest. In this sense an administration of justice, in which the counterbalance afforded by the proper performance of an independent defence counsel is frustrated, runs counter to the public's interest.

V. A supranational court

The ICC is a jurisdiction without a territory, based in a host State that is far away from the territory of the State where the crimes were committed. Witnesses may live and documents may be found in States far away from the seat of the court. The ICC legal system is pretty unclear about the consequences for the defence of a trial based on case presentation by the parties, which supposes an obligation to put one's case, before a court that is not a part of the legal system of a State. Defence counsel in cases before the ICC do not have a standing before the courts of the State where prosper witnesses live and where relevant documents can be found. Where remedies are not available, national law can only be of little help, because in most cases implementing laws of States are silent on the way defendants can obtain evidence. It seems that counsel can independently perform some investigatory acts in some common law jurisdictions. In civil law jurisdictions the gathering of evidence in general tends to be a prerogative of national investigative authorities. As a result the Defence may ultimately have to invoke the powers of the court to issue compliance orders in the hope to get what it deemed essential to the defence. However, such procedures are time consuming and the powers to issue such order are limited, either because it may not bind state officials, or

¹⁵ Registrar Regulation 119(2). See also article 63(2) of the Statute and Rule 21(4) of the Rules of Procedure and Evidence.

¹⁶ The Dutch delegation to the Preparatory Committee in New York, to which delegation I was a consultant, tried but unsuccessfully.

¹⁷ The STL took a different route, whereas the Defence is a fourth organ of the court, though its budget falls under the Registry.

because cooperation may be subject to national privileges recognized by international law. People who may have relevant information are difficult to locate. When they are officials, civil servants, police or military forces, the hurdle to approach or to depose them may be their superior. The same kind of problems may arise with documents, as most documentary evidence will be official documents that are hard to locate, collect, and there might not be local remedies for compulsory release. Comparable issues with witnesses and documents may arise with the prosecution as well, but this office is an organ of the court with legal facilities to make foreign officials comply, such as invoking the possibility of exerting political pressure. Except in rare cases the Defence does not have such possibilities.

VI. Getting used to the system

The idea of the legal system of the ICC is that it would reflect the state of affairs in international law and the latest developments of the *ad hoc*'s with respect to new standards for international trials, but that it should have to be acceptable to both common law countries that follow the accusatorial procedure and the civil countries that apply the inquisitorial method of criminal procedure. Different to the ICTY Statute and Rules the ICC Statute and Rules of Procedure and Evidence are not dominantly oriented on an accusatory system but designed to be a compromise between the major criminal justice systems blended with typical international norms. The advantage of this approach was also believed to address the difficulty some commentators have with international justice to be Anglo-Saxon justice.

Like the concept of fair trial, it is an old truism that a correct practice in one system may not necessarily be right in another system. And indeed, the experience of the past three years has shown that the new hybrid character of the legal system caused varying interpretations by the judges of the way preliminary and trial examination should be performed. The way witnesses are disposed before giving evidence and the way proffers of testimony are prepared pursues the ICC. This practice, inherited from the *ad hoc*'s, is accepted by some judges, while others have strongly criticised this practice as being an unfair if not misleading that should not take place in a proper court of law. From the perspective of defence counsel some preparations of prosecution witnesses have been characterised as an obstacle for an effective cross-examination. Apart from this objection, the interpretation of witness examination from the perspective of common law in one trial and of civil law in another trial can hardly be seen as consistent with a fair administration of justice. Rather than harmonising varying views, a due process approach would require one univocal regime. Additional issues can be raised that are not addressed in this paper, such as the role of the Registry-based Office of Public Counsel for the Defence, also *vis-à-vis* external counsel and the need for defence-specific trainings, including on case management and ICC information-technology tools.

VII. Disclosure

The procedural rules do not reflect a true file system but a mechanism of discovery that better resembles the common law practice. It could be argued that any obligation to assist the other party can be understood as inherently inconsistent with a party driven system, as it encourages the mood to win a case, rather than disclosing in a full fledged way all materials to the defence. However, it is true to say that this is not a typical problem of accusatorial systems, as it occurs in inquisitorial systems as well. Disclosure of prosecutorial materials to the defence is a troublesome topic that caused problems in cases before other international tribunals and one would expect that rules of procedure of the ICC would address the issue properly to avoid repetition. Unfortunately the same problems popped up in the proceedings before the ICC as well. The problems are threefold: the extent and moment of disclosure of evidence, the disclosure of disculpatory materials, and the disclosure of materials that are considered confidential. The first one has much to do with timely disclosure of evidence to the Defence. A specific feature of this problem is related to protected witnesses, when essential data are disclosed in such a late stage that the Defence is hardly able to prepare case presentation and cross-examination due time. The second one is perhaps caused of a disinterest in the need of the Defence to be able to address or rebut the charges. Sometimes the prosecution is ignorant, simply sloppy or claims not to understand the relevancy or importance of materials in their possession for the Defence. The third one is more complicated as it relates to the nature of the materials. Some sources are prepared to provide the prosecution with information only on the condition that it shall not be disclosed to the Defence.¹⁸ According to article 54(3)(e) of the Statute allows the Prosecution to receive information confidentially which is not for use at trial but solely a s ‘springboard’ to generate new evidence. Problems may arise when confidential material is evidence rather than information and is deemed to be relevant evidence for the case that should be disclosed. Sometimes information and data are considered by the prosecution to be confidential, not because of external conditions, but to protect a witness¹⁹. Such discretional decisions may result from honourable intentions, but it does not fit in transparent proceedings if non-disclosure would tamper the possibilities of the Defence to properly cross-examine a witness or to learn about the existence of a witness at all. All these three faces of disclosure problems haunted the few cases before the court so far.

¹⁸ On 13 June 2008, Trial Chamber I decided to stay proceedings in the Lubanga case because it held that it was impossible for the trial to be fair since the Prosecutor had not disclosed to the Defence, or made available to the judges, important exculpatory evidence. The Prosecution had obtained this evidence on a confidential basis from several sources that had refused to disclose it to the Defence and, in most cases, to the Trial Chamber (see ICC-01/04-01/06-1401).

¹⁹ On 8 July 2010, Trial Chamber I decided to stay proceedings in the Lubanga case again, considering that the fait trial of the accused was no longer possible due to non-implementation of the Chamber’s orders by the Prosecution to disclose to the Defence the names and identifying information of a certain individual (see ICC-01/04-01/06-2517-RED).

It is striking that the ICC has been faced with two serious incidents related to deficiencies of disclosure in the first and only trial that has been completed so far.

VIII. Witness protection

A special feature of trials before international courts is witness protection, or allowing witnesses to give evidence in private to avoid retraumatisation or possible retaliation. Witness protection involves anonymity by assigning a pseudonym to the witness, distorted broadcast of faces and voices and late disclosure of identifying details to the Defence. A genuine concern is the fear and confusion, which may be endemic in the traumatised area and is likely to lead to the proliferation of stories and rumours that may or may not be reliable. The length of time past may adversely affect the reliability of the memory, as may have the extreme provocations and abuses suffered. The reliability of witnesses is always an issue. In cases before international courts the risks of lies or painting the picture black is more likely to happen. In most cases, opposing witnesses are of the other ethnic group or with opposing politics believe.

Witness protection might cripple the possibilities of the defence to test the reliability of evidence given in court. Witness protection may restrict the right of the accused to conduct effective cross-examination of witnesses against him. It can jeopardise the ability of the defence to assess and challenge the evidence presented. The defence must have an opportunity to conduct an in-depth examination of the background of prosecution witnesses, to test the veracity of their testimony and to identify their potential bias. The objectivity of prosecution witnesses will have to be thoroughly examined. Witness protection is a troublesome feature of international trials indeed.

The key issue here is not the balance of interests between the defendant and the witness but the lack of public control. The faithfulness of the testimony of a witness is not to be tested by cross-examination only, but by public control as well, i.e. statements given in open court can be scrutinised by the audience. That is beneficial to truthful statements and would be consistent the purpose of any trial: to unravel what truly happened.

IX. Specific challenges

The typical challenge defence counsel before the ICC faces is working outside one's own jurisdiction without the benefit of the infrastructure and facilities available in national trials. One has to deal with other cultures and social practices. Counsel visits troubled areas where it is difficult to travel. Working abroad in domestic criminal cases usually occurs in a setting of legal assistance between States. In these situations, defence counsel can participate in discovery while abroad through a Commission Rogatory and in that case court officials usually deal with the logistical issues and liaise with the foreign authorities. In this respect the defence is only supported to a limited extent in cases before interna-

tional tribunals. Sometimes discovery on location is simply not possible because of an ongoing conflict in the area or at least troublesome.

Trials before international courts are not trials around the block, but cases with a high profile. These cases are not about ordinary manslaughter, but rather reflect twisted political emotions and aspirations. This factor is an element of the crime and therefore an issue of law that must be addressed in a proper way. The political motivation of the defendant must be presented in such a way that fits into the strategy on criminal responsibility or to sever political aspirations from alleged criminal actions. Politics is also factor to consider because of the profile of the defendant—some of them are heroes at home with substantial political influence.

Their support in the homeland and the inherent mass media attention may raise specific challenges for defence counsel to protect his professional independence when dealing with media attention. Prosecutors are in a better position in this respect as they have a spokesperson, or even a public relations office available. Such facilities protect them from direct contact with the media and help to prevent slips of the tongue and other unfortunate utterances defence counsel may well suffer.

Besides the political factor, the political influence and the media attention, the person of the defendant is a factor to consider. In these types of cases, defendants are usually persons with a strong personality – powerful people – with strong opinions. All these issues may affect the professional independence of defence counsel. Counsel has to balance between the possible necessity to grill a witness and to pay victims due respect. Counsel has to be careful whom to call. In most cases, it is not that difficult to convince the defendant that counsel will not call witnesses to make false statements. But what if a witness supports the political views of the defendant? On one hand, it may be helpful to produce evidence that explains the motives of the defendant's actions, but on the other hand a trial should not be a forum for dispensing political views. Counsel will have to consider the objective effect on the case.

Another political component is the involvement of officials in the conflict and for that reason access to all kinds of information documented by official bodies will be required. This may not be an issue related to the factual aspects of a case only, but more specifically to the legal elements of the alleged crimes, such as: whether the conflict is of an internal or an international character, or who initiated the actions as charged.

Language may become an issue when the assistance of interpreters is required, as it may damage the quality of the trial. During the first years of the ICTR for example, examination of Rwandans, who only speak Kinyarwanda²⁰, appeared to be troublesome if the witness was to be deposed before an English-speaking Trial Chamber. Sometimes confusing situations arose when questions were asked in English, translated from English into French, subsequently from French into

²⁰ The local language of Rwanda.

Kinyarwanda, and then backwards into French and English. A notorious example is the event where an answer given by a Rwandan witness took about a minute, but according to the translation the court was told: ‘the witness says yes’. Experienced litigators know that language is one of the means to evaluate the veracity of a witness. One cannot afford the risk of losing grip on relevant information.

Different to the other international tribunal, save the STL, the ICC boosts specifically the interests of victims, a feature practised in various ways in Napoleonic oriented legal systems, but little known in most other jurisdictions. The idea is that true justice is achieved when voices of victims are heard and their suffering is addressed. Acting for victims in cases before the ICC raises new challenges that are different from the usual functions of a defence counsel. It is a matter of assisting victims in the proceedings and sometimes taking a part in the trial itself on behalf of victims. Given the massive number of victims counsel for victims usually represent large or specific groups of victims. Such representation falls beyond the scope of this paper.

X. The right to prosecute

Roughly speaking, prosecutors and prosecutorial services are either individuals and services appointed and established by organs of the State or elected by constituency. The usual principle is that prosecutors are supposed to be independent but by all means accountable. This principle was neglected at the establishment of the ICTY and ICTR were established. According to the Statute of the ad hoc’s the prosecution is an independent organ of the tribunal that is not accountable for its prosecutorial decisions. A decision not to prosecute cannot be challenged before a chamber of the tribunal. This far-reaching independency has been criticised, as for example the decision of the ICTY prosecutor not to prosecute officials for events during the NATO campaign against Yugoslavia. The power of the prosecutor of the ad hoc’s of *nolle prosequi* of accomplices when testifying against certain defendants or otherwise assisting the prosecution encountered the same criticism, as appeared in the Plasić-case.²¹ The controversial issue of plea and charge bargaining will not be discussed in this paper. Under the ICC system, the prosecutor is not able to initiate investigation, drop charges or even decide not to prosecute at all, without a remedy for an interested party, which may well be a suspected or accused person, before a chamber of the court. Despite the judicial supervision of the ICC system that remedied the flaws of the system of the ad hoc’s, non-member States are reluctant to recognize the ICC Prosecutor’s *ex officio* powers and raised concerns that he may use his powers inappropriately. Yet, it should be recognised that the Prosecution is not a party to adversarial proceedings only, but also an organ of international criminal justice, whose object is not simply to secure a conviction but to assist the judges to discover the truth in

²¹ The former president of Republica Srpska, Biljana Plasić, testified in trials of other Srpska officials, who faced charges of genocide. When on trial herself Plasić was not charged with genocide.

a judicial setting. So far so good, but the (former) Prosecutor has been criticised for only prosecuting losing parties in conflicts and for focussing on Africa, where all of the cases are based. Others say that the Prosecutor avoided situations, like Gaza, where it would be likely to step on the toes of permanent members of the Security Council. Despite critical notes about reasons why international tribunals were established and critical comments on the Prosecution in general or the functioning of prosecutors in specific cases, a final positive note to conclude. Since the establishment of the ICTY the message of no impunity for international crimes has spread around; it is now for the ICC to encourage the same as a principle for domestic jurisdictions and to bolster fair justice by their own trials.

Independent bars in international criminal courts and tribunals

*Kenneth S. Gallant**

I. Introduction

For two centuries, the Bar of Gent has served the legal profession and the public interest. I am very honoured to be here for this anniversary.

In its long service, the Bar of Gent resembles many other Bars of Europe and elsewhere. Among national Court systems, especially in democracies, the institution of a Bar is nearly universal.

Today, there is one group of Courts which, for various reasons, generally do not have Bars: international courts. My presentation is about a prominent group of international courts, the International Criminal Court (ICC) and the other international criminal tribunals. I will focus on the ICC, but what I say can also be applied to other international criminal tribunals as well as non-criminal international courts and dispute resolution bodies.

II. The ICC needs a bar

The International Criminal Court needs a Bar now. The other international criminal tribunals, including the new United Nations residual Mechanism for International Criminal Tribunals, need Bars as well.

At stake is the full and fair legal representation of clients who are in front of these Courts. Through such representation, lawyers protect, for all persons, those civil rights and civil liberties associated with the existence of an effective criminal justice system.

The criminal law being enforced in the ICC and other international criminal courts and tribunals is the prohibition of the greatest crimes against all humanity. The persons who must conform their conduct to this law, are all of us here, all persons connected to the 120+ states parties to the ICC Statute, and all other citizens of the world. As the ICC Statute functionally recognizes, all persons who are subject the jurisdiction of a criminal Court are entitled to full and equal treat-

* Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law, 1201 McMath Avenue, Little Rock, Arkansas, 72202-5142 USA; former Representative of Counsel, International Criminal Court Advisory Committee on Legal Texts; current Member, List of Counsel maintained by the ICC Registry; Council Member, International Criminal Bar. The research for this article has been supported by grants from the UALR Bowen School of Law. This article is prepared for Defence Rights: International and European Developments, Gent, Belgium, 23 November 2012, celebrating 200 years of the Gent Bar.

ment by it, in accordance with all internationally recognized civil rights and civil liberties.¹

Fair representation and full recognition of legal and civil rights are values that the Bar of Gent and its Members have supported in Belgium over the past two hundred years. They are protected by independent national Bars here and in the legal systems of democratic societies around the world.²

Originally, I planned an academic lecture. I intended to discuss the role of independent Bars in various different types of legal systems around the world. Then I would scientifically build from these a model for a Bar of the International Criminal Court that would be an adaptation of the most appropriate models around the world.

The thoughts I will present to you today will, I hope, withstand scientific scrutiny. However, because of the urgency of the matter, I hope you forgive me for focusing on what needs to be done, and for touching only lightly on the comparative law and law of international organizations behind my thoughts.

This need is based both on the interests of lawyers and on the interests of the public in I will also suggest a model for creating such Bars. This model will not conflict with the interests and powers of national Bars concerning practice of law in their nations and their nations' courts. It will also strengthen the operation of these Courts, and contribute to their efficiency and effectiveness.

A. What do we mean by a bar?

A Bar is a self-governing entity which represents Counsel in a Court or Court system.³ It protects the rights of lawyers, and the rights of their clients, to fair treatment within the system. A Bar is not merely the collection of Counsel who practice in a given Court or Court system. Bars may have grown up throughout the Civil Law and Common Law systems. However, Bars also exist in states with Islamic majority populations (whether or not governed by Islamic Law), and in states with Asian judicial systems.

Bars have powers, to a greater or lesser degree, to control matters such as admission to practice, ethical standards, discipline of Counsel, and other matters relating to the practice of law in a given system. They often provide ethical advice for Counsel, on a confidential basis. Especially in the Civil Law system, its leader,

¹ Cf. ICC Statute, art. 21(3) (internationally recognized human rights generally); ICC Statute, arts. 11, 19, 20, 22-24, 55-57, 63-67 (other human rights, civil rights, civil liberties and procedural rights recognized).

² Even in some undemocratic societies, the Bars and their members have served as a protection for at least some aspects of the rule of law, and for at least some rights for disfavoured groups. Examples frequently cited are the anti-apartheid lawyers who practiced in South Africa and lawyers who protected the rights of members of the independence movement in India during the British Raj.

³ Today we will not address the Barrister/Solicitor divide in some common law countries. In that tradition, Barristers are generally members of a Bar, while Solicitors are generally members of a cognate entity usually called a Law Society.

the *Bâtonnier*, has the ability to mediate disputes between a lawyer and the Court, providing prompt resolution for matters which otherwise would tend to disrupt the functioning of the Court, or interfere with progress in a particular case. They often have a voice in the process of making the Rules of their Courts or Court systems.

A Bar in a democratic society is independent. It is not controlled in its self-governance activities by an organ of the Court it is associated with.⁴ In some national systems, some of the Bar decisions concerning individual rights, such as refusal of membership or disciplinary action, may be appealed to a judicial body, but such an appeal is regulated by law.

Bars may take different forms in different societies. In the Civil Law tradition, followed by the ICC and other international tribunals, Prosecutors are part of the structure of the Court itself. Thus, the Civil Law Bar consists only of those lawyers representing clients in front of the Court. It does not include lawyers working for the Prosecution. In many common law jurisdictions, the Bar includes those lawyers who represent the Prosecution and other government lawyers, as well as those who represent the defence and other private interests.

While the choice to make the Prosecution lawyers part of the Court was originally controversial among some supporters of the ICC, it has a benefit here. It makes it somewhat easier for a Bar to represent interests otherwise unrepresented in the structure of the ICC.

In most systems, membership in the Bar is mandatory for those admitted to practice of law. Bars are often self-financing, though in some cases they may receive outside funding.

I distinguish the formal, required 'Bar' from 'Bar Associations' which also exist in many systems.⁵ Bar Associations are voluntary groups of Counsel, Bars, or both. The purpose of Bar Associations is to offer information and advice (sometimes in the form of lobbying) to their members, to courts, and to others involved in the justice system. Typically, they do not have an official place in qualification, ethics, or discipline of Counsel, or in the rule-making system of courts, though their views are often listened to with great respect on issues of making Court rules, and even statutes. Both the International Criminal Bar (ICB) and the International Bar Association (IBA) have given useful advice to the ICC and its Assembly of States Parties on issues such as the Rules of Procedure and Evidence, Legal Aid, Ethics of Counsel, and other issues.⁶ Neither of these organizations, however, has an official place as the Bar of the ICC.

⁴ Cf. Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), paras. 24-29. The Basic Principles do not require that every State have a Bar as described in this paper. However, having an independent Bar certainly promotes the goals of the Basic Principles, and the paragraphs cited here encourage the existence of an independent, self-governing Bar (though without using the word 'Bar' in the English text).

⁵ Unfortunately, in some countries, the name 'Bar Association' is used for the formal Bar, leading to occasional confusion in terminology. I hope the functional difference is clear.

⁶ Cf. ICC Rules of Procedure and Evidence, Rule 20(3).

The universality of the institution of a Bar in modern democratic societies suggests that, in modern conditions, it is necessary to fair operation of Court systems. At very least, no modern national system has come up with a successful alternative to having a Bar.

B. Bars are creations of their own legal systems, organizing lawyers as appropriate to that system

One characteristic of Bars common around the world is that they organize the lawyers of a Court or a Court system. They may be regional, as the French Bars of Paris and other areas, or national, as the Bar Council of India. They are not always 'juridical persons' like corporations.

For example, in some American states, Bars are created as part of the state judicial system, but retain the character of self-governance by holding their own elections for officers. In other countries, they may be independent bodies created by Statute. By contrast to both of these, the Inns of Court in England began without statutory authority or corporate charters, but became recognized in the common law courts. This suggests a flexibility in the form of Bars, appropriate to the systems in which they arise.

A vital consequence of this is that Bars are entities created within the state that they serve. This may seem obvious: domestic legal arrangements are created according to domestic law. But it is difficult to imagine that these entities would have been able to achieve their official powers of self-regulation if they were extensions of bodies created by foreign law, no matter how friendly or similar to the law of their own system. So, in the United States, which most strongly insists on the sovereignty of its constituent states, the Bar is not national. It is separately organized in each State, which would not accept subordination to a single Bar created by the federal government. However, the United States Supreme Court and each of the federal Courts of Appeal and District Courts, each have their own Bars, with jurisdiction only over matters in each respective court (and generally with much less power than the State Bars).

C. Missing elements in the international criminal court, and how a bar might fill them

The justice system of the International Criminal Court and other international criminal tribunals is incomplete without a Bar. You will hear from Jean Flamme and Mischa Wladimiroff many compelling reasons why this so—and they are much more eloquent than I am. Nonetheless, I will state a few reasons of my own for this conclusion.

First, perhaps most importantly for the day to day operations of the Court, there is no *Bâtonnier*-type leader who can intervene to assist in resolving conflicts between Counsel and an organ of the Court or among Counsel. Such conflicts have occurred between Counsel and Judges of the Court; Counsel and the Reg-

istry; and Counsel and the Prosecution. Given the importance and complexity of ICC cases, it is not surprising that such conflicts sometimes arise.

Having a leader of a Bar who is respected both by its members and by the officers of the Court can be exceptionally useful in resolving a very broad variety of issues. Even where the issue cannot be resolved without a determination by the Court (as where the Prosecution and Defence cannot agree on disclosure of a certain document), the *Bâtonnier* can help depersonalize the conflict, and ensure that it is resolved professionally.

Second, in many systems, the Bar provides confidential ethical advice for Counsel on difficult matters. This provides protection for the rights of clients as well as improving the standards of practice in the courts. It reduces uncertainty for Counsel as well as the need for disciplinary proceedings.

Third, the lack of a Bar at the ICC places nearly the entire burden of the regulation of law practice on the Registry. This burden is substantial. The functions performed by Bars in many national systems, include qualification, discipline, and training of lawyers. Advocacy training is a particularly important in international criminal courts, because practice in each international tribunal is different in significant ways from any given national judicial system. The existence of a functioning Bar, with appropriately defined duties and funding, can address this burden.

Fourth, the ICC Registry, like Registries in many Civil Law countries, is intended to be a neutral organ of the Court, serving the Judges, the parties, and others with business before the Court (such as victims and witnesses). However, in the ICC, the Prosecution function is a separate organ of the Court. The Registry has no say in who can be an officer of the Prosecution before the Court. Therefore, 'law practice regulation' in the ICC means regulation of the practice relating only to representation of individuals—i.e., Defence Counsel and Legal Representatives of Victims. That is, while officially neutral, the Registry is put in the awkward position of both supporting and regulating the individual side of law practice only.

Moreover, the Registry is an administrative, not a judicial, body.⁷ Yet many of the issues it is called upon to deal with respect to Counsel, such as decision of disciplinary actions against Counsel, have predominantly judicial rather than ministerial characters. In many national systems, some or all of these duties are done not by the Registry (or its Common Law analogue, the Office of the Clerk), but by the Bar. In some jurisdictions, there is a possible appeal by aggrieved individuals (e.g., 'disbarred' Counsel) to the Court.

The current law applicable in the ICC (i.e., the Code of Conduct for Counsel, drafted by the Registry with input from the worldwide legal profession, and approved by the Assembly of States Parties) has gone some ways to mitigating the last of these problems, by establishing a disciplinary mechanism involving

⁷ See ICC Statute, art. 43(1).

lawyers who are not Registry employees. Nonetheless, this is not the same thing as having this function performed by an independent Bar, as it is in most states.

D. Reasons for having a bar specific to international tribunals

The need for a Bar is even greater in the ICC and other international criminal tribunals than in national court systems of democracies. This is because of what is missing from international Courts—and not just criminal courts. As international organizations (e.g., the ICC) or organs thereof (e.g., the ICTY and ICTR), they are unconnected to all the apparatus of government existing in states.

The ICC and other international criminal tribunals are not Courts of states, and thus, do not have citizens to whom they are directly responsible. Within democratic states,⁸ civil society—including both individuals and non-government organizations—will generally have within itself strong elements representing civil liberties and rights of the defence. These persons and organizations take part in the democratic process, both in terms of election advocacy and development of policy by legislators and others.

By contrast, international criminal courts and tribunals have no such direct democratic controls—a character shared with international organizations generally. They are ultimately controlled by states, and their law-making functions are given either to the member states, the Judges, or some combination of the two. Some have described this as a ‘democratic deficit’ in international organizations generally, and in international criminal courts and tribunals in particular.

For example, in the ICC, the RPE and Elements of Crimes are both enacted by the ASP, and the Regulations of the Court are enacted by the Judges, with oversight by the ASP.⁹ In other international criminal tribunals, the Judges amend the RPEs, whether or not there are Advisory Committees including other voices.¹⁰ There is no independently acting constituency within the ICC or the other international criminal tribunals, which has the same interests in civil rights as civil society in a democratic state, or a full voice in the lawmaking process.¹¹

The lawyers who represent clients in these courts need an institutional means for voicing their interests and those of their clients. The Prosecution in these

⁸ The problems of undemocratic states cannot be addressed here, except to say that they need not be taken as models for international criminal justice.

⁹ ICC Statute, arts. 51, 52.

¹⁰ The ICTY has a Rules Committee. One member of the Committee is from ADC-ICTY, an association organized under the laws of the Netherlands which has some of the functions of a Bar, but is not itself part of the legal system of the ICTY.

¹¹ This and the preceding paragraph are substantially drawn from Kenneth S. Gallant, *Addressing the Democratic Deficit in International Criminal Law and Procedure: Defence Participation in Law Making*, to be published in Charles Jalloh, ed., *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* (Cambridge Univ. Press, forthcoming).

courts, by contrast, is an Organ of the Court, and has a voice that is regularly heard in administrative and other arrangements.¹²

Indeed the defence in the ICC has only a limited voice that can speak for individual human rights in the criminal process, other than the voice of counsel practicing independently in each case.¹³ Thus generally the Judges and the Prosecution have much more influence in matters such as budgets and the Rules of Procedure and Evidence. In the words of Elise Groulx, international criminal courts are missing the Third Pillar of a strong and independent defence voice and legal profession.

A Bar can help to fill this gap, because Counsel share many interests with their clients. For example, Counsel who would belong to an ICC Bar have the interests of the Defence as part of their interests, in a way that the Prosecutor does not; and even in a way that the Judges and Registry do not. The Prosecutor must be fair; but her essential job is holding international criminals accountable. The Judges and the Registry must be neutral, protecting the interests of all parties equally. It is very difficult to do this when only one side, the Prosecution, has an institutional voice in matters such as making the rules and regulations under which the Court operates, or the budget, which governs legal aid.

I have principally been speaking of the rights of the Defence, which is a full party to proceedings in the Court. The Defence has many rights which the ICC Statute recognizes as necessary to promote,¹⁴ but which lack an institutional advocate in the bare text of the Statute. A Bar can be an institution with official standing which helps advocate for these positions.

However, the ICC Statute also recognizes rights of Victims,¹⁵ even though they are not parties to the case (as in some civil law systems). Here again, Counsel who would be members of a Bar represent these persons. The Bar thus can help advocate for these positions as well.

This is not a perfect solution to the ‘democratic deficit,’ largely because the interests of Counsel and their clients do not always mesh perfectly. It is also the case that no single organization, such as a Bar, can represent every interest of every citizen who may come into contact with the ICC. Nonetheless, the creation

¹² E.g., ICC Statute, arts. 42(1) (‘The Office of the Prosecutor shall act independently as a separate organ of the Court.’), 51(1) (Prosecutor may propose changes to Rules of Procedure and Evidence), 52(2) (‘The Prosecutor . . . shall be consulted in the elaboration of the Regulations [of the Court]’).

¹³ I have just completed two terms as the Representative of Counsel on the ICC Advisory Committee on Legal Texts. This Committee resembled the Rules Committee of some national court systems. My role on the Committee was to comment on and participate in making recommendations on Proposals to change the Rules of Procedure and Evidence, Elements of Crimes and Regulations of the Court, and a few other matters. However, under the ICC Statute, arts. 51-52, only the Judges and the Prosecutor could initially propose changes to the former two; and the Registrar alone was added to the consultation group for the third.

¹⁴ E.g., ICC Statute, arts. 11, 19, 20, 21(3) (consistency of law with international human rights generally), 22-24, 55-57, 63-67. One might also include the articles on substantive defences to crimes.

¹⁵ ICC Statute, arts. 68, 75-78.

of an ICC Bar is one thing which can be done straightforwardly and consistent with the law, which would alleviate the problems caused by the 'democratic deficit,' especially to the extent of issues concerning criminal procedure and law.

Moreover, traditional national regulation of lawyers practicing in international criminal courts would be problematic. A State does not have the same interests in who represents the Accused in an international criminal tribunal as it does in who it can choose as its own representative in the ICJ. The interests that States do have in controlling practice in the international criminal tribunals may be sometimes be illegitimate. Some States may be hostile to some persons accused of crime in these tribunals, and freedom of choice of counsel by these persons must be protected. Some regimes are hostile to the political activities of some lawyers who are their nationals.

A Bar of the ICC could not invade the province of national Bars. A lawyer today who wishes to practice in two different national Court systems must meet the Bar requirements of each, and act in accordance with the rules of each. An international Court such as the ICC should be no different. The regulation of the practice of law by a Bar of the ICC can only extend to Counsel's representation of clients in the ICC itself. It cannot interfere with the regulation of the practice of law in any national state. That regulation can only be done by the Bar of the concerned state, acting under the law of that state.

III. How a bar might be created for the ICC

The need for a Bar of the ICC is compelling. Its creation would be fully consistent with the ICC Statute and implementing law.

The existence of Bars as parts of their own legal systems¹⁶ has an important implication for the ICC and other international criminal courts that has not been recognized sufficiently. A Bar for such a Court needs to be created as part of the system of that Court, if it is fully to fulfil the functions of a Bar.¹⁷

The Assembly of States Parties (ASP) has the authority to create subsidiary bodies as needed.¹⁸ Because a Bar is needed to advance the cause of international criminal justice which is the object of the ICC, this alone would be enough to authorize it to create a Bar. However, considerably more justification for its creation is available.

Authority for a Bar already exists in the Rules of Procedure and Evidence. Rule 20(3) foresees the existence of an 'independent representative body of counsel or legal associations' and that 'the establishment of [such body] may be facilitated by

¹⁶ See part I.B above.

¹⁷ This is not the place to go into the entire history of the Association of Defence Counsel of the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY). It was, and remains, the first real effort to create a Bar-like entity for the international criminal courts. It is an association created under the law of the Netherlands, rather than the ICTY or its parent international organization, the United Nations. Despite its many accomplishments, I think its formation under other law has been a stumbling block to its full recognition as the Bar of the ICTY.

¹⁸ ICC Statute, art. 112(4).

the Assembly of States Parties.’ Rule 20(3) mentions some—though by no means all—of the traditional functions of a Bar being performed by this body. If, however, more explicit authorization is desired, the Rules of Procedure and Evidence could be amended to specifically name the Bar as an entity to be created.

There is precedent for creating a subsidiary body by the Assembly of States Parties (ASP). In the course of adopting the Staff Regulations authorized by the ICC Statute, the ASP authorized creation of a staff representative body of the ICC.¹⁹ This staff representative body exists as an entity authorized under the law of the ICC as an International Organization. One difference which may make the creation of the Bar a bit more complicated than that of the staff organization is that the authority it will have must be defined. That is, decisions will need to be made about the extent to which the Bar will have authority to admit members, to define the standards of legal ethics for practice before the Court, and to discipline members, along with other issues. These decisions will eventually need to be approved by the ASP.

Having set out a technical basis for the creation of the Bar, I would like to make a suggestion—and this is only one suggestion out of many possible—about bringing this entity into existence. The initial membership of the Bar would most sensibly come from the current List of Counsel. It would seem that a representative group elected from this List, in consultation with appropriate experts, might draft a charter for this Bar, for eventual consideration and approval by the ASP.

This Bar would be an independent, self-governing group, separate from the organs of the Court. It would join the Bar of Gent and other Bars worldwide in promoting the ideals of impartial justice.

¹⁹ Cf. ICC Staff Regulations, ICC-ASP/2/Res. 2, Reg. 8.1. This idea is not original with me, but the person who suggested it to me prefers not to be identified.

The fundamental right to a full and fair defence before the ICC

On the confines of common law
and Roman-German Law: an analysis

Jean Flamme*

I. Introduction

The fundamental right to a fair and full defence is for the fair trial what a free press means for democracy

Victor Hugo wrote:

‘Avec la presse libre, les problèmes de société ont de la lumière au-dessus d’eux, ils sont praticables, on voit leurs précipices, on voit leurs issues, on peut les aborder, on peut y pénétrer. Abordés et pénétrés, c’est à dire résolus, ils sauveront le monde.

