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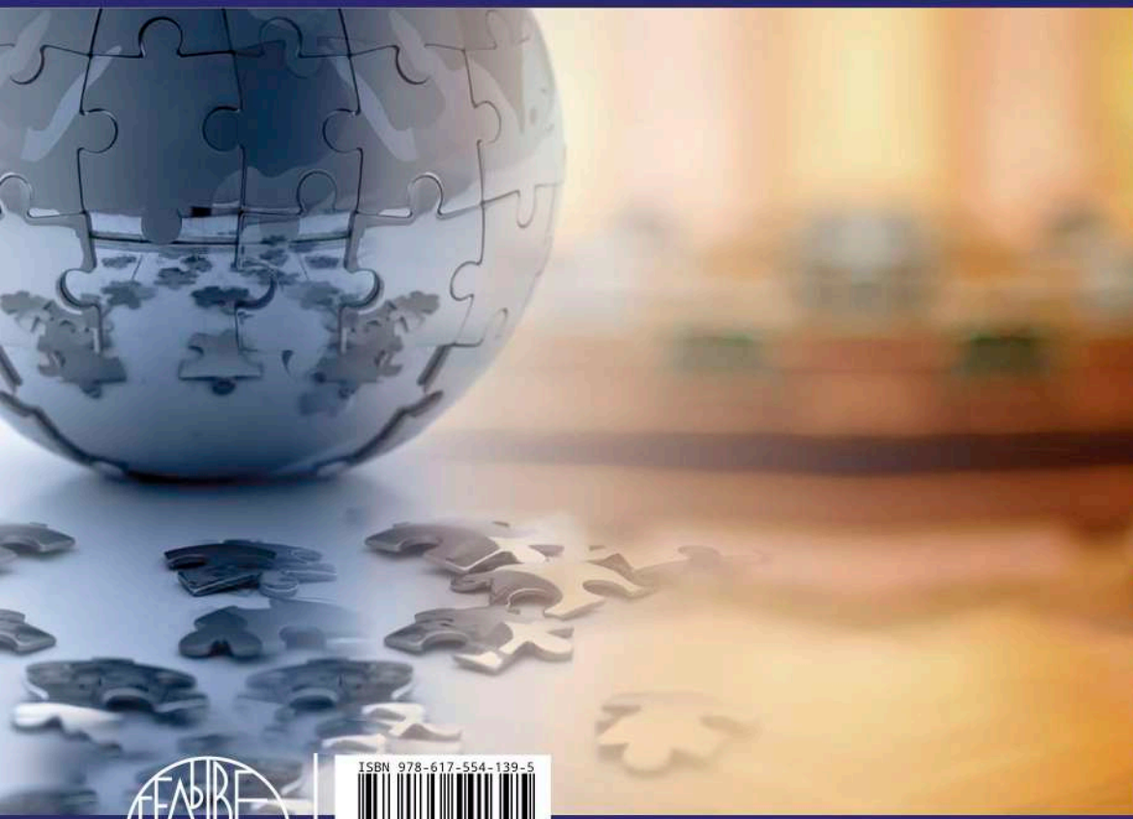
CRIM HUM

EUROPEAN CRIMINAL LAW AND PROCEDURE



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Modernising Master's Training on Criminal Justice

CRIMHUM

EUROPEAN CRIMINAL LAW AND PROCEDURE

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УДОСКОНАЛЕННЯ МАГІСТЕРСЬКОЇ ПРОГРАМИ З КРИМІНАЛЬНОЇ ЮСТИЦІЇ

ЄВРОПЕЙСЬКЕ КРИМІНАЛЬНЕ ПРАВО ТА ПРОЦЕС

Навчальний посібник

Видавничий дім
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Призначено для студентів спеціальностей 081 «Право» та 293 «Міжнародне право», аспірантів, викладачів закладів вищої юридичної освіти, а також для суддів, прокурорів, слідчих, адвокатів, представників інших юридичних професій.

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Про проєкт
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«Модернізація магістерських програм для майбутніх суддів, прокурорів, слідчих з урахуванням європейських стандартів у сфері прав людини»

Програма Європейського Союзу ERASMUS+ спрямована на підтримку діяльності у сфері освіти, перепідготовки, молоді та спорту в 2014–2020 рр. ERASMUS+ об'єднав наявні раніше сім програм: програми безперервного навчання (Erasmus, Leonardo da Vinci, Comenius і Grundtvig), програму «Молодь у дії», 5 програм міжнародного співробітництва (Erasmus Mundus, Tempus, Alfa, Edulink, програму для співробітництва з промислово розвинутими країнами). TEMPUS (Транс'європейська програма мобільності для навчання в університетах), що існувала з 1990 р., підтримувала модернізацію вищої освіти і створювала простір для співпраці в країнах, які межували з Європейським Союзом, протягом більш ніж 25 років.

Програма ERASMUS+ створює можливості для студентів, здобувачів освіти, працівників і волонтерів для мобільності до інших держав з метою покращення своїх навичок і можливості працевлаштування. Вона дозволяє організаціям працювати у транснаціональному партнерстві та ділитися інноваційними практиками у сфері освіти, професійної підготовки та молоді.

Мета програми ERASMUS+ полягає у сприянні в розвитку реалізації стратегії Європи 2020 для розвитку, зростання кількості робочих місць, соціальної справедливості та інтеграції, а також цілей ЕТ2020, стратегічної рамки ЄС у сфері освіти і професійної підготовки. Програма ERASMUS+ також спрямована на сприяння сталому розвитку своїх партнерів у сфері вищої освіти і робить свій внесок у досягнення цілей Стратегії ЄС у справах молоді.

Проєкти зі створення потенціалу у сфері вищої освіти, яким є CRIMHUM, являють собою транснаціональні проєкти співробітництва на основі багатосторонніх партнерських відносин, передусім між закладами вищої освіти держав ЄС та держав-партнерів.

Мета таких проєктів полягає у наданні підтримки державам-партнерам у:

– модернізації, інтернаціоналізації й розширенні доступу до вищої освіти;

– вирішенні проблем, з якими стикаються їхні вищі інститути й система освіти;

– активізації співробітництва з Європейським Союзом;

– добровільній конвергенції з розвитком Європейського Союзу у сфері вищої освіти, а також заохоченні контактів між людьми і міжкультурному порозумінні.

У проєкті 598471-EPP-1–2018–1-AT-EPPKA2-CBHE-JP (CRIMHUM) беруть участь представники Австрії, Білорусі, Німеччини, Литви, України, Франції та Хорватії. Конкретна мета ERASMUS+ – проєкту 598471-EPP-1–2018–1-AT-EPPKA2-CBHE-JP (CRIMHUM) полягає у тому, щоб створити комплексну, засновану на правах людини підготовку до кримінального правосуддя шляхом модернізації спеціалізованих магістерських програм судово-прокурорсько-слідчої спеціалізації.

Під час реалізації загальної мети проєкту здійснюються такі завдання:

• суттєве покращення традиційних навчальних програм для основних курсів так званого «кримінально-правового блоку» на першому ступені вищої юридичної освіти, використовуючи найкращі практики університетів ЄС;

• структурна й концептуальна модернізація навчального плану спеціалізованих магістерських програм судово-прокурорсько-слідчої спеціалізації (профілізації), поєднуючи навчання навичкам викладання з європейськими науковими методами і впроваджуючи новітні навчально-методичні посібники;

• підвищення професійної та дидактичної кваліфікації викладачів держав-партнерів;

• зміцнення ресурсної бази модернізованих магістерських програм.

З 2020–2021 навчального року на юридичних факультетах Львівського національного університету ім. Івана Франка, Національного

юридичного університету ім. Ярослава Мудрого, Національного університету «Одеська юридична академія» відкрилися модернізовані магістерські програми у сфері кримінальної юстиції.

Координатори проєкту

The European Commission's support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

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LIST OF ABBREVIATIONS

AA – Association Agreement between the European Union and its Member States, on the one part, and Ukraine, on the other part
AFA – Agence Francaise Anticorruption
AFSJ – Area of freedom, security and justice
CC – Criminal Code
CCP – Code of Criminal Procedure
CFREU – Charter of Fundamental Rights of the European Union
CIS – Commonwealth of Independent States
CISA – Convention implementing the Schengen Agreement
CJEU – Court of Justice of the European Union
CoE – Council of Europe
DoJ – U.S. Department of Justice
DPA – deferred prosecution agreement
EAW – European Arrest Warrant
EC – European Community or European Communities
ECHR – European Convention on Human Rights (= European Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR – European Court of Human Rights
EDP – European Delegated Prosecutor
EDPS – European Data Protection Supervisor
EEU – Eurasian Economic Union
EIO – European Investigation Order
ELO – Europol Liaison Officer
EPPO – European Public Prosecutor's Office
et seq. – et sequentia
EU – European Union
FCPA – Foreign Corrupt Practices Act (United States)
FD – Framework Decision
FRA – European Union Agency for Fundamental Rights
GCM – UN Global Compact for Safe, Orderly and Regular Migration

GRECO – Group of States against Corruption
GRETA – Group of Experts on Action against Trafficking in Human Beings
ibd. – ibidem
ICC – International Criminal Court
ICCPR – International Covenant on Civil and Political Rights
ILO – International Labour Organisation
IRM – Implementation Review Mechanism
NGO – Non-government organisation
NPA – non-prosecution agreement
OECD – Organisation for Economic Co-operation and Development
OJ – Official Journal
para – paragraph
PNF – National Financial Prosecutor (France)
SAR – Search and Rescue
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union
THB – Trafficking in human beings
UN – United Nations
UNCAC – United Nations Convention against Corruption
UNTOC – United Nations Convention against Transnational Organised Crime
WWII – World War II

1. INTRODUCTION

1.1. The relevance of European criminal law and EU criminal law

1.1.1. Introduction

According to the Association Agreement between the European Union and Ukraine (AA), association is to **enhance co-operation in the field of justice, freedom and security** with the aim of reinforcing the rule of law, respect for human rights and fundamental freedoms[1]. Rule of law and respect for human rights and fundamental freedoms are therefore the most important reference points in this co-operation. The same notion is more fully elaborated in Article 14 AA: 1

"In their co-operation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Co-operation will, in particular, aim at strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption. Respect for human rights and fundamental freedoms will guide all co-operation on justice, freedom and security".

For Belarus, there are, of course, no similar provisions because there is no association agreement. But it is clear that whichever way relations between the EU and Belarus will develop, human rights and the rule of law will be central to any further deepening. **Human rights and the rule of law** therefore represent **core principles** in the co-operation with Ukraine and Belarus, and they also extend to the project of an evolving European criminal law. 2

[1] Article 1 para (1) lit. e) and Article 2 of the Association Agreement between the EU and its Member States, on the one part, and Ukraine, on the other part.