Sans presse, nuit profonde. Eteignez le phare et le port devient l’éceuil. Nulle incertitude. Allez à l’idéal, allez à la justice et à la vérité.’

In his censored manifesto of 25 november 1939 Albert Camus wrote:

‘La vérité et la liberté sont des maîtresses exigeantes puisqu’elles ont peu d’amants.’

In l’ ‘Homme révolté’ he wrote:

‘La vertu de l’homme est de se maintenir en face de tout ce qui le nie.’

Let us speak about this ‘truth’. There is often a tendency to reduce what some call ‘justice’ to the self-declared and ‘unique’ ‘truth’ of a judicial file.

In this process an independent and strong defence, with full equality of arms, can become a troublemaker, with very little lovers.

And yet, a strong and independent defence, protected by a strong and independent Bar Association, is the last rampart of democracy.

There is no ‘unique truth’. There are as many ‘truths’ as there are men and women. A fair trial should be a moment of the ancient Greeks’ concept of ‘katarisis’, a moment of ‘truths’, in the plural form, an endeavour of explanation and, consequently, of ‘purification’, which makes civilizations advance, in the concept

* Lawyer at the Ghent Bar, Defence council at ICTR (Muvunyi), at ICC (Lubanga), with respect to damages from the UN (Kabiligi), Secretary General International Criminal Bar (ICB).

of 'light' of Victor Hugo. 'Reconciliation' is only possible when all 'truths' have been told. The fair trial organizes the stage where this could be achieved.

The necessity of 'punishment' becomes of lesser importance in the face of what is at stake, while dealing with the sufferings of entire populations and sometimes millions of deaths, as in the Congo, millions of deaths nobody talks about. We speak about hope for peace for millions and the means to achieve it.

In this process defence is there to bring the other 'truth', and often the 'inconvenient' one. It is the truth of the accused, of his tribe and of his/her political and/or armed battle. It is sometimes the truth of a whole population or part of it.

There is no trial without a strong defence.

II. A 'sui-generis' system, accusatorial but with inquisitorial elements: a good choice ?

1. The Rome Statute has fully endorsed the fundamental principle of a full defence by determining what the contents of the rights of the accused are in art. 67

Among these rights, qualified as '*minimum guarantees*'¹, art.67.1.e gives the accused the right to '*examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.*'

The Rome Statute must be considered has having installed '*sui generis*' proceedings, with elements of both Common Law and Roman-German Law.

The question however has to be asked whether, when creating this 'hybrid' system, the correct choices have been made.

It has certainly been a good choice to make 'other' evidence admissible in a much broader way than is usually the case in Common Law² and to give the trial chamber very broad powers in ruling on the relevance or admissibility of any evidence, as is the case in Roman-German Law.³ It means that it is possible to present evidence without having to enter it through a witness.

The Court shall also have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.⁴

It, most importantly, has also been a sound choice to safeguard the common law proceedings of examination and cross-examination of witnesses, because this is the best way to find the truth.

In the Roman-German tradition the examination of a witness is, generally speaking, done by the presiding judge. Cross-examination consequently does not exist and questions are addressed to the judge who then asks them to the witness, if accepted.

¹ Art. 67.1.

² Art. 67.1.e in fine Rome Statute.

³ Art. 69.4 Rome Statute.

⁴ Art. 69.3 Rome Statute.

It is almost impossible to examine a witness on credibility or to ask a series of very precise questions. These will either be omitted or reformulated by the presiding judge, who will tend to 'protect' the witness exceedingly.

It is quite surprising that this inadequate system still survives today. The examination of a witness should not be done by a judge, simply because he/she does not have at his/her disposal all the elements the defence counsel has collected, or should have collected.

It is even more surprising, bearing in mind that in arbitration proceedings in Europe more and more use is made of direct examination and cross-examination of witnesses.

It is also provided for in the European Convention of human rights.⁵

However, most witnesses in the Roman-German system are not even interrogated by the judge but by the police, certainly in cases relating to smaller crimes. It has to be considered as a reminder of the inquisitorial method (see further), where witnesses were interrogated secretly, which is unthinkable in the accusatorial system.

The accused shall be presumed innocent⁶ and the onus is on the Prosecutor to prove the guilt of the accused beyond reasonable doubt⁷.

2. Confusion has been created however by installing one of the bases of the 'inquisitorial' (the choice of this kind of qualification is very unlucky as we shall see) system at the heart of what was meant to be essentially an 'accusatorial' system

The Rome Statute⁸ imposes on the Prosecutor, '*in order to establish the truth, (to) extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;*'

For the common law-systems this provision is entirely new as, in these countries, the duty of the Defence has the advantage of being clear: defence has to investigate and constitute its own defence-case. There is no such thing as a 'credible' and 'official' case-file. This culture of defence-investigation is unknown in the Roman-German tradition, in a very unlucky way.

However, the drafters of the Rome Statute have forgotten that, in most countries of the Roman-German tradition, the duty to investigate 'incriminating and exonerating circumstances equally' is given to an independent investigating judge (and not a judge 'of the investigation', who has only mere 'controlling' powers) and not to the Prosecutor. The investigating judge is not a party to the public action and does not constitute an instrument of prosecution. He/she has to keep

⁵ European Convention art 6.3 (d).

⁶ Art. 66.1 Rome Statute.

⁷ Art. 66.2&3 Rome Statute.

⁸ Art. 54.1 (a) Rome Statute.

the balance between accusation and defence and, in doing so, must not cease to be a judge.⁹

The rationale of this institution is that an investigating judge is in a better position to investigate both incriminating and exonerating circumstances equally, than a prosecutor or a police-officer would be.¹⁰

Experience at the ICC in the meanwhile has learnt that indeed the onus of 'décharge' resting on the Prosecutor is but an illusion, given the essential accusing role of the Prosecutor's Office. This is even more the case in a big international investigation that may relate to millions of deaths and that concerns entire states. The Prosecutor's machinery is a very heavy and costly one. Once it has been set in motion against an individual or several persons, it is almost impossible to make it halt itself and wonder whether it is acting correctly and should, possibly, be stopped.

The counterpart of this obligation is to be found in another of the Prosecutor's duties¹¹: the disclosure to the defence of exonerating evidence in his/her possession.

Also this obligation has proven to be problematic.

In the case of *Thomas Lubanga v/ Prosecutor*, the trial Chamber ordered a stay of proceedings because the Prosecutor did not meet his obligations under art. 67.2.

The problem in enforcing this duty is that the defence does not know what elements are in possession of the Prosecutor on one hand, and that the appreciation of the exculpatory character of elements of evidence belongs primarily to the Prosecutor, who, in thus doing, is judge and party at the same time, on the other hand. It may, consequently, well be that evidence important for the defence stays 'in the cellars' of the Prosecutor's Office, because Prosecution deems it not to be relevant '*to show the innocence of the accused, or to mitigate the guilt of the accused, or in affecting the credibility of prosecution evidence.*'¹²

During the Lubanga pre-trial stage the defence had found evidence in form of mails, establishing that, at the time when Thomas Lubanga was about to come to power in Ituri (E-Congo), the political forces in power were preparing a genocide against the Hema, which is the ethnical group Thomas Lubanga belongs to.

The Prosecutor had to admit he had examined the concerned mail-box. Notwithstanding that he had not disclosed the concerned mails to the defence.

As a way of remedy, the Defence had asked access to the full file of the Prosecutor, also in the RDC situation case-file. This was refused by decision of 17 th may 2006¹³.

It thus means that defence is entirely dependent on the interpretation of the Prosecutor as to the exculpatory character of evidence he/she possesses.

⁹ Henri-D. Bosly, Damien Vandermeersch – Droit de la Procédure pénale – La Charte – p. 244

¹⁰ H. Bosly, D. Vandermeersch – op.cit. – p.245

¹¹ Art. 67.2 Rome Statute

¹² Art. 67.2 Rome Statute

¹³ ICC-01/04-01/06-103 17-5-2006

This is of course not acceptable and contrary to the principle of equality of arms and fair trial.

The debate is crucial of course and may be decisive as to the question whether trials at the ICC are going to be fair or not.

The said duties of the Prosecutor, which are clearly not enforceable, have already brought some to the conclusion that, as things stand, there is no need for a strong and well equipped defence, given the fact that the prosecutor's file is supposed to be 'reliable' and to contain both incriminating and exculpatory evidence.

We have, consequently, come back to the inquisitorial mirage of the one and only 'objective' file as a basis for what has to be a 'fair' trial.

This 'mirage' is, very unluckily, still a sad 'reminder' of the Inquisition, which was practised by the Catholic church for centuries in a very global way 'avant la lettre' and which was, in fact, based upon the obsessional 'conviction' of this church to be 'invested' with the one and only 'truth', which later on made the Pope 'infallible'.

The inquisitorial 'investigation' could only result in an irrefutable and absolute 'Truth'.

It speaks for itself that this kind of infallibility was nothing else than a very clever tool to exercise absolute power, and the Inquisition, or rather terror, was the armed wing to impose that power at random. The King was happy that he did not have to do this job himself. He must have welcomed intensely that the Church took care of what in fact belonged to the state.

Inquisitorial methods, including torture, survive still today and have even been re-introduced for example in the US, by the Bush-administration, resulting in detention locations like Guantanamo and other secret places where there is no law to protect detained people and where torture is again an accepted tool to learn the 'truth', in breach of the international and binding standards. They of course equally survive in dictatorships and every lawyer should have read the compelling novel of Arthur Koestler 'Darkness at noon', in a simulacrum of Stalin's Russia, at the height of the purges in the 1930s.

It is the said and still surviving 'mirage' that withholds Roman-German lawyers from investigating cases from the defence-perspective, which they should do.

Even case-files produced by investigating judges indeed are often not reliable from a defence-perspective.

Witnesses that have been heard in this kind of investigation are not submitted to cross-examination and their credibility will neither be seriously tested nor challenged.

Also will a witness often have a very personal and subjective view of what is remembered. Cross-examination is there also to confront the witness with other testimonies, with documents and unknown facts, with questions, which may alter the way the witness recalls facts and possible conclusions made. It is an ongoing process that lasts for the complete duration of the trial. The witness may also be 'intoxicated' by a certain view of things.

An example of what a good cross-examination is able to achieve is what happened in the Military I-case before ICTR, when General Roméo Dallaire (commander in chief of the UN peace-keeping force in Rwanda in 1994) was cross-examined by defence. When confronted with the fact that the FAR (Rwandan army at the time) had to fight the invasion by the rebellious RPF of Gen. Paul Kagame, and could logically not have been busy with organizing genocide at the same time, Gen. Dallaire answered that he had never looked at it that way.

The file of the investigating judge is a product of a momentum and proceedings in Roman-German tradition, additionally, are often poorly equipped to deal with facts and evidence, revealed after closure of the investigation.

This has something to do with the 'mirage' of sticking to one truth, once 'established', also an inquisitorial legacy: the 'truth' as an immutable datum.

One has, consequently, to come to the conclusion that it has been a very bad choice to provide for a duty for the Prosecutor to investigate exonerating circumstances equally, in presence of his/her onus to prove the guilt of the accused. Both duties (incriminating and exonerating) are contradicting each other. It is as if defence were to be asked to mention all incriminating elements it comes across. That would be considered absurd.

The common law system has the advantage of being simple and clear: the accusation investigates in an incriminating way and the defence investigates in an exonerating way.

Also is there, as already said, no sanction provided for if the Prosecutor does not meet his/her obligation to investigate in an exonerating way. Normally, and given the importance of the concerned duty, this should lead to nullity of the proceedings. This was invoked in the Lubanga pre-trial stage but the chamber left it without consequence.

What is clear is that defence can rely neither on the exculpatory investigating duties of the Prosecutor, nor on his/her disclosing obligations, which means that the investigating duties of defence remain entire.

The question, consequently, is whether the ICC gives to defence the means which are requested to exercise the rights given to the accused by art. 67 of the Rome Statute.

III. The need and obligation for defence to investigate the case

- 1. We have to conclude that defence should be put in a position which enables it to investigate the case fully from a defence-perspective. In common law systems this duty is generally regarded as a professional obligation**

Before ICTR this right was fully recognized. Under the prevailing legal aid-system a defence-team was generally entitled to a lead-counsel, a co-counsel, one professional investigator and two legal assistants or two professional investigators and one legal assistant.

Before international criminal jurisdictions legal aid is the rule as most of the accused persons are indigent.

The issue is of utmost importance because it is at the heart of what is to be understood as a fair trial. If the accused is not put into a position which enables him to exercise his minimal and basic rights, there could be no question of a 'fair trial'. A sufficient legal aid is consequently crucial.

Regulation 83 of the Regulations of the Court provides:

'Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances.'

The draft UN principles and guidelines on access to legal aid in criminal justice systems provide under 1.1:

'Legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. It is a foundation for the enjoyment of other rights, including the right to a fair trial, as defined in art. 11 para. 1 of the Universal Declaration of Human Rights, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.'

It is the Registrar of the ICC who determines the contents of the legal aid, under the supervision of the chambers. Decisions of the Registrar regarding applications for additional means¹⁴ can always be reviewed by the relevant Chamber¹⁵. This is important given the fact that this Chamber has the best knowledge of the particularities and the complexity of the concerned case. Consequently legal aid can be 'tailored' in order to respond to the said particularities.

Several decisions of the Registrar have been reviewed in this sense.

The Registrar however had designed a general scheme of remuneration of counsel and his/her assistants. In doing so the Registrar pretends to use the principle of 'equality of arms' as legal basis, as should be the case.

It means, basically, that a party to the proceedings should not be put in a disadvantageous position as compared to another party, provided that the elements concerned are within the control of the Court.

The minimum standard that a Court is thus able and has to impose is that a defendant will be put into a position that enables him/her to fully challenge the file of the Prosecutor and give him/her the means to do this.

The rules of procedure and evidence provide that for purposes such as the management of legal assistance:

¹⁴ Regulations of the Court – reg. 83.3.

¹⁵ Regulations of the Court – reg. 83.4.

*‘The Registrar shall consult, as appropriate, with any independent representative body of counsel or legal associations, including any such body the establishment of which may be facilitated by the Assembly of State Parties’*¹⁶

The problem however is that the Assembly of State Parties, in more than 10 years of existence of the Court, has not established such a body.

The consequence of this is that there is no proper Bar at the ICC. Defence should be the third institutional ‘pillar’ of the Court. The absence of an institutional Bar has far reaching consequences, not only concerning the issue of the legal aid.

It also means that counsel at the ICC do not have at their disposal mechanisms for ethical advice and dispute resolution, as is the case in any modern law system. It means that hearing incidents, which are numerous, are to be resolved by the president of the chamber, who could be judge and party at the same time. In exceptional cases the President could even suspend counsel on a temporary basis.¹⁷ It is very clear that this is not acceptable. Many legal systems place this authority within a Bar, because that is where the ultimate independent disciplinary authority resides.

The Presidency of the ICC has already stated the lack of a mechanism for ethical advice and ordered the Registry to provide for a solution. As today nothing has been done about this. Traditionally ethical advice is also provided through an independent Bar, which, equally, will be in the best position to give advice on matters such as legal aid.

2. The Registrar of the ICC had installed a system of legal aid that was not meeting the requirements of equality of arms in terms of human resources made available

The defence teams were far too reduced to be able to challenge the file of the Prosecutor in the reduced amount of time made available by the Court. One tends to forget that the Prosecutor has a considerable advantage on defence, not only in terms of human resources

(specialists of all sorts, big investigation teams with considerable means, separate teams for trial and appeal phases, etc.), but also in terms of time.

When defence starts, the Prosecutor has already spent a considerable amount of months, if not years, on the concerned case. This should result in defence teams which are even more important than has been the case before ICTR¹⁸ and ICTY¹⁹, bearing in mind also that, at the ICC, defence is, additionally, confronted with teams representing victims, which is not the case before the said ‘ad hoc’

¹⁶ Rules of Procedure and Evidence – rule 20.3.

¹⁷ Code of professional conduct for Counsel – rule 39.8.

¹⁸ International Criminal Tribunal for Rwanda.

¹⁹ International Criminal Tribunal for the former Yugoslavia.

tribunals. Representation teams for victims add in a considerable way to the workload of defence-teams for accused persons.

This has not lead to an increase of human resources in defence teams at the ICC. On the contrary, human resources at the ICC are even more reduced than is (was) the case before ICTR.

To give but one example, time for professional investigation is limited to an absurd amount of 90 days for pre-trial and trial-phases cumulated, whereas before ICTR investigation time is (was) limitless. There has never been given any sound rationale for this extreme limitation, which of course damages defence deeply and nobody knows where it comes from.

The Registrar has, moreover, recently proposed to abandon professional investigation and to start working with poorly paid 'resource persons' who do not meet the professional requirements one would expect from an investigator.

It is quite obvious that in trials relating to the killings of thousands, even millions (Congo), on a political and international background of extreme complexity, where defence ought to look for secret files and documents and for a considerable quantity of witnesses, an amount of 90 days of investigation means nothing, certainly if compared to the extent of the investigation time spent by the Prosecutor.

In the case 'Military I' before ICTR, the defence for Major Aloys Ntabakuze obtained an order from the Chamber to inspect all UN documents relating to the period at stake (1994) in Rwanda. This inspection took weeks, if not months, of full-time work and resulted in a final judgment where the Chamber found that the prosecutor had not established that there existed a 'plan' to commit genocide. It also resulted in the full acquittal on all charges of the former Chief of operations of the FAR (Rwandan army at that time), Gen. Brig. Gratien Kabiligi²⁰ and acquittal of all other accused on charges of 'conspiracy and planning to commit genocide'.

This example illustrates the problems of defence. Clearly the Prosecutor should have disclosed these documents to defence²¹ as being exculpatory evidence, which he did not (see also higher as to this issue). The discussion about the alleged 'planning' of the genocide, and, in fact, eventually about the presence of all the elements of that crime as such should have been crucial from the very start. Instead the evidence relating to this issue was kept away from defence.

In the draft amendments to the Rules of the Registry at the ICC²², the registrar plans to add a new level of confidentiality to evidence and decisions, marked 'secret'. The difference with the existing level 'under seal' being that methods of reproduction of a 'secret' document are prohibited and that only 'one' person at the Registry can make copies.

²⁰ Prof. Peter Erlinder – 'accidental genocide' – International Humanitarian Law Institute St. Paul Mn. 2012.

²¹ Rule 68 A ICTR rules of procedure and evidence.

²² Draft regulation 14 d.

Not only is this regulation beyond the legitimate authority of the Registry to make²³, but also does it conflict with the principle of openness of justice. The Rome Statute provides for this basic rule of law: *'the trial shall be held in public'*²⁴. Justice must be seen to be done. 'Secret' is a qualification that should have no place in a Court of Justice. It is also an inquisitorial reminder.

Limitations to the principle of openness are exceptional²⁵ and related to protection of witnesses, victims²⁶ or national security information²⁷. As to protection measures for witnesses and victims, the Statute specifies that they shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

Also should the use of 'ex parte' hearings between the Prosecutor and the Chamber, in the absence of defence, be banned. It is a way to discuss undisclosed evidence.

All of this illustrates the vital need of professional investigation for defence.

Experience has learnt that the best investigators will be local counsel, not only because they understand the legal implications of what they look for or find, but also because they speak the language of the conflict-zone and understand better than any-one the history of the conflict.

The proposal of the Registrar to abandon professional investigation is, consequently, simply not to be understood.

Equally it has to be underlined that this kind of investigation and even defence is not without dangers.

Counsel and investigators have been accused. Some have been killed.

Crucial is consequently to dispose of an enforceable system of functional immunity for counsel. At ICTR and ICTY there was no specific protection provided for counsel and the Trial Chambers have long refused to grant functional immunity to them until, only recently, the Appeal's Chamber reversed that.²⁸

It has not prevented that counsel for Ntabakuze was arrested in Rwanda on charges of 'denial of genocide' mainly because of what he had defended in the Military I-case (see higher) before ICTR. He was detained in the prison of Kigali for several weeks and could only be released on 'medical' grounds. The Republic of Rwanda never even acknowledged his functional immunity, despite the demand of the Registrar of ICTR as to this.

Shortly thereafter the same counsel was dismissed by the Appeal's Chamber, on grounds of obstruction, when not appearing on a hearing for which he had asked for representation by video-link on medical grounds and notwithstanding

²³ Art 43 Rome Statute & rule 14 of the Rules of Procedure and Evidence.

²⁴ Art. 64.7 Rome Statute.

²⁵ Art. 54.3 e & f Rome Statute.

²⁶ Art. 68 Rome Statute.

²⁷ Art. 72 Rome Statute.

²⁸ The immunity for defence counsel before international jurisdictions – J. Flamme – Code of International Criminal law and procedure annotated – Larcier Law Annotated 2012.

the fact that he would clearly be under threat in Arusha or when travelling in Africa.

We shall see further on that this kind of ‘dismissal’ of counsel, or even ‘suspension’, by a Court is highly problematic.

IV. The right to counsel and the legal aid, powers of the Registrar

1. Equality of arms and fair trial mean that a defendant will be entitled to counsel of recognized experience in international criminal law

The Registrar has consequently determined that counsel would be paid to the same extent as members of the Bureau of the Prosecutor, who work on an equivalent level. Until shortly counsel were also entitled to a percentage of this fee, in terms of compensation for their ‘professional costs’.

Indeed counsel have to keep running their offices in their home-countries, while they will be away on a full-time basis for several years, if they want to keep their licenses.

Counsel were also paid gross-amounts, in order to permit them to pay taxes in their home-countries.

This legal aid-scheme has recently been reduced to a very serious extent.

One has to add here that the so-called ‘equality of arms’ only existed on paper. The Registrar only uses the basic salary (without indexation and readjustments) as a reference and several important parameters are left out in the legal aid scheme, such as:

- The social security and pension advantages linked to prosecutor’s wages, which are not paid to defence-team’s members, who will have to pay these with their fees,
- The various advantages such as rental subsidies, rental reductions, overtime and night differential payments, dependency benefits, education grants, travel expenses for spouse and dependents & DSA, mobility allowances, annual leave, sick leave, maternity leave, etc,
- The level of seniority and experience (at the STL²⁹ the basic amount is adapted according to the UN rates of seniority³⁰).

2. In its ‘discussion paper on the review of the ICC legal aid system’ (dec. 2012) the Registry states:

‘While the Committee on Budget and Finance had requested that a full review of the legal aid system be performed upon the conclusion of a full cycle of trial

²⁹ Special Tribunal for Lebanon.

³⁰ Art. 9.6 STL principles applicable to legal aid.

proceedings³¹, the Registrar has decided to proactively undertake this exercise. This exercise started even before the presentation of the proposed budget of the Court for 2012 and before the closure of the first trial before the Court, in order to reduce as far as possible the financial incidence of the increase in the activities of the Court where they risk to put an excessive burden on the overall budget of the institution.³²

This ‘rationale’ is quite surprising.

The increase of the activities of the Court is a natural consequence of the creation as such of the institution, and even constituted an ambition that spoke for itself, as linked to the idea of international criminal justice in se.

Justice moreover has to be regarded as the conscience of a society and cannot be measured and financed according to ‘market’-criteria.

An increase in justice-activities could never be a reason to abandon basic standards because of budget reasons. The basic standards of Justice have to be safeguarded by the institution itself, regardless of the costs involved. Without that they would be meaningless.

We have to conclude that the Registrar, while reducing the legal aid, which had earlier been determined as necessary to achieve the Rome Statute standards, for mere ‘budget-reasons’, does not meet his/her obligations as set out in rules 20& 21 of the Rules of Procedure and Evidence and reg. 83 of the Regulations of the Court.

Moreover has this exercise been undertaken by the Registry without serious consultation of an independent representative body of counsel or legal associations, as is mandatory³³.

V. The list of counsel and the powers of the registrar

Unlike the ‘ad hoc’-tribunals (ICTR & ICTY) the ICC has created two bureaus, called the Office of the public counsel for victims (OPCV) and the Office of the public counsel for Defence (OPCD)³⁴

Both Bureaus were basically meant to be advisory organs for representation-teams for victims and defence-teams for accused persons.

The regulations of the Court had determined the duties of the Bureaus as: ‘providing support and assistance ‘to these teams, ‘where appropriate’, by providing ‘legal advice and research’, and ‘appearing before a Chamber in respect of specific issues’.

³¹ See report of the Committee on Budget and Finance on the work of the 14 th session (ICC-ASP/9/5), para.16.

³² Discussion paper on the review of the ICC legal Aid System p. 1.

³³ Rules 20.3 & 21 of the Rules of Procedure and Evidence.

³⁴ Regulations 81 & 77 of the Regulations of the Court.

These duties have recently been enhanced and can presently also include representation as such. This could be the case as duty-counsel (OPCV and OPCD)³⁵, or even on a permanent basis (OPCV)³⁶.

‘Duty-counsel’ are appointed by the Registrar whenever a person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable.³⁷

Under the old system duty-counsel were selected from the list of counsel that is maintained by the Registrar³⁸.

To be accepted on the list of counsel a candidate must have an established competence in international criminal law and procedure and the necessary relevant experience in criminal proceedings, be at as a judge, prosecutor or advocate or in a similar capacity.³⁹

There were already weaknesses in the old system, which still prevail. Judges and prosecutors have a very different professional experience from the one of attorneys-at-law. An experienced attorney-at-law (advocate) has, since many years, practiced not only the law and proceedings but also a very complicated system of ethics and professional conduct, which is essential for a fair and fluent course of justice.

Moreover is the approach from their side of the Bar a totally different one from the approach of a judge and/or a prosecutor. It is the practice of that approach that constitutes the specific experience that distinguishes a qualified attorney from an inexperienced one.

Besides is the required ‘similar capacity’ a very vague description which should have no place in a legal disposition of that importance. It would enable the Registrar to accept professionals with no real trial-experience at all, such as law-professors who have been acting as experts.

Finally is this legal provision problematic in this sense that it does not provide as condition that the candidate has to be in possession of a valid professional license such as provided by a Bar Association. It is, generally speaking, a Bar which admits lawyers to the profession and imposes duties on their members, such as continuous education, insurance of professional liability, discipline, etc.

The weakness of the system is in fact double, as a consequence, because the Rome Statute has not provided for a proper Bar at the ICC, as should be the case (see higher).

The code of professional conduct of the ICC provides only for disciplinary proceedings ‘a posteriori’ without any mechanism for immediate intervention in ongoing conflicts, be it hearing-incidents, conflicts between counsel or with the prosecutor or otherwise.

³⁵ Regulation 73.4 regulations of the Court.

³⁶ Regulation 81.4(e) regulations of the Court.

³⁷ Regulation 73 regulations of the Court.

³⁸ Rule 21.2 rules of procedure and evidence.

³⁹ Rule 22 rules of procedure and evidence.

In ‘exceptional circumstances’, in disciplinary proceedings, the investigating ‘commissioner’ could ask the Chamber before which counsel is acting to suspend him/her provisionally, when the alleged misconduct compromises seriously the interests of Justice.⁴⁰

This ‘solution’ is of course not satisfactory and this also on a double level. Not only will it take a considerable amount of time before the commissioner will have come to such a conclusion, whereas for example serious ‘hearing-incidents’ may demand an immediate decision, but also should a decision of suspension of counsel not been made by a Chamber which may very well be part of the problem and, consequently, become judge and party at the same time.

A proper Bar with a ‘Dean’ or ‘Bâtonnier’ would have provided for all these kinds of solutions.

It should also have managed the ‘list of counsel’ and the admission to it and it has to be regretted that this authority has been given to the Registrar, who does not dispose of this kind of experience.

Moreover and sadly, cases are known where counsel were simply dismissed by the Registrar at ICTR, when their speech became too free. Any system should make this kind of excesses impossible because they obstruct the course of Justice.

VI. ‘In-house’ counsel, a dangerous experiment

By enabling members of OPCD & OPCV to engage in proper ‘representation’ and ‘defence’, thus making use of ‘in-house’-‘counsel’, the Court is abandoning internationally and recognized basic principles

The UN Basic Principles on the role of Lawyers (Havana, Cuba 1990) are very clear and explicit on the basic conditions for defence and legal representation. Full independence of counsel is the key condition.

The Charter of Core Principles of the European Legal Profession⁴¹ states under principle (a) – The independence of the lawyer, and the freedom of the Lawyer to pursue the client’s case:

‘A lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates. .../... ‘

The principle of independence is provided for in art. 2.1.1 of the Code of Conduct for European Lawyers and art. 16 of the UN principles, which prescribes:

⁴⁰ Art. 39.8 Code of professional conduct for counsel.

⁴¹ CCBE – Brussels 24th November 2006.

‘Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; .../... ‘

The European rules also mention the absence of conflicts of interest as a basic condition.

Entrusting representation to civil servants of the Court is not only contradicting the basic UN and European principles, but is also endangering the Court to a very serious extent.

It is clear, indeed, that civil servants on the pay-roll of the Court and working in OPCD & OPCV are not free from possible ‘improper interference’ and possible conflicts of interest with other cases and/or situations.

Moreover has the Libya crisis been a direct consequence of this practice and has shown almost immediately what the dangers of this kind of representation and defence are.

The Libya crisis arose recently when a chamber had entrusted the defence of the interests of Mr. Saif Al-Islam (son of Mr. M. Gaddafi) to two members of OPCD. It has to be understood that the defendant had not been arrested internationally and transferred to the ICC detention facility in Scheveningen, but was still detained by a militia in Zintan (Libya).

It had been decided upon that a member of OPCD would visit Mr. Saif Al-Islam in Zintan and permission had been given as to this purpose by the Zintan militia, under certain conditions.

When the OPCD-member visited the defendant, together with a translator, both women were arrested, apparently on basis of charges of spying. No details of the precise charges and facts have been made available as today.

Two other ICC civil servants, who were accompanying the women, apparently decided to stay and were held for about one month, together with both ‘accused’ civil servants.

Following important diplomatic interventions of all sorts the four civil servants were finally freed, after about one month of detention in what looked like a hostage-taking rather than any legal arrest.

When civil servants of the Court represent victims or accused persons, they will be seen as representing the Court and the Court will be seen as represented by them. It means that any word spoken or written, any mistake committed will be attributed to the Court, which may, consequently, lose its independence to judge the case. It also means that these civil servants, much more than independent counsel, will be subject to be taken hostages, which is in fact what happened in Libya.

It is very easily imaginable that a civil servant of OPCV would be taken hostage by a local militia under demand to free the accused person.

Besides, civil servants of the Court are not subject to any Bar membership and to the many obligations which go together with such a membership, in terms of

ethical obligations, continuous education, mandatory insurance of professional liability, etc.

It is also very probable that these civil servants will miss the trial experience needed for such complicated representation and defences.

Finally must be said that it is obvious that OPCV and OPCD will be brought into a position where they will not be able any more to meet their core duty, which is advising the defence-teams, not only because of lack of time (which is already presently the case), but also because of obvious conflicts of interests, which may not always be apparent when beginning a case.

VII. Language lost in translation, a cultural nightmare

Language is a very problematic issue at the International Criminal Court

Translation is very often, the enemy of Justice.

In the Democratic Republic of Congo (DRC) at least 400 different native languages are spoken and an accused person has the basic right *'to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks'*.⁴²

An essential debate as to this issue arose at the Lubanga pre-trial stage.

It had appeared, in course of the proceedings, that the Prosecutor was of the opinion that there exists only one form of *'Swahili'* in Africa. In fact it was not an *'opinion'* as such on his behalf, but he had acted as if it were.

'Swahili' was, originally, a form of *'lingua franca'*, with also Arab influences, which was developed on the east-coast of Africa, mainly for commercial purposes. It is spoken by almost 50 million people.

When defence contested the views of the Prosecutor and asked for an expert-opinion, the Chamber ordered the Registrar to provide for this opinion. After one day the Registrar confirmed the views of the Prosecutor.

The fact of the matter however is that when *'Swahili'* also spread inland, it mixed up with the different local native languages and changed. In *'Ituri'* (E-Congo), which is the conflict-zone in the Lubanga-case, this resulted in a new language, *'Kingwana'*.

It means that *'Swahili'*-speakers from different regions will often not understand each other.

The Prosecutor had completely ignored this issue and had children of Ituri interviewed in *'Swahili'* by a Swahili-speaking woman from Kenya, resulting in the children not understanding fully the questions asked and the woman not understanding fully the answers given.

Bearing in mind that all this still had to be translated into English and/or French, one can imagine the complexity of this issue and the extreme dangers of the inaccurate translations of witness-statements resulting from it.

⁴² Art 67 1 (a) of the Rome Statute.

The draft regulation 64.7 of the Rules of the Registry provides for ‘training’ in interpretation of languages, other than French and English.

As indicated, the languages spoken in the conflict-zones are extremely diverse and more than likely to be unknown and inaccessible to the people working at the Court (also because of total lack of dictionaries, books or documents). It will, consequently, be very difficult to ‘train’ a person in a new language in a brief period of time, even when that person is a skilled linguist in other languages.

It also means that the proceedings become partly dependent on the qualities of one person, given also the total absence of ‘quality-control’ inside the registry.

The Registry should be required to obtain recognized academic expertise in the concerned languages for as long as necessary to complete all work in a given ‘situation’ and any cases that may result from it.

These persons should organize the concerned ‘trainings’ and also maintain a permanent ‘quality-control’ of interpretation at the Court, or could recommend that such trainings could not be successful (as to a given language), and that native speakers who also know English or French should be recruited and controlled.

Given the importance of the issue, the new regulations of the Registry should be much more elaborate on this very important aspect of the judicial process.

The same applies, *mutatis mutandis*, to the ‘field interpreters’⁴³. It is not clear at all who these ‘field interpreters’ are, how they are recruited, and what the standards for their recruitment are.

There is consequently an urgent need for a set of very specific ‘quality-standards’ and resulting control-mechanisms as to interpretation, as it is a key-component of the fairness of the trial.

VIII. The principle of free choice of counsel, an inconvenient truth

The free choice of counsel is guaranteed in the Statute⁴⁴

The reality is not as simple as it may seem and often nothing is what it looks like. The problem starts with the fact that most accused are indigent and must rely on legal aid (see higher). In se a system of legal aid should be exercised with full respect of the principle of free choice. But the problem is that this legal aid system is managed by the Registrars of the international courts themselves, and not by an independent body, such as a Bar Association.

We know cases at the ICTR, where arrested persons have been kept in isolation for months, in breach of the own directives of the UN, awaiting their ‘choice’ of counsel and were defended by duty-counsel in the meanwhile. They could not communicate with any-one, not even with their co-detainees.

⁴³ See regulation 68 of the regulations of the Court.

⁴⁴ Art. 67 Rome Statute.

Counsel have been refused to contact these detainees, when asked to do so by family or friends of the accused person and it is absolutely unclear what precise information about the list of counsel has been communicated to these detainees.

Some of them have been compelled to 'choose' certain counsel who, consequently, were imposed on them.

There is no independent organization present at the international criminal jurisdictions to prevent this kind of 'drift' and one should wonder whether the omission of a 'third pillar' for defence is just 'un oubli'.

IX. Absence of jurisdiction on corporate bodies

It has to be deeply regretted that the Court has no jurisdiction on corporate bodies, but only on natural persons ⁴⁵

Criminal jurisdiction on corporate bodies, as existing in modern criminal justice systems, could be a very important tool in the fight against international crime.

The most important liabilities reside often on anonymous, secret and multi-national levels of corporate bodies or firms, making part of misty conglomerates, even on state-level, which sell or make available the weapons that will be used to commit genocide, aggression, war-crimes and crimes against humanity.

Some banks may also secretly finance these kinds of transactions, which can serve important financial interests of states wanting to preserve their influence and presence in the concerned regions and practising sordid policies through secret services and the said conglomerates, under the old banner '*divide et impera*'.

In Congo the violence is anything but 'tribal'. It is maintained and financed from outside.

Needless to say that, if the jurisdiction of the Court were complete, it could exercise control to a very considerable extent over international political and economic behaviour.

Also victims could find herein a much more efficient way to claim and also obtain compensation through freezing and seizing of assets by the Court.

X. Conclusion

The main danger that threatens the ICC is that it would be used for purposes of international politics

The fact that the main persons responsible for the millions of death people in the Congo are not prosecuted would possibly confirm this. It goes without saying that the exploitation of this 'treasure-land' plays the determining role here.

⁴⁵ Art. 25 Rome Statute.

The powers of the Security-counsel (including the power of suspension of ongoing investigations⁴⁶) have to be regretted and the brilliant doctrine of Montesquieu in *'l'esprit des lois'*, the 'separation of powers', which constitutes the cornerstone of any democracy, tends to be forgotten.

Ian Paisley jr. comments in the NY Times about the political chessboard on which the Prosecutor of the ICC intervenes. The ICC cannot judge all of the criminals and has to make choices. Ian Paisley does not believe that he made the good choices and the former Prosecutor was also severely criticized in the newspaper *'Le Monde'* in its edition of 16 march 2012, when the observation was made that he shook hands warmly with the main actors of the Congolese drama, even telling that he 'admired' them, while he prosecuted only very small 'fishes'.

It is true that, on a chessboard, most pieces have limited and well defined powers and that it is not simple at all to 'create' a new piece with the kind of power a Prosecutor has normally.

Ian Paisley believes that making the bad choices means that one diminishes the chances for peace.

Thomas Lubanga is prosecuted for conscripting, enlisting and use in combat of child soldiers, a crime any warlord or DRC army-officer could be charged with, in a situation which was created by the father of the present president, who 'liberated' Congo with an army of 'Kadogos' (child-soldiers), who became popular heroes, commanded by his son.

Thomas Lubanga, who tried to demobilize these children, at a time when the structures necessary to realize that demobilization were not in place, is accused of that one crime, in a region where millions of people were killed in the most horrible massacres, not to mention those who were brutally raped.

Thomas Lubanga had obtained a peace-agreement, signed by all ethnical groups and armed factions in Ituri but one, after three months of presidency and before being removed from power by the Ugandan army and jailed. He constituted the hope for the future of an entire population and was called ironically by his enemies 'the Pastor' (the one who wants peace).

This is the kind of 'inconvenient truth' a full and fair defence must be enabled to bring.

Defence as such is not addressed in the Rome Statute and defence-issues were not even an item at the revision conference in Kampala in 2010.

As long as the Rome Statute-system does not take care of the organization of an independent defence and does not take these crucial issues away from the authority of the Registrar, one must doubt about the fairness of the ICC proceedings.

⁴⁶ Art. 16 Rome Statute.

Victims before international criminal courts

Some views and concerns of an ICC trial judge¹

*Christine Van den Wyngaert**

I. Introduction

For much of my career as an academic, international criminal justice was a far-away dream. Like most scholars of my generation, I never expected to see international criminal courts emerge in my own lifetime. And then, all of a sudden, they were there: first the ad hoc tribunals, now the International Criminal Court (ICC). And to make it even more exciting, I have had the privilege of serving first at the International Criminal Tribunal for the former Yugoslavia (ICTY) for nearly six years and now at the ICC since 2009. These years have been the most rewarding years in my professional life. It has been a thrilling experience to have belonged to panels of judges who made defining decisions in the field of international criminal law. This was true at the ICTY, and perhaps even more so at the ICC, which, despite the entry into force of the Statute almost ten years ago, is still a fledgling court facing challenges that are multiple and immense. One of those challenges is the role of victims before the Court, which I believe to be one of the most important ones for the years to come. The victims' participation regime at the ICC has indeed been hailed as one of the major achievements of modern day

* Judge Van den Wyngaert graduated from Brussels University in 1974 and obtained a PhD in International Criminal Law in 1979. She was a professor of law at the University of Antwerp (1985–2005) where she taught criminal law, criminal procedure, comparative criminal law and international criminal law. She authored numerous publications in all these fields. She was a visiting fellow at the University of Cambridge (Centre for European Legal Studies (1994–1996), Research Centre for International Law (1996–1997)) and a visiting professor at the Law Faculty of the University of Stellenbosch, South Africa (2001). Her merits as an academic were recognised in the form of a doctorate honoris causa, awarded by the University of Uppsala, Sweden (2001). In 2010, she was awarded a doctorate honoris causa by the University of Brussels, Belgium. She was an expert for the two major scientific organisations in her field, the International Law Association and the International Association of Penal Law. She was an observer of the Human Rights League at the trial of Helen Passtoors in Johannesburg in 1986 and made human rights a focal point in her teachings and writings throughout her career. In 2006, she was awarded the Prize of the Human Rights League. Judge Van den Wyngaert gained expertise in various governmental organisations. She was a member of the Criminal Procedure Reform Commission in Belgium (Commission Franchimont) (1991–1998) and served as an expert for the European Union in various criminal law projects. She has extensive international judicial experience. She served in the International Court of Justice as an ad hoc judge in the Arrest Warrant Case (2000–2002) and was elected as a judge at the International Criminal Tribunal for the former Yugoslavia where she served for more than five years (2003–2009). She took up her mandate as a Judge at the International Criminal Court in the autumn of 2009.

¹ This contribution was previously published as Van den Wyngaert, Victims before international criminal courts: Some views and concerns of an ICC trial Judge, *Journal of International Law*, 2011, Vol. 44, 1-22.

international criminal justice.¹ But it is also only one of the more controversial aspects of the ICC Statute, and it is for this reason that I have chosen it as a topic for this lecture. It is a good moment in time, as the first two trials before the ICC have almost run their course, which allows for a preliminary assessment of how the regime has been implemented in practice. It also allows for a comparison between the objectives of the designers of the victims' participation regime and the results achieved in practice.

The ICC is said to have marked the shift away from a retributive judicial system to a more restorative, justice oriented model.² Victims did not participate at Nuremberg, nor did they at the two ad hoc Tribunals of the U.N. created in the early 1990s.³ In fact, the ICC regime for victims can, in part, be traced back to the dissatisfaction, at least in some quarters, over the ICTY system, which does not allow participation of or reparations for victims of serious human rights abuses.⁴ Critics of the ICTY system blamed it for failing to sufficiently account for the interests of the victims.⁵ Victims testifying at the ICTY, very far away from their homes and from the places where the crimes were committed, were often traumatised by the experience. The French ICTY judge, Claude Jorda, complained that victims were 'reduced' to instrumentalised witnesses.⁶ Civil lawyers had problems with the fact that victims testifying for the prosecution were subjected to the often painful cross-examination process by the defence. Much of this was captured in the phrase 'secondary victimization,' meaning that victims of atrocity crimes were victimised for a second time as a result of a judicial process in which they could not fully participate.⁷

Looking at this from my own experience as an ICTY judge, I understand these criticisms, but I am not sure they are well founded. I saw many courageous victims who were very keen to come and testify and tell their stories. The cross-examination process, although difficult at times, was practiced with restraint and

¹ Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. U. J. Int'l Hum. RTS. 459, 459 (2008).

² War Crimes Research Office, Am. Univ. Washington Coll. of Law, victim participation before the International Criminal Court 8 (2007) [hereinafter WRCO REPORT].

³ See *id.* at 12 ('While the *ad hoc* criminal tribunals do benefit from the participation of victims as witnesses, victims have no opportunity to participate in their own right . . .'); Yael Danieli, *Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law*, 27 *Cardozo L. Rev.* 1633, 1641 (2006) ('At Nuremberg, the prosecution was overwhelmingly based on documentary evidence. . . . The decision to rely primarily on documentary evidence minimized the role of victims/survivors in the trials.').

⁴ Carsten Stahn, Héctor Olásolo & Kate Gibson, *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. Int'l crim. just. 219, 220 (2006).

⁵ WRCO Report, *supra* note 2, at 11–12.

⁶ See Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in *The Rome Statute of the International Criminal Court: A Commentary*, 1387, 1387–88 (Antonio Cassese et al. eds., 2002) (exploring consequences in lack of victim participation in the international criminal system).

⁷ See United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims 9–10* (1999) (describing how institutional mechanisms can create a secondary victimization, often due to the failure to properly account for the victim's point of view).

caution by counsel appearing before the tribunal and, if necessary, was controlled by presiding judges. The system had its shortcomings, but whether victims' participation in criminal proceedings was an appropriate remedy against secondary victimisation remains to be seen. In a report presented to the Security Council in 2000, ICTY judges, while emphasizing that victims of crimes coming within the jurisdiction of the court should receive compensation, advised against incorporating a compensation mechanism in the Statute or the Rules, as this would affect the duration of the trials. Rather, they advocated the creation of another body that could operate as an international compensation commission.⁸

Meanwhile, the drafters of the 1998 ICC Statute had ventured in a different direction. They not only granted victims a right to reparations, but they also introduced a totally novel participatory regime. Much of the participatory regime for victims was inspired by the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly of the U.N.⁹ This declaration, which was followed up in the 2005 Resolution of the U.N. Commission on Human Rights containing guidelines,¹⁰ is still considered as the foundational text by advocates of extensive victims' rights to participation and reparation.¹¹ Parts of this declaration were copy-pasted into the Statute.

Yet, the regime that was introduced in Rome was the result of heated debates. It was mainly France and some civil law countries that insisted on the introduction of a participatory regime that resembled the French *partie civile* system. While no such full-fledged system was incorporated in the Statute, victims were given the right to 'present their views and concerns' to the Court, and to do so 'where their personal interests are affected.'¹² This way of drafting illustrates what Philippe Kirsch, chairman of the Committee of the Whole at Rome and the first president of the ICC, used to call 'a constructive ambiguity.'¹³

⁸ See United Nations Office for Drug Control and Crime Prevention, Handbook on Justice for Victims 9–10 (1999) (describing how institutional mechanisms can create a secondary victimization, often due to the failure to properly account for the victim's point of view).

⁹ See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc A/RES/40/34 (Nov. 29, 1985).

¹⁰ See Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

¹¹ See The Office of Public Counsel for Victims, Int'l Criminal Court, representing victims before the International Criminal Court 30 (2010) ('Indeed, the UN General Assembly adopted in December 2005 the Resolution 60/147 which points out that victims are entitled to the following forms of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, also known as the Van Boven Principles.'). The ICC also adopted the Basic Principles. *Id.* at 26.

¹² Rome Statute of the International Criminal Court art. 68.3, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

¹³ See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 409 n.166 (2000); Claus Kress, *The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise*, 1 J. Int'l Crim. Just. 603, 605–06 (2003) (noting that constructive ambiguity was used in the drafting of the Rome Statute and accompanying rules to allow judges to shape the ICC's structure).

It was left to the Rules and the judges to further explain and develop the victims' participatory regime. In their first decisions on this matter, the judges gave an extremely extensive, teleological interpretation of the regime, often by reference to the jurisprudence of the human rights courts, in particular the decisions of these courts on the right to access to justice.¹⁴

In this lecture, I will briefly describe the victims' regime at the ICC, and I will then share some of my observations and concerns with you. Considering my position as a judge and the fact that so many issues are still in the process of being decided, I must limit myself to expressing some general thoughts. Having served on both the ICTY and the ICC, I may be in a position to make some comparisons that could be a useful contribution to the debate. What follows are my personal thoughts, which do not necessarily reflect the views of my colleagues at the ICC.

II. Victims at the ICC

A. Victim Status in General

All in all, the ICC regime is characterised by its 'victim-friendliness,' which is certainly to be welcomed as an improvement as compared to the ICTY and ICTR regimes. The Statute requires the Court to take appropriate measures to protect the safety, physical and psychological wellbeing, dignity and privacy of victims and witnesses.¹⁵ Various rules and regulations further implement this part of the ICC mandate in great detail.¹⁶

In 2009, the Court adopted an overall Strategy in relation to victims that, again, draws upon the two U.N. instruments on Basic Principles of Justice for Victims and the Right to Reparation for Victims.¹⁷

A whole infrastructure has been set up to fulfil this part of the mandate. Within Registry, there is a Victims and Witnesses Unit (VWU) which, like its counterpart at ICTY, provides protective measures and security arrangements for victims and witnesses who appear before the Court.¹⁸ In addition, there are two other sections dealing with victims: the Victims Participation and Reparations Section (VPRS), a specialised unit in Registry for dealing with participation and

¹⁴ See, e.g., Prosecutor v. Germain Katanga & Matheiu Ngudjolo Chui, Case No. ICC-01/04-01/04-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (May 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc486390.pdf> (discussing access to justice in the context of victims' rights and access to court materials during ICC proceedings).

¹⁵ Rome Statute, *supra* note 12, art. 68.1.

¹⁶ See, e.g., Rules of Procedure and Evidence, ICC-ASP/1/3 (Sept. 9, 2002) (establishing extensive regulations regarding, *inter alia*, victims' legal representatives, physical protection of witnesses, and other policies involving access to and the protection of victims).

¹⁷ Int'l Criminal Court, Report of the Court on the Strategy in Relation to Victims, para. 6, ICC-ASP-8/45 (Nov. 10, 2009); see also G.A. Res. 40/34, *supra* note 9; G.A. Res. 60/147, *supra* note 10.

¹⁸ *Victims and Witnesses Unit*, Int'l Criminal Court, <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Protection/Victims+and+Witness+Unit.htm> (last visited Mar. 4, 2012).

reparations);¹⁹ and the Office of Public Counsel for Victims (OPCV), which provides support to counsel representing victims.²⁰

Victims at the ICC are indeed entitled to legal representation, which is another big difference with the ICTY. Although it is theoretically possible for victims to appear individually, this would be totally impractical in view of the high number of victims, which tends to increase as time goes by and the Court becomes better known. For that reason, victims at the ICC are, in all cases, represented by common legal representatives. For example, there were three groups of legal representatives in the *Lubanga* case.

The ICC's draft budget for 2012 envisages at least seven million euro (ten million USD) being earmarked specifically for victim-related tasks.²¹ Almost four million euro would be spent on paying the fees and expenses of the lawyers representing the victims.²² The VPRS budget would be almost 1.9 million euro (over 2.5 million USD), whereas the OPCV would receive close to 1.2 million euro (1.6 million USD).²³ The draft budget is still under discussion with the States Parties, but these figures illustrate the overall order of magnitude involved.²⁴

Alongside the participatory regime, a reparatory mechanism has been created: the Trust Fund for Victims.²⁵ This Fund may play a role in the process of awarding reparations to victims after a conviction has been reached. Apart from these reparations, the Trust Fund for Victims can also use its resources to benefit victims of crimes that have not given rise to prosecution.²⁶ Whereas reparations

¹⁹ *Reparation for Victims*, Int'l Criminal Court, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Reparation/> (last visited Mar. 4, 2012).

²⁰ *Office of Public Counsel for Victims*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/victims/office%20of%20public%20counsel%20for%20victims/office%20of%20public%20counsel%20for%20victims?lan=en-GB> (last visited Mar. 4, 2012); see Int'l Criminal Court, *Victims before the International Court: A Guide for the Participation of Victims in the Proceedings of the Court 9–19*, available at http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273_C5E9AB4/282477/160910VPRSBookletEnglish.pdf (last visited Feb. 26, 2012).

²¹ Int'l Criminal Court, *Proposed Programme Budget for 2012 of the International Criminal Court*, 54, 85, 133, ICC-ASP/10/10 (July 21, 2011) [hereinafter *Proposed 2012 ICC Budget*], available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf (noting proposed budgets of 3,990,500 euro for counsel for victims, 1,160,200 euro for the OPCV and 1,873,000 euro for VPRS, among others).

²² *Id.* at 54 (budgeting 3,990,500 euro for counsel for victims, a noteworthy 147.6% increase over 2011 expenditures).

²³ *Id.* at 85, 133 (projecting expenditures on the Victims Participation and Reparations Section and Office of Public Counsel for Victims of 1,873,000 euro and 1,160,200 euro, respectively).

²⁴ See generally *Proposed 2012 ICC Budget*, *supra* note 21.

²⁵ Rome Statute, *supra* note 12, art. 79.

²⁶ The General Assistance role of the Trust Fund for Victims is specified in Rule 98(5) of the Rules of Procedure and Evidence. Rules of Procedure and Evidence, *supra* note 16, r. 98. The resources available are outlined in Regulation 47 and are used in accordance with Regulation 48 of the Regulation of the Trust Fund for Victims. Int'l Criminal Court, *Regulations of the Court*, ICC-BD/01-01-04 (May 26, 2004). A practical example is that of projects Trust Fund for Victims/UG/2007/R2/039 & Trust Fund for Victims/UG/2007/R2/041. These projects are taking place in the Gulu and Amuru Districts of Uganda and include vocational training and school fees for victims of mutilation or torture, 'Healing of Memory' sessions for victims of mutilation and torture and referrals to healthcare services for victims who are in need of physical rehabilitation.

in the narrow sense have not yet been awarded, the Trust Fund for Victims has already started implementing the second branch of its mandate, giving general assistance to victims and their families by means of programs for physical rehabilitation, material and/or psychological rehabilitation in situations where the Court has jurisdiction.²⁷ For example, although, to date, no accused in the Uganda situation has been brought before the court to stand trial, various projects have already been set up in Northern Uganda, including, among other things, medical care and reconstructive surgery such as prosthetic limbs, as well as vocational training for victims.²⁸

B. Victims' Participation in Proceedings

Victims who wish to participate in the proceedings must make an application to the Registrar, who then transmits the application to the Chamber.²⁹ For each individual victim, the Chamber must assess whether he or she satisfies the criteria; i.e., whether the applicant qualifies as a victim under Rule 85 of the Rules of Procedure and Evidence.³⁰ In practice, this means that for every applicant, the Chamber must make an individual decision, based on a *prima facie* assessment of the victim status of the person or organisation in question.

This involves a long and cumbersome process of receiving the applications, which arrive in the form of very lengthy standard forms plus supporting evidence. These forms—and especially the supporting evidence—may have to be translated into one of the working languages of the Court. Once that is done, the applications must be sent to the parties for observations. In almost all cases victims are afraid of being identified publicly and ask for the redaction of identifying information. This means that their names are blackened out, as well as any passages in their story that may lead to their identification. In principle, these redactions must each be checked and approved by the competent Chamber. The parties are then given a deadline to make observations. However, as they usually only receive heavily redacted forms, their submissions are unavoidably somewhat abstract. The Chamber is then required to decide—on a case-by-case basis—whether

See *Projects*, Trust Fund for Victims, <http://www.trustfundforvictims.org/projects> (last visited Feb. 17, 2012) [hereinafter *TFV Projects*] (providing a complete list of the General Assistance Projects).

²⁷ See generally The Trust Fund for Victims, Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations, Programme Progress Report (2011) (providing background information about the Rehabilitation Assistance Mandate).

²⁸ *TFV Projects*, *supra* note 26.

²⁹ Rules of Procedure and Evidence, *supra* note 16, r. 89.

³⁰ See *id.* r. 85.

Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court [and] . . . organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places or objects for humanitarian purposes.

each applicant meets the criteria of Rule 85 and whether his or her interests are affected by the proceedings.

Since the ICC started functioning, 9,910 applications for participation have been received. Of those applicants, roughly a third was actually allowed to participate in the proceedings thus far. For example, in the Democratic Republic of the Congo situation, 127 victims were given permission to participate in the *Lubanga* case,³¹ and 366 in the *Katanga* case.³² In the *Bemba* case, 1889 victims are participating.³³

Under the current prevailing interpretation, the assessment of personal interest in the proceedings must be made anew each time a victim applies to participate at a different procedural stage. For example, the Appeals Chamber has held that if a victim wants to intervene in an interlocutory appeal, that victim must demonstrate how his interests are affected by the appeal, *even if this person already has victim status in the proceedings that gave rise to the appeal*.³⁴ Such applications are made by written submission, on which the parties have the right to comment. This process inevitably delays the appeals proceedings.

Some Chambers have also taken the approach that even within the same procedural phase, victims must justify each intervention they want to make by explaining how the intervention relates to their interests.³⁵ For example, under Rule 91(3), if a victim wishes to question a particular witness, the legal representative must submit a written request, explaining which questions they want to ask and how these questions further their interests.³⁶ This was in part meant to rein in questioning by victims and to make sure that their questions bear on their 'personal interests' in the sense of Article 68(3) of the Statute.³⁷ The side effect, however, is a steady stream of submissions on the part of the victims' legal representatives. In principle, the Prosecution and the Defence have the right to make observations on each such request, and the Chamber must rule on them separately.

This individualised approach to victim participation may work in a national proceeding, where there are only a few victims in each case. At the ICC, however,

³¹ Press Release, Int'l Criminal Court, Trial Chamber I to Deliberate on the Case Against Thomas Lubanga Dyilo, ICC-CPI-20110826-PR714 (Aug. 26, 2011).

³² Int'l Criminal Court, *Questions and Answers: Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, § 7, ICC-PIDS-CIS-DRC2-01-001/09 (Nov. 16, 2009), available at <http://www.icc-cpi.int/NR/rdonl/yres/51E53AB9-7D3B-4582-AE3B-F4999C7EB521/281257/QAKatangaandchuiWEBENG.pdf>.

³³ Press Release, Int'l Criminal Court, Central African Republic: VPRS Holds Training Seminar for Local Intermediaries Assisting Victims, ICC-CPI-20110729-PR705 (July 29, 2011).

³⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA9 OA10, Decision on Request of the Prosecutor and the Defense for Suspensive Effect of the Appeal Against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, ¶¶ 17–20 (May 22, 2008).

³⁵ Cf. Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT'L REV. RED CROSS 409, 412–14 (2008), available at http://www.icrc.org/eng/assets/files/other/irrc-870_baum.pdf.

³⁶ Rules of Procedure and Evidence, *supra* note 16, r. 91(3)(a).

³⁷ Rome Statute, *supra* note 12, art. 68(3).

the number of victims is becoming overwhelming. The judges had to go through this entire process for each of the nearly 10,000 applications received. Now that the Court is investigating the Libya and Ivory Coast situations, even more applications continue to arrive. The Court may soon reach the point where this individual case-by-case approach becomes unsustainable. It may well have to consider replacing individual applications with collective applications.³⁸

C. What Participatory Rights do Victims Have?

The key provision concerning participation is Article 68, paragraph 3, which states that: 'where the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered.'³⁹

The provision does not elevate victims into real parties to the proceedings. They are but 'participants.' They are indeed limited to raising their 'views and concerns.' Yet their role exceeds by far the role that their counterparts can play at the ad hoc tribunals, ICTY and ICTR. In practice, judges at the ICC have given a quite broad interpretation of victims' rights.

Victims have been allowed to participate, not only in cases, but also in the stage of the situation, that is before charges have been formulated against a particular individual. This far-reaching decision was in part based on the jurisprudence of the human rights courts according to which the right of access to a court of law also implies that victims should have some participatory rights during the investigation of human rights abuses.⁴⁰ Initially, victims were even given a general right to participate at the stage of the investigation, regardless of judicial proceedings.⁴¹ However, the Appeals Chamber put a limit to this general participatory right: it now applies only if there is a judicial proceeding in which

³⁸ See Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11-01/11-33, Decision on Issues Related to the Victims' Application Process, ¶ 8 (Feb. 6, 2012) (holding that 'under the existing legal framework collective victims' applications cannot be imposed but individual victims may be encouraged to join with others so that a single application is made by a person acting on their behalf, with their consent').

³⁹ *Id.*

⁴⁰ For an explanation of the rationales behind the decision to expand victims' participation rights in the ICC, see War Crimes Research Office, Wash. Coll. Law, Victim Participation before the International Criminal Court 8–14 (2007), available at http://www.wcl.american.edu/war-crimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf.

⁴¹ Situation in the Democratic Republic of the Congo, ICC-01/04-101, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ¶ 71 (Jan. 17, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183441.pdf>. In the light of the core content of the right to be heard set out in article 68 (3) of the Statute, persons accorded the status of victims will be authorised, notwithstanding any specific proceedings being conducted in the framework of such an investigation, to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.

Id.

victims would be able to participate,⁴² for example proceedings regarding a review by the Pre-trial Chamber of a decision by the Prosecutor not to proceed with an investigation or prosecution pursuant to Article 53 of the Statute.⁴³

Not only the Pre-trial Chambers, but also the Trial Chambers have given a very extensive interpretation of participatory rights. For example, in *Lubanga*, the Trial Chamber initially granted participatory rights, not only to victims of the crimes charged, but also to victims of uncharged crimes.⁴⁴ In practice, this meant that, although the prosecutor had limited the charges to child soldiers only, victims of sexual crimes (rape, sexual slavery, etc.) could also participate.⁴⁵ This too was reversed by the Appeals Chamber, which limited participatory rights to victims of the crimes charged.⁴⁶

Despite these limitations, participatory rights for victims are quite extensive, both during pre-trial and trial. The implication is that the Chambers, in many of their decisions, must also consider submissions of the victims, in addition to the submission of the parties. This inevitably increases the length of our decisions, compared to, for example, those of the ICTY, where judges only have to address the observations of the prosecution and the defence.⁴⁷

At pre-trial, the role of victims has, thus far, mainly consisted of the right to attend public sessions of the confirmation hearing and to present views and con-

⁴² Situation in the Democratic Republic of the Congo, ICC-01/04-556, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, ¶ 56 (Dec. 19, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc612293.pdf>.

[T]he Pre-Trial Chamber adopts the position that [Article 68(3)] could be extended beyond its self-evident confines, to areas outside its ambit. Article 68 (3) of the Statute is treated as a hybrid provision, allowing the participation of victims in any matter dealt with by the Statute, including investigations. This is a position that can find no justification under the Statute, the Rules of Procedure and Evidence or the Regulations of the Court.

Id.

⁴³ Rome Statute, *supra* note 12, art. 53(3)(b).

⁴⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims' Participation, ¶ 93 (Jan. 18, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc409168.pdf>.

Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework. Rule 85(a) of the Rules simply refers to the harm having resulted from the commission of a 'crime within the jurisdiction of the Court' and to add the proposed additional element—that they must be the crimes alleged against the accused—therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court.

Id.

⁴⁵ *Id.*

⁴⁶ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, ¶ 108 (July 11, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc529076.pdf>.

⁴⁷ War Crimes Research Office, *supra* note 40, at 11–14 (describing the failure of the ICTY and ICTR to substantively include victims in the process and noting that '[w]hile the ad hoc criminal tribunals do benefit from the participation of victims as witnesses, victims have no opportunity to participate in their own right').

cerns. They have access to and are notified of all public filings, public decisions and all the evidence disclosed between the parties, insofar as it is public. They have also been granted the right to make short opening and closing statements and could request permission to make oral submissions. In terms of written submissions, they have been allowed to address both issues of law and fact. Finally, the legal representatives could make an application to question witnesses called by the defence, on the condition that they demonstrate that the personal interest of one or more of the victims was affected by the testimony.

At the trial level, victims are allowed to question witnesses called both by the Prosecution and the Defence. They have also been given the possibility of suggesting evidence to the Trial Chamber. However, they have not been given the right to call such evidence themselves. Significantly, victims can apply to be heard as witnesses, independently of the Prosecutor or the Defence.⁴⁸ This has led to a separate stage in the proceedings: in the *Katanga* trial, there was a ‘victim’s case’ that came after the Prosecution’s case and before the Defence’s case.⁴⁹ Different from the pre-trial phase, common legal representatives (not the victims themselves) at the trial stage have been allowed to access confidential documents and evidence and attend closed sessions as well.⁵⁰

D. Reparations

Ultimately, victims do not only want to participate in the proceedings. They want to be recognized as victims and they want to be compensated for the harm suffered. While the Rome Statute is quite vague on victim’s participatory rights, it is even vaguer on reparations. Indeed, the drafters could not agree on this subject, and left it to the Court to further decide what it means. This is another example of a ‘constructive ambiguity’ in the Statute, which places a high burden on the shoulders of the judges.

In Article 75, the Statute provides that the Court must ‘establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.’⁵¹ On the basis of these principles, victims may request—and the Chambers may award—reparations.

⁴⁸ Trial Chamber III decided to allow victims to present their ‘views and concerns’ in the form of unsworn statements as well. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-1935, Order Regarding Applications by Victims to Present Their Views and Concerns or to Present Evidence (Nov. 21, 2011).

⁴⁹ Jennifer Easterday, *Judges in Katanga and Ngudjolo Trial Hear Testimony from Participating Victims*, katangatrial.org (Mar. 15, 2011), <http://www.katangatrial.org/2011/03/judges-in-katanga-and-ngudjolo-trial-hear-testimony-from-participating-victims/> (‘Upon resuming hearings after the Prosecution rested its case and the court observed its annual winter recess, the trial heard testimony from victim participants.’).

⁵⁰ *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-474, Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case, ¶ 149 (May 13, 2008); *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial, ¶¶ 118–25 (Jan. 22, 2010).

⁵¹ Rome Statute, *supra* note 12, art. 75(1).

Some observers expected the Court to lay down general court wide principles applicable to reparations. The Court has thus far refrained from doing so. It will therefore be for the first trial chambers to determine on which basis they will award reparations in concrete cases. As a result, we will have to wait for the first convictions before we know the legal principles that will allow victims to claim reparations before the ICC.

In essence, the States Parties have delegated to the Court—eventually the judges—the responsibility of defining rules of tort liability. This is not an obvious task for a judge in a criminal trial, especially considering the massive numbers of victims that are likely to claim reparations. What causal link will be required between the crime and the harm? For example, when dealing with mass murders, will each individual murder need to be established for the purposes of reparations? What type of harm will be the subject of reparations, only material harm or also psychological and moral harm? Will the court go for individual or collective reparations? Who will adduce the evidence? What is the evidentiary regime? Will the defence have the right to cross-examine all the witnesses? What will be the standard of proof? These are but a few of the very many questions that need to be resolved.

How to avoid a prolongation of an already very lengthy trial proceeding? Imagine for a moment what might happen if, after the criminal trial has been completed, the Trial Chamber would still have to rule on each individual claim for reparations. If the extent of the harm suffered and the causal link with the crimes has to be proved on an individual basis, there is a good chance that the length of the reparations proceedings could exceed the duration of the criminal trial itself.

III. Some views and concerns

A. Victims and the Truth Finding Process

One of the arguments in favour of victim participation at trial is that victims can make a meaningful contribution to the truth-finding process and can thus add to the evidence led by the prosecution. The idea is that victims should be able to make the Chamber see the facts from their perspective as well. As they are the ones who lived through the relevant events, their experience and knowledge of the circumstances of the case could be helpful in providing the judges with important insights about the local situation. As such, victims can make their contribution to the fight against impunity, which is the basic objective of the ICC.

It remains to be seen whether this really happens in practice. In a typical case, many witnesses for the prosecution will be victims, which means that victims will give evidence anyway. A trial against a person accused of human rights abuses without victims of such abuses testifying in court is indeed highly unlikely. To allow common legal representatives to bring an extra number of victims to The Hague to testify as part of a ‘victim-case’ may not be necessary to try the case. It

may not only be time consuming, but it poses all sorts of problems relating to the ‘double status’ of the witness, i.e., a participating victim and a witness.

There is even a risk that a ‘victim case’ may, unwittingly, undermine the case of the prosecution, in situations where common legal representatives bring victims to The Hague whom the prosecutor, for strategic reasons, decided not to call. Also, victims may have a very different theory of the case, which may, or may not, be conducive to the truth-finding process.

B. Victims and the Rights of the Accused

In theory, victims’ participation should not have a negative impact on the rights of the accused. Article 68(3) provides clearly that the Court must permit victims to present their views and concerns ‘in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’⁵² In other words, the ideal of allowing victims to take part in the trials must not come at the expense of the accused.

Yet the paradox remains. Typically, victims have an interest in seeing the accused found guilty and convicted. Only then can they feel that justice has been done. Only then can they hope to receive reparations from the Court. Yet, the most basic requirements of fairness dictate that Victims’ Legal Representatives should not act as so-called ‘Prosecutor *bis*.’⁵³ It would be wholly unfair if the defence had to counter not just the Prosecutor’s accusations, but also those of the Victims’ Legal Representatives. Nevertheless, the participation of victims would probably be meaningless if they were entirely barred from proffering incriminating evidence. A fine balancing act is thus required. Experience has shown that finding this balance is not always easy. Victims are not neutral and forcing them to act as if they were risks alienating them from the proceedings.