3 On the EU end of this equation, there are two sets of developments that need to be considered when discussing "European criminal law" (as the harmonised criminal law of EU Member states) as well as "EU criminal law" (as the EU's own supranational criminal law). The one set of development is the emergence of the Area of Freedom, Security and Justice (AFSJ), the other is the development of human rights law in the EU context.

• From a competences point of view, the **AFSJ**[2] has a complex genealogy and can properly be understood only against the Maastricht Treaty's three-pillar structure. Without going into any details here[3], the AFSJ was originally understood as an intergovernmental add-on to the common market project. Later on, it moved from this strictly intergovernmental foundation to one where we see deepening integration up to true supranationality.

• **Human rights law** has traditionally been represented in the EU context in two emanations: the one is the European Convention on Human Rights (ECHR) to which EU Member states have acceded individually, the other is human rights as the common legacy of the constitutional traditions of EU Member states, as recognised by the Court of Justice of the European Union (CJEU). As long as the EU lacked legal personality to accede to the ECHR, it developed the Charter of Fundamental Rights of the EU (CFREU) originally as a non-binding clarification, later elevated to EU primary law by the Lisbon Treaty. As for the ECHR, the CJEU decided that despite the clear wording of Article 6 (2) TEU, the EU is not entitled to join[4].

4 Following the failure of the Constitutional Treaty in 2005[5], the project of EU integration is now at some 2.0 stage of development in which much has been achieved, but some beliefs held earlier have been shattered. Throughout its evolution from originally three rather tightly focused sets of

[2] Article 3 (2) TEU and Title V TFEU. It was originally introduced by the Treaty of Amsterdam in 1999.

[3] For students with no proper background in the history of European integration, it is recommended to consult the relevant literature, e. g. Chalmers, Davies and Monti (2019).

[4] CJEU Opinion 2/13 of 18 December 2014, available at <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=en>.

[5] The Treaty Establishing a Constitution for Europe failed to win support in France and the Netherlands. Lack of ratification in the two countries meant that the ratification process was ultimately unsuccessful.

treaties to one big integration project *sui generis*, the European Community's (–ies') (EC's) and later EU's development had always been **driven by competences**. Due to its original foundation in international law, the Communities functioned strictly on the basis of the competences delegated from Member states ("principle of conferral")[6]. However, when the logic of "communitarising" the production of coal and steel took off and the project of an single market came into being, any given set of competences soon proved to be inadequate. It was therefore mostly thanks to the CJEU that implied competences and an *effet utile* doctrine were used to legitimise the reaching out to newer depths of integration, – even while continuing to pay lip service to the principle of conferral. This theme of deepening the EC and later the EU has been resounding throughout the CJEU's case law, and it has also been reflected in the string of TEU revisions, named after the places where the treaties were signed: Maastricht (1993), Amsterdam (1999), Nice (2003). European criminal law was not only part of these dynamics, but its development is basically a reflection of this experience.

It is probably fair to say that up until the failure of the Constitution Treaty in 2003, there was a **widening gap between so-called Europhiles and Eurosceptics**. The first, an elitist group of people socialised in Brussels and European capitals, held rather euphoric assumptions that there would be an "ever closer integration", ultimately leading to a Union state with a proper constitution. Eurosceptics, by contrast, represented the larger part of the electorate in the Member states who felt left behind and not taken seriously in their concerns over the importance of the nation state. Arguably, it is this fundamental contradiction that contributed not only to populism, but also to the rise of illiberalism in some EU Member states, in a lack of unity of purpose vis-à-vis Russia in times of dwindling U.S. support, to Brexit and the ongoing crisis in migration and asylum policies. 5

Against this background, the **idea of an EU criminal law** (as opposed to a European criminal law created by harmonisation of national law) represented **a typical Europhile project**, its arguments based on the idea of moving integration to ever-higher levels. Consequently, in the earlier literature on EU criminal law there was a euphoric assumption that from new institutions to new fields of activity EU criminal law would be 6

[6] Now in Article 5 (1) TEU.

emerging ever more strongly and that through the study of EU institutions it should be possible to understand this process of reaching out[7]. Echoes of this approach from the past can still be found in discussions relating to the recent establishment of the European Public Prosecutor's Office (EPPO) which is supported by 22 out of 27 Member states[8].

7 The antidote to this Europhile vision is the view that criminal law is traditionally (at least since the 19th century) a product of the nation state reflecting deeply the national customs and values[9]. Situated on separate islands of the nation state, this **Eurosceptic argument** goes, it is the field of law least interested in being drawn into the maelstrom of European integration. A neat comparison is to imagine an old-fashioned kitchen aid used for preparing dough. Set at a low level of rotation, the hook would be moving slowly and even in the centre of the bowl the ingredients would hardly mix. The higher the level of rotation, the better the mixing will work, and increasingly even those parts of flour that resisted the pull at lower speed levels will be pulled into the centre. This is, metaphorically speaking, the more conservative position on criminal law in the process of Europeanisation. Keeping the speed at a controlled level, some would argue, will create a modicum of harmonisation which would not hurt. But increasing the speed would create undesirable consequences.

8 From a CRIMHUM perspective, the important point to note is that whatever middle ground existed between the aforementioned positions came to naught when the Constitution Treaty failed. Suddenly, there was no longer a prospect of an "ever closer union" and not even a shared vision of the *finalité* of the European project. The **Treaty of Lisbon** which is the current legal basis of the EU is a product of the work of negotiators from all Member states who have gone through the purgatory of ratification failure. It is a **blueprint not for bold, but for careful action**, preserving some of the institutional innovations anticipated by the Constitution Treaty, but giving the various stakeholders more control over reaching out into newer

[7] Hecker (2015) 3.

[8] E.g., Jour-Schröder (2018) calls it a "far-reaching milestone on the European criminal law agenda". For more details, see 5.4.5. in this book.

[9] It is simplistic because up until the early 19th century the *Carolina* served as a subsidiary source of criminal law in the Holy Roman Empire of the German Nation, which covered a large part of nowaday's EU. For more background, see Sieber (2014) 81.

fields of integration, such as European criminal law and EU criminal law. Respect for national legal traditions[10], subsidiarity[11] and proportionality[12] are now the magic words to ensure that not even European criminal law is encroaching on national interests. When using the instrument of directives to harmonise national criminal law, each Member state is entitled to "pull the emergency break" when it considers that a draft directive would affect fundamental aspects of its criminal justice system[13].

1.1.2. Is there a post-Lisbon consensus?

Answering the question about a post-Lisbon consensus on the role of criminal law requires some differentiation. On the one hand, in the area of the **protection of the financial interests** there is a solid consensus among Member states to use criminal law in a resolute way to protect the EU budget. This consensus is expressed in Article 325 (4) in the Treaty on the Functioning of the EU (TFEU), which contains so far the only supranational competence to legislate on EU criminal law. Hence, the term "EU criminal law" should be reserved to matters representing a genuinely supranational criminal law effective throughout all Member states of the EU. Beyond this, we speak of **"European criminal law" as a Europeanised version of national criminal law**. And in this field, we are witnessing the most wide-ranging debates[14]. But this is even the good news: instead of dreaming about an EU criminal law pushing forward, Member states are thrown back into debating how they want to create the necessary trust based on harmonised laws when the reality is that in some countries there is a backsliding in rule of law standards[15]. There is no shiny "export model" of EU law (or EU criminal law for that purpose) that could be recommended to either Belarus or Ukraine, rather the humble acknowledgement that a lot of arduous work is needed to define the Europeanised dimensions of

9

[10] Article 67 (1) TFEU.

[11] Article 5 (3) TEU in conjunction with Article 69 TFEU.

[12] Article 5 (4) TEU).

[13] Article 82 (3) and 83 (3) TFEU.

[14] Among the most recent contributions, see Csonka and Landwehr (2019) and Schroeder (2020).

[15] On this issue, see in greater detail Chapter 5, 5.2.1.

national criminal law in the EU. Whatever enlightenment this will bring to associated partners and the wider neighbourhood, it is "work in progress" and in the best cases work that can be achieved together.

10 There is one forward-looking approach to the study of European criminal law that *Brière and Weyembergh* proposed. In their opinion, there should be **four balancing exercises** at the heart of promoting Europeanisation:

1) The quest for the right balance in the institutional design / between the EU and the Member states and between the EU institutions;

2) the quest for the right balance between diversity and unity;

3) the quest for the right balance between liberty and security;

4) the quest for balance regarding criminal justice actors and in their mutual relations[16].

11 *Klip*, in his chapter on "Rethinking European Criminal Law", is rather hesitant to outline a vision for European criminal law[17]. *Mitsilegas* posits that the entry into force of the Lisbon Treaty "will not bring an end to the competence debate, but will serve to refocus the mind on the impact of the exercise of EU competence in substantive criminal law upon the Union's criminalisation policy". A key question in *Mitsilegas'* view is "whether, irrespective of the existence of EU competence to legislate, criminal law is the most effective way to address security threats or achieve the effective implementation of Union policies"[18].

12 Interestingly, in the first half of 2019 the Romanian EU Presidency launched a **policy debate on the future of EU substantive criminal law**. Evaluating feedback from Member states, it prepared a report of which it claimed that it had the support of a "very large majority of EU Member states"[19]. This report was subsequently submitted to the Council (Justice and Home Affairs) meeting on 6/7 June 2019 and debated by the Ministers of Justice[20].

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[16] Brière and Weyembergh (2017).

[17] Klip (2012).

[18] Mitsilegas (2016) 80.

[19] Report of the Romanian Council Presidency "The Future of EU Substantive Criminal Law" of 28 May 2019, doc. no. 9726/19, available at <http://data.consilium.europa.eu/doc/document/ST-9726–2019-INIT/en/pdf>.

[20] Outcome of the 3697th Council meeting, Luxemburg 6 and 7 of June 2019, doc no. 9970/19, available at <https://data.consilium.europa.eu/doc/document/ST-9970–2019-INIT/en/pdf>.

The Ministers of Justice supported the conclusions of the Presidency Report[21]. They mainly stressed that emphasis should be placed on the effectiveness and quality of implementation of *existing* legislation. They also propounded that further "Lisbonisation" is currently unnecessary, i. e., Framework Decisions that were adopted under the Amsterdam/Nice Treaty should not be transposed and updated by Directives under the Lisbon Treaty in light of the CFREU. 13

However, the door to the establishment of more minimum rules on criminal offences and sanctions has not yet been completely shut. Instead, the reflection process is to continue. Some Member states and the Commission mentioned *inter alia* the following specific areas where EU legislation would be advisable in the future: 14

- environmental crimes, including maritime, soil, and air pollution;
- trafficking in cultural goods;
- counterfeiting, falsification, and illegal export of medical products;
- trafficking in human organs;
- manipulation of elections;
- identity theft;
- unauthorised entry, transit, and residence;
- crimes relating to artificial intelligence.