A related problem is whether victims should have the obligation to disclose potentially exonerating evidence they may have. The jurisprudence so far says that they do not have such an obligation.⁵⁴ This may strike some as odd: how can victims have a right to tender incriminating evidence without a corresponding duty to disclose exculpatory material?

C. Is the Participatory Regime Meaningful for Victims?

The question whether the participatory system is meaningful will be differently answered by different persons. Even the judges of the Court may have very dif-

⁵² *Id.* art. 68(3).

⁵³ See Prosecutor v. Dyilo, Case No. ICC-01/04-01/06-1432, ¶ 93 (stating that, despite the role given to victims’ representatives, it is still the prosecutor’s duty to investigate crimes, formulate charges, and decide what evidence to bring).

⁵⁴ See Prosecutor v. Katanga, Case No. ICC-01/04-01/07-2288, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial,’ ¶ 72 (July 16, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc909021.pdf>.

ferent views on this issue. Maybe it is a little early to make a full assessment, because, at this point in time, no trial has completely run its course. However, it is possible to make some preliminary observations.

Victims who expect to find a forum where they could personally and publicly express their grief and thus have a platform to expose their feelings will probably be disappointed. In mass trials, victims are necessarily represented by common legal representatives, and consequently victims will not be able to appear in person. Also, a criminal trial, unlike, for example, a truth and reconciliation commission, is not the appropriate forum for victims to express their feelings, as this would detract from the serenity of the trial and would not serve a useful purpose from the perspective of a criminal proceeding.

The meaningfulness of the ICC victims' participation regime will probably vary from one victim to another. The level of education, language skills, and access to means of communications all play an important role in this regard. There is an enormous distance—both in the literal and the cultural sense—that often separates the reality of victims' lives from the proceedings in The Hague. Victims generally do not personally attend any hearings. Considering their numbers, this would simply be impossible. In general, therefore, victims are represented by counsel, and most of them never make it to The Hague.

Common legal representatives will have to take instructions from their clients for a meaningful representation. But how do you achieve this when your clients are several thousands of kilometres away from the courtroom and live scattered over large distances—sometimes in very remote areas that are hard to reach? Sometimes victims live in areas where armed conflict—or the threat thereof—is still ongoing. It may even be dangerous for them to have regular contacts with the legal representative, because they have to keep secret the fact that they are participating in the proceedings, for fear of harassment or reprisals by people loyal to the accused.

In the typical case before the Court, massive amounts of victims will be represented by common legal representatives who attend the hearings in court. Even if these common legal representatives organise themselves to take instructions from great numbers of victims, it will be very difficult if not impossible to relay these instructions to the court. In those circumstances, can legal representation be anything more than symbolic? And if it is only symbolic, how meaningful can it be?

D. How Meaningful Can Reparations Be?

It may well be that reparations matter more for victims than participation. As explained above, it still remains to be seen how the judges will give effect to the statutory provisions on reparations.

However, one thing is already very clear at this point in time. The resources available for reparations will probably not allow the Court to meet the expectations of all victims. Indeed, once we have defined the principles and determined

reparation awards, where will we find the money to pay for reparations? So far, most accused have arrived in the Court's Detention Centre penniless. And those who are not may have spent most of their money by the time their case comes to an end, as the Charles Taylor case before the Special Tribunal for Sierra Leone illustrates.⁵⁵

This problem is not typical for the ICC: in many national proceedings, courts award generous compensations to victims. However, very often, victims never see their money. This is true for many victims who bring successful proceedings under the Alien Tort Claims Act in the United States,⁵⁶ as it is for victims of the genocide trials in Belgium who acted as *partie civile* under our famous war crimes statute.⁵⁷ And I would not wish to count the victims who were promised compensation by Truth and Reconciliation Commissions who were disappointed at the result.⁵⁸

Theoretically, this problem could be resolved by the ICC's Trust Fund for Victims. However, the Fund has very limited resources, by far insufficient to provide anything more than nominal sums to individual victims. Furthermore, the current financial crisis makes it seem unlikely that the Fund will be able to increase its resources significantly in the near future. Moreover, it is not at all clear whether the Chambers can decide how the money of the Trust Fund can be used.⁵⁹ In other words, if the convicted person is indigent, the Trial Chamber simply cannot decide how the victims should be compensated. At this point in time, the Trust Fund has a budget of one million euro to cover all the reparations in all the cases that are before the Court.⁶⁰

There is a possibility of making awards on a so-called 'collective basis'.⁶¹ An example would be that, instead of paying individual victims for the harm they suffered, the Court would finance the construction of a hospital or a school. Such measures benefit communities as a whole. But here again, if the convicted person

⁵⁵ See Doreen Carvajal, *As Liberian Stands Trial, Investigators Lose Scent in Hunt for Missing Millions*, N.Y. TIMES, June 6, 2010, <http://query.nytimes.com/gst/fullpage.html?res=9905E4D8173CF935A35755C0A9669D8B63&ref=liberia> (stating that no money has been found in Charles Taylor's name and that he has been declared 'partially indigent').

⁵⁶ See Edward A. Amley, Jr., *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177, 2178 (1998) (noting that plaintiffs who win Alien Tort Claims Act suits are not likely to collect 'a dime' of the judgments they are awarded).

⁵⁷ See *Large Compensation Awards... Never Paid*, Int'l Just. Trib. (Sept. 23, 2007), <http://www.rnw.nl/internationaljustice/article/large-compensation-awards-never-paid> (de-tailing situation of Rwandan genocide victims who won verdicts in Belgian courts but had nothing paid to them).

⁵⁸ See Tyrell Haberkorn, *Just, Fair, Accountable!*, New Mandala (Aug. 22, 2011), <http://asiapacific.anu.edu.au/newmandala/2011/08/22/just-fair-accountable/> (detailing the work of the Truth and Reconciliation Commission in Thailand, where, as of August 2011, many victims had not been compensated); see also Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 Hum. RTS. Q. 228, 246 (2007) (noting that implementation of the Truth and Reconciliation Commission's reparations plan was slow).

⁵⁹ See Int'l Criminal Court, Regulations of the Trust Fund for Victims, paras. 54–75, ICC-ASP/4/Res.3 (Dec. 3, 2005).

⁶⁰ *Financial Info*, the Trust Fund for Victims, <http://www.trustfundforvictims.org/> financial-info (last visited Feb. 20, 2012).

⁶¹ Rules of Procedure and Evidence, *supra* note 16, r. 97.

is indigent, reparations will largely depend on the initiative of the Trust Fund, which plays a leading role in defining and financing collective reparations.

Here too, putting into practice the lofty ideals expressed in the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power seems to be more difficult than anticipated.⁶² Reparations for victims risk being more symbolic than real.

E. Equal Access to Justice?

One of the central objectives of the 1985 Basic Principles and the 2005 Guidelines underlying the ICC system is that victims should have *equal* access to justice.⁶³ The 2009 report spelling out the overall Court Strategy in relation to victims makes very clear that the ICC subscribes to this goal.⁶⁴

This may be possible for human rights courts and for reparations commissions, but it is far from obvious before criminal courts and tribunals. Prosecutors will never be able to bring charges in *all* the cases involving victims of human rights abuses that have come to their attention after investigating a given situation. Prosecutorial selectivity being inherent in criminal trials means that, inevitably, only a limited amount of victims will be able to participate and to receive reparations.

Victims of uncharged crimes in situations that are before the court will not be able to participate. From the viewpoint of the victims, this means that only victims who happen to have been victimized in the locations that are the subject of the charges will be allowed to participate.

This lack of equal access does not only affect the participation regime, but also the reparations regime. Only victims of crimes charged that lead to a conviction will be able to claim reparations. If the accused is acquitted, or if he cannot be apprehended, reparations will have to wait. For example, in the Uganda situation, with Joseph Kony and others still being fugitive, no participating victim has, at this point in time, any perspective of reparations.⁶⁵

This may even have a negative impact on reconciliation, as victim groups belonging to different sides of a conflict may not always understand the legal intricacies of the system explained above, and may wonder why other victims can claim participation and reparations.

⁶² See G.A. Res. 40/34, *supra* note 9 (declaring that states should help to compensate victims when offenders cannot and that victims should receive access to prompt redress through ‘mechanisms of justice’ that have ‘expeditious, fair, inexpensive, and accessible’ procedures).

⁶³ See *id.* ¶ 3 (providing that the Basic Principles are ‘applicable to all, without distinction of any kind’); see also G.A. Res. 60/147, *supra* note 10, Annex ¶ 12 (stating that victims should have equal access to an ‘effective judicial remedy’).

⁶⁴ Int’l Criminal Court, Report of the Court on the Strategy in Relation to Victims, para. 15(d), ICC-ASP-8/45 (Nov. 10, 2009).

⁶⁵ See U.N. Secretary General, *Report of the Secretary-General on the Lord’s Resistance Army-Affected Areas Pursuant to Security Council Press Statement*, ¶ 4, U.N. Doc. S/2011/693 (Nov. 4, 2011) (noting that Kony and two others charged with crimes against humanity and war crimes remain fugitives who continue to commit atrocities as part of the Lord’s Resistance Army).

These inequalities are inherent in a system where victims participate in criminal trials. It sharply contrasts with other redress mechanisms, such as access to human rights courts or administrative claims commissions. It may be too much to expect from the ICC to be a retributive (fighting impunity) and a restorative mechanism at the same time. It may be worth considering separating the two, and to leave the restorative functions to the Trust Fund

F. Is the System Sustainable?

A lot of judicial energy and resources have been put in the victims' participation and reparation regime. To date, no information exists as to reparations, but what seems to be likely in the two first trials is that the means of the accused will not suffice for reparations. Even if the Trust Fund were to be asked to contribute, the resources available for a reparation award would be very modest.

This stands in sharp contrast with the expenditure on victims in terms of fees, salaries and expenses. I already mentioned the budget numbers for 2012, which indicate that at least some seven million euro (almost ten million USD) have been directly earmarked for victims-related tasks, money that will be spent on fees, salaries and expenses of the common legal representatives and the sections in the ICC registry responsible for victims.⁶⁶ However, the real cost is probably even higher, because the budget figures do not reflect the considerable time also spent by the parties (prosecution as well as defence) on responding to victims-related issues. Nor do they tell you how many working hours judges and their staff devoted to dealing with victims' applications and participation-related motions.

I know from experience that the time devoted by the Chambers to victims-related issues is considerable. At any given time before or during the trial, there would always be some victims-related issue pending for decision; whether it be a request from a surviving relative to participate in the name of a deceased victim, or a motion to clarify whether the defence is entitled to mention the names of participating victims during their investigations. Moreover, in most cases, Victims' Legal Representatives have made submissions on motions made by the parties. And then, the countless hours spent on determining the victim status of hundreds—and in the future perhaps thousands—of applicants, also puts a strain on the parties (prosecution and defence) and the related expenditure.

I hesitate to guess how significant a portion of the Chamber's time has been used for victims' issues. It is difficult to know this, because it varies a lot depending on the phase of the proceedings. For example, before the start of the hearings on the merits in the *Katanga* case,⁶⁷ for several months, more than one third of the Chamber's support staff was working on victims' applications.

⁶⁶ See Proposed 2012 ICC Budget, *supra* note 21, at 128.

⁶⁷ See Int'l Criminal Court, Registry and Trust Fund for Victims Fact Sheet 1 (March 2011), available at http://www.iccnw.org/documents/Victims_Factsheet_March_2011.18_apr1832.pdf (noting the number of victims authorized to participate in the *Katanga* case trial).

During the trials, victims take up an important proportion of the time. Even if common legal representatives questioning of witnesses has been limited by the Trial Chambers in their victims participation decisions,⁶⁸ time spent during the hearings is considerable because questions by the victims will often trigger new questions by the Defence. In addition, the ‘victims’ case’ is taking a lot of time. During the weeks leading up to the testimony of victims at trial in the *Katanga* case, judges and staff devoted a large majority of their time to this, even if the actual hearings only lasted five days.⁶⁹ Whatever the actual average number of hours, it is clearly significant.

When I compare my experience as an ICC judge with my experience as an ICTY judge, a huge amount of time is spent on victims-related issues, which, obviously, has an impact on the length of proceedings. Whether this is in the best interest of the victims whom the ICC wishes to serve remains to be seen.

IV. Final observations

The ICC can certainly be commended for its considerable efforts to give a voice to the victims of serious human rights abuses and to put the victims at the head of the international criminal justice system. Its general approach towards victims and the Trust Fund are undoubtedly a great improvement. While the Court still needs to render its first judgments,⁷⁰ the Trust Fund has been in operation since late 2008 and has already reached out to thousands of victims.⁷¹ It has allowed the alleviation of victims’ needs long before trials before the Court materialized, as the example of Trust Fund for Victims projects in Northern Uganda illustrates.⁷²

By contrast, the implementation of the ICC victims’ participation and reparation regime in trials before the Court shows how difficult it is to put the ideals of the 1985 U.N. Declaration into practice.⁷³ The Court will have to assess whether

⁶⁸ See, e.g., Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1788, Decision on the Modalities of Victim Participation at Trial, (Jan. 22 2010), http://www.worldcourts.com/icc/eng/decisions/2010.01.22_Prosecutor_v_Katanga.pdf (evaluating the Chambers requirements for legal representatives to questions witnesses).

⁶⁹ See *Registry and Trust Fund for Victims Fact Sheet*, supra note 67, at 3. See generally *Timeline of Developments Summarized by the CICC on the DRC situation related to the Case of Germain Katanga*, COAL. Int’l Criminal Court, http://www.iccnw.org/documents/Timeline_DRCKatangaCase_Current1.pdf (last visited Feb. 22, 2012) (outlining the developments in the *Katanga* case).

⁷⁰ At the time of writing this paper, no decision had yet been rendered. However, on March 14, 2012, Trial Chamber I of the ICC issued its first verdict, finding Thomas Lubanga Dyilo guilty of conscripting and enlisting children to actively participate in hostilities. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

⁷¹ See Gaëlle Carayon, *Interview with Pieter de Baan, Executive Director of the Trust Fund for Victims of the ICC*, ACCESS (Victims’ Rts. Working Grp. Bulletin, London), no.18, Spring 2011, at 6, 6 (describing the successes and challenges of the Trust Fund).

⁷² See *id.*

⁷³ See G.A. Res. 40/34, supra note 9, Annex (describing who a victim is and outlining how they should be treated based on fairness and justice).

the system it has installed is capable of reaching the objectives it has set for itself. By the time the first trials have run their full course, the Court will be in a position to do so.

One major objective has been to avoid the ‘secondary victimization’ for which the ad hoc tribunals were blamed.⁷⁴ Victims have vested enormous hopes in the ICC, which, through its outreach programs, has created immense expectations.⁷⁵ Many resources have gone into fees, salaries and expenses, which are in sharp contrast with the resources that will eventually be available to pay for reparations. If it should appear that both participation in the trials and reparations are more symbolic than real, a different kind of frustration may emerge.

If victims’ participation slows down proceedings, fewer trials can be held. Seen from that perspective, victims’ participation may be in conflict with the basic purpose of the ICC, which is to fight impunity.

The whole system is premised on the idea that victims’ participation in criminal trials avoids secondary victimization and indeed empowers victims. The burden is on the ICC to prove that this proposition is correct. At this point in time, the jury is still out. It may well be that the premise proves to rely on a false analogy with domestic trials in civil law states. It may well be that victims’ participation in criminal trials of the kind that are held before the ICC, i.e., trials with massive amounts of victims, cannot be more than symbolic, which, in turn, may be a new cause of secondary victimization. The same risk exists if it appears that reparations, too, can be only symbolic.

A question the Court will have to ask itself is whether the participation system set in place is ‘meaningful’ enough to justify the amount of resources and time invested in it or whether it would be better to spend those resources and time directly on reparations?

Victims’ participation in criminal trials is not the only possible avenue if one wants to empower victims. Contrary to what is often argued, I do not believe that victims’ procedural rights (such as the right to the truth, the right to reparations, and the right to be informed), recognized by human rights courts,⁷⁶ necessarily need to be exercised by introducing the victims into the *criminal* trial proceeding.

A possible alternative could be to transform the Trust Fund for Victims into a Reparations Commission, which would directly deal with victims’ reparations claims. In this proposal, the victims would detach from the criminal proceedings and be allowed to bring their claims before a Trust Fund for Victims Reparations Commission. Reparation claims before such a Commission would not need to

⁷⁴ See U.N. Office for Drug Control & Crime Prevention, Handbook on Justice for Victims 2, 16–17 (1999) (noting the problems of ‘secondary victimization’ in criminal justice ICC’s positive provisions in regards to victims work).

⁷⁵ See Victims’ Rights Working Group, the Impact of The Rome Statute System on Victims and Affected Communities 8–11 (2010), [http://www.redress.org/Stocktaking report2010.pdf](http://www.redress.org/Stocktaking%20report2010.pdf) (noting the tension between the ICC and the expectations of the victims).

⁷⁶ See generally *Law Sources: Procedural Guarantees*, humanrights.ch, http://www.humanrights.ch/en/Standards/Law-Sources/idart_8107-content.html (last updated Aug. 19, 2011) (containing a collection of treaties on procedural guarantees in international humanitarian law).

be restricted to convictions, but also could be open to potentially all the victims of the situations investigated by the ICC. The number of beneficiaries of this mechanism would be significantly higher than the victims of cases that result in convictions. In fact, the 'second branch' of the Trust Fund for Victims mandate already fulfils this function.⁷⁷ It has indeed already compensated victims on a parallel track, unattached to cases that are tried before the Court, as the example of Northern Uganda illustrates.⁷⁸ The idea of a Trust Fund for Victims Reparations Commission would bear some analogy with the proposal formulated, but not further elaborated by ICTY judges in 2000⁷⁹ and again repeated by President Robinson in his address to the U.N. General Assembly on November 11, 2011.⁸⁰ It may well be that this procedural avenue is a more effective means to attain the objective of victim empowerment. I think it therefore deserves further consideration. Any change of this kind would of course require extensive prior discussion and negotiation. In the meanwhile, the ICC has to continue the challenging task of finding ways to implement the existing provisions of the Rome Statute which go as far as practically possible towards meeting the legitimate expectations of victims.

In a way, the problems the ICC is facing in giving victims a meaningful place in its proceedings, can serve as a metaphor for the ICC as a whole. Both are inspired by and based upon noble and important ideals. And we should be grateful to those who have made it possible to dream of a world in which the ideal of international justice might one day reign. However, putting into practice those ideals is proving to be a big challenge. It is important to assess and to face this challenge. If we really want our ideals to become reality, we must allow ourselves and others to be critical of our efforts to put them into practice. This, after all, is the only way towards improving ourselves.

⁷⁷ See *What is the Role of the Trust Fund for Victims?*, Int'l Criminal Court, <http://www.icc-cpi.int/menu/icc/about%20the%20court/frequently%20asked%20questions/> 27 (last visited Feb. 21, 2012) (noting the Trust Fund for Victims is a separate institution from the ICC and can benefit victims separate from even without a conviction from the ICC).

⁷⁸ See Jennifer Easterday, *Q&A with the Executive Director of the Trust Fund for Victims Pieter W.I. de Baan*, [bembatrial.org](http://www.bembatrial.org) (Sept. 12, 2011), <http://www.bembatrial.org/2011/09/qa-with-the-executive-director-of-the-trust-fund-for-victims-pieter-w-i-de-baan/> (noting that the Trust is helping Northern Uganda separate from the ICC proceedings).

⁷⁹ See Letter, *supra* note 8, Annex (recognizing the victims need for compensation).

⁸⁰ Press Release, Int'l Criminal Tribunal Former Yugoslavia, President Robinson's Address Before the United Nations General Assembly (Nov. 11 2011), <http://www.icty.org/sid/10850> (calling upon Member States of the ICTY to assist victims beyond the Tribunal via the formation of a trust fund).

The EU Procedural Rights Roadmap

Background, importance, overview and state of affairs

*Caroline Morgan**

I. Introduction

The Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings¹ is known as the Procedural Rights Roadmap. It resulted from a Swedish Presidency proposal for a Resolution, inviting the European Commission to present draft legislation on fair trial rights in stages. This was the first successful procedural rights measure in a long campaign commenced by the Commission in 2001. Unlike previous attempts at legislation, the Procedural Rights Roadmap sets out a 'step-by-step' which involves devoting a proposal for legislation to each of five separate fair trial rights:

- (a) the right to interpretation and translation;
- (b) the right to information about rights (Letter of Rights) and about the charges;
- (c) the right to legal advice, before trial and at trial, and to legal aid;
- (d) the right for a detained person to communicate with family members, employers and consular authorities; and
- (e) the right to protection for vulnerable suspects.

This paper will examine why the Roadmap is necessary despite the European Convention on Human Rights (ECHR) which protects persons facing a criminal charge, and where we are with the Roadmap, three years after its adoption.

II. Background

In 2000, the EU announced a Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters² which listed 24 specific measures facilitating judicial cooperation (and thus cross border investigation and prosecution of crime) between EU Member States, the most important

* Caroline Morgan BSc LLM is a UK solicitor working for the European Commission, DG Communication, formerly working at DG Justice, unit Criminal Justice, officer in charge for the EU's procedural rights policy for over 10 years.

¹ OJ C 295 of 4.12.2009, p.1

² 2001/C 12/02

of which was the European Arrest Warrant (EAW)³. EU citizens have the freedom to travel over its territory with very few limits and controls. This has resulted in an increase in cross-border crime and for this reason, the EU has, for some years, included combating crime in its mandate. With enhanced judicial cooperation, there is a need for common standards of fair trial rights throughout the European Union. The ECHR is not sufficient to ensure fair trial rights in an age of mutual recognition and increased travel. Investigative and prosecuting authorities have at their disposal a range of new mutual recognition instruments enabling suspected person, information and evidence to be sent across borders more swiftly and without safeguards, but these advances for the prosecution of crime have not been matched by better safeguards for the defence. Furthermore, persons subject to an EAW do not benefit from the right in Article 6 ECHR because EAW proceedings are considered to be a form of extradition and not part of criminal proceedings.

The Commission has been trying for many years to convince the Council to adopt measures that guarantee fair trial rights and redress the balance⁴ but Member States do not all share the Commission's view that this is important. The entry into force of the Lisbon Treaty in 2009 changed the rules, preventing any single Member States from blocking Commission proposals in the criminal law field by replacing the requirement of unanimity with qualified majority voting (QMV) in the criminal law field and making the European Parliament a co-legislator. This change, together with the adoption of the Procedural Rights Roadmap, has made it possible for some fair trial rights legislation to be adopted at EU level.

The principle of mutual recognition in criminal matters is a system whereby judicial decisions taken in one Member State are considered as equivalent to each other wherever that decision is taken. This means that the decision, taken in one Member State, should be enforceable anywhere in the EU. The characteristics of mutual recognition as compared with traditional judicial cooperation instruments are that it involves direct contacts between judicial authorities, that there are limited grounds for refusal, limitations to the principle of dual criminality, short deadlines, and that standard forms and certificates are used. It's a simplified approach as compared with traditional judicial cooperation and leads to much swifter procedures. However, decisions taken using mutual recognition instruments carry fewer safeguards and leave the defence with less time and fewer arguments at its disposal. These effects are felt most keenly in EAW cases. The EAW came into force on 1 January 2004 and replaced extradition between all EU Member States. The surrender takes place rapidly (generally within 30 days) and traditional safeguards such as dual criminality and speciality requirements are set aside.

The counterpoint to mutual recognition measures must be strong fair trial safeguards, guarantees about detention conditions and no unnecessary use of

³ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) OJ L190/1 of 18.7.2002.

⁴ European Commission's 2004 proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union – COM(2004) 328, 28.4.2004.

pre-trial detention. With the EAW available, it doesn't make sense for foreign courts to keep someone in pre-trial detention unless they are trial ready since if the person fails to appear in court, their presence can now be secured, across an EU border, by way of an EAW.

However, surrender under an EAW is equivalent to extradition so Article 6 ECHR does not apply. Moreover, the EAW Framework Decision itself does not lay down any common minimum safeguards, relying instead on national systems. Research⁵ has repeatedly shown a wide variation in adherence to ECHR standards, and the complete absence of certain rights (such as effective interpretation, or legal aid) in criminal proceedings in certain EU Member States. The Commission has long sought to address these diverges and to lay down some common standards.

The Commission's initial approach to procedural rights was to present a single text⁶ covering five different rights – access to a lawyer and to consular authorities, interpretation and translation, the right to communicate the fact of being in detention and to information about rights, and special protection for vulnerable suspects such as children – identified during a 2003 Green Paper consultation as essential in order to achieve the required level of trust for the operation of mutual recognition.

In 2004, the Commission put forward a proposal for a Framework Decision covering the five basic rights. Under the former treaty provisions, unanimity was required for adoption of a Framework Decision. The European Parliament did not take part in the decision-making process but was merely consulted once a text had been agreed. However under the Lisbon Treaty, adoption is by QMV and the European Parliament is a full decision-making partner in the co-decision process (via a three way negotiation procedure known as 'trilogies' involving the Council, represented by the Presidency, the Commission and the European Parliament, represented by the rapporteur for the measure).

The Commission's 2004 proposal was negotiated for three years, but ultimately failed – no consensus could be reached in Council – and was abandoned in 2007. The failure was the direct result of opposition from six Member States. The need for a measure setting these common minimum standards didn't disappear with the failure of the proposal. In November 2008, an extensive study of mutual recognition in criminal matters, published by the Université Libre de Bruxelles⁷, showed that, in the view of most of the experts and practitioners interviewed,

⁵ See, *inter alia*, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards*, Spronken and Attinger, published by University of Maastricht, December 2005; *EU Procedural Rights in Criminal Proceedings*, Spronken, Vermeulen, de Vocht and van Puyenbroeck, published by the IRCP and Maastricht University, 2010, and *Effective Criminal Defence*, Spronken, Smith, Cape and Namarodzhe, Intersentia, 2010.

⁶ European Commission's 2004 proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union – COM(2004) 328, 28.4.2004.

⁷ 'Analysis of the future of mutual recognition in criminal matters in the European Union' by Gisèle Vernimmen-Van Tiggelen and Laura Surano (Call for tenders JLS/D3/2007/03 European Commission) – 20 November 2008

mutual recognition could not function optimally without a higher level of trust and that such trust could only be achieved if common standards were in place.

Together with what was then the future Swedish Presidency (July-December 2009), the Commission devised a new approach, to tackle the rights in individual measures, rather than in one instrument. The Swedish Presidency put forward the proposal for the Roadmap Resolution, which was adopted in November 2009.

III. Importance

Why do we need EU legislation on defence rights when we have the ECHR? Under the ECHR, the onus is on States to protect the rights of their nationals⁸ and yet violations of Article 6 ECHR occur in all EU Member States; that much is clear from the case-law which shows findings of violations against all 27 of them. A suspect or defendant who has suffered a breach of his rights must fulfil a significant number of tests at the national level before he is in a position to make an application to the European Court of Human Rights (ECtHR). Before making such an application, he must 'exhaust domestic remedies'⁹ which means taking his case as far as the appeal system of the country allows. The protection of the ECtHR can only be accessed when all domestic avenues have been tried and have failed. The obligation to exhaust national remedies requires having the financial resources to pay for such appeals, or a national legal aid system that covers costs for those unable to do so, something which is not the case uniformly throughout the EU. The ECHR sets a short time limit (6 months) for bringing cases to the ECtHR, which the potential applicant may simply be unable to meet. There are also psychological factors which may discourage him from taking the case any further, even if a violation has occurred. A deterrent factor will be the statistical probability of the case failing since only around 5 % of all applications to the ECtHR result in a finding of a violation.

The potential applicant will have to decide whether or not to pursue an application to the ECtHR, and a further factor as to whether or not to commence proceedings in Strasbourg is the amount of time involved since the process will usually last for many years. The ECtHR takes a broad view of what is 'reasonable time' for criminal proceedings to last. In one case¹⁰ the ECtHR ruled that after almost 18 years (twelve and a half years for the national investigation and proceedings, five and a half years for proceedings in Strasbourg) the reasonable time provision of Article 6 had not been violated. The applicant must be prepared to face substantial lawyers' fees and additional costs for travel, accommodation,

⁸ Article 1 ECHR places responsibility to sanction breaches on national authorities: '*The High Contracting Parties shall ensure to everyone within their jurisdiction the rights and freedoms of this Convention*'.

⁹ Article 35(1) ECHR '*The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken*'.

¹⁰ A case of tax fraud, *Hozee v. Netherlands*, judgment of 22 May 1998, n° 21961/93.

interpretation and translations. Even if the applicant is eligible for legal aid, both in the national and in the Strasbourg legal aid schemes, the compensation available as a rule does not cover the actual time and costs involved. The case may have occurred in a country that does not provide legal aid with which to pursue an application under the ECHR and the ECtHR itself only provides limited financial assistance to pursue applications¹¹.

Most applicants to the ECtHR are therefore not typical of the category of persons who may have suffered a violation of their rights, but rather the exception. They have to be tenacious and determined, and those that pursue that route are very much in the minority.

Having EU legislation improves the situation considerably. It places an obligation on States to have systems in place guaranteeing the rights in the Roadmap. If rights are violated, the person concerned immediately has a remedy against the Member State at national level for failure to implement an EU Directive, thus obviating the need to bring proceedings in the ECtHR. The right would normally arise as soon as the person becomes aware that they are suspected of having committed an offence, and thanks to a provision in the second Roadmap measure, on the right to information, the person must be informed in writing, in a language they understand of their rights (by way of a Letter of Rights). Someone who is aware of their rights is in a much better position to enforce them than someone who does not know what their rights are. Needless to say, it is much easier to enforce one's rights in the country in which they have been violated and in the immediate aftermath of the violation, with no obligation to exhaust all other remedies.

Furthermore, recent changes in the ECtHR mechanism designed primarily to reduce the number of cases before the court by way of a rigorous filtering mechanism, will make it even harder to go to the ECtHR. The changes aim to enable the ECtHR to concentrate on cases which raise important human rights issues and reduce the time spent on clearly inadmissible or repetitive applications. From the potential applicant's point of view however this means an even more reduced chance of a finding of a violation, making it all the more important to have national safeguards drawn up at EU level.

IV. Overview of the Procedural Rights Roadmap: State of affairs

The first measure, a Directive on the right to interpretation and translation in criminal proceedings¹², was adopted in October 2010 and Member States have until October 2013 to implement it. It provides that suspected and accused persons in criminal proceedings in the EU will receive interpretation assistance, not only in the trial and during police questioning, but also for communication with

¹¹ Rules 91-96 Rules of Court.

¹² 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, OJ L280/1 of 26 October 2010.

their lawyer. The right to translation, which is not explicitly mentioned in the ECHR, extends under the Directive to translation of all documents essential to ensure an effective defence. The Directive therefore clarifies the ECHR right to interpretation and explicitly fills the gap left by the ECHR's silence on the subject of translation.

The second measure¹³, a Directive on the right to information in criminal proceedings, was adopted on 22 May 2012, and Member States have until April 2014 to implement it. It provides that all suspects and accused persons in the EU should be informed of their rights orally, and that if they are arrested, they be given a written Letter of Rights in a language they understand. Furthermore, the Directive lays down the right to full information about the accusation and access to materials of the case. The Commission sees this as clarifying certain rights in Article 6 ECHR (to be informed promptly, in a language that the suspected understands, and in detail, of the nature and cause of the accusation against him, and to have adequate time and facilities for the preparation of his defence). It provides added value in that it specifies that information on rights is to be given in writing and spells out the right to access to essential documents in the case-file.

In June 2011, the Commission presented the third measure, a proposal for an EU directive on access to a lawyer in criminal proceedings and on the right to communicate upon arrest¹⁴. The Commission therefore merged the third and fourth Roadmap measures in this proposal. However, the right to legal aid, which is included in the third Roadmap measure, has been left out of this proposal and will be covered at a later date. The Commission did this so that the discussions on the right of access to a lawyer were not hampered by financial considerations, and so that the right to see a lawyer could be discussed on its own merits. The Commission must present an impact assessment with all its proposals. It did not have the financial information from Member States about their legal aid regimes, and since collecting this information will be a lengthy process, it decided to allow itself sufficient time to carry out the impact assessment on legal aid and present that aspect of the Roadmap in the future. However, the Commission did decide to include the right to information together with the right of access to a lawyer. This decision was taken because once national legislation on the right to communication was analysed, the Commission discovered that in at least 22 Member States out of 27, that right was already included in domestic legislation on access to a lawyer. Member States would therefore find it easier to implement any EU legislation if these two rights were covered together in the EU Directive.

The proposal aims to set out minimum rules by drawing on existing international standards and in particular the ECHR. Article 6(3) ECHR refers to the right 'to defend [oneself] in person or through legal assistance of [one's] own

¹³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1 of 1 June 2012.

¹⁴ Proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326 of 8 June 2011.

choosing’)) but does not refer to the right to communicate with the outside world, which is frequently cited by the Committee for the Prevention of Torture in its periodical reports as one of the guarantees against ill-treatment and abuse of detainees. The right to communicate with consular authorities for foreign defendants is the mirror image of the obligation, incumbent on States parties to the 1963 Vienna Convention on Consular Relations, to inform the consular authorities of any other State where one of its nationals has been arrested or detained and to allow these authorities to visit the person.

A number of recent ECtHR rulings, beginning with the landmark *Salduz* case¹⁵, have clarified the scope of Article 6 (3) (b) and (c). The ECtHR has repeatedly held that Article 6 applies to the pre-trial stage of criminal proceedings and that a suspect must be offered the assistance of a lawyer at the initial stages of police questioning¹⁶ and as soon as he is deprived of his liberty, irrespective of any questioning¹⁷. The ECtHR also ruled that these guarantees must apply to witnesses whenever they are in reality suspected of a criminal offence, as the formal qualification of the person is immaterial¹⁸. In the case of *Panovits*,¹⁹ the ECtHR found a breach of Article 6 where statements made by the suspect in the absence of his lawyer were used to secure a conviction, even though they were not the sole evidence available. The ECtHR found that the lack of legal assistance during an applicant’s questioning constitutes a restriction of his defence rights, in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings²⁰. The number of complaints about the right of access to a lawyer has been growing steadily over the last few years.