Overall, the earlier enthusiasm about accelerating the "Europeanisation" blender is visibly gone. Member states and their Ministers of Justice are not categorically opposed to developing EU legislation further, but they appear to be rather selective. The difference to earlier times can best be seen in the proposal by the Romanian Presidency to consider developing a common understanding of notions in criminal law that are regularly used, such as "serious crime", "minor cases", etc. Such a proposal, if adopted, would have opened the doors wide to scholarly contributions and attempts to build a doctrinal approach. Ministers, however, rejected the proposal and saw no need to develop common definitions of certain legal notions[22]. 15

[21] Summary based on Wahl (2019).

[22] Wahl (2019).

1.1.3. Some perspective on the design of this course book

16 This coursebook is complementary to the seven specialised course books that will be written by scholars from Belarus and Ukraine as part of the CRIMHUM consortium. Unlike the literature that strives to give complete overviews in the development of all relevant fields[23], this course book is somewhat selective in addressing problems that are either fundamental (also for a student's better understanding) or particularly important for the discussion of criminal law in Belarus and Ukraine. It is written mostly by authors from the programme countries participating in the CRIMHUM consortium and designed to offer a wide variety of national criminal law traditions from Western Europe.

17 For CRIMHUM students, it is important to go beyond the scholarly analysis of academic observers and delve into the wealth of case law. Nothing indeed replaces the self-study of the relevant materials! For case books that select the most relevant cases carefully, please see the references in this footnote[24].

1.2. Europeanisation of national criminal law in a wider framework

1.2.1. Perspectives on Europeanisation

18 The history of European criminal law is often presented in a unidirectional manner. Considering that the "discovery" of EU law's effects on criminal law ("Europeanisation") was a breakthrough of the 1990s, the resulting **emphasis on the functional role of criminal law's harmonisation** for the

[23] E.g. Ambos (2018). There is also abundant literature in German, e. g. Böse (2013), Hecker (2015), Safferling (2011), Satzger (2020) and Sieber, Satzger and von Heintschel-Heinegg (2014).

[24] Mitsilegas, di Martino and Mancano (2019). Please also have a look at case books, dealing with the case law of the European Court of Human Rights (ECtHR) more broadly, as they might well discuss cases related to criminal law. For a recent overview, focusing, *inter alia*, on freedom of assembly and speech issues in Russia, see Meyer (2018).

achievement of wider integration goals has been well described. In parallel, since the 1990s and possibly earlier there has been an increasing interest in **human rights and their effect on criminal law and criminal procedure**. It is probably fair to say that the current level of scholarly analysis is a result of the amalgamation of these two research strands, and that we are now equally concerned about using criminal law in the interest of defending liberty and guaranteeing security, on the one hand, and limiting criminal law in the interest of individual freedoms, on the other[25].

19 From a CRIMHUM perspective, putting oneself into the shoes of a single Member state only goes as far as academic interest reaches. For the real-life situation in Belarus and Ukraine, it is preferable to offer a framework that works more broadly. Indeed, in addition to the conventional top-down perspective there is an important bottom-up perspective and also a variety of horizontal exchanges that need to be taken into account. Most importantly, the vertical directions of the interplay between European and national law have different functions[26]. While top-down Europeanisation is often creating new grounds for criminal law and / or expanding its reach, the bottom-up function is often limiting the reach of criminal law in the interests of individual liberty.

1.2.2. Vertical (top-down)

20 The major distinction to be made when considering top-down influences on national criminal law is the authority and legitimacy of the "influencer". Conventionally, this authority is based on **international law** and thus derived from a government's willingness to be bound vis-à-vis other governments. In supranational influences, the nature of the agreement to be bound is different, as governments at one earlier point in time decided to agree to be bound by a majority vote, even if they find themselves in the minority. Outside the proper EU, this model of supranational decision-making does not have applicability, so technically for so-called third states (Belarus) and associated states (Ukraine) the results of this process may only be interesting from an academic perspective. At the same time, whatever progress is

[25] See 2.1. in this book with more details on this approach.

[26] Hecker (2015) 13.

achieved in bringing the national criminal laws of EU Member states into line forms the so-called *acquis communautaire*, the level of integration achieved to which future members will need to subscribe and which invariably forms whatever "concept" or "model" the EU is eager to export to its partners.

21 International law-based top-down influences come in a **variety of formats**. One is the universal format, such as in the areas of transnational organised crime and corruption[27]. Others formats are more plurilateral, such as the Organisation for Economic Co-operation and Development (OECD). Originally created to support the reconstruction of Europe after WWII, it now has a global profile. Finally, the Council of Europe (CoE) which from an EU perspective is a regional sister organisation with a clear European identity, but still reaches out globally, as a number of its conventions are opened up to non-European countries.

22 No matter which international organisation is the host or sponsor of an international convention, **criminalisation obligations do not pose legal challenges *per se***. As will be later discussed in the section on transnational organised crime and corruption, the criminalisation obligations can be couched in various terms, giving the State party more or less leeway to bring the fundamental principles of its constitutional order into consideration. In the worst case, a State party may, upon ratifying the convention, make a declaration or express a reservation regarding certain provisions. Alternatively, it may just choose to ignore the convention.

23 The **CoE**, in its role as European standard-setter, has a broader profile than many other international organisations. It is instructive, on the one hand, to have a look at the CoE **Treaty Office**[28] which is the central repository for all the conventions signed and ratified under the aegis of the Co E. A significant share of conventions developed have a criminal law dimension, and the EU, in deciding on which track of Europeanisation of criminal law to choose, will invariably consult the level of agreement reached within the CoE to avoid any duplication. Nevertheless, in the Vienna Action Plan of 1998 EU Member states decided in principle to develop Europeanisation of criminal law based on framework decisions and not on the basis of CoE treaties[29].

[27] See 4.2. in this book.

[28] <https://www.coe.int/en/web/conventions/>.

[29] Heger (2009) 57.

On the other hand, the CoE is also prolific in producing recommendations and other types of **soft law** which addresses its Member states on a number of upcoming issues and which significantly helps to create awareness and start discussions, eventually leading to the adoption of a convention. It is worthwhile indeed to visit the CoE Rule of Law Portal in order to get an appreciation of the breadth of standard-setting activities which are in essence top-down instruments, but with no binding force. 24

Finally, an important CoE instrument in top-down standard setting is the so-called **Venice Commission** or "European Commission for Democracy through Law", as it goes by its full name[30]. Although technically committed to issues of constitutional law, the independent experts of the Venice Commission are constantly touching upon issues of criminal law when consulting on rule of law, judicial reforms and human rights. 25

Despite being formally outside the CoE, Belarus is no stranger to the organisation. Where interests meet, Belarus is an *ad hoc* participant in a number of initiatives and has also acceded to conventions with a criminal law character where they have been opened up for non-CoE Member states. The best example in this respect is the Convention against Trafficking in Human Beings which for Belarus entered into force on 1 March 2014. Ukraine, on the other hand, joined the CoE on 9 November 1995 and is probably one of its most over-consulted members. 26

1.2.3. Vertical (bottom-up)

Two often underestimated, but most powerful sources of Europeanisation of law including criminal law have a bottom-up character. One is the possibility of bringing individual human rights complaints to the ECtHR, the other is the possibility of asking the CJEU for a preliminary ruling. Both are of course very different in their legal character. 27

Bringing a **human rights complaint** as an individual is invariably tied to the specific situation of the exercise (or the lack thereof) of public authority. The law, which the public official purports to implement, is not in itself, as a rule, the target of the complaint. Possibly, the public official has abused some discretion that the law granted to him, and it is precisely this use of 28

[30] <https://www.venice.coe.int>.

discretion that constitutes the grievance. It might, however, well be the case that the public official's action (or inaction) was bound by the law so that the concrete instance of exercising public authority creates a direct connection to the law in question. In this case, it is quite possible to say that the human rights violation in the exercise of power contaminates the very law which is the basis of this exercise. In this way, a provision of criminal law may well come under the scrutiny of human rights. If it is the ECtHR, the right of individual complaint to which is enshrined in Articles 34 and 35 European Convention of Human Rights (ECHR), the Court's judgement will only regulate the individual case. But incidentally, pressure will build upon the national legislator to consider the law itself.

29 While the mechanism described above may not be considered a case of Europeanisation *strictu sensu*, it is in practice treated this way because the ECtHR is applying the ECHR as a **regional European human rights compact**. There are other regional human rights systems, and it is true that those systems all recur to the UN International Covenants on Civil and Political Rights as well as on Economic, Social and Cultural Rights, and ultimately to the Universal Declaration of Human Rights. In other words, there is probably no specific European or regional flavor in the wording of the ECHR, but its consistent and decades-long application by judges from various European states gives it a strong European identity.

30 The **CJEU** is technically set up not to hear complaints from individuals, but there is one specific action that allows the Court to review any action (or inaction) by organs of the EU in the light of the CFRE. It is every **individual's right to claim non-contractual damages** (tort) from the EU for any violation of Union law including the CFREU[31]. Since the focus of this action is on damages and therefore requires a certain monetarisation of the individual grievance, it is not a backdoor to human rights litigation. Nevertheless, it is quite possible that officials of the EU when implementing EU criminal law proper (primarily in the area of the protection of the financial interests of the EU)[32] violate some provision of the CFREU. So, while adjudicating the specific case the CJEU might easily draw inferences on the validity of the legal act behind it.

[31] Article 340 (2) in conjunction with Article 268 TFEU.

[32] On this single instance of a true supranational European criminal law, see below.

The second, perhaps even more far-reaching instrument of Europeanisation is the **preliminary ruling procedure**[33]. By giving national courts the possibility[34] to stay proceedings and inquire about the correct application of EU law, the drafters of the Treaties have created a powerful mechanism for the harmonisation of national law in light of Union law. In a request for a preliminary ruling, the national court is, as a matter of fact, questioning the validity of its own national law. Therefore, any finding that the national law is in breach of EU law will make the provision in the national law inapplicable. Preliminary rulings have had a strong influence on the Europeanisation of criminal law so far[35]. 31

The above-mentioned avenues towards bottom-up Europeanisation are often not sufficiently appreciated when discussing the emergence of a European criminal law. However, in reality, they are even more powerful because they address the attention to the courts both inside and outside the EU as pacemakers of a European criminal law. 32

1.2.4. Horizontal

Finally, a potent source of Europeanisation are the exchanges that take place in academia where issues of comparative law, European law and criminal law are often scrutinised at conferences, roundtables, etc., but also professional exchanges in national and European networks and associations of judges, prosecutors, police practitioners[36]. A central place is taken up by the Academy of European Law (ERA)[37] which annually offers a wide spectrum of continuing education opportunities in European law. 33

From a CRIMHUM perspective, it is probably difficult to imagine how intense and far-reaching nowadays' internal debates[38] on the development of EU law are when comparing them to similar events that take place in 34

[33] Article 19 (3) lit. b) TEU in conjunction with Article 267 TFEU.