Despite this jurisprudence, which falls to all States party to the ECHR (and therefore to all EU Member States) to implement, legislation (and standards) across Member States differ substantially in the way this right is actually conferred on suspects. The Commission’s proposal thus seeks to harmonise the way this right is governed in EU Member States, to set out what actions the lawyer can carry out on behalf of his client, to ensure confidentiality in lawyer-client communication and to provide for remedies in the event of a violation.

The proposal is currently being negotiated with the Council and the European Parliament and a first Trilogue will be held on 6 September 2012.

The issue of legal aid should form the subject matter of a separate proposal in 2014 along with the final Roadmap measure, on protection for vulnerable suspects.

It should be noted that all Roadmap measures contain provisions explicitly laying down rights for persons subject to an EAW, thus remedying the European Arrest Warrant Framework Decision, by enabling those persons to have the right

¹⁵ *Salduz v Turkey*, judgment of 27 November 2008, application no. 36391/02, § 50.

¹⁶ *Ibid*, § 52.

¹⁷ *Dayanan v Turkey*, judgment of 13 January 2010, application No. 7377/03, § 32.

¹⁸ *Brusco v France*, judgment of 14 October 2010, application No. 1466/07, § 47.

¹⁹ *Panovits v. Cyprus*, judgment of 11 December 2008, application No. 4268/04 § 73-76.

²⁰ *Ibid* § 66.

to legal advice, interpretation and translation of relevant documentation (such as the European Arrest Warrant form itself) into a language they understood.

The EU Roadmap measures will complement the ECHR system. Once the Roadmap is fully implemented, certain basic rights such as the right to legal assistance, interpretation, translation, the right to communicate the fact of being in detention to one's family or employer and the right to consular assistance for foreigners will be guaranteed at a uniform, common minimum level throughout the EU. The Commission has been careful to base its proposals on the standards set by Article 6 ECHR and on the ECtHR case law so as to avoid any discrepancy or problems of interpretation leading to diverging standards at the national level. The new right for persons to be given a 'Letter of Rights' on arrest setting out their rights under national legislation will go a long way to ensuring that the suspect is aware of his rights such as the right to see a lawyer or the free services of an interpreter, even in a country in which he does not speak the language.

V. Conclusion

Article 6 ECHR and the possibility of taking a case to the ECtHR in cases where there have been violations of that provision do not offer an adequate safety net to suspects and defendants in criminal proceedings throughout the EU. The chances of a potential applicant fulfilling all the arduous, lengthy, time-consuming criteria at national and ECtHR level are very slight and depend to a certain degree on sheer luck. Only a small percentage of violations at the national level are capable of leading to an application to the ECtHR since many potential applicants fail through lack of legal advice, inadequate knowledge of rights, lack of funds or simply lack of tenacity and will. EU Roadmap legislation will reduce the number of possible violations *ab initio* by increasing knowledge of rights on the part not only of suspects but of all those involved in the criminal justice system and by making suspects explicitly aware of their rights by way of a Letter of Rights. The EU Procedural Rights Roadmap measures will benefit all those involved in criminal proceedings at the national level, whether the crime they are accused of is purely domestic or whether it has a cross border aspect, and will act to reduce the number of applications to the ECtHR. Once implemented fully, the Roadmap should ensure a fairer Europe, with better justice systems, and this will have many beneficial effects.

Effective Defence

The Letter of Rights and the Salduz-directive¹

*Taru Spronken**

I. Introduction

Criminal procedures vary enormously across European jurisdictions and so does the level of legal protection offered to suspects in criminal proceedings. Initial attempts by the European Union to establish minimum procedural rights for suspects and defendants throughout the EU failed in 2007, in the face of opposition by a number of Member States who argued that the European Convention on Human Rights (ECHR) and the enforcement mechanism of the European Court of Human Rights (ECtHR) rendered EU regulation unnecessary. However, with ratification of the Lisbon Treaty, criminal defence rights appeared on the agenda again in order to increase mutual trust between Member States and thus improve the operation of mutual recognition. In November, 2009, the European Council adopted the Roadmap on Procedural Rights setting out a step-by-step approach to strengthen the rights of suspects and accused persons throughout the European Union. The first steps have currently been taken through the adoption of the Directive on the right to interpretation and translation in criminal proceedings of 26 October, 2010² and on the right to information in criminal proceedings.³ The draft Directive on the right to legal assistance in criminal proceedings is currently (October 2012) pending before the EU legislative organs.⁴ In parallel with these developments, two research projects have been conducted. One into the way suspects and defendants are informed of their rights throughout the EU⁵ and another one on access to effective defence in criminal proceedings across nine European jurisdictions that constitute examples of the three major legal traditions

* Prof. Criminal law (Maastricht University), lawyer, the author has published widely on issue related to (the right of) defence.

¹ This article is a revised and actualised version of Taru Spronken, *EU Policy to Guarantee Procedural Rights in Criminal Proceedings: an Analysis of the first Steps and a Plea for a Holistic Approach*, *EuCLR* 2011, p. 213-233.

² Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and to translation in criminal proceedings, *OJ L* 280, 26.10.2010.

³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, *OJ L* 142, 1.6.2012.

⁴ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, 8 June 2011, COM(2011).

⁵ *Taru Spronken, An EU-Wide Letter of Rights, Towards Best Practice*, Intersentia Antwerp 2010.

in Europe: inquisitorial, adversarial and post-state socialist.⁶ The outcomes of this research are the basis for critical analysis of the way EU policy aims to fill the gaps in human rights protection in the area of criminal procedural law.

II. Rights of suspects and defendants within Europe: the European Convention on Human Rights

The ECHR sets out fundamental rights for those who are charged with a criminal offence. In this respect, the most important provision can be found in article 6 dealing with the right to fair trial. Also important for the protection of human rights in criminal cases are: article 3 (prohibiting torture), article 5 (dealing with the right to freedom) article 8 (dealing with the right to privacy) and art. 10 (regulating the freedom of speech).⁷ Over the years, the Convention system has evolved into a well-known and lively human rights regime with the Strasbourg Court and its sophisticated case law playing the leading part. The European Convention on Human Rights is of vital importance for the protection of fundamental human rights in criminal proceedings within Europe.⁸

III. Challenges the Strasbourg system faces

It is not all roses in Strasbourg: for the last fifteen years Europe's main human rights protector has been confronted with complicated challenges threatening its authority and effectiveness.

For years, the Strasbourg institutions have been faced with a steadily increasing backlog of cases caused by the increasing number of Member States and the frequent use of the individual complaint procedure.⁹ As a result of the current caseload, it can take years before the Court reaches a final decision on any given case.

The vast majority of current violations in the case law of the ECtHR, concerns so-called 'repetitive cases': cases in which the Court decides on matters which

⁶ Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, *Effective Criminal Defence in Europe*, Intersentia Antwerp 2010.: See for a similar study that was inspired by the previous one *Ed Cape and Zaza Namoradze*, *Effective Criminal Defence in Eastern Europe*, LARN, Soros Fundatio -Moldova 2012 with regard to Bulgaria, Georgia, Lithuania, Moldova and Ukraine.

⁷ See in general: *D.J. Harris, M. O'Boyle and C. Warbrick*, *Law of the European Convention on Human Rights*, 2009; *R.C.A. White and C. Ovey*, *The European Convention on Human Rights*, 2010 and *E. Bates*, *The evolution of the European Convention on Human Rights: from its inception to the creation of a permanent Court of Human Rights*, 2010.

⁸ Some even claim that 'The European Convention on Human Rights is the most effective human rights regime in the world': *A. Stone Sweet and H. Keller*, *The Reception of the ECHR in National Legal Orders*, in: *A. Stone Sweet and H. Keller (eds.), A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, p. 3.

⁹ To illustrate the increasing workload of the ECtHR: on 31 December, 2007, there were 79.400 pending applications (before a judicial formation), on 31 August 2012, this figure was as high as 147.400. This means that the number of pending applications has doubled in four years. Statistical information on the functioning of the ECtHR is available at: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data/>

have already been dealt with in previous cases but which remain problematic because the concerned member state has not (yet) taken the necessary steps to improve or adjust the situation. An important example of such repetitive cases concerns the excessive delay-cases against a small number of countries (such as Italy and France) in which the ECtHR, time after time, finds a violation of the right to be tried within a reasonable period.¹⁰

Although it is for the Member States to uphold complaints by victims of manifest violations of the Convention and to make reparation for the consequences of violations¹¹, the fact that repetitive cases have to be dealt with in Strasbourg shows that national systems are not well-adapted and that, quite often, judgments are not properly executed by states.¹² In a way, this is closely connected to the nature of the Strasbourg case law: decisions of the Court are always inextricably bound up with the circumstances of the case which makes it difficult to draw general conclusions from the case itself. When the Court finds that a member state has violated its obligations as laid down in the ECHR, it rarely occurs that part of national law (or practice) is *in abstracto* declared incompatible with the Convention.¹³ As a result, whether a judgment of the ECtHR will have actual consequences for the national legal system depends to a large extent on the interpretation of the national authorities who have a substantial margin of appreciation in this respect.¹⁴ In addition, it should be mentioned that the Court has the advantage of hindsight that parties and courts at national level do not have during the course of the ongoing proceedings. The judgment of the Court is always and inevitably *ex post*. For example, it is difficult to convert the Strasbourg case law on the right to call and question witnesses into a regulation at national level, regulating the right of the defence to call witnesses in the course of the proceedings. The requirement that a conviction should not be based solely or to a decisive extent on statements of a witness, which the defence could not test nor challenge, can only be assessed *after* the highest national court has reached its final verdict. The strengths of the Strasbourg complaint mechanism lies in doing justice to each individual case, but its weakness lies in the fact that it is hard to deduce general rules from its case

¹⁰ As provided for in art. 6 § 1 ECHR.

¹¹ See art. 46 § 1 ECHR.

¹² See for example the speech of the President of the ECtHR Bratza on the opening of the year 2012 in which he says the Court has 30.000 such cases on his docket, www.echr.coe.int.

¹³ When dealing with alleged violations of art. 6 ECHR the Court will always assess whether 'the procedure as a whole' was in accordance with fair trial requirements. See, for example, ECtHR *Bykov v. Russia*, Application no.4378/02 Judgment of 10 March 2009. Judgments of the ECtHR considering art. 6 ECHR, will therefore never be based on one isolated incident during criminal proceedings.

¹⁴ With regard to the specific subject of criminal defence rights, there is another characteristic of Strasbourg case law influencing its effectiveness. As a general rule, the ECtHR exercises restraint when it comes to the quality of the defence: it is a basic principle of ECtHR case law that the conduct of the defence is essentially a matter between the defendant and his counsel in which national authorities and the ECtHR should not interfere, see for example ECtHR *Kamasinski v. Austria*, Application no. 9783/82, Judgment of 19 December 1989, margin no 65.

law and that the Court has no powers to implement general implications of its judgments under national jurisdictions.

In the long run, the large amount of repetitive cases and the Court's growing backlog may have considerable consequences for the general role and function of the Strasbourg system. Essentially, they may cause the ECtHR to lose part of its authority as a mechanism for effective human rights protection. There already seem to be signs of 'fatigue', especially within certain Member States, with regard to the constant effort of fully implementing the requirements of the Convention.¹⁵ In this respect, the system seems to be trapped in a vicious circle: because Member States do not (adequately) fulfil their ECHR-obligations, the repetitive nature of the case law increases which – in turn – causes a threat to the authority of the ECtHR due to the growing feeling that its judgments mainly concern old wine in new bottles.

The current problems with the functioning of the Strasbourg system, however, do not refrain the Court from delivering 'revolutionary' judgments every now and then. An important example in this respect is the 2008 *Salduz* case¹⁶ concerning the right to legal advice before and during police interrogation that has initiated major law reforms in the Netherlands, Belgium, France, Switzerland and Scotland with regard to the assistance of lawyers in the phase of police interrogation.¹⁷

IV. What to do about the gap in European human rights protection?

Although it is a general principle of ECtHR case law that the Convention is intended to guarantee rights that are not *'theoretical and illusionary'* but rights

¹⁵ 'The legislator, the administrator and the courts have other pressing needs pushing human rights to the background': C. Brants and S. Franken, The protection of fundamental rights in criminal process – General report, Utrecht Law Review 2009-2, p. 49 and see also the discussion on the Brighton Conference on the future of the Court where there were discussions on limiting the discretion of the Court <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences/>.

¹⁶ ECtHR *Salduz v. Turkey*, Application no. 36391/02, Grand Chamber Judgment of 27 November, 2008.

¹⁷ See for the Netherlands Concept Wetsvoorstel Rechtsbijstand bij Politieverhoor, 15 April, 2011; Belgium Wetsontwerp tot wijziging van de wet van 20 juli, 1990, betreffende de voorlopige hechtenis en van het Wetboek van strafvordering, om aan elkeen die wordt verhoord en aan elkeen die van zijn vrijheid wordt beroofd rechten te verlenen, waaronder het recht om een advocaat te raadplegen en door hem te worden bijgestaan, 4 March 2011, Doc 53 1279/001; France: LOI n° 2011-392 du 14 avril, 2011, relative à la garde à vue (1) NOR: JUSX1022802L; Switzerland Directive de la Commission du Barreau du 21 December, 2010, concernant Permanence de l'avocat dit de la première heure instituée par l'art. 8A LPav; Scotland: Criminal Procedure Legal Assistance, Detention and Appeals (Scotland) Bill, 26 October, 2010, (SP Bill 60), introduced in the Scottish Parliament on the same day of the judgment of the UK Supreme Court of 26 October, 2010, in *Cadder v HMA* [2010] 43 rendering Scottish limitations of access to a lawyer in violation with Strasbourg jurisprudence. All documents can be found on the website of the Dutch Criminal Bar: <http://www.advocatenorde.nl/3363/advocaten/salduz-tour-d-urope.html?thema=thema/salduz&themaID=3236>.

that are ‘*practical and effective*’¹⁸ the Strasbourg system does not seem to be able to (adequately) enforce this rule in the criminal justice systems of its Member States.

Next to the considerable amount of repetitive cases, research on the existing level of safeguards within the EU shows that a considerable number of European countries do not fulfil their obligations resulting from the Convention. A study conducted on the existing level of procedural safeguards in all 27 EU Member States illustrates that certain fundamental rights – such as the right to remain silent, to have access to the case file and to call and/or examine witnesses or experts: all basic requirements of a fair trial in the ECHR – are not provided for in the legislation of all Member States.¹⁹ It is also clear that certain fundamental rights are guaranteed by law but at the same time it is doubtful whether their implementation in everyday practice corresponds to the Strasbourg standard.²⁰

In short, it can be argued that the European Court of Human Rights has been very successful in setting general (minimum) standards but since it cannot provide for general guidelines on how to implement them, the *practical and effective* nature of the Convention rights leaves much to be desired. As such, the current situation in practically all EU Member States shows that the ECHR lacks the instruments to adequately protect procedural safeguards in criminal proceedings in the Member States.

If the level of human rights protection in criminal proceedings is insufficient in practically all European countries and this would call for additional regulations to provide for adequate standards of protection throughout Europe.

Currently, it has become increasingly likely that the European Union is willing and able to fill the aforementioned gap in European human rights protection. Given its original economic objectives, the EU initially had no explicit ambitions in the field of human rights protection and was not – or rarely – active in the area of criminal (procedure) law. This picture has, however, drastically altered over the last few years.

V. EU policy on procedural rights of suspects and defendants: background and recent developments

The Treaty of Amsterdam (which entered into force in 1999) made fundamental changes to the Maastricht Treaty and *inter alia* introduced the Area of Freedom,

¹⁸ This is, according to the ECtHR, ‘particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (...)’ ECtHR, *Artico v. Italy*, Application no. 6694/7413, Judgment of 13 May, 1980, margin no 33.

¹⁹ See T. Spronken, G. Vermeulen, D. de Vocht and L. van Puyenbroek, *EU Procedural Rights in Criminal Proceedings*, 2009. This study was carried out as a follow-up report to a similar study conducted by T. Spronken and M. Attinger a few years earlier: See T. Spronken and M. Attinger, *Procedural Rights in Criminal Proceedings: existing levels of safeguards in the European Union*, 2005, available at <http://arno.unimaas.nl/show.cgi?fid=3891>.

²⁰ Spronken *et al.*, p. 111. See also E. Cape, Z. Namoradze, R. Smith and T. Spronken, *Effective Criminal Defence in Europe*, 2010, Chapter 12.

Security and Justice (AFSJ) replacing the former third pillar-title 'Area of Justice and Home Affairs'. In 1999, the European criminal law policy received new impetus at the European Council of Tampere, introducing mutual recognition as the cornerstone of judicial cooperation in criminal matters.²¹ Over the years, the emergence of criminal law as a topic of EU law has led to many achievements concerning police and judicial cooperation, such as the European Arrest Warrant and the European Evidence Warrant. In sharp contrast to this, until recently, there has been little to no progress in developing similar instruments for the creation of common standards for the protection of suspects and defendants in criminal proceedings. Before the entering into force of the Lisbon Treaty, there has been one unsuccessful attempt to create an EU level of the most important procedural safeguards for suspects and defendants. In 2004, the European Commission presented a proposal for a Council Framework Decision to set common minimum standards as regards to certain procedural rights applying in criminal proceedings throughout the European Union.²² The original proposal contained the right to legal advice (including legal aid), the right to free interpretation and translation, specific attention for persons who cannot understand the proceedings, the right to communication and/or consular assistance and the right to information (including the duty to inform a suspected person of his rights in writing).

For many years, the proposed Framework Decision was a subject of heated debate among Member States. One of the main arguments of the opponents was that the European Convention on Human Rights already provides for procedural safeguards in criminal proceedings and that there is no need for the EU to create another set of rules on this subject. In addition, some opposing Member States argued that there was no legal basis in the EU Treaties for such a proposal and that the Union therefore did not have the competence to deal with the issue of procedural rights. Several revised (and much more limited) counter-proposals were introduced but due to the difficulties of the negotiation process, none of them were ever adopted. Eventually, in 2007, no further action was planned on the procedural-rights topic and the matter – at least temporarily – disappeared of the EU's agenda.

The failed negotiations on the 2004 proposed Framework Decision had made it painfully clear that it was difficult to reach political agreement on whether and how the EU should establish a 'separate' set of standards for procedural rights in criminal proceedings. However, after 2007, the awareness grew that the current discrepancies in levels of procedural safeguards between Member States could

²¹ Commission of the European Communities, Presidency Conclusions, Tampere European Council 15 and 16 October, 1999, SI (1999). In addition to mutual recognition, the Tampere Conclusions listed approximation of substantive and procedural law as key objectives of Justice and Home Affairs.

²² Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union', 28 April, 2004, COM(2004) 328 final. This Framework Decision followed a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the EU, 19 February, 2003, COM(2003) 75 final.

seriously affect the realisation of an ‘area of freedom, security and justice’. After all, mutual recognition – as the cornerstone of cooperation in criminal matters – relies on mutual trust and confidence, and can therefore be seriously hindered by divergent standards on suspects’ procedural rights.²³

As a result of the awareness on this matter, the subject of procedural rights was recently put back on the political agenda, and, as will be discussed below – since the entering into force of the Lisbon Treaty – it may be expected that the realisation of EU legislation in this field will be less problematic in the near future than before.

VI. The Lisbon Treaty

The Lisbon Treaty entered into force on 1 December, 2009.²⁴ With regard to criminal (procedure) law in general – and more specifically the protection of rights of suspects and defendants – the Lisbon Treaty has at least three important consequences.

First of all, the Treaty has introduced several institutional changes, significantly simplifying the decision making process in the field of criminal law. With the Treaty of Lisbon, the three pillar system has been abolished leaving the EU with one institutional structure for all areas of activity with the directive as its main legislative tool and majority voting (instead of unanimity) as the main voting mechanism. This is important because – as the fate of the 2004 Framework Decision had made painfully clear – the unanimity rule dominating pre-Lisbon decision making on third pillar issues made it virtually impossible to reach consensus on procedural rights matters. The directive is also a more influential legislative tool than the framework decision, *inter alia* because according to the direct effect doctrine of the European Court of Justice (ECJ), unimplemented or badly implemented directives can actually have direct legal force. In addition, when the provisions of a directive are described unconditionally and are sufficiently precise, they leave the member state no room for interpretation and they must be strictly complied with.²⁵

As a result, it is fair to say that the Lisbon Treaty has considerably strengthened the legislative powers of the EU in the field of criminal (procedure) law. More specifically, the above-mentioned institutional changes have made it easier

²³ See also G. Vernimmen-Van Tiggelen, L. Surano and A. Weyembergh, The future of mutual recognition in criminal matters in the European Union, 2009. As the application of the European Arrest Warrant in practice shows, states try to find ways of not being obliged to cooperate with a state they don’t trust: C. Rijken, Re-balancing security and justice: protection of fundamental rights in police and judicial cooperation in criminal matters, *Common Market Law Review* 2010-47, p. 1456.

²⁴ Extensively on the Treaty of Lisbon: P. Craig, The Treaty of Lisbon, Process, Architecture and Substance, *European Law Review* 2008-33(2), p. 137-166.

²⁵ A. Klip, *European Criminal Law. An Integrative Approach*, second edition 2012, p50-51.

for the EU to draw up – by means of directives – (minimum) rules on, *inter alia*, the rights of individuals in criminal procedures.²⁶

Secondly, as a result of the Treaty of Lisbon, it is now possible for the EU to accede to the ECHR.²⁷ Debate about the accession of the EU to the European Convention had already been going on for decades but had not yet led to any concrete steps being taken. Official talks on the EU's accession started in July, 2010, and the European Commission has proposed negotiation directives but it is a complicated process which is expected to take several years.²⁸ Once the accession takes place, however, it is beyond doubt that this will have far-reaching consequences for the European system of human rights protection. With the EU expanding its activities in human rights protection, the division between the legal orders of the European Union on the one hand and the Council of Europe on the other, will become increasingly unclear. The complementary relationship between both organisations raises many complex legal questions on how the two organisations could and should coexist in the near future. For example, when the European Union will indeed accede to the ECHR, the ECHR and its control mechanisms will also apply to EU acts. This means that it will be possible for the ECtHR to examine whether the application and implementation of EU legislation is in conformity with Strasbourg standards. What if the ECJ's interpretation of ECHR norms differs from the interpretation given by the Strasbourg Court though and *vice versa*?²⁹

Thirdly, with the entering into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union (CFREU) has become legally binding.³⁰ Although there is debate on the added value of the Charter to the ECHR³¹, it is

²⁶ Art. 82 § 2 under b Treaty on Functioning of the European Union provides the explicit legal basis for such instruments: '*To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:(...)'.*

(b) the rights of individuals in criminal procedure;(...)

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.'

²⁷ Also, the fundamental rights as guaranteed by the ECtHR and as they result from the constitutional traditions common to the member states now constitute general principles of European Union law. See respectively art. 6 § 2 and 3 Treaty on the European Union.

²⁸ It seems that especially UK and France are obstructing the EU accession to the ECHR, see www.EuropeanVoice.com 26-1-2012 and www.Euobserver.com 19-4-2012.

²⁹ From a procedural point of view, it might be possible that a question on procedural rights is – for example in a preliminary ruling – answered in a certain way by the ECJ and subsequently brought before the ECtHR. Until now, the two courts generally respect and follow each other's judgments but there are already numerous examples of divergent interpretations, for example on the right to respect for private and family life (art. 8 ECHR). See on this matter: L. Rincón-Eizaga, Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts regarding interpretation of article 8 of the European Convention on Human Rights, *International Law: revista colombiana de derecho internacional* 2008-11, p. 134-144.

³⁰ Art. 6 § 1, Treaty on the European Union.

³¹ See for example Klip, p. 213: '*The added value of the Charter is limited because it does not offer much more or different rights than those that were already protected under the ECHR*'.

a fact that it creates a new, separate set of rights, freedoms and principles which can be used by the ECJ and national courts when interpreting EU law.³² The Charter includes – *inter alia* – the right to a fair trial and respect for the rights of the defence.³³

VII. The Roadmap on procedural rights

A few months before the entering into force of the Lisbon Treaty, the matter of procedural rights was explicitly put back on the EU's agenda by the European Commission.³⁴ Subsequently, the Swedish presidency presented a Roadmap on procedural rights in which Member States agreed that measures at European level were necessary.³⁵ In the Roadmap, strategic guidelines were formulated for developing an area of freedom, security and justice in Europe for the period 2010-2014. It was explicitly mentioned in the Roadmap that EU action in the field of procedural rights is essential for the purpose of enhancing mutual trust within the European Union and to complement and balance existing EU policy on law enforcement and prosecution. Furthermore, it was stressed that there was room for further action on the part of the EU to ensure full implementation and respect of Convention standards and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.³⁶

The Roadmap was adopted by the European Council on 10-11 December, 2009, as an explicit part of the Stockholm Programme, containing guidelines for a future common policy in the field of justice and home affairs.³⁷ In the Stockholm Programme, the European Council stated:

*“The protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union. The European Council therefore welcomes the adoption by the Council of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which will strengthen the rights of the individual in criminal proceedings when fully implemented. That Roadmap will henceforth form part of the Stockholm Programme.”*³⁸

³² See for the consequences with regard to the powerful legislative tools and effective control mechanism of the EU the Conclusion below.

³³ The right to an effective remedy and the right to a fair trial are laid down in article 47 of the Charter of Fundamental Rights of the European Union.

³⁴ Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen, COM (2009) 262 final, Brussels 20-6-2009.

³⁵ Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July, 2009, 11457/09, DROIPE 53, COPEN 120.

³⁶ Resolution of the Council of 30 November, 2009, on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01).

³⁷ Council of the EU, The Stockholm Programme – An open and secure justice serving and protecting the citizens OJ 2010 C 115/01.

³⁸ Council of the EU, The Stockholm Programme – An open and secure justice serving and protecting the citizens OJ 2010 C 115/01, § 2.4.

The Roadmap contains six measures which should – during the years 2010-2014 – result in legislation providing a minimum set of procedural rights within the European Union on the following topics:

- Measure A: Translation and Interpretation
- Measure B: Information on Rights and Information about the Charges
- Measure C: Legal Advice and Legal Aid
- Measure D: Communication with Relatives, Employers and Consular Authorities
- Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable
- Measure F: A Green Paper on Pre-Trial Detention.

According to the step-by-step approach chosen in the Roadmap, these matters should be dealt with one at a time. The first measure, dealing with the least controversial subject of the right to translation and interpretation, was adopted in 2010.³⁹

The second measure concerning the right to information, the Directive on the right to information in criminal proceedings was adopted in 2010 and has to be implemented by 2 June 2014.⁴⁰ Originally, Member States wanted to limit the scope of this directive only to suspects and defendants in cross border cases. This led to heavy criticism since such a limitation would result in differential treatment between citizens of the EU, and thus in discrimination.⁴¹ In the field of measure C of the Roadmap, dealing with the right to legal advice, the European Commission has also adopted a draft proposal that is currently negotiated.⁴²

VIII. Measure B: Information on Rights and Information about the Charges

The suggestion to inform suspects and accused persons of their basic rights was – at the European Union level – addressed for the first time by the Commission in its Green Paper of 19 February, 2003, on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.⁴³ The

³⁹ 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, OJ L 280, 26.10.2010, p. 1.

⁴⁰ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p.1.

⁴¹ See, for example, the Open Letter from several international human rights organizations to European Commissioner for Justice Viviane Reading (29-6-2010), available at: <http://www.soros.org/initiatives/brussels/news/criminal-proceedings-call-20100629/Open-letter-20100629.pdf>.

⁴² Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final.

⁴³ COM(2003) 75 final.

Commission stated that it is important for both the investigating authorities and the persons under investigation to be fully aware of existing rights and therefore suggested the institution of a scheme requiring Member States to provide suspects and defendants with a written note of their basic rights – a ‘Letter of Rights’. According to the Commission, this suggestion received a favourable response during its consultations prior to the Green Paper. In the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union of 28 April, 2004,⁴⁴ the Commission proposed a written Letter of Rights, notifying suspects of their rights to be introduced as one of the common minimum standards to be regulated in a framework decision.⁴⁵ To require Member States to produce a short, standard written statement of basic rights and to make it compulsory for all suspects at the earliest possible opportunity, especially before the first police interrogation, in a language that the suspect would be able to understand was, according to the Commission, a simple and inexpensive way to ensure an adequate level of knowledge. The Member States were unable to reach an agreement on the proposed text and the negotiations were stopped.

As mentioned above, on the eve of the Lisbon Treaty coming into force, the Swedish Presidency once again took up the issue of procedural safeguards by presenting a roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings which provided for a step-by-step approach.⁴⁶ According to the Roadmap, the second step, Measure B, is described as follows:

*‘Measure B: Information on Rights and Information about the Charges
Short explanation:*

The suspect or defendant is likely to know very little about his/her rights. A person that is suspected of a crime should get information on his/her basic rights in writing [ideally by way of a letter of rights]. Furthermore, that person should also be entitled to receive information about the nature and cause of the accusation against him or her. The right to information should also include access to the file for the individual concerned.’⁴⁷

⁴⁴ COM(2004) 328 final.

⁴⁵ Next to access to legal advice, access to free legal interpretation and translation, special features for vulnerable suspects and access to consular assistance.

⁴⁶ Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July, 2009, 11457/09 DROIPEN 53 COPEN 120.

⁴⁷ Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, 1 July, 2009, 11457/09 DROIPEN 53 COPEN 120.

IX. Research Project: An EU-Wide Letter of Rights

To gain insight into the matter, a study has been conducted on the way suspects in the EU Member States are informed of their rights in writing during criminal proceedings. In this study, a normative framework has been developed, based on the jurisprudence of the ECtHR to establish standards and a legal basis for information that should be given to the suspect in the initial phase of police investigations. Secondly, texts were gathered in all Member States as to how suspects were informed of their rights by means of standardised written information. These texts were analysed and, finally, a model has been designed for an EU-wide Letter of Rights to be applicable throughout the EU, which was intended to function as a source of inspiration for initiatives at national level as well as at EU level. The research was concluded in July, 2010.⁴⁸

The study revealed that in 17 (of the 27) EU Member States, suspects are informed of their rights by a Letter of Rights or in a similar standardised form. In the documents that were gathered, 12 topics could be identified as having been addressed, although in different compounds and with different frequency. All documents contain information on legal assistance, although to a lesser extent, information on legal aid is provided. In addition, the right to silence, to have contact with trusted persons, the right to interpretation and translation, medical care and consular assistance are also dealt with in a considerable number of Letters of Rights and similar forms. With lesser frequency, access to the file, information on charge or suspicion, detention and custody, provisions for vulnerable suspects, conditions of detention and participation in proceedings, are mentioned.

Significant differences could be observed as to how and in what kind of format the information is provided. In some Member States, information on rights is included in a standardised form of the record of the questioning of the suspect by the police, which clearly functions as a checklist for the interrogating officer who has to read out the suspect's rights to him. The suspect has to sign the form in order to record that the interrogating officer has performed his duty of cautioning the suspect.⁴⁹ Other Member States provide information in the form of leaflets or brochures that obviously are meant to be handed out to suspects.

An important aspect for a Letter of Rights or written information to be understandable is the language used. In many cases, the rights are formulated in very formal and legal language, even using lengthy quotations of legal provisions, which are probably very difficult for lay people to understand. There are also examples, however, of more or less successful efforts to draft the informa-

⁴⁸ T. Spronken, *An EU-Wide Letter of Rights, Towards Best Practice*, 2010.

⁴⁹ This is the case in the Czech Republic, Luxembourg and Estonia.

tion into a more simple and understandable form.⁵⁰ Where juveniles are concerned it has to be borne in mind that on average within the EU, children from the age of 15 years old are considered criminally liable. Some Member States, however, apply diverging age limits. In Cyprus, for example, children from the age of 7 can be considered liable and in France, children from the age of 10 are criminally liable.⁵¹ Letters of Rights should also provide understandable information for this category of especially vulnerable suspects.

Only a few Member States have the Letter of Rights available in different languages, something which is obviously detrimental for the effectiveness of a Letter of Rights for foreign suspects. England and Wales, Germany, Sweden and Belgium are noticeable exceptions to this rule, providing a Letter of Rights (respectively written information) that is translated in more than 40 languages.⁵²

Interviews conducted with practitioners provide evidence that Member States using a Letter of Rights appear to have a well-organised procedural framework to support it. The effectiveness of the Letter of Rights and its procedural framework is, however, very much dependent on the way it is brought into practice. The attitude of the police is pivotal to the question of whether or not the Letter of Rights is given in accordance with the underlying legal obligations. In general, the attitude of the police towards the Letter of Rights is that it is considered to be a nuisance, rather than a valuable procedural right for the defence. This means that the Letter of Rights is treated as a formality that gets in the way of the interrogation.

Consequently, in the opinion of the interviewed lawyers, the police often negatively impact the effectiveness or value of the Letter of Rights, for example, by discouraging the person deprived of his liberty to exercise his defence rights, not explaining these rights adequately or by starting with informal chats before informing about the defence rights. It therefore seems that in many Member States adequate instructions as to how and when to make the Letter of Rights available to the person deprived of his liberty is lacking.

The model for a pan-European Letter of Rights that has been developed within the aforementioned study, addresses the situation where a person is deprived of his liberty because he is suspected of having committed a criminal offence. The model contains the core basic rights that are applicable from the first contact that the suspect has with the police in relation to a criminal investigation and are based on norms derived from the ECHR and other international treaties.

⁵⁰ See, for instance, the Letters of Rights of Austria, Germany, Luxembourg and Spain in *Spronken*, Annex 1) and the written information provided in Belgium and Ireland.

⁵¹ See *Spronken and Attinger*, p. 81.

⁵² For the written information given to persons in administrative arrest in Belgium, see *Spronken* Annex 2.