[34] If the question arises with a national court of last instance, it is even obliged to request a preliminary ruling.

[35] See, for example, 2.3.2. in this book.

[36] See, e. g., the European Criminal Law Academic Network (ECLAN) at <https://eclan.eu/en>.

[37] <https://www.era.int/>.

[38] In all fairness, it should be noted that up until the Maastricht Treaty, criminal law did not play any role in EC law as well.

the post-Soviet space. Given that the Eurasian Economic Union (EEU) has not been designed to function with an inbuilt integration engine and is not allowed to touch upon Member states' criminal law, coupled with the novelty of this organisation, the result is one of a marked difference in dynamics and openness.

1.2.5. Conclusion

35 Europeanised national criminal law now takes up the largest part of the body of law that we conventionally call "European criminal law". Its most prominent feature is that it is the result of intricate processes of convincing, rejecting and discussing anew. Contrary to the experience of national law-making, it is a debate that brings in the various national legal cultures of the diverse EU Member states. From a CRIMHUM perspective, particularly relevant experiences can be drawn from those EU Member states that have been part of the family of socialist legal systems earlier, e. g. in Central Europe, in the Baltics, in South Eastern Europe and particularly the Western Balkans.

1.3. European criminal law as a result of Europeanisation

1.3.1. The classical mechanics of Europeanisation

36 During the past 20 years research on the Europeanisation of criminal law has been preoccupied by the study of the **inter-penetration of national criminal law and EU law**, often visible only to the expert's eye, but with a profound effect on shaping the character of national criminal law. *Satzger*, in his seminal work on the Europeanisation of national criminal law, distinguishes three large fields:

1) References between EU law and national criminal law, creating a new Europeanised criminal law;

2) Neutralisation of national criminal law as a result of the priority of EU law;

3) Interpretation in line with EU law.

In the first field, there are two constellations to be distinguished. One is called **"assimilation"** and refers to the situation that Union law refers to national criminal law and includes into the scope of protected legal interests on the national level also the legal interests of the EU. The classical case for this, however controversially discussed, is found in Article 30 of the Statute of the CJEU: 37

"A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court".

The relevant offence in national criminal law is thus expanded to also include violations of oath when testimony is given before the CJEU. Needless to say, this practice raises questions from the point of view of predictability of criminal legislation, as long as the national legislator does not adapt the national offence. 38

The second constellation refers to cases in which national criminal law makes a **blanket referral to EU law**. The offence is thus not completely circumscribed, but needs to be complemented by reference to some EU legal act. This legal technique is often chosen because technical standards in EU law are changing quickly. Again, from a predictability point of view, the scope of the criminal behaviour cannot be inferred from the criminal law provision by itself, but only by additionally taking into account the substance of EU law that is taken into reference. 39

The second field (so-called **neutralisation**) is, in fact, an application of the principle of the priority of EU law. To the extent that EU law is directly applicable (and this is by far not always the case), EU law takes precedence over the norm of national law and makes it inapplicable. Unlike similar situations in national law in which a violation of higher levels of law makes the lower level norm null and void, the EU law is unable to legislate such a consequence under national law. The consequence thus is only inapplicability. 40

The classical case of neutralisation comes from the internal market. National law, for example, may require that certain information is posted 41

in a certain way on a product, and that in case of violation the producer will be criminally liable. When the EU requires that the product shall be labeled in a different way uniformly throughout all Member states and the national producer follows this requirement, he will not become criminally liable under his national law if he does not follow the national requirements.

42 Finally, **interpretation in line with EU law** is the most obvious and everyday case of Europeanisation. Structurally, it is comparable to the national experience of interpretation in line with constitutional law, but in the case of EU law the obligation to do so additionally flows from the duty of loyalty established in Article 4 (3) TEU. For criminal law, this means that from a variety of possible interpretations of a criminal law norm in national law the one is preferable that best realizes the goals and purposes of EU law. While this idea is pretty clear in theory, there is a long-standing debate raging in the area of directives and framework decisions, i. e. whether the values expressed in such instruments will need to be taken into account by national legislators and the courts in the time period between entry into force and the transposition deadline of the instrument. Beyond transposition, the CJEU has consistently held that provisions of directives that are sufficiently clear and need no implementing legislation become directly applicable.

1.3.2. Harmonisation

43 In comparison to all above-mentioned techniques, the harmonisation of national criminal laws is currently the most important field of Europeanisation. *Ambos* gives a very insightful delimitation: **harmonisation is less than standardisation** because it is gradual and merely aims at the convergence or approximation of national criminal law; harmonisation is **more than assimilation** because by focusing on the Union interest and asking national criminal law to protect these interests, assimilation only acts as a "gap-filling tool". Indeed, assimilation rather cements the differences between national criminal justice systems than harmonising them[39].

[39] Ambos (2018) 22. See also the earlier approach by Weyembergh and de Biolley (2013) 9.

In the Lisbon Treaty, the Member states have been extremely reluctant to grant a genuine supranational competence to create a proper EU criminal law. The only case where this has actually happened is Article 325 (4) TFEU for the protection of the financial interests of the EU. By comparison, **the legislative basis for harmonisation** of national criminal law is now much broader. **Article 83 TFEU** is the most important legal basis, distinguishing two very different sets of harmonisation situations in its first two paragraphs, but juxtaposing them with the emergency break provision in its third paragraph. 44

Article 83 (1) TFEU has the following wording: 45

"The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament".

As there is no legal definition of "serious crime", the **notion of "particularly serious crime"** is even more vague. The same is true for the property of a **"cross-border dimension"**. While offences committed spontaneously are usually characterised by their local nature, any type of premeditated crime may easily involve a cross-border dimension, as the offender may think of acquiring the instruments of crime abroad, going into hiding abroad, etc. The given list of crimes (often called **"eurocrimes"**) is therefore not beyond criticism, but the fact that it has been developed based on the threat assessments of Europol and in endless debates of the Ministers of Justice makes it intuitively convincing. It is also intimately connected to the justice and home affairs agenda that has been debated 46

since the early 2000s. This agenda critically relies on the spectre of criminal threats either coming from outside the EU altogether or using the open borders within the EU to outsmart the police[40].

47 Harmonisation based on Article 83 (1) TFEU works by establishing minimum rules and prescribing these rules to Member states **by means of directive**. A directive is a legal tool originally widely used for creating the single market. It is binding on Member states in prescribing the goals to be achieved, but leaves every Member state the choice of instrument[41]. In the AFSJ, the Maastricht Treaty had earlier created the instrument of joint action, later replaced by the Amsterdam Treaty's **framework decision**. Compared to the classical directives, FDs were not not capable of having direct effect. Furthermore, they were only subject to the optional jurisdiction of the CJEU and enforcement proceedings could not be taken by the European Commission for any failure to transpose a FD into domestic law[42].

48 A second characteristic feature is the use of the **ordinary legislative procedure**. FDs had existed in the third pillar of the EU, which was a purely intergovernmental construct. Hence, Article 34 TEU (old) provided for the need for unanimity in the Council when acting upon the proposal of the Commission or a Member state to adopt a FD. Under the current ordinary legislative procedure (also called co-decision procedure)[43], the authority to adopt directives has moved away from the Council and is now jointly exercised by the European Parliament and the Council. In the Council, under certain circumstances decisions may be taken by a qualified majority. So, it can be rightly claimed that under the Lisbon Treaty a directive that introduces minimum standards for certain types of crime is a supranational instrument.

[40] It is worthwhile to consult the programmes developed by the EU for the AFSJ, e. g. the Hague Programme (2005–2009) and the Stockholm Programme (2010–2014). For the post-Stockholm era, there is no similar programme available. Instead, the European Council adopted in its Conclusions of 26 / 27 June 2014 the so-called JHA Strategic Guidelines (EUCO 79/14) which in 2017 were subjected to a mid-term review (Council Doc. 15224/1/2014 of 1 December 2017).

[41] Now Article 288 TFEU.

[42] Hence, one of the topics raised by the Romanian Council Presidency mentioned earlier was the "Lisbonisation" of the earlier framework decisions by updating them into the shape of directives.

[43] Article 289 (1) TFEU in conjunction with Article 294 TFEU.

The second type situation in which national criminal law may be harmonised by means of directive is expressed in **Article 83 (2) TFEU**: 49

"If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76".

This provision is basically an adoption and acknowledgement of the earlier practice of the CJEU which confirmed **annex or implied competences** for criminal law harmonisation when such measures were seen as essential for an integration project for which the EU clearly had competences outside the criminal sphere. A current example is the struggle to adopt a legal framework for migration policy, which includes, *inter alia*, the issue whether Member states may criminalise humanitarian search and rescue missions by non-government organisations (NGOs)[44]. Again, the phrase "proves essential" refers to the full panoply of subsidiarity and proportionality concerns and needs to be seen with the "emergency break" provision in Article 83 (3) TFEU in the background. 50

1.3.3. Harmonisation of criminal procedure law

The goal of creating a Europeanised law of criminal procedure is probably not less ambitious than the idea of harmonising existing substantive criminal law[45]. However, there are some **nuanced differences**. For instance, while in the 19th century the national differences in criminal law were discovered and celebrated, the law of criminal procedure remained more stable and unified. Notwithstanding the unique features of common law jurisdictions which served as inspiration for many studies of comparative procedure law, continental European criminal procedure systems came quite strongly under the influence of French criminal procedure. This may 51

[44] See 4.3.3. in this book.

[45] See 5. in this book for more details.

be less true for the Nordic legal systems, but in the Germanic countries, the Napoleonic occupation of German territories left of the river Rhine led to the astonishing spread of the liberal, so-called reformed criminal process. Even without going into details, it is possible to say that while in the area of criminal law there were a lot of centrifugal tendencies in the 19th century, the effect of comparative scholarship in criminal procedure law was an overwhelmingly centripetal one. On the other hand, different traditions in policing remained strong. Therefore, the specific combinations that emerged over time are now the basis for the diversity that exists in the criminal justice systems.

52 In the late 1990s when the EU began to conceptualise a common agenda in justice and home affairs, one of the driving arguments was to withstand the dangers of globalisation of crime in a borderless Europe. The first impulse was therefore to increase co-operation between police and justice authorities and to streamline and rationalise existing cross-border initiatives, especially in the area of policing. The institutions created at that time (Europol, European Judicial Network, OLAF) inspired much optimism and much effort was expended in establishing and inter-connecting them with national institutions.

53 The turning point occurred with the special meeting of the European Council held in Tampere in October 1999. At this historic event, the EU declared that the **principle of mutual recognition** shall henceforth be developed to become the corner stone of judicial co-operation both in civil and in criminal law. The basic idea for the principle of mutual recognition was taken over from the single market: judicial decisions should be able to travel the entire "single market" of the EU and be recognised in any Member state. The analogy between a judicial decision and a product on the market was of course quite flawed, as many critics were quick to point out. But the overall idea remained in force with a very important qualification: a certain amount of **approximation of legal systems** would be needed, coupled with **mutual trust**[46], to create the background for the "tradeability" of judicial decisions.

54 Whatever one may think of this concept, it created a torrent of discussions and activity. For once, legal practitioners were clear that

[46] Sicurella (2018).

mutual trust cannot be decreed, but needs to be earned. An approximation of standards is a very gradual and complex project because of the high inter-relatedness of constituent principles in every national system. Indeed, the recent experience with the backsliding of some EU Member states into what is called illiberal democracies has been doing damage to an extent that some Member states are considered no longer trustworthy.

55 Under the Lisbon Treaty, the Tampere discussions and their aftermath have been codified into **Article 82 TFEU**. Paragraph (1) defines the principle and also various areas of priority:

"Judicial co-operation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;

(b) prevent and settle conflicts of jurisdiction between Member States;

(c) support the training of the judiciary and judicial staff;

(d) facilitate co-operation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions".

56 The second paragraph of Article 82 TFEU intersects with the approach of Article 83 (1) TFEU to establish minimum rules by means of directive:

"To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial co-operation 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:

(a) mutual admissibility of evidence between Member States;

(b) the rights of individuals in criminal procedure;

(c) the rights of victims of crime;

(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

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.

57 Similar to Article 83 (3) TFEU, the third paragraph of Article 82 TFEU contains the emergency break mechanism discussed earlier.

1.3.4. Conclusion

58 Contrary to the earlier "Europhile" suggestion that it is the study of institutions which opens up the view on the development of European criminal law, it is really competences or the lack thereof which explains the ticking of the EU. In the earlier period that began with the Maastricht Treaty, the instruments of harmonisation changed relatively often and it was academia that tried to develop some more systematic approach to the ways and means of harmonisation. Nowadays, with the Lisbon Treaty versions of TEU and TFEU firmly in place, the legal framework for harmonisation of national criminal law and for the adoption of genuine EU criminal law has become much clearer.

1.4. Human rights in European criminal law

59 Contrary to the experience of national law where doctrinal concerns and constitutional principles play a leading role, the development of European criminal law is unimaginable without human rights. It can be argued that human rights act as a **surrogate check on a possibly ever-widening net of European criminal law**. As for EU criminal law, a clear commitment to human rights also acts as an **additional source of legitimacy**. *Sieber* argues that the Lisbon Treaty has created a breakthrough for the EU: compared to other international organisations, its commitment to human rights has enabled it to assume the moral high ground to engage in the creation of supranational criminal law. Although there is currently only one limited

competence to create genuine supranational criminal law[47], the EU has been breaking new ground with this development.

60 The commitment of the Lisbon Treaty towards human rights is expressed in two directions. On the one hand, Article 6 (1) TEU elevates the **CFREU** to the rank of **primary EU law** and makes it binding on all EU institutions insofar as they implement EU law[48]. On the other hand, the EU finally obtained legal personality and was thus put in a position to **accede to the ECHR** on a par with its Member states. Indeed, under Article 6 (2) TEU and Protocol No. 8 on Article 6 (2) TEU it is even under an obligation to do so. However, the entire process of ECHR accession came to a grinding halt when the CJEU scrutinised the draft accession agreement. In opinion 2/13 of 18 December 2014 it concluded that the agreement is not compatible with Article 6 (2) TEU so that accession may only proceed if the agreement is modified or the TEU changed. The argument is highly complex and leaves the EU at this stage in some kind of limbo.

61 In its guarantees referring to criminal law, the CFREU is essentially modelled after the ECHR so that in the wording there are hardly any differences. Before the Lisbon Treaty it had been of secondary importance in the framework of EU law, but now its importance has increased significantly. *Ambos* holds that its significance for the future of EU criminal law cannot be overestimated[49]. The problem behind this ascent to importance, however, is **which court has the final authority to interpret human rights**. It is here where the views about the inter-relationship between CJEU and the ECtHR most fiercely clash. Whatever the outcome might be, it is specifically the role of the ECtHR that has the greatest impact on the EU neighbourhood.

62 In the system of multi-level governance that the current design of the EU represents, the CFREU is also most important in **coordinating national criminal systems.** As we had seen before, the *raison d'être* of the AFSJ was the threat of increasing cross-border serious crime. While harmonisation of police and justice responses is a slow process, citizens may now find themselves targeted by multiple investigations in a variety of EU Member states. Indeed, there is no instrument yet to prevent multiple investigations,

[47] Article 325 (4) TFEU.

[48] Article 51 (2) CFREU.

[49] Ambos (2018) 142.

but on the level of adjudication, the CFREU is guaranteeing – in line with Article 54 of the Convention implementing the Schengen Agreement (CISA) – the **principle of *ne bis in idem***, also called the prohibition of double jeopardy[50]. Article 50 CFREU holds:

"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

63 This principle of *ne bis in idem* has raised numerous difficulties especially in the context of the European Arrest Warrant (EAW), but it shows how important it is to have a powerful counter-weight to the increasing efficiency of criminal investigations on an EU-wide scale.

1.5. Important take-away points

64 From a CRIMHUM perspective, much of what has been happening in the field of Europeanisation of criminal law presents a test case for developing greater sensibility in developing one's own criminal law. While the history of European integration is a complicated story in and of itself, the major focus of this narrative is that no matter how complicated the systems of competences have developed, **the story of human rights has been intertwined into the emergence of the AFSJ**. Human rights in the EU context are "work in progress" very much like the harmonisation of criminal law itself and the failure of the EU to accede to the ECHR has undoubtedly presented a setback. Nevertheless, human rights are central and inform a large part of the debate on developing criminal law. This will also be the dominant theme of the following chapters.

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[50] For more details see 5.2.3. in this book.

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2. CRIMINAL LAW IN SPACE AND TIME[51]

2.1. Introduction

Criminal law is often described as the field of law that expresses the strongest national characteristics of a given jurisdiction and is the least amenable to change[52]. Naturally, social rules providing some kind of penalty when violated have existed throughout the history of mankind. In Europe, the current understanding of criminal law has been shaped by **Enlightenment thought, the ideas of human rights, liberalism and finally the national movements,** which led, *inter alia*, to the famous codifications of criminal law of the 19th century. In Belarus and Ukraine, these developments have perhaps been felt even more acutely because both territories have been dependent on various empires and cultural influences for the largest part of their histories. Both have also experienced strong national movements. Perhaps it is too crude to say that whatever "modern" influences have been transmitted through Lithuania, Poland and the Austro-Hungarian Empire have collided with the conservative influences of the Russian Empire. However, not to be discussed in black and white, **the influence of Russia has had a chilling effect** on the development of liberalism, political freedoms and a national criminal law rooted in rule of law traditions. 65

The central message for this chapter is that criminal law, despite its relatively stable nature, is under a variety of influences among which the **changing understanding of human rights** is a very important one. There is a large amount of literature dealing with human rights and criminal law in general[53], and it is hardly possible to come to an overall systematisation. 66

[51] An earlier version of this chapter was published as "Criminal Law and Human Rights: Some Examples from the Emergence of European Criminal Law" in Allrussian Criminological Journal (Всероссийский криминололгический журнал) 2020 No. 5.

[52] On this view see 1.1.1. in this book (the kitchen aide example).

[53] See, e. g., Tulkens (2011) and van Kempen (2014). There is even more literature on human rights and international criminal law.

To be sure, there are parts of criminal law which have experienced very little change in light of human rights. One central tenet of human rights, for example, is the equality of men[54] (in a pre-feminist reading including both men and women) which leads to the criminalisation of slavery, slave trade, forced labour and trafficking in human beings. The smuggling of humans, on the other hand, is a controversial topic to which we shall return later[55]. In the liberal world view of the 19th century, another pillar of human rights is the human right to property[56] which informs a whole range of criminal law provisions for violations of the right to property on land (theft, robbery, etc.) and on water (piracy). By comparison, the right to life is a more difficult concept. Human rights are behind the global drive for the abolition of the death penalty[57], but a number of other life-related issues are determined less by human rights than by religious and ethical views, such as the criminalisation of abortion, aiding and abetting suicide, and euthanasia. Finally, a number of human rights are experiencing a very lively debate, e. g. freedom of speech[58] and freedom of religion, and consequently there is also a high impact on the development of criminal law.

67 It would probably go too far to say that human rights are the main driver of criminal law reform. However, human rights undoubtedly play an important role. Realizing that even such type of statement is probably difficult to accept for representatives of legal traditions which view criminal law as the foremost instrument of the state, we shall trace in this chapter

[54] See Art. 1 of the French Declaration of the Rights of Man and of the Citizen of 1789: "Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good".

[55] See 4.3. in this book.

[56] See Art. 17 (*ibd.*): "Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified".

[57] See the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), Aiming at the Abolition of the Death Penalty of 15 December 1989, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx>. See also the Protocol to the American Convention on Human Rights to Abolish the Death Penalty of 6 August 1990, available at <http://www.oas.org/juridico/english/treaties/a-53.html> and last but not least Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Concerning the Abolition of the Death Penalty Under All Circumstances of 3 May 2002 (available at <https://www.echr.coe.int/Documents/Library_Collection_P13_ETS187E_ENG.pdf>.

[58] Lobba (2014) 60: "While it is undisputed that free speech is not an absolute right, its boundaries have fluctuated over time and in relation to geographical context".

a number of examples in which human rights play an important role in criminal law reforms. The take-away point will be that changes in the understanding of **human rights can lead both to increased criminalisation as well as to de-criminalisation**. This has also been described as the "sword" function of human rights (using human rights offensively to call for criminalization against impunity for serious violations of human rights by officials and private persons) and the "shield" function (using human rights law defensively to call for limits to the use of criminal law and even de-criminalisation and furthermore, to strengthen the rights of the accused person)[59].