Model EU-Letter of Rights for suspects and defendants in criminal proceedings

You are entitled to keep this letter of rights with you during your detention
If you are deprived of your liberty by the police because you are suspected of having committed an offence you have the following rights:

- A. to be informed of what offence you are suspected
- B. not to answer the police's questions or to give any statements to the police
- C. to assistance of a lawyer
- D. to an interpreter and translation of documents, if you do not understand the language
- E. to notify somebody of your deprivation of liberty
- F. to inform your embassy if you are a foreigner
- G. to know for how long you can be detained
- H. to see a doctor if you feel ill or need medicine

You can find more details on these rights inside A. Information on the suspicion

A. Information on the suspicion

- You have the right to know what offence you are suspected of immediately after deprivation of liberty, even if the police do not question you.

B. Right to remain silent

- You do not have to answer the police's questions nor give any statements to the police
- A lawyer can help and advise you on the law and help you to take decisions on whether or not to answer questions.
- If you want a lawyer, the police are not allowed to start questioning you before you have had the opportunity to talk with a lawyer.

C. Help of a lawyer

- You have the right to talk to a lawyer before the police start questioning you.
- If you ask to speak to a lawyer, it does not make you look like you have done anything wrong.
- The police must help you to get in touch with a lawyer.
- If you are not able to pay for a lawyer, the police have to provide you with information how to get free legal assistance.
- If you want to talk to a lawyer but do not know one, or cannot get in touch with your own lawyer, the police must take care of arranging that a lawyer is appointed for you in case you have a right to free legal assistance.
- The lawyer is independent from the police and will not reveal any information you give to him or her without your consent.

- You have the right to speak with a lawyer in private, both at the police station and/or on the telephone.
 - You can ask your lawyer to be present during the interrogation by the police.
- D. Help of an interpreter
- If you do not speak or understand the language, the police will arrange for an interpreter.
 - The interpreter is independent from the police and will not reveal any information you give him without your consent.
 - You can also ask for an interpreter to help you to talk to your lawyer.
 - The help of an interpreter is free of charge.
 - You have the right to receive a translation of any order or decision concerning your detention.
 - You have the right to have documents of the investigation translated that are important for a request for release (see under G).
- E. Telling somebody that you are detained
- Tell the police if you want someone, for example a family member or your employer, to be told that you are detained.
- F. For foreigners: how to contact your embassy
- If you are a foreigner, you can tell the police to inform your embassy or consular authority that you are detained and where you are being held.
 - The police must help you if you want to talk to officials of your embassy or consular authority.
 - You have the right to write to your embassy or consular authority. If you do not know the address the police must help you.
 - The embassy or consular authority can help you with finding a lawyer.
- G. How long can you be deprived of your liberty?
- You have the right to ask a judge for your release at any time. Your lawyer can advise you on how to proceed.
 - You or your lawyer can ask to see the parts of the case-file relating to the suspicion and detention or be informed about their content in detail.
 - If you are not released, you must be brought before a judge within * hours after you have been deprived of your liberty.
 - The judge must then hear you and can decide whether you are to be released or to be kept in custody.
 - You have the right to receive (a translation) of the judge's decision if he decides that you will remain in custody.
- H. Medical care
- If you feel ill or need medicine, ask the police to see a doctor.
 - You have the right to be examined by a doctor in private.
 - You can ask for a male or a female doctor.

X. Directive on the right to information in criminal proceedings

At the moment of finalising the results of the Letter of Rights-study, the European Commission presented a proposal for a directive on the right to information in criminal proceedings, including an indicative Model Letter of Rights inspired by the model developed in the study.⁵³ The most striking difference between the model and the proposed directive was that originally the latter did not address the right to silence. This gave rise to criticism in Council and the European Parliament and subsequently it was proposed that the suspect should also be informed of his right to silence⁵⁴ and finally the right to silence is mentioned in Article 3 par. 1 (d) as a right a suspect or accused should be informed on.

The fact that the right to silence was not included in the first draft of the proposed directive is a good example of the difficulties that are faced when trying to draft practical rules for the implementation of procedural safeguards aimed to be applicable throughout the EU. Evidently, the right to silence is considered to be one of the fundamental features of the concept of fair trial as formulated by the ECtHR, and the right is applicable immediately upon arrest or before the first questioning of a suspect.⁵⁵ It is therefore quite astonishing that this right would not be included in a directive setting minimum standards. The most likely reason for not including the right to silence in the first draft is that within Member States there might be certain restrictions or exceptions to the right to silence. This is the case in England and Wales, for example, where adverse inferences may be drawn from using the right to silence. Also, in some Member States the right to silence does not apply in situations where a person is not yet formally suspected of an offence.

In Annex I of the Directive an indicative model Letter of Rights is proposed addressing the right to assistance of a lawyer and entitlement to legal aid, information about the accusation, interpretation and translation, right to remain silent, access to documents, informing someone else about arrest or detention or informing the consulate or embassy, urgent medical assistance and period of deprivation of liberty. The model is less detailed than the model proposed in the study but drafted in comparable simple and accessible language. In addition model Letter of Rights is included for those who are arrested on the basis of a European Arrest Warrant.

XI. Research Project: Effective Criminal Defence in Europe

The research project, 'Effective Defence Rights in the EU and access to justice: investigating and promoting best practice' was conducted over a three year period commencing in September 2007 and concluded in June 2010. A team of 30

⁵³ COM (2010) 392 final.

⁵⁴ See draft Report of Committee on Civil Liberties, Justice and Home Affairs, 20 December, 2010, 2010/0215(COD).

⁵⁵ See ECtHR 18 February 2010, *Zaichenko v. Russia*, Application no. 39660/02, par. 42.

scholars and practitioners coming from nine jurisdictions have closely cooperated in order to produce comparable information for analysis. The jurisdictions involved are Belgium, England & Wales, Finland, France, Germany, Hungary, Italy, Poland and Turkey. The reasons for choosing these jurisdictions were that they constitute examples of the three major legal traditions in Europe: inquisitorial, adversarial and post-state socialist. Within the inquisitorial traditions, France and Belgium have a Napoleonic background while Germany and Italy have significantly departed from that tradition. Hungary and Poland as former 'East-bloc' nations had been required to make significant adjustments to their legal systems as a condition of EU membership. Turkey was included as a potential Member State of the EU, which was worthy of study in its own right.

The project team developed a detailed set of research questions to elicit information about the constituent elements of criminal defence. Based on the research questions, in-country researchers from the chosen jurisdictions – all experts in criminal law in their respective countries – provided information on their criminal justice system and the identified defence rights, using a structured approach provided by the project team. The results were discussed within the research team and finally described in country reports that were validated by independent in-country reviewers. The data of all nine jurisdictions involved in the study were analysed and conclusions and recommendations were made. The complete results, country reports, analysis and recommendations are published.⁵⁶

XII. The research questions

One of the main premises underlying this research was that effective criminal defence does not only require adequate legal assistance but also a legislative and procedural context, as well as organisational structures, that enable and facilitate effective defence being a crucial element of the right to fair trial. This argument is based on the presupposition that no matter how good legal assistance is, it will not guarantee fair trial if the other essential elements of fair trial are missing. Thus, effective criminal defence has a wider meaning than simply competent legal assistance. In the research, therefore, the assessment of access to effective criminal defence was approached on three levels:

1. Whether there exists a constitutional and legislative structure that adequately provides for criminal defence rights taking ECtHR jurisprudence, where it is available, as establishing a minimum standard.
2. Whether regulations and practices are in place that enable those rights to be 'practical and effective'.
3. Whether there exists a consistent level of competence amongst criminal defence lawyers, underpinned by a professional culture that recognises that effective defence is concerned with processes as well as outcomes, and in res-

⁵⁶ *Cape et al.*

pect of which the perceptions and experiences of suspects and defendants are central.

The baseline for the examination and assessment was the ECtHR jurisprudence on the rights set out in article 6 ECHR, and also the jurisprudence in articles 5, 8 and 10 ECHR where this concerns the right to release during the pre-trial phase, confidential lawyer/client communication, and freedom of speech in the context of criminal procedure.⁵⁷

It appeared from the analysis of each of the nine countries in the study that the various rights and standards cannot be considered in isolation from each other. Each has a dynamic relationship with some or all of the other rights. For example, the ability of a defence lawyer to effectively advise his or her client, whether at the investigative or trial stage, will be dependent on the information that is made available to them by the investigating or prosecuting authorities, and the timing of such disclosure.⁵⁸

XIII. Five major themes

From the country studies, five major themes emerged showing deficiencies in the mechanisms and judicial cultures to support effective criminal defence in practically all jurisdictions that were included in the study.⁵⁹

First, legal assistance is in many countries problematic, especially with regard to access to legal assistance, the timeliness of the access and the quality of legal assistance.

Secondly, legal aid, closely linked to the right to legal assistance, is often ineffective due to slow, unclear and complicated application methods. In addition, availability, quality and independence of criminal defence lawyers in legal aid cases proved to be inadequate, *inter alia*, due to low remuneration provided for legal aid work.

Thirdly, interpretation and translation are not always guaranteed and, in particular, problems arise with regard to which documents are to be translated and how this is funded.

The fourth theme concerns adequate time and facilities to prepare a defence. It is significant that criminal investigations and proceedings are largely conducted according to the needs, interests and timetables of the investigative and judicial authorities and do not take into account the needs of the suspect or accused. This is especially the case in the initial stages of the investigation of which it is acknowledged that this stage often has a determinative effect on the eventual outcome of the case. Problems arise with regard to the way suspects are informed of their rights, such as the right to silence, lack of clarity at what moment rights

⁵⁷ *Cape et al*, Chapter 2 The European Convention on Human Rights and the right to effective defence, p. 23-62.

⁵⁸ *Cape et al*, Chapter 13 The Effective Criminal Defence Triangle: comparing patterns, p. 573-580.

⁵⁹ *Cape et al*, Chapter 13 The Effective Criminal Defence Triangle: comparing patterns, p. 581-611.

become effective, time to prepare for pre-trial hearings, access to the case file, various forms of expedited proceedings that do not take into account the needs for an effective defence and no rights for independent investigation on behalf of the defence.

The fifth and final theme concerns the excessive use of pre-trial detention that in itself implies major concerns for the adherence to the presumption of innocence but which also impacts on the defence strategy. The right to pre-trial release is poorly developed in most countries and being in custody limits the ability of suspects to prepare their defence. These problems are exacerbated by the fact that under many jurisdictions, the material on which applications for detention are based is not disclosed to the accused, legal aid is, in practice, rarely available at this stage and if it is, lawyers tend to be passive to argue the case owing to low remuneration.

XIV. Measure C Right to Legal Advice and Legal Aid

In June 2011, the European Commission adopted a draft proposal for a directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest.⁶⁰ The objective of the directive is to lay down rules governing the rights of suspected and accused persons and persons subject to a European Arrest Warrant to have access to a lawyer in criminal proceedings against them, and rules governing the right of suspects and accused persons who are deprived of their liberty to communicate upon arrest with a third party.

The initial design of the proposed directive is ambitious. The aim is that the Directive should apply from the time a person is made aware by the competent authorities of a Member State that he is suspected or accused of having committed a criminal offence and it lays down, as a general principle, that all suspected and accused persons should have access to a lawyer as soon as possible, and at the latest, upon deprivation of liberty before the start of the questioning. Access to a lawyer must be granted upon and during questioning and, in principle, no derogation of this right should be possible. Article 4 of the initial proposal expressly states that the lawyer shall have the right to be present at any questioning and hearing and shall have the right to ask questions, request clarification and make statements that have to be recorded. In addition, the confidentiality of meetings between the suspect or accused person and their lawyer, and any other form of communication, should be ensured. The proposed Directive contains detailed conditions for the waiver of these rights.

The proposed directive is based on recent Strasbourg case law that has confirmed the importance of legal assistance for a proper defence in all its aspects and has made clear that the right to legal assistance arises immediately upon

⁶⁰ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final.

arrest. This case law is also referred to as the *Salduz* doctrine.⁶¹ Especially in the early stages of the criminal investigation, it is the task of the lawyer, amongst other things, to ensure respect for the right of the accused not to incriminate himself. The ECtHR has stressed that the principle of equality of arms requires that a suspect, as from the first police interrogation, must be afforded the whole range of interventions that are inherent to legal advice such as discussion of the case, instructions by the accused, the investigation of facts and search for favourable evidence, preparation for interrogation, support of the suspect and control of the conditions under which a suspect is detained.⁶² The ECtHR has even set standards for sanctioning breaches of the right to legal assistance by ruling that incriminating statements obtained from suspects who did not have access to a lawyer may not be used in evidence.⁶³

This directive proves to be more difficult to negotiate than the previous two on the right to interpretation and translation, and on the right to information, first because the impact on the jurisdictions that still have strong inquisitorial features will be immense. There still are Member States where the right for a lawyer to be present during interrogations is not safeguarded⁶⁴, where access is not granted immediately upon arrest⁶⁵ or where access can be restricted when the interests of the investigation so require.⁶⁶

The negotiations and debates between the Council and the European Parliament on the proposed directive on the right to access to a lawyer show that there are still differences of opinion on when and under what conditions access to a lawyer should be afforded, whether there may be restrictions on the principle of confidentiality of communications between the lawyer and the suspect, at what moment the right of a suspect who is deprived of his liberty to communicate with a third person or consular authority should be granted, whether it should be allowed to make temporary derogations to the right of access to a lawyer and whether the right of requested persons subject to a European Arrest Warrant should have access to a lawyer in the executing state.⁶⁷ In the trilogues⁶⁸ that began in September 2012 it became obvious that there are tensions between

⁶¹ Following the judgment of the ECtHR *Salduz v. Turkey* that has been confirmed, since in more than 100 other judgments of the ECtHR.

⁶² *Cape et al*, Chapter 2, § 4.3.

⁶³ ECtHR *Salduz v. Turkey*. See also more recently: ECtHR, *S balj v. Croatia*, Application no. 4429/09, Judgment of 28 June, 2011.

⁶⁴ The Netherlands, Ireland, see *Spronken et al*, p. 51. Belgium, France and Scotland changed their legislation after the *Salduz* judgment allowing lawyers early access to suspects during police interrogation.

⁶⁵ Austria, Germany, Denmark, Hungary, Ireland, Luxembourg, Sweden, see *Spronken et al*, p. 38-39.

⁶⁶ Such as supervision of communications in Austria, Belgium, The Netherlands, Poland, Romania, Tsjech Republic, Spain, Sweden and the UK., see *Spronken et al*, p. 49.

⁶⁷ See the amendments of the European Parliament, LIBE (PE474.063 and PE486.050) and the Council general approach 2011/0154(COD), 8032/12, 11 April 2012.

⁶⁸ Informal inter-cameral exchanges between Council and European Parliament (party leaders) in order to speed up the formal legislative procedure.

Member States as to the scope of the directive. Some want a narrow scope of application (for instance only to those deprived of their liberty or only for serious criminal offences) and wide derogations.⁶⁹ Others do not want to spelled out the modalities of providing a lawyer in detail.⁷⁰

Another hurdle will be its financial consequences for the Member States. The right to legal assistance is inextricably bound up with the right to legal aid. This is a controversial issue on which there is no conformity within the EU Member States regarding matters such as mechanisms to ensure that legal advice is available, minimum requirements regarding eligibility for legal aid as well as minimum quality criteria, and remuneration for lawyers providing legal assistance paid for by the state. The proposed Directive does not seek to regulate the issue of legal aid; that particular matter has been postponed to a later stage.⁷¹ However, it can hardly be expected that when negotiating the right to access to a lawyer Member States will not have the financial consequences in the back of their minds.

XV. Cross-border cooperation and effective criminal defence

Even if the outcome of the negotiations would result in an ambitious and well considered design of a directive to safeguard the right to legal assistance, it is questionable whether regulating access to a lawyer will be effective when other areas are not included simultaneously such as legal aid, access to the case-file, time and facilities to prepare a defence and drive back of systematic application of lengthy periods of pre-trial detention. The research project on effective criminal defence offers evidence that a holistic approach is needed. In addition it can be assumed that this is not only true within a national jurisdiction but also when judicial cooperation in criminal matters is concerned, like transfer and gathering of evidence. The European Evidence Warrant⁷² or the proposed Directive on the European investigation order in criminal matters⁷³ differ considerably from other mutual recognition instruments such as the European Arrest Warrant and measures that facilitate mutual recognition (i.e. the execution) of national decisions in criminal cases.⁷⁴ When a suspect is surrendered to another Member State the criminal investigation and trial is in principle conducted withing the jurisdiction

⁶⁹ France, Belgium, Luxembourg, the Netherlands and Ireland.

⁷⁰ Germany and Austria.

⁷¹ The so called Measure C2 that is currently subject of an impact assessment by the European Commission and a proposal for a directive is expected in 2013.

⁷² Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72, 30.12.2008.

⁷³ Proposal of the European Parliament and the Council for a Directive of the European Parliament and the Council regarding a European Investigation Order in criminal matters, 2010/0817 (COD), 9145, 29 April 2010.

⁷⁴ Such as the Framework Decision 2006/783/JHA on the application of mutual recognition to confiscation order, the Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and the Framework

of one single state. The impact of cross-border gathering of evidence in states with different rules for obtaining, admitting and assessing evidence has not been addressed in the proposed directive on the right to legal assistance, although the gathering of evidence in another jurisdiction may be crucial for the outcome of the trial of a suspect prosecuted in a different jurisdiction. The ECtHR has not only acknowledged that Article 6 ECHR is relevant also in the pre-trial phase as fairness of the trial may be prejudiced by initial failure to comply with its provision⁷⁵ but has also underlined the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial.⁷⁶ When cooperation in criminal investigation in the pre-trial phase is concerned, complex questions arise how this can be combined with a high level of procedural safeguards. What legal remedies should be available when investigative measures are used in another jurisdiction than the one in which the suspect is tried. How should equality of arms be safeguarded in cross-border investigations? In its case law on Article 6 ECHR the ECtHR applies as an overall criterion that the proceedings as a whole have to be fair, but what does this mean in terms of effective defence when a part of the investigations is conducted in another jurisdiction? The European Evidence Warrant only mentions in very broad terms that Member States should ensure that interested parties have legal remedies against the recognition and execution of a European Evidence Warrant, that any action by an interested party shall be brought before a court in the executing state and that the authorities of both the issuing and executing state should take the necessary measures to facilitate the exercise of the right to bring actions.⁷⁷ But how we should envisage this to work in practice still remains very vague.

XVI. Conclusion

The results of the study in the nine European countries demonstrate that effectiveness of criminal defence does not simply depend upon whether suspects have access to legal assistance. Effective criminal defence relies on the presence of, and interrelationship between, a range of principles, laws, practices and cultures. It is of paramount importance that rights are expressed in sufficient detail and supported by appropriate enforcement mechanisms and judicial cultures. It thereby has to be taken into account that defendants are mostly poor, which requires an adequate legal aid system. In order to be practical and effective, all components have to be in balance and require appropriate timing. For example without access

Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

⁷⁵ ECtHR 24 November 1993, *Imbrioscia v. Switzerland*, Application no. 13972/88.

⁷⁶ ECtHR *Salduz v. Turkey*, par. 54

⁷⁷ See art. 18 of the Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

to interpretation and translation, for example, it is hard to imagine how a defendant who does not speak the language could actually participate in the proceedings or communicate with his lawyer. Furthermore, the right to silence cannot protect the suspect from making incriminating statements when he is not aware or informed of this right before his interrogation. And last but not least, without a properly functioning legal aid system, access to adequate legal advice is unattainable for most suspects.

National governments clearly have an important role to play in establishing the legislative context within which effective criminal defence is possible. Evidential and procedural rules, and effective enforcement mechanisms, are of fundamental importance in ensuring access to effective criminal defence. Similarly, national governments have an important responsibility for establishing structures and providing resources to ensure that free legal assistance, as well as free interpretation and translation, are available in a timely fashion to those who cannot pay for this themselves.

As set out before, it has become increasingly clear that the Strasbourg human rights regime is not (sufficiently) able to make sure that national authorities pay due diligence to all the responsibilities mentioned above. The ECHR and the ECtHR jurisprudence that flows from it has been, and continues to be, of crucial importance in establishing European standards in relation to effective criminal defence but there are important limitations to the Strasbourg convention mechanism.⁷⁸ Some of them are practical, such as the backlog of cases waiting to be heard. Others are more systemic such as the *ex post* nature of the application process and the weak mechanisms for ensuring compliance with ECtHR decisions. Furthermore, the ECtHR has largely, and rightly, been reluctant to go beyond formulating broad requirements when it comes to certain crucial elements of effective criminal defence, such as the standards of criminal defence lawyers.⁷⁹

The current level of human rights protection in criminal proceedings is insufficient in practically all existing EU Member States. In addition new directives on EU cooperation such as the Evidence Warrant and the proposed Investigation warrant raise the question whether the current approach on the EU level to safeguard minimum standards is adequate. It shows that additional action at the European level is necessary and should be taken as soon as possible in order to strike a balance between trans border investigating and prosecuting powers and procedural safeguards for suspects and defendants. The European Union has recently taken up this task, developing a policy on procedural rights for suspects and defendants in criminal proceedings, but it is questionable whether the scope

⁷⁸ *Cape et al*, Chapter 2 § 8.1. and also, for example, G. Vermeulen and L. van Puyenbroeck, 'Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union', in: M. Cools, B. De Ruyver, M. Easton, L. Pauwels, P. Ponsaers, G. Vande Walle, T. Vander Beken, F. Vander Laenen, G. Vermeulen and G. Vynckier (eds.), *EU and International Crime Control*, 2010, p. 49.

⁷⁹ *Cape et al*, Chapter 2, § 4.6.

of this policy adequately responds the needs of effective defence in transborder cases.

Although, at this stage, there are still many uncertainties on how the EU policy on procedural rights will develop, it can be argued that the EU potentially has far more possibilities to enforce human rights standards than the Strasbourg institutions do. After all, with its powerful legislative tools and effective control mechanism, the EU is better equipped than the Council of Europe to ensure that national authorities establish the legislative framework to make effective criminal defence possible. The Lisbon Treaty has enhanced the role of the ECJ in relation to procedural rights and allows for minimum rules to be adopted in relation to rights of individuals. This has opened the way for enforcement mechanisms which have a character other than the *ex post* complaints to the ECtHR and can be of additional value to the Strasbourg control mechanism. The EU enforcement mechanism operates in a different way and provides for the general competence of the ECJ concerning questions of interpretation of the Treaty.⁸⁰ Every national court may in criminal proceedings ask the ECJ to give a preliminary ruling on a relevant issue. In addition, the European Commission has the power to bring a case against a member state for failing to fulfill its obligations under the Treaty. A finding that a member state has not brought its national legislation into compliance may result in financial penalties imposed by the ECJ. These possibilities will be especially relevant when directives on procedural safeguards have been adopted.

Only the future will tell whether the EU's potential in this respect can and will be used to the full. To a large extent, this will depend on the scope and contents of the legislative instruments foreseen in the Roadmap on Procedural Rights. Obviously, the step-by-step strategy chosen in the Roadmap has at least one advantage: small bits will be easier to swallow than the bigger portion which was served to the Member States in the 2004 proposal for a Framework Decision. However, there might also be a downside to the step-by-step approach: after all, as mentioned before, most of the procedural rights of suspects are complementary to each other and, therefore, it remains to be seen whether it is wise to deal with them separately.

The negotiations on the development of an EU policy on procedural rights are at a crucial stage right now. Measure C, in particular, concerns rather controversial topics on which there is little conformity between Member States, which makes it difficult to reach a balanced approach that fits into each jurisdiction, making effective criminal defence possible. It remains to be seen whether and how the planned directives will in fact force national authorities to create the necessary conditions for effective criminal defence. Only when this is the case will the European Union be able to fill the gaps which Strasbourg cannot fill by actually providing suspects and defendants with rights that are practical and effective.

⁸⁰ Art. 267 TFEU.

Prisoners' rights in the EU & procedural rights in the context of EU cross-border gathering & use of evidence in criminal matters

Gert Vermeulen*

I. Context

Back in 1999, the European Council endorsed the principle of mutual recognition (MR) as the bedrock of judicial co-operation in both civil and criminal matters within the EU. Aiming to eliminate all intermediate exequatur measures for the recognition of judicial decisions among the member states of the EU, MR was designed to create a situation whereby judicial decisions would no longer be treated differently or be subject to additional procedures because they were handed down in another member state. The 2000 European Council programme of measures to implement the principle of mutual recognition in criminal matters emphasised the benefits of MR by asserting that mutual recognition is not only designed to strengthen co-operation between member states but also to enhance the protection of individual rights and to ease the process of rehabilitating offenders.¹ The programme also highlighted that implementing the principle of mutual

* Professor of Criminal Law, Head of Department Criminal Law and Criminology, Ghent University. Director Institute for International Research on Criminal Policy (IRCP) (www.ircp.org). Extraordinary Professor of Evidence, Maastricht University. The current book chapter builds on research conducted on prisoners' rights in the EU (G. Vermeulen et al., *Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures*, 2011, Antwerp | Apeldoorn | Portland, Maklu, 310 p.; G. Vermeulen et al., *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States*, 2011, Antwerp | Apeldoorn | Portland, Maklu, 1006 p.) respectively procedural rights in the context of EU cross-border gathering & use of evidence in criminal matters (G. Vermeulen, *Free gathering and movement of evidence in criminal matters in the EU. Thinking beyond borders, striving for balance, in search of coherence*, Antwerp | Apeldoorn | Portland, Maklu, 2011, 52 p.; G. Vermeulen, W. De Bondt & Y. Van Damme, *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, 2010, Antwerp | Apeldoorn | Portland, Maklu, 254 p.; G. Vermeulen, W. De Bondt & C. Ryckman, *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Antwerp | Apeldoorn | Portland, Maklu, 2012, 402-412). Text-wise, it has essentially been compiled from (excerpts from) P. Verbeke, W. De Bondt & G. Vermeulen, 'To implement or not to implement? Mutual recognition of judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty', in: *European Criminal Justice and Policy. Governance of Security Research Paper Series (GofS)*, Volume 7, M. Cools, B. De Ruyver, M. Easton, L. Pauwels, P. Ponsaers, G. Vande Walle, T. Vander Beken, F. Vander Laenen, G. Vermeulen & G. Vynckier (ed.), 2012, Antwerp | Apeldoorn | Portland, Maklu, 17-39) and G. Vermeulen, *Free gathering and movement of evidence in criminal matters in the EU. Thinking beyond borders, striving for balance, in search of coherence*, Antwerp | Apeldoorn | Portland, Maklu, 2011, 52 p.

¹ Council of the European Union, 'Programme of Measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters', *O.J. C 12*, 15.1.2001.

recognition ‘presupposes that member states have trust in each other’s criminal justice systems’ and, that such trust ‘is grounded on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.’

The adoption of MR as the cornerstone of judicial cooperation in criminal matters within the EU has resulted in an extension of the EU *acquis* via a range of legal instruments designed to give effect to the ‘area of freedom, security and justice’ as envisaged by the Treaty of Amsterdam. One of these instruments is the 2008 Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU (hereafter: the Framework Decision (or FD Transfer of Prisoners)), which had to be fully implemented by the end of 2011.

Meanwhile, at the end of November 2009, i.e. on the eve of the entry into force of the Lisbon Treaty, the Council of the EU adopted a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings,² aimed at step-by-step upgrading of certain procedural rights in order to provide a better trust base for rolling out the MR principle. In the context of the current text, only measure F of this Procedural Rights Roadmap matters, in which the Council invited the Commission to present a Green Paper on pre-trial detention, expressing its worries on the matter as follows: ‘The time that a person can spend in detention before being tried in court and during the court proceedings varies a lot between the Member States. Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands’. Where the 2009 Roadmap still focused exclusively on matters of pre-trial detention, the actual Green Paper that the Commission issued in response in June 2011 (‘Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention’),³ rightly shifts attention to detention conditions as such and to the necessity to support the functioning of the FD Transfer of Prisoners.

Being aware of potential hazards, the European Commission called for the biggest study to date on member states’ material detention conditions as well as on early/conditional release and earned remission provisions and sentence execution modalities. This study was carried out by the Institute for International Research on Criminal Policy (IRCP) of Ghent University, which resulted in the publication of two books,⁴ which moreover were made available to the public by

² OJ C 295, 4.12.2010, 1.

³ European Commission, COM(2011) 327 final, Brussels, 14.6.2011.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0327:FIN:EN:PDF>.

⁴ G. Vermeulen et al, *Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures*, 2011, Antwerp | Apeldoorn | Portland, Maklu, 310 p.
http://ec.europa.eu/justice/news/consulting_public/0012/JLS-DC-FinalReport_en.pdf;

the European Commission itself when issuing in June 2011 its above mentioned Green Paper on the application of EU criminal justice legislation in the field of detention (*supra*). The broad nature of this project has involved various ways of collecting information so as to ensure the most complete understanding and overview of the issues involved, allowing for a proper problem analysis and precise recommendations addressing the problems identified (*infra*, 'EU prisoners' rights').

Further, it needs to be recalled that, picking up on the conclusion by the 1999 Tampere European Council that 'evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there', the Commission, in the explanatory memorandum to the European Evidence Warrant (EEW) as proposed by it in 2003,⁵ even if not addressing the issue of mutual admissibility of evidence in that instrument, expressed its intention to later deal with the issue, for which the Lisbon Treaty moreover has in the mean time created an explicit legal basis in the TFEU (Article 82.2, paragraph 2, under a). In 2003, the Commission referred back to its thinking on the matter as reflected in its 2001 Green Paper on the European Public Prosecutor⁶ that 'the prior condition for any mutual admissibility of evidence is that the evidence must have been obtained lawfully in the Member State where it is found. The law that must be respected if evidence is not to be excluded is first and foremost the national law of the place where the evidence is situated'. Nonetheless, the Commission pointed out that it had decided not to deal with the issue in its 2003 EEW proposal, because 'consultation with experts has identified the need for further preparatory work' and 'first, the admissibility of evidence should be facilitated by the inclusion of some procedural safeguards to protect fundamental rights'.

Consequently, in order to prepare future legislative initiative, the Commission in 2009 called for a 'Study on the laws of evidence in criminal proceedings throughout the European Union'. Again, this study was carried out by IRCP, Ghent University, resulting in early 2010 in the publication of a book,⁷ made widely available online.⁸ In connection to it, the Commission in November 2009 issued its 'Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility'⁹, confirming its dedica-

G. Vermeulen et al, *Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States* 2011, Antwerp | Apeldoorn | Portland, 1006 p.

http://ec.europa.eu/justice/news/consulting_public/0012/JLS-DC-FR_IRCP41_en.pdf.

⁵ European Commission, *Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters*, COM(2003) 688 final, Brussels, 14.11.2003, 13-14.

⁶ European Commission, COM (2001) 715 final, Brussels, 11.12.2001.

⁷ G. Vermeulen, W. De Bondt & Y. Van Damme, *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, 2010, Antwerp | Apeldoorn | Portland, Maklu, 254 p.

⁸ E.g. http://www.ecba.org/extdocserv/projects/EEW/JLS_Evidence_finalreport_review.pdf.

⁹ European Commission, COM(2009) 624 final Brussels, 11.11.2009.
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0624:FIN:EN:PDF>.

tion to table legal initiative on the matter, seeking a proper balance between the striving for enhanced mutual recognition in the domain of mutual assistance in criminal matters and procedural rights protection. In early 2010, the Commission's long-announced initiative was flagrantly frustrated by the upcoming Belgian EU Presidency's hunger to introduce a competing instrument – the so called European Investigation Order (EIO) – for which eventually it found the necessary supporting member states to qualify under the new Lisbon regime for effectively tabling it.¹⁰ In the mean time, it seems rather unavoidable that the proposed directive on the EIO will effectively be adopted in the nearby future. The Council already agreed on a general approach to the text of the proposed directive in December 2011, after which negotiations with the European Parliament were started. Even if the proposal has certain merits (the essential one being that it consolidates various existing instruments when it comes to obtaining evidence), it must be stressed that it hardly advances things when it comes to what really matters, i.e. the future of cross-border admissibility of evidence in the EU and procedural rights protection in that very context. IRCP, on the contrary, has continued to focus on the matter, inter alia in the context of its major study (also for the European Commission) on the future institutional and legal framework of judicial cooperation in criminal matters in the EU,¹¹ again published as an open access book.¹² It is my strong conviction that, in addition to general flanking measures through the Procedural Rights Roadmap, specific procedural rights attention is required when it comes to the future introduction of mutual recognition of evidence in the EU (*infra*, 'Procedural rights in the context of EU cross-border gathering & use of evidence'). The debate on the issue is urgent, as are enhanced awareness amongst and commitment from defence lawyers.

II. EU prisoners' rights

A. Introduction

Because the aforementioned 2008 FD Transfer of Prisoners implies a shift from a voluntary to an often obligatory prisoner transfer system – i.e. where the consent of the detained person is no longer necessary – the introduction of this instrument immediately sparked discussions as to whether the operation of the instrument would be compatible with its very objective, being the enhancement of detained persons' social rehabilitation prospects. Viviane Reding, EU Commis-

¹⁰ The Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Grand Duchy of Luxembourg, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden, *Initiative for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters*, 9145/10 COPEN 115 CODEC 363 EUROJUST 47 EJM 12, Brussels, 29 April 2010.

¹¹ JLS/2009/JPEN/PR/0028/E4.

¹² G. Vermeulen, W. De Bondt & C. Ryckman, *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, Antwerp | Apeldoorn | Portland, Maklu, 2012, 767 p.

sioner for Justice and Vice President of the European Commission, highlighted a range of concerns relating to prison conditions in EU member states.¹³ She focused in particular on the problem of prison overcrowding, stating that in over 50% of EU countries the prison occupancy rate is now more than 100%; in four countries, this figure even exceeded 120%. Citing both the European Convention on Human Rights and the EU Charter of Fundamental Rights, the Commissioner warned that inhuman or degrading prison conditions had the potential to seriously undermine these new EU rules on prisoner transfer. However, prison conditions are not the only factor that has to be taken into account. Transferring detained people back to their respective member state of origin is precarious in light of the often substantial variety of member states' legal systems with regards to sentence execution modalities and provisions of early/conditional release. These differences could easily result in a deteriorated detention position for the detainee as a consequence of a transfer. As foreseen under measure F of the Procedural Rights Roadmap (*supra*), the Commission also issued a Green Paper on detention, be it rather late, in June 2011, i.e. when in a number of member states, the (preparatory) legislative processes had already started.