A second important point to make in this chapter is that in the EU the effect of human rights on criminal law reform has an **institutional dimension**, is largely driven by competences and can be enforced by the courts. It would be rather common-place to argue that changed sensibilities in the area of human rights lead to greater awareness in society over time, eventually getting picked up by lawmakers in parliaments and translated into changes to criminal law. In the EU legal framework which extends to Ukraine via the Association Agreement and has an at least referential value also for Belarus, human rights concerns have a more direct impact on criminal law reform via the instruments used to approximate criminal law in the AFSJ. 68

2.2. Criminalisation: Freedom of speech and the problem of denialism

2.2.1. EU Joint Action on combating racism and xenophobia

Among the 2020 changes to the Constitution of the Russian Federation is Article 67.1 para 3 which has the following wording: "The Russian Federation honours the memory of the defenders of the Fatherland and guarantees the defence of the historical truth. It is prohibited to diminish the achievements of the people when defending the Fatherland". Assuming that a relevant provision in criminal law will be enacted, will it remain possible, under freedom of speech,

[59] See Tulkens (2011) at footnote 51 with further references.

to share the results of critical research on the atrocities committed by Stalin against the Soviet people? Is there a conceptual difference between criminal law that penalizes the denial of the Holocaust and criminal law that penalizes the diminishing of the achievements of the people when defending the Fatherland?

69 While every country is under the influence of human rights when debating the reform of criminal law, it has now, under the changed framework of competences of the Lisbon Treaty, become quite common that the **EU is engaging in "upwardly" harmonising the criminal law of its Member states**. The earliest example of this is in the area of combating racism and xenophobia. Triggered by the problem of Holocaust denial (also called "denialism" or "negationism"), increasing levels of racism and xenophobia compelled the EU to take action as soon as the Treaty of Maastricht opened up the EU's third pillar. Going back to the concept of human rights as a "sword", it should be observed that what was worrying EU politicians and lawmakers was not racism and xenophobia as a public policy of Member states (although later in the course of events such concerns regarding some Member states definitely came up). On the contrary, it was **racism and xenophobia as a private course of action**, affecting societies and creating a climate of fear and retribution. Under a progressive understanding of human rights law, such occurrences also trigger the responsibility of states because their human rights obligations also include the positive obligation to protect and to create an environment in which all citizens are safe and equal. The **positive duty to protect** thus provides the justification for a course of action that leads to the increase of criminal law sanctions while at the same time raising concerns about fundamental freedoms such as freedom of expression.

70 The first step taken by the EU was the adoption of **Joint Action of 15 July 1996** by the Council on the basis of Article K.3 of the Treaty on European Union, **concerning action to combat racism and xenophobia**[60]**.** It is the foundation of what later became an entire policy field for the European Commission: combating racism and xenophobia[61].

[60] OJ L 185 of 24 July 1996, 5.

[61] See <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/combating-racism-and-xenophobia_en>.

71 The Joint Action starts out by observing that in the EU cases of racism and xenophobia are on the increase. Perpetrators were said to be "moving from one country to the other to escape criminal proceedings", exploiting the fact that racist and xenophobic activities were classified differently in different states. It is not clear whether this assumption was based on criminological research at the time and how large the share of perpetrators was who were suspected of moving back and forth between EU Member states. Nevertheless, this particular framing of the problem allowed the EU to take **measures in order to "ensure effective judicial co-operation"**. Thus, while speaking only of racism and xenophobia, the Joint Action asked Member states to ensure effective co-operation, including, if necessary, by taking steps to see that the **following behaviour was punishable as a criminal offence**:

- public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin;
- public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;
- public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin;
- public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;
- participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred.

72 Circumscribing racist or xenophobic activities predominantly as public expressions (inciting, condoning, denying, disseminating or distributing) brings this line of criminalisation into conflict with the **human right to freedom of expression**. However, the Joint Action remained rather vague on this account, asking Member states to take action in harmonising their respective criminal laws until a certain date while affirming that human rights obligations of Member states shall not be affected. How this was to be achieved was not explained so that it would ultimately be

left to the European Court of Human Rights (ECtHR) to decide on the measures adopted.

73 Given that a specific concern in fighting racism and xenophobia was the **denial of the Holocaust**, the solution adopted in the Joint Action is rather interesting. There is no express mentioning of Holocaust denial; instead, the Joint Action refers to the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945. These include

- crimes against peace;
- war crimes and
- crimes against humanity, including "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

74 Thus, Holocaust denial is safely covered by the reference to Article 6, but only to the extent that it "includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin". This limitation may be of no concern in the case of Holocaust denial, but it may raise question when it comes to the denial of other types of atrocities, e. g. the Holodomor in Ukraine or mass deportations in the Soviet Union.

Discussion:

The Holocaust, i. e. the systematic and industrial-scale annihilation of people of Jewish descent, homosexuals, Roma and other parts of the population not deemed "worthy to live", is perhaps one of the most well-researched chapters of the history of World War II (WW II). In fact, there is no ground left for denying the Holocaust or propagating that it is the product of Jewish propaganda. Therefore, any attempt at denial represents by definition a racist (antisemitic) position. By contrast, "diminishing the achievements of the people when defending the Fatherland" refers to a very broad and still largely under-researched area of historiography. Research into collaboration of individuals with Nazi Germany, desertion, or anti-war efforts is not necessarily the expression of an "evil" attitude (not to mention a racist or xenophobic motivation) and not in itself "diminishing the achievements of the people"

on the whole. The two cases can only be partially compared. However, in both cases the result is a limitation on freedom of expression. While in the case of the EU the motivation is to protect human rights from racist or xenophobic transgressions, in the case of Russia it is to support a state-sponsored ideology with no foundation in human rights.

2.2.2. EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law

Assignment: Please find online Council FD2008/913/JHA of 28 November 2008 in the Official Journal (OJ) of the EU and consider whether the harmonisation mandated in this Decision would require changes to the criminal law of your country as well.

FD Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law **replaces the preceding Joint Action** on combating racism and xenophobia. After lengthy negotiations, it represents a milestone in the history of European criminal law because it directly obliges Member states to adjust their criminal laws to common standards. At the same time, the FD is cognizant of the Member states' cultural and legal traditions when stating that its goal is to combat only particularly serious forms of racism and xenophobia. According to the FD's Preamble, a full harmonisation is "currently not possible"[62]. 75

Interestingly, FD2008/913/JHA drops the rather crude reference to perpetrators who travel between Member states to take advantage of differences in the legal framework. Instead, it refers to the **principle of subsidiarity** (Article 2 TEU) in explaining that the FD's objective, i. e. "ensuring that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties", cannot be sufficiently achieved by Member states individually because "such rules have to be common and compatible and since this objective can therefore be better achieved at the level of 76

[62] Preamble reference no. 6 of Framework Decision 2008/937/JHA.

the EU". This argument is rather circular because it does not explain why Member states are prevented from adopting "common and compatible" rules except that such amount of coordination is probably very difficult to achieve outside the realm of the EU.

77 In mandating the (partial) harmonisation of criminal law, the FD acknowledges the **importance of human rights in two distinct directions**: on the one hand, it ascertains that "racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States"[63], on the other hand, it proclaims to respect the fundamental rights and observes the principles recognised by Article 6 TEU and in particular Article 10 ECHR (freedom of expression). Therefore, the connection between the criminal law to be harmonised and human rights is obvious. Still, whether it will come to human rights violations can only be judged in light of application of the concrete norm of criminal law in a concrete set of circumstances.

78 In substantive terms, FD2008/913/JHA raises a number of **questions as to its effectiveness**. The first offence to be harmonised is practically the same as in the Joint Action[64]. It is a **classical "hate speech" offence** with the following wording: "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin". There is hardly any difference in the wording compared to the Joint Action, except that public incitement to discrimination is no longer included. Therefore, a situation in which Nazis would call upon shopkeepers not to sell their products to Jewish citizens would not be caught under this harmonised offence. Nowadays, classical "hate speech" offences are quite common in the national criminal laws of all EU Member states so that an added value of this line of harmonisation is not really visible.

79 The two offences to be harmonised relating to international crimes[65] are now more elaborately circumscribed compared to the Joint Action.

[63] Preamble reference no. 1 (*ibd.*)

[64] Article 1 (1) lit. a) of FD2008/937/JHA

[65] Article 1 (1) lit. c) and d) *ibd.*

However, both are now also drafted according to a **pattern, which is likely to decrease their effectiveness**[66]**.** First, the modality of committal shall be harmonised in the following way: in each case, the relevant behaviour shall be expanded from either "publicly condoning" or "publicly denying" to "publicly condoning, denying or grossly trivialising". This expanded wording is certain to create greater legal clarity. Beyond this welcome expansion, there is a more worrying situation. Although the scope of applicable international crimes is now clarified to include genocide, crimes against humanity and war crimes[67] as well as the crimes defined in Article 6 of the Charter of the International Military Tribunal, both now need to observe an important condition, i. e. that the conduct is "carried out in a manner likely to incite to violence or hatred" against a certain group or a member of such a group[68]. For questions of denialism, **inciting to violence or hatred thus becomes an overall condition**, effectively making Article 1 (1) lit. a) the most central provision and rendering the following paragraphs relating to international crimes obsolete. It also means that the "pure" denial of the Holocaust, which is not likely to incite violence or hatred obviously falls out of the harmonisation obligation.

Further serious limitations to the harmonisation are introduced in the following two paragraphs. On the one hand, Member states are free, for the purpose of paragraph 1, to choose to punish only conduct, which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting[69]. On the other hand, Member states may decide to make punishable the act of denying or grossly trivialising the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only[70]. 80

It thus appears that the legislative breakthrough in harmonising the criminalisation of racism and xenophobia intended by the EU has 81

[66] Lobba (2014) 65.

[67] Articles 6–8 of the Statute of te International Criminal Court.

[68] Article 1 (1) lit. c) and d) of FD2008/937/JHA.

[69] Article 1 (2) Framework Decision 2008/937/JHA.

[70] Article 1 (3) Framework Decision 2008/937/JHA.

been rather botched. Some clarification has been achieved, but publicly condoning denying or grossly trivialising the Holocaust as well as other international crimes when there is no likelihood to incite violence or hatred effectively stands outside the applicability of this Framework Decision.

2.2.3. The limits of criminalisation: *Perinçek v. Switzerland*

82 Presenting the role of human rights as a "sword" would not be complete without giving reference to the function of human rights as simultaneously limiting the amount of permissible criminalisation. As already mentioned, there has been much concern in the EU that, not least as a result of right-wing populist parties, a social climate may emerge in which racism and xenophobia are increasingly accepted. An early trigger of such concerns was the denial of the Holocaust, but more recently, other types of denial, including the **denial of the Armenian genocide**, have created waves. In this respect and against the background of a large number of national parliaments recognising the Armenian genocide, a famous case was decided by the Grand Chamber of the ECtHR with far-reaching consequences: the case of *Perinçek v. Switzerland*[71].