Lagging behind with the implementation of European instruments can be considered to be an inherent characteristic of member states' administrations. In the case of this Framework Decision however it is to be hoped that the above mentioned problems have been recognized by the member states as to explain why the implementation status across Europe is very poor. So far, only ten member states seem to have effectively implemented the Framework Decision.¹⁴

In this context, member states should (have) be(en) encouraged to take account of the hereafter recommended flanking measures (as identified by the IRCP study) whilst implementing the instrument in their domestic regulations. Not only could the adoption of these measures (have) enhance(d) neat, smooth and adequate cooperation; transfer decisions would also less likely (have) be(en) scrutinised because the respect for the (fundamental) rights of prisoners would be guaranteed.

¹³ Viviane Reding Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship The Future of European Criminal Justice under the Lisbon Treaty Speech at the European Law Academy Trier, 12 March 2010.
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/89&type=HTML>.

¹⁴ Council of the European Union, 6345/2/12 REV 1 COPEN 34 EJM 10 EUROJUST 13, Brussels, 18 September (Belgium, Denmark, Italy, Malta, Austria, Poland, Slovakia, Finland, United Kingdom); Council of the European Union, 14427/12 COPEN 217 EUROJUST 93 EJM 76, Brussels, 1 October 2012 (The Netherlands).

B. Problem analysis

A thorough study of the Framework Decision's content, coupled to the survey results obtained in the context of the IRCP study, identified five vast categories of problems, which below are dealt with consecutively.

1. Social rehabilitation

The particular problems faced by those imprisoned abroad have been well documented and appear to constitute a cogent case for a more proactive approach on the part of European law and policy makers to ensure that increased opportunities are afforded to convicted prisoners to serve their sentence in their country of origin because this optimises their social rehabilitation prospects.¹⁵

The European Court of Human Rights' deliberations in the case of *Dickson v. The United Kingdom* (ECtHR, 2007)¹⁶ are of significance here, not so much because of the judgement reached, but because of the prominence given to articulating the objectives of a prison sentence during its reasoning. In this judgement, the ECtHR endorsed the principles it viewed as central to rehabilitation in the context of a responsible prison regime, thereby providing a benchmark against which other regimes can reasonably be assessed.¹⁷ The Chamber judgement cites the evolution in penal philosophy and functions traditionally assigned to punishment, noting that in recent years there has been a trend towards placing more emphasis on rehabilitation as demonstrated by a range of Council of Europe legal instruments. While rehabilitation was initially construed as a means of preventing recidivism, more recently and more positively, it has been taken to constitute the idea of re-socialisation through the fostering of personal responsibility. This objective has been reinforced by the development of the 'progression principle' which entails that in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release. Because of the specific emphasis on preparation for release, it is important that the sentence is executed in the country with which the individual has the closest links. Recital 9 therefore contains a non-exhaustive list of criteria which competent authorities of the issuing state

¹⁵ A. Van Kalmthout, F. Hofstee-van der Meulen & F. Dünkel (Eds.), *Foreigners in European prisons*, 2007, Nijmegen Wolf Legal Publishers; S. Snacken, J. Keulen, L. Winkelmanns L., *Buitenlanders in de Belgische gevangenissen – knelpunten en mogelijke oplossingen*, 2005, Brussels, VUB. See also Council for Penological Co-operation (PC-CP) 2nd plenary meeting (28-30 March 2012) – Draft Recommendation concerning Foreign Prisoners. <http://www.coe.int/t/dghl/standardsetting/prisons/PCCP%20documents%202012/PC-CP%20%282012%29%20OJ%201%20Bil%20-%20March%202012.asp>

¹⁶ Case of *Dickson v. The United Kingdom*, Strasbourg 4th December 2007.

¹⁷ D. Van Zyl Smit & S. Snacken S., *Principles of European Prison Law and Policy. Penology and Human Rights*, 2009, Oxford, University Press, 106.

should take into account when reaching a decision as to whether or not the enforcement of a sentence in the executing state will in fact enhance the possibility of the sentenced person's social rehabilitation prospects. These criteria are: 'the person's attachment to the executing state, *whether he/she considers* it the place of linguistic, cultural, social or economic and other links to the executing state'. From the wording of this provision it can also be concluded that transfer decisions will have to be considered on a case by case basis, taking into account the specificity of the individual's situation.

The principle of article 3.1 FD Transfer of Prisoners – that enforcement of a sentence in the executing state should enhance the possibility of the social rehabilitation of the sentenced person, – implies that no competent authority can ever take a decision to transfer a prisoner or recognise and enforce a sentence when this would not be the case. Such an assessment seems to necessitate consideration of both the conditions to which that individual would be subjected as a result of a transfer to the executing state (*rehabilitation*) and the individual's personal situation (*social* rehabilitation). For such a process to be successful however, both information concerning the executing state's prison regime and aftercare arrangements as well as information on the individual's links with the executing state will be required. Such information will allow both issuing and executing states as well as prisoners to make informed judgements about whether the social rehabilitation test contained in the Framework Decision can be effectively met.

Alarminglly however, only 67% of practitioners indicated that they thought the terms of the Framework Decision required member states to assess the social rehabilitation of prisoners on a case by case basis rather than assuming that serving a sentence in the prisoner's home state would automatically facilitate their social rehabilitation. Coupled with the remarkable results that over 20% of all respondents did not consider it to be important to have information on material detention conditions in the prison of the executing state, on a prisoner's home circumstances in the executing state and on education, work and training facilities in the executing state's prison system, it can be concluded that there is reason for concern here. In this context it is to be hoped that member states take their responsibilities in respect of assessing the prospects of a prisoner's social rehabilitation seriously and do not choose to use the Framework Decision as a blunt instrument by which foreign prisoners with EU nationality can be routinely sent back to their country of origin. Such an interpretation may seem easier to justify from the perspective of member states who are likely to be 'net exporters' of prisoners but it is unlikely that member states who will be required to accept large numbers of prisoners will share this view.

The legal framework questionnaire results also identified that some member states have not – to a satisfactory degree – incorporated some standards that are specifically related to the 'progression principle' and to education and recrea-

tion.¹⁸ This is a worrying observation since these standards directly relate to the social rehabilitation prospects of the detainees.

In addition to this, the lack of information on member states' prison regimes, the insufficient incorporation of material detention conditions which could potentially violate prisoners' fundamental rights as well as the significant variations between member states with regard to their sentence execution modalities and early/conditional release provisions (*infra*), will make it even harder for competent authorities to make an informed and well founded decision as to whether or not a transfer decision truly enhances the possibility of the sentenced person's social rehabilitation.

2. Knowledge and (access to) information

A good functioning of all European cooperation instruments evidently presupposes that the people who are involved with its implementation and application in practice have a good knowledge of its content and its effects.

The above mentioned survey results in light of the assessment of prisoners' social rehabilitation prospects have already indicated that too many professionals involved have – or at least at the moment of responding to the questionnaires – insufficient knowledge of the content, aim and practical implications of the Framework Decision. This conclusion is also supported by the respondents' answers to the following case study:

Mr. E.T., a national of member state A, was arrested, tried and convicted for assault in the city of X in member state B. The assault took place following a football match. Mr. E.T. moved to member state B from member state A six months ago and since then has had a number of temporary jobs in the city of X. He was sentenced to three years imprisonment for the assault and has currently served two months of his sentence in a prison in member state B. Mr. E.T. has limited knowledge of the language in member state B. Mr. E.T. has indicated that he does not wish to return to member state A despite the presence of his family and many close friends there. He cites the poor state of the economy and his increased chances of finding work as the main reasons for wishing to remain in member state B following the completion of sentence. Without making any

¹⁸ For example: Only 58% of the member states sampled adopted laws or policies requiring that a – periodically reviewable – sentence management plan will be prepared for each prisoner serving a sentence of 12 months or over as soon as practicable after their admission and which provides for, inter alia, the welfare and health needs of the prisoner, training, employment or education needs he/she may have, and include a release plan for the prisoner; only 54% of the member states sampled adopted laws or policies ensuring that prisoners shall have access to a well-stocked library at least once a week; only 67% of the member states sampled adopted laws or policies requiring work to be incorporated as a positive aspect of prison regimes and only 67% of the member states sampled adopted laws or policies ensuring that, subject to the constraints of the particular prison and the maintenance of good order and security, prisoners shall be entitled to spend as much time out of their cells as is possible.

further enquiries, the authorities of member state B, as the issuing state, have now taken the decision to authorize Mr. E.T.'s transfer.

Here, 65% of all respondents stated that the transfer could be authorized under the Framework Decision. However, according to Article 6 of the Framework Decision, Mr. E.T. cannot be transferred to member state A without his consent as he is currently living in member state B (safe in the case where the original judgment was accompanied by an expulsion order).

In addition, too many respondents felt that important information on which to base transfer decisions is not readily available, or cannot easily be sourced. This information not only concerns material detention conditions in the executing state, but also includes more information on an executing state's sentence execution modalities and its early/conditional release provisions. Almost half (43%) of all respondents felt that the information to make an assessment on the social rehabilitation prospects of prisoners under the Framework Decision is not readily available (with another 24% of all respondents feeling unsure about this). This too is a major reason for concern as it could make member states hesitant to use the Framework Decision on the one hand – when not enough information is at hand – or lead to increased legal action – when decisions are based on insufficient information – on the other.

3. *Material detention conditions*

The European Convention on Human Rights and Fundamental Freedoms (ECHR) and its associated protocols afford a range of rights and freedoms to all those within the jurisdiction of a contracting party. Although the ECHR does not contain any specific provisions relating to prisoners' rights, it does protect some of their fundamental rights as human beings. Of particular significance with regard to detention conditions are the provisions of Article 3 (prohibition of torture, inhuman or degrading treatment), Article 5 (right to liberty and security), Article 6 (right to a fair trial) and Article 8 (right to respect for privacy and private life).

The ECtHR has been of particular importance in highlighting issues related to material detention conditions and the rights of prisoners. Jurisprudence is continually evolving, determining new obligations and acceptable minimum standards regarding the treatment of persons deprived of their liberty. The Court's attention has broadly focused on two key areas: physical detention conditions and health provision.

The ECtHR's jurisprudence has significantly been affected by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment (the CPT), the European Prison Rules (EPR), and by a growing number of specialist Rules and Recommendations (from the Committee of Ministers of the Council of Europe) that deal in more detail with a range of issues such as the medical treatment of prisoners.

It should also be noted that the influence of the ECHR in respect of material detention conditions has also been manifest at member state level as demonstrated, for example, by the case of *Napier v. The Scottish Ministers* (2004), whereby the Scottish Court of Session (Appeal Court) upheld a complaint brought by a prisoner that lack of access to in-cell sanitation constituted an infringement of human right not to be subjected to inhumane and degrading treatment under Article 3 of the Convention.¹⁹

The legal questionnaire results as well as the analysis of the practical EU reality clearly indicate that sub-optimal implementation of some material detention norms and standards – some of which are legally binding – on a national level is a growing reason for concern.

The most troubling findings of the survey concern the following areas:

- overcrowding: cell sharing, cell size and cell capacity;
- sanitation facilities, clothing, bedding and nutrition: privacy, screening and appropriate clothing;
- health care: injury detection, women’s health care, forced feeding and hunger strikers, monitoring prisoners at risk of suicide, medical examination (upon arrival), accommodation of vulnerable prisoners and all monitoring of prisoners in special cells;
- other: special cells/recording-staff contact-monitoring, security assessments, protection status and strip searches.

These shortcomings may be perceived as undermining both the object of social rehabilitation of the convicted person and the stated commitment to human rights which underpins the mutual recognition process and which is repeatedly articulated within the Framework Decision. In this regard, the on-going concerns raised by the CPT concerning prison conditions alongside the ECtHR’s jurisprudence become highly significant in that both may influence an issuing state’s decision-making concerning prisoner transfer or it may be used by prisoners to raise a legal challenge arising from a compulsory transfer.

However, prisoners who want to establish an infringement under the ECHR will need to put forward a strong case where a concurrence of circumstances has led to a violation of one or more of their fundamental rights. A mere violation of the EPR or a fragile CPT report does not constitute sufficient grounds for legal action. This is regretful as many commitments derive from legally binding instruments and documents for which there seems no satisfactory enforcement mechanism in place. The question can therefore be raised whether or not the EU

¹⁹ Scottish Courts website – <http://www.scotcourts.gov.uk/opinions/P739.html>.

should aim higher than the standards put forward by the Council of Europe in light of the ECtHR's judgements.

4. *Double criminality, sentencing equivalence and sentence execution*

The recognition and enforcement of judgements by an executing state undeniably requires knowledge on the behaviour underlying the offence that is the basis of the conviction. Executing states may choose to make recognition of the judgement and enforcement of the sentence subject to the condition that it relates to an act which is also an offence under the law of the executing state itself (Article 7.3). Mirroring the provisions of the Framework Decision on the European Arrest Warrant however, Article 7.1 FD Transfer of Prisoners sets out a list of 32 offences for which the establishment of double criminality by an executing state is no longer required. This provision is optional in that member states are empowered to opt-out should they so wish.

The abolition of the double criminality requirement for some offences leaves us with the question on how member states should handle execution in situations where the offence is not criminally actionable in the executing state, since some of the execution principles might be dependent on the underlying offence.

Articles 8.2, 8.3 and 8.4 FD Transfer of Prisoners permit an executing state to adapt an issuing state's punishment where the original sentence is incompatible with its laws. Two grounds for adaptation are established by the Framework Decision. First, where the sentence imposed is incompatible in terms of duration, adaptation can occur but only when the sentence exceeds the maximum penalty provided for similar offences under the law of the executing state. In such circumstances, the adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing state. Second, where the sentence imposed is incompatible in terms of nature, an executing state may adapt to the punishment or measure provided for under its own law for similar offences. Such punishments must correspond as closely as possible to the sentence imposed in the issuing state and cannot involve conversion to a financial penalty.

In each instance, the adapted sentence shall however not aggravate the sentence passed in the issuing state in terms of either its nature or duration. However, it is unsure on which grounds a competent authority will decide on the fact whether or not the adaptation has deteriorated the sentenced person's detention position.

Article 17.1 determines that the enforcement of a sentence shall be governed by the law of the executing state whose authorities are afforded competence to decide on procedures for enforcement and determination of any related measures. This includes the grounds for early/conditional release and earned remission. Here, there is no provision in the Framework Decision specifying that the sentence execution practices of the executing state should not aggravate the prisoner's detention position.

Article 17.3 of the Framework Decision allows an issuing state to request information from an executing state regarding the applicable provisions concerning early or conditional release which the executing state is duty bound to supply. The issuing state is thereafter able to withdraw the certificate underpinning sentence transfer (presumably on the basis of concerns relating to these early release provisions).

It is striking that the Framework decision does not deal with the other side of the problem: the prisoner who, as a result of the transfer, will end up spending a significantly longer time in prison than what he/she would have had to serve if the transfer had not taken place. Possibly even more than the mere duration of the sentence, early/conditional release provisions truly determine the severity of the sanction and thus whether or not a situation is aggravated or not.

In the case of *Szabó v Sweden* (ECtHR 2006)²⁰, the Court raised a number of interesting issues in respect of early release provisions when a prisoner is transferred to serve his sentence in a country other than that in which he was tried, convicted and sentenced. Of particular relevance to this assessment is the fact that the Court may in fact be willing to uphold a complaint in relation to harsher early release arrangements, but only if the *de facto* period of imprisonment is *flagrantly* longer in an executing state than in an issuing state.²¹ *Flagrantly*, according to the Court's reasoning, would seem to be defined using a test based on the principle of proportionality between the actual sentence to be served under the conditional release programme in the executing state and that which would have been served under the conditional release programme of the issuing state. It is open for speculation as to whether the increase of 20% deemed acceptable in the case of *Szabó* is in fact the highest permissible variance in *de facto* sentencing for cases of this type.

Although establishing offence equivalence in light of prisoner transfers seemed unproblematic to some respondents, in practice this will not always be straightforward. Similarly, it remains to be seen whether or not the abolishment of dual criminality for some crimes will prove to be effortless operational in practice. It also remains unsure whether or not sentence adaptations will not deteriorate the prisoner's detention situation, even though 45% of respondents

²⁰ Case of *Szabó v. Sweden*, Strasbourg 27th June 2006. The applicant, a Hungarian national, was convicted of drugs offences in Sweden and sentenced to a period of ten years imprisonment with the Swedish Court also ordering that he be permanently expelled from Sweden. Under Swedish law, the applicant would normally have expected to be conditionally released after serving two thirds of such a sentence (in casu six years and eight months). Under the terms of the Additional Protocol to the 1983 CoE Convention on the Transfer of Prisoners, the applicant was transferred to Hungary to serve the remainder of his prison sentence there. The applicant declared that he did not consent to such a transfer. The provisions for conditional release under Hungarian law were however, somewhat more stringent than those in Sweden with prisoners (dependent on regime) only becoming eligible for conditional release after serving four fifths of their sentence. This effectively entailed that the applicant would be detained in prison in Hungary for sixteen months longer than would have been the case had he remained in Sweden.

²¹ D. Van Zyl Smit & S. Snacken, *Principles of European Prison Law and Policy. Penology and Human Rights*, Oxford, 2009, University Press, 319.

felt that determination of sentencing equivalence would not prove problematic (30% of respondents disagreed with a further 24% professing themselves to be uncertain).

More worrying is the immense variety in member states' sentence execution modalities and early/conditional release, earned remission and suspension of sentence provisions. As argued before, there is no mentioning in the Framework Decision of a principle stating that the enforcement of a sentence by the executing state should not aggravate a sentenced person's detention situation. Coupled to the often enormous variations in the member state's enforcement systems, 46/47% of respondents felt that these differences would make people reluctant to use the Framework Decision. The use of the Framework Decision in situations where the *de facto* period of detention is prolonged could potentially lead to more legal action similar to the above mentioned Szabó case.

5. *The sentenced person in the transfer process: exposed to a compulsory stem without procedural safeguards*

The shift to a compulsory system of prisoner transfers is a highly significant departure from the voluntarist principles which underpin the 1983 CoE Convention on the Transfer of Sentenced Persons. Article 6.1 of the instrument stipulates that a judgement may only be forwarded to the executing state with the consent of sentenced person.

This provision is however substantially qualified by Article 6.2 which states that the sentence transfer process can proceed without the consent of a sentenced person when the judgement is forwarded for execution to:

- the member state of nationality in which the convicted person lives;
- the member state to which he/she will be deported following completion of his/her sentence;
- the member state where to he/she has fled in view of the criminal proceedings pending against him/her in the issuing state.

The locus of initiation for transfer of a judgement is assumed to lie with the issuing state. Whilst the Framework Decision affords prisoners the right to initiate the sentence transfer process, the issuing state is not obliged to accede to such a request. Potential executing states can also initiate the transfer process, albeit again with the proviso that the issuing state is not obliged to accede to such a request (Article 4.5).

In all cases where the sentenced person is still in the issuing state, he/she must be provided with the opportunity to state his/her opinion which will be taken into account when deciding whether or not a sentence transfer will proceed (Article 6.3). After this, the judgement and certificate can be forwarded to the

competent authority of the executing state under the terms of Article 5. The competent authority in the executing state shall decide as quickly as possible whether or not to recognise the judgement and enforce the sentence and shall inform the issuing state thereof, including of any decision to adapt the sentence (Article 12.1). Whether or not the executing state's competent authority should give details on how they will specifically adapt the sentence remains unclear from the Framework Decision's wordings. Article 12 should be read together with Articles 17.1 and 17.3: the competent authority in the executing state should only confirm that they recognise and will enforce the judgement without giving any details on how they will specifically enforce the judgement. According to Article 17.3, the competent authority of the executing state shall, (only) upon request, inform the competent authority of the issuing state of the applicable provisions on possible early or conditional release.

This procedure implies that the opinion of the sentenced person (who has no right to legal representation, save in exceptional circumstances) precedes decisions by the executing state's competent authority on the specific adaptation and enforcement of his/her sentence. However, a prisoner cannot be expected to give his/her solid and well-founded opinion on the transfer process if he/she has no information on these issues. Furthermore, a prisoner cannot be expected to give his/her solid and well-founded opinion on whether or not a transfer would be in his/her best interests with regard to his/her social rehabilitation prospects, if there is virtually no information available on a member state's material detention conditions, sentence execution modalities and early/conditional release provisions (*supra*). All of this renders the sentenced person's opinion meaningless.

The procedure as introduced by the Framework Decision not only obstructs the prisoner from giving an informed opinion on his/her social rehabilitation prospects; it is also unclear how an issuing state's competent authority can evaluate these prospects as the same reasoning applies to the issuing authority's decision as well.

Responses to the practitioners' questionnaire indicate that 58% of respondents feel that the compulsory nature of prisoner transfers under the Framework Decision increases the chance that a prisoner could be removed, expelled or extradited to a member state where there is a serious risk that they would be subject to torture or other inhuman or degrading treatment or punishment in breach of Articles 2 and 19 (2) of the EU Charter of Fundamental Rights.

Similarly, the absence of any right to legal assistance during the prisoner transfer process or a judicial hearing if he/she objects to a transfer were also identified by respectively 67% and 63% of respondents as increasing the chance that a prisoner could be removed, expelled or extradited to a member state where there is a serious risk of torture or other inhuman or degrading treatment or punishment. Survey results also show that 67% of all respondents agreed to the fact

that the designation of a non-judicial body as the competent authority increases this risk.

C. Flanking measures needed

Based on the problem analysis and the practitioners' responses to the IRCP study, a series of flanking measures have been recommended. Below follows a non-exhaustive overview of them, organised in four clusters.

1. Implementation handbook, training and monitoring & enhanced (access to) information

In light of the above mentioned survey results, it was not surprising that 78% of all respondents (and 72% of all competent authority respondents) felt that it would be helpful for the European Commission to clearly define member states' responsibilities in relation to the assessment of social rehabilitation under the terms of the Framework Decision. A large majority of 86% of all respondents therefore thought it would be helpful for the European Commission to develop an implementation handbook.

The circulation of an implementation handbook could be accompanied by workshops for competent authorities for an even better functioning of the Framework Decision. The European Judicial Training Network (EJTN) could play an important coordinating role in this regard.²²

In addition, it could also be advised to instigate a monitoring system to evaluate the operation of the Framework Decision for a limited time in the beginning stages.

The necessity of a case by case approach implies that transfer decisions should be substantially underpinned. This approach is substantially at risk when relevant information is not readily available or cannot easily be sourced, especially with regard to the relatively tight timings that apply. Therefore, 91% of all respondents thought it would be helpful to have a central point in each member state from where information on that state's prison system, sentence execution modalities and conditional/early release provisions could be sourced.

Although it is important for competent authorities to have sufficient information on an issuing or executing state's prison and sentence enforcement system, there is more information that could be of major relevance before deciding on the transfer of a prisoner. As the law in the books does not always comply with the practical reality, competent authorities and prisoners may also have to be informed of related documents and judgements such as CPT reports, national prison inspection reports, ECtHR's judgements and national jurisprudence concerning prison conditions on each member state. A large majority of 89% of all respondents agreed it would be helpful to have a central European information

²² <http://www.ejtn.net>.

point from where this information could be sourced. From a practical point of view, the ideal course of action could be the instalment of a web application where all relevant information could be uploaded and sourced by all parties concerned. Here, the European Judicial Network (EJN) could play an important role.²³

2. *Increasing CPT inspections, monitoring systems and best practice promotion & introducing binding European minimum standards for material detention conditions*

The CPT delegations carry out visits on a periodic basis (usually once every four years), though additional ‘ad hoc’ visits are carried out when necessary. Over 65% of all respondents in the survey felt that increasing the frequency of the CPT inspections would improve prison conditions within the EU. The major impediment however with regard to increasing the frequency of the CPT visits is the lack of sufficient funding. The EU could play a vital role here by providing assistance to the CPT in order to enhance its operation and various formula could be envisaged such as the co-financing of additional CPT visits to EU member states.

In addition, the 2006 Optional Protocol to the United Nations Convention against Torture (OPCAT) created a new system of regular visits to places of detention to prevent ill-treatment of detainees: on a national level, states must set up or designate National Preventive Mechanisms (NPMs) to carry out monitoring of prisons. The EU and the Council of Europe jointly fund a project promoting the establishment of an active network of NPMs in Europe to foster peer exchange and critical reflection and it seems reasonable that this system should further be encouraged.

Similarly, the Stockholm Programme stated that efforts were needed to promote the exchange of best practices and to support the implementation of the EPR. The Commission already supports a number of prison related activities via different financial programmes with activities ranging from studies on prison conditions to practical projects on education, training and social inclusion, as well as on the re-integration of ex-offenders. This too could further be encouraged and elaborated.

Earlier, the question as to whether or not the EU should aim higher than the implementation of standards put forward by the Council of Europe in light of the CPT reports, the EPR and the ECtHR’s judgements was touched upon.

However, the soft law status of the Council of Europe’s Rules and Recommendations, such as the EPR, is not as clear as it may appear. As stated before, these instruments are getting increasing recognition by way of the ECtHR’s jurisprudence and reports from the CPT as well as by some national courts, thus enforcing their significance. As argued elsewhere though, the ECtHR continues to accept that imprisonment inevitably leads to a restriction of prisoners’ rights and that this implies that conditions in prison must attain a certain level of sever-

²³ <http://www.ejn-crimjust.europa.eu/>.

ity before the rights under the European Convention on Human Rights become applicable.

Hence, it is reasonable to raise the question whether or not the EU should aim higher than the Council of Europe standards by introducing its own binding minimum detention standards. It was not that surprising that 81% of respondents were in favour of the EU introducing binding minimum detention standards: this figure rose to 83% were such standards to include limits for the occupancy of prison cells and to 89% if binding standards addressed prisoners' health care provisions.

The question remains however whether or not it is opportune for the EU to introduce minimum rules as there are already binding European and international norms and standards in place. It might be better to enforce the already existing norms and standards through the introduction of a motivational duty for member states wanting to start up the transfer process (*infra*), rather than to introduce another set of detention standards which could raise legal objections in regard of the EU's competence, as well as political objections. It is highly unlikely that member states will agree to introduce minimum detention standards on a national level as they would subsequently have to make immense adjustments (and costs) to their prison systems.

3. *Addressing the problems related to double criminality, sentencing equivalence and sentence execution*

The abolition of the double criminality requirement for some offences leaves us with the question on how member states should handle execution in situations where the offence is not criminally actionable in the executing state, since some of the execution principles might be dependent on the underlying offence.

It could therefore be argued that – considering the character of taking over the execution of the sentence as a substantial part of the criminal proceeding – the double criminality requirement as such should never be abandoned since member states remain masters on their own territory and should therefore retain the discretion to decide on the opportunity to execute a specific sentence.

A facilitation that can be offered in this respect is to assess to what extent this double criminality test can be abandoned based on pre-existing knowledge on the fulfilment of the double criminality requirement. As argued elsewhere, using the knowledge on the extent to which the double criminality requirement is met to its full potential could significantly facilitate and speed up cooperation.²⁴ It could make sense to use the approximation-*acquis* for the purpose it was created, namely the facilitation of cooperation between the member states. In a context where knowledge on double criminality is crucial to delineate the scope of coop-

²⁴ W. De Bondt & G. Vermeulen G., 'Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU', in: M. Cools et al (Eds.). Readings On Criminal Justice, Criminal Law & Policing, 2010, Antwerp | Apeldoorn, Maklu, 15-40.

eration obligations, the facilitating abilities of the use of the approximation *acquis* may not be underestimated. It would not place a high burden on the authorities of a convicting member state to indicate from early on in the proceedings whether the case relates to behaviour that is known to be criminalised in all 27 member states. A similar assessment could be included in the conviction and later on in the criminal record and the certificate requesting execution abroad. The question arises how authorities could know whether the underlying behaviour is known to be criminalised in all 27 member states. It is unrealistic to expect a thorough analysis of the different legal systems for each of the cases dealt with. However, a high level assessment could be considered realistic. The types of behaviour for which the 27 member states committed themselves to ensuring criminalisation in legally binding instruments (e.g. Framework Decisions and Conventions) can be used as a basis for this knowledge. It is exactly with this in mind that an EU level offence classification system (EUOCS) was designed in 2008 to support authorities when conducting such a high level assessment.²⁵ Visualising which parts of offences are common by grouping them under the heading ‘jointly identified parts of offences’ could significantly facilitate this assessment and in doing so also facilitate cooperation. In analogy to the classification system designed for the exchange of European criminal records information (ECRIS)²⁶, EUOCS was complemented with a coding system to further facilitate incorporation in forms and data systems. Because EUOCS visualises the ‘jointly identified parts of offences’ and has an increased level of detail to allow the elaboration of exclusive categories, EUOCS has significant added value when compared to ECRIS. Obviously, the extent to which EUOCS can facilitate cooperation in this way is directly dependent on the extent to which common parts of offences are established.

Whereas the functioning of the approximation principle is well known, the introduction of a *lex mitior* principle – especially a very broad one – is new. Therefore, before reporting on the results of the analysis, the importance of *lex mitior* as a general principle should be underlined.

Cooperation between member states through transferring prisoners and enforcing each other’s sentences unavoidably leads to a situation where multiple legal systems apply or have applied to the enforcement of a sentence. The reasoning underlying the principle of *lex mitior* consists of the fundamental idea that cooperation between member states and thus also the transfer from one member state to another member state may never have a negative effect on the position of the person involved. A person involved may never lose rights or privileges he/she would have had if there would not have been a transfer and execution would have taken place in the issuing member state, when compared to the rights or

²⁵ G. Vermeulen & W. De Bondt W., EUOCS. *The EU level offence classification system: a benchmark for enhanced internal coherence of the EU’s criminal policy*, 2009, Antwerp | Apeldoorn | Portland, Maklu, 112.

²⁶ Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93 of 7.4.2009.

privileges he/she has after being transferred. Similarly, it is unacceptable that the person concerned would be deprived of any rights or privileges he might have had in the executing member state if the case was tried in the executing member state in the first place. This means that a transferred person should have equal rights and privileges as if the case would have been dealt with by the authorities of the executing member state to begin with.

With respect to the possibility to adapt the duration of the sentence, there is some concern with respect to the wording of Article 8 in that it is not clear that the adaptation of a sentence (and thus bringing it back to the maximum penalty foreseen by the law of the executing member state) should be automatic and leaves no room for discretion. An automatic application of the *lex mitior* principle could facilitate the adaptation procedure not only in that it would be more transparent and increase legal certainty, but also because it would no longer require the intervention and consideration of a competent authority. Most unfortunate, two forms of discretionary power can be found in the implementation legislation. First, some member states have introduced the possibility to adapt the duration of the sentence into a duration that still exceeds the maximum penalty in the executing member state. Second, it should be noted that in line with Articles 8.2 and 8.4 not all member states have introduced an obligation to adapt. When the sentence is incompatible with the executing state's laws in terms of its duration, the competent authority of the executing state *may* decide to adapt the sentence. Hence, there is no automatic adaptation applicable when a sentence is incompatible with the law of the executing state in terms of duration.

Both of these situations are unacceptable taking the *lex mitior* principle into account. Hence, bringing back the duration of a sentence to the maximum eligible to be imposed on the executing member state could be made mandatory.

With respect to the possibility to adapt the nature of the sanction, similar concerns exist. In addition to the fact that here too no adaptation obligation exists, it is not clear by whom nor on what grounds a decision will be made as to whether or not the adapted sentence has in fact aggravated the issuing state's punishment. *When someone, for example, was sanctioned in member state A to 5 years of home detention and member state B decides to adapt this sentence (because home detention as a stand-alone sentence is incompatible with its own laws), it is unclear as how this could be done and how it will be decided that the detention situation is not aggravated in absence of a general EU wide agreed understanding on the severity of all different sanctions that could be applied. It is unclear whether adaptation to 2 years of imprisonment (for example) would be appropriate in this particular case; the duration of detention may have declined but whether or not the sentenced person will feel that his situation has not been deteriorated is less certain.* In light of proposals to introduce home detention with electronic monitoring as a stand-alone sentence in various European countries, problems of this kind could well increase in the near future.

In order to amend this problem, two recommendations could be combined. First, there is a need to gain a deeper understanding of each other's sentencing

legislations and practices. Second, it should be seen to that an adaptation will never unreasonably aggravate the situation of the person involved.

Both recommendations need further clarification.

First, because understanding foreign sentencing legislation and practices is crucial, existing instruments that attempt to influence the national situations are welcomed. Before the Amsterdam Treaty and the arrival of the Framework Decision, the weaker forms of instruments that were then used to extend the range of criminalization within the EU tended to leave the issue of sentencing distinctly vague – typically requiring member states to provide penalties that would be ‘effective, proportionate and dissuasive’, and letting each member state decide what these would be. However, Framework Decisions requiring behaviour to be criminalized tend to be more prescriptive. They commonly prescribe a ‘maximum minimum penalty’ meaning that each member state must ensure that the offence in question carries a maximum penalty of at least a given period of imprisonment. Additionally, the impact of a sanction requirement in the existing sanction climate in each of the 27 different national criminal justice systems will significantly differ in each of these member states. Combined with the considerable discretion a judge will have in each individual case, this makes it impossible to introduce and maintain approximated sanction levels in the EU member states.²⁷ What is important however, is to learn more about each other’s sanction systems and compare it with the own sanction system as an alternative to approximating sentencing legislation and practices. It would therefore be interesting to draw up an index of all sanctions eligible of being imposed in the member states. The sanction tables drawn up in ECRIS²⁸ can be used as a basis for such an index system.

Second, in order to assess whether the adaptation will not lead to an unreasonable aggravation, it could be recommended to complement ECRIS-like tables with a commonly decided nature-based severity ranking. Only such common understanding of the severity of the sanctions visualised in a ranking table will allow an objective assessment of the aggravating effect of adapting the nature of a sanction in the executing member state. With a view to respecting the legality principle and ensuring legal certainty, it is important to have conversion tables between all eligible sanctions in the EU and the known sanctions in the own national legislation.