83 At the outset, it is important to clarify that Switzerland is not a Member state of the EU and that its relationship with the EU is governed by a series of bilateral treaties. These treaties do not include participation in the AFSJ. For this reason, the abovementioned FD2008/913/JHA is not applicable to Switzerland. Independently of the harmonisation exercise within EU Member states, **Article 261 *bis* of the Swiss Criminal Code**, entitled "Discrimination and incitement to hatred", provides for the following:

"(§ 1) Any person who publicly stirs up hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion;

(§ 2) any person who publicly disseminates an ideology aimed at systematic denigration or defamation of the members of a race, ethnic group or religion;

[71] Application no. 27510/08, available at <https://hudoc.echr.coe.int/eng# {"itemid": ["001–158235"]}>.

(§ 3) any person who with the same objective organises, encourages or participates in propaganda campaigns;

(§ 4) any person who publicly denigrates or discriminates against a person or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or other means, or any person who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity;

(§ 5) any person who refuses to provide a service to a person or group of persons on the grounds of their race, ethnic origin or religion when that service is intended to be provided to the general public;

– shall be punishable by a custodial sentence of up to three years or a fine".

84 The case was triggered by a number of public speeches of Mr. Perinçek who at the time was Chairman of the Turkish Workers' Party and a vocal proponent of radical left-wing positions. His speeches were given in the context of press conferences and a party rally in Switzerland in 2005. He claimed that the genocide of the Armenian at the hands of the Ottoman Empire in 1915 is an international lie, that it had never happened and that this lie is now used by "imperialists of the USA and the EU". Mr. Perinçek was subsequently charged with a violation of Article 261 *bis* § 4 of the Swiss Criminal Code and sentenced to pay a fine. He appealed the fine, but the appeal was dismissed. He then appealed to the Swiss Federal Court, but again his appeal was dismissed. Finally, he lodged an appeal to the ECtHR on 10 June 2008. He complained that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had been in breach of his right to freedom of expression under Article 10 ECHR. He also complained, relying on Article 7 ECHR (no punishment without law), that the wording of Article 261 *bis* § 4 of the Swiss Criminal Code was too vague.

85 In its judgment of 17 December 2013, a Chamber of the ECtHR held, by five votes to two, that there had been a violation of Article 10 ECHR. The Swiss Government then requested the case to be referred to the **Grand Chamber**. A Grand Chamber hearing was held on 28 January 2015 and the final judgment pronounced on 15 October 2015. In it a majority of the 17 judges came to the

conclusion that the criminal sanction by the Swiss authorities amounted to a violation of the applicant's right to freedom of speech.

Assignment: Please familiarise yourself with Article 10 (2) ECHR to understand the limits of the right to freedom of speech!

86 Being aware of the great importance attributed by the Armenian community to the question whether the historical mass deportations and massacres of 1915 were to be regarded as genocide, the Court approached the issue from the need of balancing the dignity of the victims and the dignity and identity of modern-day Armenians (protected by Article 8 ECHR – right to respect for private life) with the right to freedom of expression of the applicant, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved. The Court concluded that it **had not been necessary, in a democratic society, to subject the applicant to a criminal penalty** in order to protect the rights of the Armenian community at stake in the case. In particular, the Court took into account the following elements: the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance; the context in which they were made had not been marked by heightened tensions or special historical overtones in Switzerland; the statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland; there was no international law obligation for Switzerland to criminalise such statements; the Swiss courts appeared to have censured the applicant simply for voicing an opinion that diverged from the mainstream one in Switzerland; and the interference with his right to freedom of expression had taken the serious form of a criminal conviction.

Assignment: In concluding that it had not been necessary in a democratic society to subject the applicant to a criminal penalty, what other possible limitations did the Court check and ultimately decide not to apply? Please read paras 226–234 of the Judgement.

2.2.4. Conclusion

The "sword" function of human rights presents an argument that is attractive at first glance. However, it also opens up a wide field for critical thinking and research. There is a fine line between the amount of criminalisation that is necessary from a human rights point of view and **criminalisation** that is **driven by sheer punitivity or the idea of securitisation**, i. e. turning a certain societal or political problem into a criminal threat[72]. "Overcriminalisation" can be particularly observed in the area of national migration policies. While in earlier decades EU Member states had an active interest in attracting a blue-collar workforce from third countries and did not consider irregular migration a big problem[73], the new millennium produced a dangerous conflagration of terrorism, migration, radicalisation and religious extremism, followed by the rise of populist and right-wing movements and ultimately right-wing extremist parties in Europe and other parts of the world. The answer in the public discourse was an increasing call to use criminal law as the ultimate weapon against such security threats. 87

To understand the particular weight of human rights arguments in the debate on criminalisation is a difficult task. In general, **it is for the criminal law sciences to counteract some of the populist arguments**, *inter alia* by developing a sensorium for the question what legal interests (or human rights interests, for this purpose) shall be protected by a certain criminal offence. Apart from the lack of criminological research, the actual rationale for criminalisation is often not acutely questioned, and commentators are happy enough to point at the formal legitimacy of laws adopted by elected lawmakers. It is probably more necessary than ever to **establish the legal interest** (or, in German doctrinal thinking, the *Rechtsgut*) as a category to **combine constitutional law with criminal law approaches** in asking 88

[72] The term "securitisation" has been coined by Buzan, Wæver and de Wilde (1998). It denotes the process of state actors transforming subjects into matters of "security", – an extreme version of politicisation that enables extraordinary means to be used in the name of security.

[73] Afia Kramo (2014) 27; Mitsilegas (2015). A variety of perspectives can be found also at João Guia, van der Woude and van der Leun (2013).

whether certain steps at criminalisation are constitutionally acceptable, thus separating the wheat from the chaff.

2.3. De-criminalisation: Irregular migration and the irregular stay of third-country nationals

2.3.1. Background

89 Apart from the "shield" function of human rights, there is another constellation which is much more rarely observed: it is that a government may be forced by human rights considerations to restrict its criminal law and **delimit the applicability of a prohibition that it once had considered legitimate and necessary**[74]. There is one famous case in the history of EU integration which brought about such a consequence, but also triggered a cascade of follow-up cases which all lead to the question how much freedom an EU Member state has left in adopting criminal law responses once the EU agrees on a certain policy. This case is the so-called *El Dridi* case, decided by the First Chamber of the Court of Justice of the European Union (CJEU) on 28 April 2011.

Assignment: Please read the entire El Dridi judgement by the CJEU, available at <http://curia.europa.eu/juris/liste.jsf?num=C-61/11>.

90 To put this case into context, it is necessary to understand that the EU, within the AFSJ, has committed itself to developing a **common immigration policy**, to include also the "prevention of, and enhanced measures to combat, illegal[75] immigration and trafficking in human beings".[76] For this purpose,

[74] For a broader perspective on de-criminalisation under EU Law, particularly as an effect of the CFREU, see Mitsilegas (2014).

[75] The EU's wide use of the term "illegal" has been severely criticised from a human rights perspective, particularly by the Co E. See Guild (2010) 4.

[76] Article 79 (1) TFEU.

the EU acquired legislative competence in the TFEU to adopt measures in the area of "illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorization"[77], but subject to "respect for fundamental rights and the different legal systems and traditions of the Member States"[78].

One centre piece of this new EU immigration policy[79] is **Directive 2008/115/EC** of 16 December 2008 **on common standards and procedures in Member states for returning illegally staying third-country nationals** ("Return Directive")[80]. It presents the attempt to lay down a unified procedure for return of irregularly staying third-country nationals. EU Member states had agreed to this normative framework in the Council, but remained skeptical. One strategy therefore was to limit the scope of remedies in order to sustain the efficiency of the return procedure[81]. Of course, the human rights of those to be returned could not be ignored in the procedural design. Nevertheless, there was a visible **attempt to affirm the *a priori* conformity of procedures with human rights**[82], leading to a very critical reception among scholarly commentators and human rights NGOs at the time[83]. The second concern was that the Directive might diminish the scope for Member states to use criminal law as a means of deterring irregular migration. Up until the entry into force of this common EU policy, Member states had shown a very punitive attitude to cases of irregular migration, using the threat of criminal law in an overly broad manner[84]. The EU had limited itself to criminalise the actions of persons engaged in trafficking in

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[77] Article 79 (2) lit. c) TFEU.

[78] Article 67 (1) TFEU.

[79] See also the rules on trafficking in human beings and human smuggling, discussed in 4.3.2. and 4.3.3. in this book.

[80] OJ L 348 of 24 December 2008, 98.

[81] According to Article 13 of Directive 2008/115/EC (*ibd.*), the third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return. Despite calling for an "effective" remedy, the appeal does not have the mandatory effect of halting the return procedure.

[82] Preamble para 24 of Directive 2008/115/EC (*ibd.*): "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". A similar reference is contained in Article 1 of the Directive (*ibd.*).

[83] See Acosta (2009); Baldaccini (2009a), Baldaccini (2009b) as well as <http://www.migreurop.org/article1333.html?lang=fr>.

[84] Mitsilegas (2015).

human beings and human smuggling[85], but did not propose any measures to criminalise third country residents who attempted to get into the territory of one of its Member states or who were simply found there.

92 The **gist of the procedure** envisaged by the Return Directive is to terminate the irregular stay of the third-country national by a **return decision** of the EU Member state's competent authority and offering the person a window between seven and thirty days for voluntary departure, unless there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security. Upon expiry of the deadline for voluntary departure or in the latter case where no such deadline is offered, national authorities are entitled to start **removing the person, if needed by coercive means**. According to Article 8 (4) Return Directive, coercive measures shall be proportionate and shall not exceed reasonable force. Measures "shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned".

93 What has earned the Return Directive criticism from a human rights point of view is not the permissibility of use of force, but the possibility of placing the irregular migrant into **detention for the purpose of removal**. There is an entire chapter in the Directive devoted to this issue. While in general the rules on detention are a clear expression of concern over the proportionality of detention, there is the possibility of extending detention up to 6 months and under certain conditions even up to 18 months[86]. So, while the Return Directive was obviously designed to appeal to the punitive demands of Member states and to give governments the possibility to be seen as "acting tough" on irregular migrants, there remained a lingering concern how much freedom would be left to Member states to employ criminal law as a means of regulating irregular migration.

94 This situation came to a head with the **Republic of Italy**. The country had been the one Member state that had most extensively used the criminalisation of irregular migration[87] and had also failed to transpose the Return Directive

[85] For more details, see 4.3.3. in this book.

[86] Article 15 paras (5) and (6) of Directive 2008/115/EC (*ibd.*).

[87] For details, see Annoni (2019).

into national law by the deadline of 24 December 2010. Furthermore, the Italian Government had hoped that it could draw on a clause in the Return Directive that allowed a Member state to not apply the Directive to third-country nationals, if they are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law[88]. The Italian Government's "scheme" was basically to charge irregular third-country nationals, whether they had just entered the country or whether they were found in it, with a criminal penalty, only to suspend this penalty upon removal from the country. In this way, it was argued that removal was effected as a result of a criminal law sanction. This "scheme" had been met with resistance both in academic writing and among the courts, but the Constitutional Court effectively upheld the line of the Government while the latter simply delayed implementation of the Directive[89].