It is important to note however that it will be very hard to reach EU wide consensus on such a severity ranking classifying the different types of sanctions according to their nature. Furthermore, it is very much possible that the individual appreciation of a sentenced person will deviate from this ranking. It becomes even more complex if such a severity ranking is complemented with sanction durations. Whereas it is likely that there will be a common understanding that

²⁷ N. Padfield, D. Van Zyl Smit, F. Dünkel (Eds.), *Release from Prison: European Policy and Practice*, 2010, Willan Publishing, 34.

²⁸ Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93 of 7.4.2009.

a prison sentence is more severe than electronic monitoring, it will be far more challenging to reach a common understanding on how long a prison sentence will be equal to how long electronic monitoring. In order to avoid endless discussions with respect to the influence of duration on severity in case sanctions have a different nature, it would be recommended to limit the index-exercise to the nature of the sanctions as such and complement it with the principle that adaptations in terms of the nature of a sanction may not *unreasonably aggravate* the position of the person concerned.

It was promising to see that the European Commission had issued a prior information notice announcing a study on national sanction legislation and practices. Unfortunately, the European Commission decided to reconsider the content of the study and decided not to grant the study to any of the tendering candidates yet.

As said, the provisions in the Framework Decision related to sentence execution practices are even more problematic for there is no mentioning of any rule specifying that a transfer should not deteriorate a prisoner's detention position. Article 17 merely explains that the enforcement of a sentence shall be governed by the law of the executing state. It is hard to argue that for a transferred prisoner to be detained longer (because sentence execution provisions are much stricter in the executing state than in the issuing/convicting state) before release is enhancing his/her social rehabilitation prospects. Certainly Szabó did not perceive it to be the case that his interests were being served by making him serve a further 16 months. Nor presumably did the Swedish Court, which may have sentenced him on the assumption that he could be released after having served six years and eight months rather than eight years.²⁹

Although 54% of all respondents agreed that the EU should introduce binding measures to harmonise sentence execution modalities in relation to custodial sentences or measures involving deprivation of liberty, and another 63% of all respondents thought the EU should introduce binding measures to harmonise conditional release measures for prisoners, studies within the area of sentencing law have placed more emphasis on the rules for imposing imprisonment than on those for release from prison. So far, no EU instruments have yet presumed to directly lay down rules for the member states about the way in which sentences must be executed.

Hence, and in analogy to the need to map all existing eligible sanctions from the perspective of their nature, it could be recommended to combine that mapping exercise with the various provisions regarding sentence execution modalities as well as early/conditional release and earned remission provisions. Here too, it could then be advised to agree on a severity ranking with regard to sentence execution modalities and to amend the instrument so that an *unreasonable deterioration* of a prisoner's detention position following a transfer cannot be said to

²⁹ Padfield N., Van Zyl Smit D. and Dünkel F. (Eds.), *Release from Prison: European Policy and Practice*, 2010, Willan Publishing, 34.

be compatible with the *lex mitior* principle. However, because of the vast amount and diversity in sentence execution circumstances, it can be difficult to assess which of the two situations is the most favourable for the person concerned. The comparison and weighing out of the different early and conditional release regimes in a specific case can indeed be very complex.³⁰ The application of the rules is usually also strongly dependent on the behaviour of the prisoner, so that it is impossible to foresee the outcome of the application of the different regimes. In those situations it will almost be impossible to make a final decision on the most favourable regime at the time of the transfer.

4. *Motivational duty for issuing states & right to an 'informed' opinion, legal assistance and judicial review*

Although the shift to a compulsory system has been predominately motivated by social rehabilitation motives, the survey results have shown that the nature of the transfer procedure leaves many practitioners *in dubio* as to whether or not this procedure truly enhances the possibility of social rehabilitation. As argued elsewhere, the safeguards provided to prisoners in this procedure are rendered relatively meaningless because the possibility to provide an informed opinion precedes decisions by the executing state's competent authority on adaptation and enforcement of the forwarded judgement.

It has therefore been recommended that the issuing state's competent authority provides the prisoner with a motivated decision as to why it would like to start up the transfer process. This motivated decision should then at least contain the following information:

- a well-documented determination that the social rehabilitation prospects will be enhanced as a result of the transfer decision;
- a well-documented and legally underpinned determination that a transfer will not *unreasonably aggravate* the detained person's detention position following an adaptation of the original sentence in terms of nature;
- a well-documented and legally underpinned determination that a transfer will not *unreasonably aggravate* the detained person's detention position following the enforcement of a different set of sentence execution modalities and/or early/conditional release and/or earned remission provisions;
- a well-documented determination that the material detention conditions in the executing state are sufficiently high in light of European and international norms and standards including the European Prison Rules and European Court of Human rights' jurisprudence.

³⁰ For example: some member states work with fractions of the sentence imposed that should have been enforced, others leave it open when a person will fall within the scope of the provisions.

When the above mentioned *lex mitior* principle would be implemented, the issuing state's competent authority should not touch upon the detained person's detention position following the adaptation of the original sentence in terms of duration as this would occur automatically in the executing member state.

The thorough motivation of transfer decisions implies that the issuing state's competent authority would have to consult the executing state's competent authority or use the EJN portal to gain sufficiently accurate and detailed information on a possible adaptation of the sentence in terms of nature, on the sentence execution modalities that would apply and on the material detention conditions in the executing state's prison. It could be argued that this is not an unreasonable burden because it is the issuing state who has decided it wants to transfer the prisoner and this decision comes with all responsibilities attached.

This motivational duty would provide detainees the necessary guarantees that they would not be transferred to a country where detention conditions are sub-optimal. An indirect consequence of the motivational duty would be that, in order for the Framework Decision to be operational, member states would have to raise their detention standards to a satisfactory level as no transfers would otherwise take place. This way of enforcing the already existing European and international norms and standards can be seen as favourable to the introduction of a new set of European binding detention norms.

This recommendation is also in line with the Commission's priorities in the area of criminal justice to strengthen procedural rights for suspects or accused persons in criminal proceedings.

The suggested motivational duty would also make it possible for the detained person to forward his/her informed opinion to the issuing state's competent authority in case he/she is not satisfied with the documented transfer decision. Whether or not the decision will then be overturned or amended (*e.g.* agreeing to transfer the prisoner, on his/her request, to a prison in a specific area) will depend on the evaluation of the prisoner's arguments by the competent authority.

Prisoners should further be granted the right to legal assistance during the transfer process in order for their procedural rights to be protected and acknowledged.

The detained person should also be granted a right to judicial review of the transfer decision when he/she is not satisfied with the issuing state's competent authority's final decision on his/her transfer. The right to be heard by a judge reflects the European Commission's course of action to enhance procedural rights within the EU and should therefore be encouraged.

It should however be noted that such right to judicial review would be a mere possibility for the prisoner and should not be considered an automatism. The objective of the Framework Decision is to facilitate the prisoner's social rehabilitation by transferring him/her to that member state where he/she has family, linguistic, cultural, social or economic links, so that it is reasonable to argue that transfer decisions – in the majority of cases – will be applauded by sentenced persons.

When the above mentioned recommendations would be implemented, there appear to be no satisfactory arguments to oblige member states to appoint only judicial bodies as competent authorities. Because the prisoner is granted the possibility of a judicial review, this is no longer a prerequisite for an adequate transfer procedure in light of the detained person's procedural rights.

D. Conclusion

Ideally, the FD Transfer of Prisoners is altered so that it properly reflects the above recommendations. That will most probably require member state and joint defence lawyer support and lobbying. In the mean time, or alternatively, member states may choose to have chosen to reflect the above concerns in their domestic legislation, transposing the Framework Decision. Notwithstanding the equal availability of the EU research results to their respective legislators, the implementing legislation of Belgium³¹ and The Netherlands³² differ significantly in this respect. Whereas Belgium has simply transposed the FD and, hence, has not addressed any of the problems outlined above, The Netherlands have at least remedied some of them. Unlike Belgium, The Netherlands have opted out of the obligation under Article 7.1 of the FD to accept transfers in case of lack of dual criminality, including where the offences concerned are one out of the well-known list of 32 (Article 2:13.1.f implementing act) and have effectively introduced the suggested judicial review procedure with guaranteed legal assistance (Article 2:27 implementing act). Hence, the procedural rights position and detention conditions of detained persons, transferred within the EU from or to Belgium or The Netherlands (be it to a significantly lesser extent), may be well in need of activist defence lawyer initiative, e.g. by triggering preliminary questions before the Court of Justice of the EU and/or pursuing cases before the European Court of Human Rights.

³¹ Wet 15 mei 2012 inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie, *Belgisch Staatsblad*, 8 June 2012.

³² Wet van 12 juli 2012 tot implementatie van kaderbesluit 2008/909/JBZ van de Raad van de Europese Unie van 27 november 2008 inzake de toepassing van het beginsel van wederzijdse erkenning op strafvonnisen waarbij vrijheidsstraffen of tot vrijheidsbeneming strekkende maatregelen zijn opgelegd, met het oog op tenuitvoerlegging ervan in de Europese Unie (PbEU L 327), van kaderbesluit 2008/947/JBZ van de Raad van de Europese Unie van 27 november 2008 inzake de toepassing van het beginsel van de wederzijdse erkenning op vonnissen en proeftijdbeslissingen met het oog op het toezicht op proeftijdvoorwaarden en alternatieve straffen (PbEU L 337) en van kaderbesluit 2009/299/JBZ van de Raad van de Europese Unie van 26 februari 2009 tot wijziging van kaderbesluit 2002/584/JBZ, kaderbesluit 2005/214/JBZ, kaderbesluit 2006/783/JBZ, kaderbesluit 2008/909/JBZ en kaderbesluit 2008/947/JBZ en tot versterking van de procedurele rechten van personen, tot bevordering van de toepassing van het beginsel van wederzijdse erkenning op beslissingen gegeven ten aanzien van personen die niet verschenen zijn tijdens het proces (PbEU L 81) (Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties), *Staatsblad*, 19 July 2012.

III. Procedural rights in the context of EU cross-border gathering & use of evidence

Applied to the future of cross-border gathering and use of evidence in criminal matters, the below text assesses procedural rights issues in the context of *gathering* (i.e. during the pre-trial investigation stage) respectively *using* (i.e. during the trial stage) evidence in criminal matters in the EU.

A. Evidence gathering

1. Blurred authority landscape

By means of introduction, it is good to recall or point out that the contemporary landscape of cross-border EU cooperation in criminal matters in view of the gathering of evidence in the *generic* sense of the word is quite blurred in terms of authorities involved. Next to judicial authorities, acting with criminal justice finality, at least five more types of authorities can be distinguished, all capable of operating with an either criminal justice or administrative finality: police, customs and administrative authorities, special central authorities (such as administrations within the ministries of justice, witness protection units, financial intelligence units, Europol national units, European Judicial Network (EJN) contact points), and, especially after 9/11, intelligence services.

In denial of reality, as shown above, evidence gathering is often perceived to be a matter of judicial cooperation only. Most probably, this is due to the fact that evidence will ultimately have to stand the test in court, i.e. before a judicial authority *sensu stricto*. Even in the trial phase though, the admissibility of evidence should not (critically) depend on whether it has been collected by a judicial authority, but rather on the observance of procedural rules in collecting it. In the pre-trial phase, most definitely, evidence issues are a matter of much more than judicial authorities only.

When having a proper look at most cooperation instruments that judicial authorities may use in information and evidence gathering across borders (the 1959 Council of Europe (CoE) European Convention on Mutual Assistance in criminal matters (hereafter: ECMA); the protocols thereto; the 1990 Schengen Implementation Convention (hereafter: SIC); the 1997 Convention on mutual assistance between customs administrations (hereafter: Naples II); the 2000 EU Convention on mutual assistance in criminal matters (hereafter: EU MLA) Convention); the protocol thereto; the Eurojust Decision; the 2006 'Swedish' Framework Decision (FD); the 2008 European Evidence Warrant FD (hereafter: EEW); the 2009 Criminal Records FD), the truth is that member states are allowed considerable discretion in indicating which authority they deem to be 'judicial' for the application of the instruments concerned. Practice shows that member states, next to judicial authorities, often assign central, governmental but also police, customs (and in a single member state case: even intelligence) authori-

ties as ‘judicial’ or ‘competent’ authorities. Even typical ‘judicial cooperation’ is apparently largely a matter of much more than cooperation between ‘judicial’ authorities only.

Not only the member states, but also the CoE and the EU themselves, in designing judicial cooperation instruments, have abandoned the demarcation line based on authorities decades ago – be it fragmentary and far from in a consistent fashion. Administrative authorities may be or are charged with criminal records information exchange (ECMA; Criminal Records FD) or may use judicial cooperation instruments when it comes to administrative offences (SIC; EU MLA; EEW). There is built-in flexibility of authorities (judicial or equivalent, police and customs) for a series of special cooperation forms, such as controlled deliveries, joint investigation teams (JITs), infiltration and interception of telecommunications (EU MLA). Such flexibility was radically taken over for law enforcement information exchange, by bringing judicial authorities under that label as well, in addition to police and customs authorities, be it that such information will be deemed as ineligible as ‘evidence before court’ (‘Swedish’ FD). It has been recognized that the prosecutorial competency may be entrusted to a prosecutor, judge or police officer of equivalent competence (Eurojust Decision). Police, customs, judicial and other competent authorities have been subjected to the very same data protection rules (2008 Data Protection FD). It is sometimes recognized that it suffices for a decision by a non-judicial authority to be labelled as ‘judicial’ after validation by a judge, court, public prosecutor or investigative magistrate (2011 proposed Directive on a European Investigation Order (hereafter: proposed EIO)), much in line with the ambiguous ‘for police use only’ autonomous police information exchange under the SIC). Recently, no further distinction has been maintained between information contained in databases held by police or judicial authorities (proposed EIO). The picture has become very much blurred – to say the least.

Finally, the time has also come to do away with the recurring misconception that adequate data protection with regard to the exchange of data that have already been gathered, requires the involvement of ‘judicial’ authorities, as opposed to ‘non-judicial’ authorities. It suffices for data protection rules to be linked to the finality of data handling, regardless of the authorities involved. Consequently, data protection needs to be a joint matter of concern for any authority acting with criminal justice finality. It must be as stringent for all types of cooperation in criminal matters, regardless of whether judicial, police, customs, administrative, central (or, in some case: even intelligence authorities) are involved. One single data protection regime should bind all authorities involved in cooperation in criminal matters. The relevant EU legislation as it stands, even confirms this. Often, even more attention is paid to data protection issues in instruments relating to law enforcement (cooperation) (e.g. data protection regulations in the 2005 Prüm Convention or the 2008 EU Prüm Decision, or with respect to the functioning of Europol) than in those regulating cooperation between judicial authorities (e.g. a single article on data protection in EU MLA). Additionally, the distinction

between data protection rules applicable to judicial respectively police cooperation has been formally labelled as inexistent in the Data Protection FD. Our freshly concluded Study on the future of international cooperation in criminal matters points out that an overwhelming majority of the member states (20) support the position that adequate data protection does not require the involvement of judicial authorities. From this perspective, it is e.g. incomprehensible that the exchange of criminal records is considered to remain a prerogative of judicial cooperation, thus depriving police authorities in many member states and – at least indirectly – Europol (which is even supposed to hold data on convicted persons) of essential information.

In conclusion, both at CoE and EU level, both in 'old' conventions and in 'newer' legal instruments relating to 'judicial' cooperation, the demarcation line between different types of authorities based on their nature/name has become extremely fuzzy. Upholding therefore that the pre-trial gathering of evidence in the generic sense of the word is a matter of judicial cooperation in criminal matters only, is a joke. It is a joint matter of various 'competent' authorities working with a criminal justice finality.

2. *Limited need for 'judicial' safeguards*

On the one hand, the EU is inconsistent in keeping a clear distinction between administrative and criminal justice finalities. As shown in the previous paragraphs, the EU very often stresses the demarcation, entirely disregarding it on other occasions.

On the other hand, the EU omits to clearly indicate when the distinction between judicial and non-judicial *does* matter. Whereas traditionally judicial prerogatives were assumed (without necessitating explicit reasons or motivation), lately (in particular the last decade), when drafting the so-called judicial cooperation instruments, the EU has almost systematically given the member states *carte blanche* by allowing them to appoint the 'competent' authorities themselves. In itself, this flexibility is not a bad thing, quite the contrary: it supports the shifting focus from authorities involved to the finality with which they act. However, in a few instances, 'judicial' safeguards seem to be necessary: not necessarily in the form of appointing judicial authorities as competent authorities, yet through a right to a legal remedy for the person involved.

In *domestic* contexts, in light of the ECHR, the ECtHR jurisprudence and the EU Charter of Fundamental Rights, it can hardly be doubted that the involvement of judicial authorities (or at least of equivalent authorities or authorities whose decisions have been validated by judicial authorities) is a necessity when taking coercive measures (which likely impact on the right to property) or measures which are intrusive to the right to privacy or data protection in particular. In the context of our study on the future of international cooperation in criminal matters, almost all member states confirmed this position (regardless, that is, of which authorities would execute the measure on the ground).

In evidence gathering *cooperation* contexts, our study on the future of international cooperation shows that, not only for sensitive and intrusive techniques such as controlled deliveries and infiltration for which the EU MLA expressly allowed for entrusting them to police or customs authorities, but also for the interception of telecommunications, for which the EU MLA required a domestic order legitimately issued in the requesting member state by a judicial or ‘equivalent’ authority, averagely half of the member states have appointed non-judicial authorities as the ‘competent’ authorities.

It seems therefore that half of the member states consider the type of authority non-determining from the perspective of compliance with ‘judicial’ safeguards as required by the ECHR, the ECtHR or the Charter. Apparently, only the procedures by which authorities act, matter. The EU must take stock of this reality and radically shift the focus to the procedures by which judicial, so-called equivalent, police or customs authorities should act and to the judicial remedies that need to be in place in taking certain investigating measures.

The approach followed in the EEW and in the proposed EIO is commendable from this perspective. Both instruments introduced an obligation for member states to foresee in judicial remedies for those measures involving coercive measures, equivalent to those, which would be available in a similar domestic case to challenge the investigative measure in question.

As to the nature of the bodies carrying out the judicial review, the name tag they carry seems again of secondary importance only. In the context of the EEW for example, it is perfectly conceivable that an administrative authority would take on this task. Yet, as stated above, as little as the name tag matters, as much do the procedural safeguards which are applied by those bodies; as long as they abide by criminal procedural safeguards and grant the subject a fair ‘judicial’ review of the decision, the nature of the authority is of minor importance.

3. *Need for a reinforced or renewed focus on ‘criminal justice finality’*

It is essential to further maintain and where no longer or inexistent (re)introduce a strict separation between criminal justice and administrative finalities. This firm position is rooted in respect for the separation of powers, procedural rights protection and data protection. It will also be illustrated how the blurring of boundaries between criminal justice and administrative finalities endangers democracy itself.

The existence of the distinction between criminal justice and administrative finalities is supported through the very legislation of the EU itself. In several cooperation instruments adopted in the past decades (ECMA, EU MLA, ‘Swedish’ FD, Data Protection FD), it has been recognised that cooperation in criminal matters is a matter of cooperation between authorities, *aimed at the prevention, detection, tracing, prosecution, punishment etc of punishable offences*. It is a pity that this has only been the case in a fragmented way, *ad hoc*, using divergent wording, not in *all* relevant cooperation instruments and sometimes for specific investiga-

tive measures only. The finality of action by authorities must become the primary, resolute demarcation line for international cooperation in criminal matters in the EU. The outdated authority-based policy-making, reasoning and practice should make way for the introduction of a new, clear, unambiguous focus on protecting the integrity of cooperation with a criminal justice finality.

Lack of respect for this demarcation line is not only problematic in light of the separation of powers³³ and data protection and purpose limitation regulations,³⁴ but also in light of the procedural guarantees applicable in criminal matters.

The fight against criminality carried out by justice and law enforcement authorities acting with a criminal justice finality can policy-wise be broadened somewhat through involving administrative or other actors. However, it is crucial that such broadening does not breach the social contract underlying the separation of powers, which is only tolerant of a limited 'governmental' enforcement of criminal justice norms. This is logical given that fighting criminality is limited by the procedural guarantees applicable in criminal matters, guarantees which have been subject to a delicate and gradually evolving balancing exercise between the interests of the individual and the public interest. This balance is alien to acts done with an administrative finality, and rightly so. Whereas criminal law has an intrinsically punitive character, the administration's aim is to assess and eliminate threats against the government, the society and the security, without affecting individuals in a punitive manner. The administration is not designed to punish the individuals which caused the threat and consequently operates under a fundamentally different regime. Indeed, not the rights of the individuals but the rights of the *apparatus* are the primary concern.

In those cases where the administration does step in the criminal law terrain, it has to acknowledge the criminal justice logics of acting in that context, and doing so brings about consequences. The latter is precisely where things go wrong. All too often administrative detours are sought in order to avoid the 'burdens' which go hand in hand with acting with a criminal justice finality. Procedural guarantees applicable in criminal matters are considered to be hindering

³³ G. Vermeulen, 'Gewapend bestuur. Kan het bestuur zich wapenen?' in: *Het strafrechtstelsel in de Laatmoderniteit*, T. Balthazar, J. Christiaens, M. Cools, T. Decorte, B. De Ruyver, P. Hebberecht, P. Ponsaers, S. Snacken, P. Traest, T. Vander Beken & G. Vermeulen (ed.), Mechelen, Gandaius – Kluwer, 2004, 169-172. See also: K. Van Heddeghem, T. Vander Beken, G. Vermeulen & B. De Ruyver, *Gewapend bestuursrecht gescreend*, Antwerp – Apeldoorn, Maklu, 2002, 212 p.

³⁴ See in particular: E. De Busser, *Data protection in the EU and EU criminal cooperation. A substantive law approach to the EU internal and transatlantic cooperation in criminal matters between judicial and law enforcement authorities*, Antwerp – Apeldoorn – Portland, Maklu, 2009, 104-106; E. De Busser and G. Vermeulen, 'Towards a coherent EU policy on outgoing data transfers for use in criminal matters? The adequacy requirement and the framework decision on data protection in criminal matters. A transatlantic exercise in adequacy', in: *EU and International Crime Control. Topical Issues*, M. Cools, B. De Ruyver, M. Easton, L. Pauwels, P. Ponsaers, G. Vande Walle, T. Vander Beken, F. Vander Laenen, G. Vermeulen & G. Vynckier (ed.), Governance of Security Research Paper Series (GofS), Volume 4, Antwerp – Apeldoorn – Portland, Maklu, 2010, 95-122; G. Vermeulen, 'Transatlantisch monsterverbond of verstandshuwelijk? Over het verschil tussen oorlog en juridische strijd tegen terreur en de versterkte politie- en justitiesamenwerking tussen EU en VS', *Panopticon*, 2004, nr. 1, 90-107.

the full coming into being of the novel ‘right to security’ which has so successfully been sold to the citizens.

The Netherlands e.g. seem to care marginally only about mixing up criminal justice and administrative finalities. Information sharing between authorities acting with criminal justice and administrative finalities has been proclaimed the new best practice, it seems. It suffices to refer to the BIBOB legislation (*Bevoordeling Integriteitsbeoordelingen door het Openbaar Bestuur*), the Regional Information and Expertise Centres (RIECs) that have been established in support of the ‘administrative’ approach to organised crime and the Amsterdam *Emergo* project, making data mining and data sharing between fiscal, administrative and criminal law enforcement authorities the standard. Effective. No doubt. Problematic. Definitely.

Our study on the future of international cooperation in criminal matters shows that (only) three member states have chosen to explicitly bring telecommunication interceptions and undercover operations with criminal justice finality by their intelligence services under the scope of the EU MLA, thus providing a procedural guarantee framework that equals that in criminal matters.

These examples show that, at least in some member states, the situation is blurred, with a distinct potential cross-border impact. It certainly is blurring in other member states too, reinforced by 9/11 in particular. Hence, a reflection about cross-border information or evidence gathering is in vain if it does not aim to unravel the blurred line between criminal justice and intelligence work. Clear EU action in this regards is long overdue. A choice must be made to either clearly apply the relevant provisions to intelligence services when they are acting with a criminal justice finality (be it directly or indirectly) or to clearly delineate the limits of competences of intelligence services (and thus bar them from gathering information or acting when these acts would have a direct or indirect criminal justice finality). The latter seems politically unrealistic since it entails a direct intervention in the national law of the member states. Therefore, the former is the only solution at EU level: instead of defining the scope of instruments dealing with international cooperation in criminal matters based on the authorities involved, it should be defined based on the finality with which they act. In doing so, if intelligence services are (directly or indirectly) acting with a criminal justice finality, it will be guaranteed that the necessary accompanying criminal justice safeguards apply. When other authorities than the traditional ones want to take part in the enforcement of criminal law, they need to be bound by the same – instead of less – rules of play.³⁵ This course of action received overwhelming support in our study on the future of international cooperation in criminal matters. Even the second option, being the clear delineation of competences of intelligence services

³⁵ B. De Ruyver, T. Vander Beken & G. Vermeulen, ‘The desirability of legally regulating the proactive phase’, in: *Undercover policing and accountability from an international perspective*, M. den Boer (ed.), Maastricht, European Institute of Public Administration, 1997, 109-112.

in that they would be barred from gathering information or acting when these acts would have a direct or indirect criminal justice finality, gained broad support.

In the context of administrative offences the finality distinction has been made explicit at EU level since the SIC, recognizing for the first time that administrative authorities too can act with a criminal justice finality and thus can be brought within the scope of cooperation in criminal matters in as far as their decisions are subject to an appeal before a judge also competent in criminal matters. There is only one legitimate cross-over situation when it comes to keeping a strict separation between criminal justice and administrative finalities: criminal justice information can and should, whenever it is useful in preventing an immediate and serious threat to public security, be shared with the competent (administrative or intelligence) authorities.

B. Free movement of evidence

The entire question of the gathering of evidence becomes superfluous if in the end, the obtained evidence will not serve any real purpose in trial due to inadmissibility. Currently, it remains completely unclear what happens in the end with evidence gathered or obtained on the basis of cross-border cooperation. None of the existing MLA or mutual recognition instruments even addresses the issue, save for Naples II, creating an opening towards *per se* admissibility of evidence, leaving member states the discretion to use it or not though.

1. Mutual admissibility of evidence gathered following a cooperation request

The *forum regit actum* principle (FRA) has been introduced in the EU over 10 years ago (EU MLA). It was supposed to accommodate concerns of admissibility of evidence that resulted from foreign evidence gathering along the then known cooperation principles. The principle provides that the requesting state can ask the receiving state to comply with some formalities or procedural requirements which it deems essential under its national legislation. The receiving member state must in principle comply with such formalities and procedures, unless where deemed incompatible with the fundamental principles of its domestic law. The state where the *forum* i.e. the court is located, can since have a say in the way evidence is to be gathered, in striving for maximized admissibility chances of the evidence gathered. It must of course be recalled that the introduction of the principle was also – at least indirectly – strongly favourable for the integrity of defence and procedural rights in the state.

First, however, even though FRA is designed to accommodate the aspirations of the requesting member states and their concerns with respect to the admissibility of evidence gathered upon their request, no commitment to accept *per se* admissibility can be found in the cooperation instruments. This means that a request to take certain formalities or procedures into account, does not entail the commitment to accept the admissibility of evidence gathered accordingly.

Second, FRA only has a very limited admissibility-raising effect in the sense that it only seeks to ensure admissibility in a one on one relation between the requesting and requested member state. In doing so, it has no potential of ensuring admissibility within the entirety of the Union. However, undeniably, the possibility to adjust the way of gathering evidence is an opportunity to work towards a situation in which the admissibility of newly gathered evidence is accepted throughout the Union. Only an approach that would ensure EU wide admissibility would really support and shape the evolution towards free movement of evidence. FRA intrinsically fails to contribute thereto.

Third, even in the one on one situation, the strength of FRA is relatively weak in the sense that it does not create a true and transparent situation in terms of the lawfulness of the way evidence was gathered, let alone the admissibility of evidence that is linked to that. Allowing one member state to request for certain formalities and procedures to be taken into account and therefore requiring another member state to take those formalities and procedures into account, runs the risk of undermining the status of either lawfully or unlawfully gathered evidence.

Considering the conceptual flaws and weaknesses of FRA, one would expect that the current momentum to redesign the entire landscape of MLA and cross-border evidence gathering would have been seized to drastically rethink the approach to tackle admissibility problems. Nothing like that. The proposed EIO simply copies the FRA principle from EU MLA, just like the EEW had done. Added value of the proposed EIO for the core issue in current EU evidence law, especially after the explicit new legal basis in Article 82.2.a TFEU for enhancing mutual admissibility of evidence in criminal matters between the member states legal: zero.

The only way to remedy things and tackle possible admissibility issues is via the introduction of minimum standards according to which evidence is to be gathered. This would mean that, if *per se* admissibility is aimed at, the information or evidence gathered following a cross-border request would have to be gathered according to commonly agreed minimum standards. This would do away with discussions on the lawfulness of the information or evidence gathering technique and subsequently, the evidence gathered would constitute admissible evidence before court in all 27 member states. Newly gathered evidence in a cross-border context would be subject to an irrefutable presumption of admissibility and consequently become eligible for free movement throughout the Union. So far, already 1/3rd of the member states judges the FRA outdated and wants to see it replaced by the introduction of minimum standards, which they view as the only way forward. Another 1/3rd is very much in favour of the idea but is hesitant as to whether minimum standards would be able to do away with the FRA principle altogether. When it comes to the level of the standards, member states suggest to base them on existing MLA regulations, backed up with standards that either surpass the ECHR/ECtHR standards or at least equal them. Evidence seized during a house search, if carried out in line with the standards in the *Van Rossem* case, would constitute *per se* admissible evidence; Evidence obtained through

the interception of telecommunications, if complying with the rules outlined by the ECtHR in the *Malone*, *Huwig*, *Kruslin*, *Klass* etc cases, would constitute *per se* admissible evidence. Anonymous witness testimony, if complying with the standards laid out by the ECtHR in the *Doorson*, *Kok*, *Visser*, *Kostovski*, *Windisch*, *Lüdi*, *Unterpertinger*, *Saïdi*, *Asch*, *Artner*, *Delta*, *Luca*, *Solakov* etc cases would constitute *per se* admissibility. Etc. It may seem difficult an exercise, but it's doable.³⁶

2. Cross-border admissibility of evidence gathered in a merely domestic context

To conclude, the issue of cross-border admissibility of evidence gathered in a merely domestic context is addressed below.

Even if the concerns are similar as for evidence gathered following a cooperation request, one needs to treat the question separately, as it has nothing to do with cooperation problems as dealt with before. The key issue, when it comes to evidence gathered in a merely domestic context, is whether and under which conditions one could attain EU-wide cross-border validity for evidence gathered and perceived admissible in one member state, in that such evidence would be considered admissible in all other member states, throughout the EU.

The easiest and quite pragmatic solution would obviously be to introduce minimum standards for evidence gathering all together, obliging member states to include them into their national criminal law systems and apply them equally in merely domestic as well as cross-border situations.

In the study on the future of international cooperation in criminal matters, the member states' willingness to extend the adoption of minimum procedural rules for evidence gathering beyond a cross-border context was tested. The prospects prove to be surprisingly good: 2/3rd of the member states have explicitly indicated that such minimum procedural standards should not be limited to cross-border situations, and should also apply in mere domestic situations, with 4/5th of them being critically aware of the significant changes this will prompt for their domestic criminal procedural systems.

³⁶ See e.g. G. Vermeulen (ed.), *EU standards in witness protection and collaboration with justice*, Antwerp – Apeldoorn, Maklu, 2005, 280 p.; S. Gluščič, G. Klemenčič, T. Ljubin, D. Novosel, D. Tripalo & G. Vermeulen, *Protecting witnesses of serious crime. Training manual for law enforcement and judiciary*, Strasbourg, Council of Europe Publishing, 2006, 373 p.

The growing internationalisation and Europeanisation of criminal procedures create new and additional challenges to traditional defence rights.

Hence, the Ghent Bar Association, as part of its bicentennial celebration, the Bar Association of The Hague, hosting the International Tribunal for the Former Yugoslavia and the International Criminal Court (ICC), and Ghent University, conducting lead research on international and European criminal policy, have joined their forces by exploring and addressing these challenges during an international conference, entitled 'Defence Rights: International and European Developments', held in Ghent on 23 November 2012, of which the current volume is the conference book.

The book has a double focus: defence rights before the ICC respectively EU defence rights.

Whereas international criminal tribunals, especially the ICC, should play an exemplary role when it comes to the right to fair trial and adequate access to a lawyer, reality proves to be troublesome. This book addresses key issues in this respect: what is the status questionis of the defence position and procedural rights before international criminal tribunals, more specifically the ICC? Has the Rome statute lived up to its expectations after a decade of its application? Can defence before international tribunals keep functioning without a Bar? What are the needs for such a defence to be adequate, knowing that it balances on the borderline between the Anglo-Saxon legal system and ours? What lessons can be learnt from this? What about victims' rights, unexplored territory for international criminal law?

At the same time, defence and procedural rights are developing as a result of different EU Directives which have been or are now being negotiated. This is of major importance to every penalist, even in strictly national cases. This book informs about and critically assesses the entire EU 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings'. The EU Directive on the right to interpretation and translation in criminal proceedings and the anticipated proposal on special safeguards in criminal procedures for suspected or accused persons who are vulnerable (especially children, the mentally ill and the mentally disabled) pass in review. Also the EU-Directives on the right to information in criminal procedure and on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (Salduz-Directive), which are about to revolutionize traditional domestic criminal procedural law, are being thoroughly assessed. Further, the book addresses the important implications and challenges for the legal position of detainees as a result of the recent Framework Decision on the mutual recognition of custodial sentences and measures involving deprivation of liberty. Finally, awareness is raised concerning the future of procedural rights in the framework of cross-border evidence gathering and admissibility.

This book is essential reading for both defence practitioners and scholars taking an interest in defence and procedural rights in criminal matters.

www.maklu.eu
isbn 978-90-466-0571-4



 **Gandaius**