2.3.2. The *El Dridi* judgement

The *El Dridi* judgement by the CJEU is a **preliminary ruling** according to Article 267 TFEU, originating from the Corte d'appello di Trento. The referring court asked the CJEU "whether Directive 2008/115, in particular Articles 15 and 16 thereof [the rules on detention], must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period".[90] 95

Mr. El Dridi, a third-country national, had entered Italy irregularly in 2004 and had not obtained a residence permit since. Therefore, the Prefect of Turin issued a deportation decree against him in 2004. Despite this decree, he continued staying in Italy irregularly. Finally, on 21 May 2010 the Questore di Udine issued a removal order based on the earlier deportation decree and notified it on Mr. El Dridi. However, since there was no place 96

[88] Article 2 (2) lit. b) of Directive 2008/115/EC (*ibd.*).

[89] For more details on this "framework of legal uncertainty and judicial chaos" see Raffaeli (2011).

[90] Judgement of the CJEU in Case C-61/11 PPU (*El Dridi*) of 28 April 2011 at para 29.

in a detention facility available, the Questore ordered him to leave the territory of Italy within 5 days. On 29 May 2010, upon checking whether he had complied with the order, he was still found to be residing in Italy. He was then sentenced to one year of imprisonment based on Article 14 (5b) of Legislative Decree No. 286/1998, which had the following wording:

"A foreign national who remains illegally and without valid grounds on the territory of the State, contrary to the order issued by the Questore in accordance with paragraph 5a, shall be liable to a term of imprisonment of one to four years if the expulsion or the return had been ordered following an illegal entry into the national territory. [...]"

97 Mr. El Dridi appealed this decision before the Corte d'appello di Trento which then requested the preliminary ruling of the CJEU. What followed became a watershed in EU law. The Court built its **argument in three steps**.

98 Firstly, it held that the Return Directive was applicable to the situation. Mr. El Dridi came under the scope of this Directive because he was a third-country national staying illegally on the territory of a Member state. The Court further noted that Italy was unable to draw on the exemption clause in Article 2 (2) lit. b), because the return order originated in a decree of the Prefect of Turin. Therefore, the removal of Mr. El Dridi was not to be considered the result of a criminal law sanction.

99 Secondly, the Court drew on its established jurisprudence according to which provisions in a directive which are not timely transposed into national law are capable of acquiring immediate effect in the national legal system of the Member state, if they are unconditional and sufficiently precise. The Court affirmed that this was the case with the provisions in Article 15 and 16 regulating detention.

100 Thirdly, the Court argued that the removal system foreseen by the Italian legislation was "significantly different" from the system provided for in the Return Directive. This concerned not only the technicality that no period for voluntary departure had to be given, not even in light of the fact that in the case of a lack of space in a detention facility there would be a 5-days-period for voluntary leaving the country as opposed to the minimum 7 days provided in the Return Directive. The gist of the difference was rather that the Return Directive's objective was to **enable the removal and repatriation of the third-country national as efficiently as possible**.

In the case of Mr. El Dridi, holding him criminally liable for the sole reason that he had violated a condition of the removal order was frustrating this objective and delaying the enforcement of the return decision. Therefore, the Court concluded that Member states, also in light of the duty of sincere co-operation in Article 4 (3) TEU, "may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness[91].

101 The Court thus did not nullify the provisions of Italian criminal law, but declared that **Italian criminal law was inapplicable** to the extent that it contravened the Return Directive in those parts which were immediately applicable. In the concrete case, not only Mr. El Dridi had to be released from prison where he served his sentence, but also a large number of other third-country nationals sentenced on the same grounds[92].

2.3.3. The aftermath of the *El Dridi* judgement

102 It is quite ironic, as some observers have pointed out[93], that a directive like the Return Directive which had originally been severely criticised for its lack of support to human rights was turned by the CJEU into an instrument for the protection of personal liberty. This was all the more remarkable as the Court had never before used its jurisprudence on the direct applicability of directives to interfere with Member states' criminal law. However, in a way the *El Dridi* judgement also opened Pandora's box[94] in that **Member states were now more eager than ever to learn which amount of residual freedom they would retain to use criminal law to deter irregular migration**[95].

103 The *El Dridi* judgement was undoubtedly a breakthrough, and the Court spared no effort to sustain its effect in related areas of criminalisation that the Member states had been experimenting with. The most important follow-up judgement was the **CJEU's Grand Chamber judgement**

[91] *Ibd.* at para 55.

[92] On the impact of the *El Dridi* judgement in France see Vavoula (2016).

[93] E.g. Vavoula (2019) 280.

[94] Vavoula (2019) 281.

[95] Needless to say, Member states remained enthusiastic proponents of criminal law measures in the area of irregular migration. See for this purpose Mitsilegas (2013), Afia Kramo (2014) and the 2014 report of the European Agency for Fundamental Rights [FRA (2016)].

Achughbabian of 6 December 2011, which is a request for a preliminary ruling concerning the Return Directive originating from the Cour d'appel de Paris (France)[96]. It raised the question whether a Member state was permitted to use criminal law to sanction a *per se* irregular stay outside a return procedure.

104 Mr. Achughbabian, a third-country national, had entered France on 9 April 2008 and had applied for a residence permit. His application was rejected on 14 February 2009 and he was ordered to leave French territory within one month. However, he stayed and was detected only on 24 June 2011 in a random highway control. He was immediately placed into custody on the suspicion that he had violated Article L. 621–1 of the French Law on Foreigners and Asylum ("Ceseda"). According to this Law,

"A foreign national who has entered or resided in France without complying with the provisions of Articles L. 211–1 and L. 311–1 or who has remained in France beyond the period authorised by his visa commits an offence punishable by one year's imprisonment and a fine of EUR3.750".

105 Simultaneously, a deportation order was adopted by the Prefect of Val-de-Marne and served on Mr. Achughbabian. Police custody was permitted only for 48 hours so that the authorities applied to the *juge des libertés et de la détention* of the Tribunal de grande instance de Créteil for an extension of the detention beyond 48 hours. Mr. Achughbababian appealed and the Cour d'appel de Paris decided to stay the proceedings and ask the CJEU for a preliminary ruling.

106 The case is different from *El Dridi* because the criminal sanction was threatened for behaviour, i. e. the **illegal stay in the country, that preceded the return decision**. However, the Court insisted that in order to give the return decision based on Article 8 (1) Return Directive practical meaning the Member state is under an obligation to take all measures necessary to carry out the removal. Holding the third-country resident criminally liable for his stay and sanctioning him with one year of imprisonment would manifestly frustrate the goal of the Return Directive. Therefore, the relevant provision of the French Law on Foreigners and Asylum had to be disapplied.

[96] Case C-329/11 *Alexandre Achughbabian v. Préfet du Val-de-Marne*, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=115941&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3328007>. For detailed discussions see Raffaelli (2012) and Mitsilegas (2013) 106–110.

A final case that extended the *El Dridi* rationale concerned the issue of illegal entry. In ***Sélina Affum v Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, a Grand Chamber judgement of the CJEU of 7 June 2016**[97], the Court affirmed there is no principled difference between a criminal sanction provided for illegal stay, as in the case of *Achughbabian*, and illegal entry. In both cases, the speedy removal of the third-country national must not be frustrated by a criminal sanction imposing imprisonment. 107

2.3.4. Conclusion

Reminiscent of its earlier *effet utile* jurisprudence in cases concerning the common market, the CJEU has again taken the lead to **promote a common EU policy against "protectionist" aspirations of EU Member states**. However, unlike the earlier free flow of goods, services, capital etc., this new "free flow of returnees" is not so much motivated by human rights concerns but by the attempt to reign in the protective instincts of Member states. It is therefore technically a victory for human rights law over excessive criminalisation, but in practice, this policy is hardly interested in promoting the human rights of those sent back to their home countries. 108

The CJEU, in pre-empting criticism from Member states, has always been careful to point out that it is **not depriving Member states of their power to enact criminal law *per se***. Its reassuring mantra is that the Return Directive 109

"[…] does not exclude the right of the Member States to adopt or maintain provisions, which may be of a criminal nature, governing, in accordance with the principles of that directive and its objective, the situation in which coercive measures have not made it possible for the removal of an illegally staying third-country national to be effected".[98]

In the Court's view, there is room for national criminal law measures when the third-country national has absconded or where his or her return is impossible due to practical (e. g. lack of documents, unwillingness of the 110

[97] Case C-47/15, available at <http://curia.europa.eu/juris/document/document.jsf?docid=179662&doclang=EN>.

[98] *El Dridi* (*ibd.*) paras 52 and 60; *Achughbabian* (*ibd.*) para 46.

home country to receive its national) or legal (non-refoulement) reasons. However, such explanations have hardly been convincing to Member states as they continue to search for loopholes to use criminal law as a deterrent against third-country nationals. It is probably the Achilles heel of the CJEU's approach that it **chose to address the criminal sanction of imprisonment from a human rights point of view (deprivation of liberty)**. It overlooked that there are other criminal sanctions, most importantly fines, that can be levied on irregular migrants. In practice, hardly any irregular migrant is able to pay a fine so that conversion of the criminal fine into a custodial sentence becomes the next challenge.

111 It is here where we stop in order not to delve ever more deeply into migration law and its interplay with criminal law. Suffice it to say that what has technically been a bold move of the CJEU to curtail the punitive instincts of Member states and to force them to accept limitations on their criminal law has **not been driven by concern over human rights in the first place**, but rather by the need to establish and defend a common EU policy. Human rights have served as an important stepping-stone in this argument, but the outcome has hardly been more humane.

2.4. Important take-away points

112 Criminal law is by no means static, and behind the many legislative initiatives that we see on the national level there is often not just a change in values, but also in sensibilities for human rights. Still, the **punitive instincts of legislators, motivated by rhetoric of "acting tough", are often stronger than compassionate and humane impulses that societies also harbour**. It is therefore up to every single country and its politicians to find the fitting answers.

113 Looking at the example of the EU is quite important because whatever policy the EU adopts will have a direct effect on Ukraine and, in a more persuasive manner, also on Belarus. This chapter's goal has been to show that **human rights can work "both ways"**: they can justify criminalisation as well as de-criminalisation. But without getting into the full complexities, it is clear that the debates that nation states may have on a rather simple and

straightforward level gets complicated by the architecture of competences when it comes to the EU. The AFSJ is one of shared competences, and while Article 79 TFEU empowers the EU to develop a common immigration policy, the antidote is Article 72 TFEU according to which the AFSJ "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". While all sides share both a legal as well as a moral commitment to human rights, the **lack of solidarity in implementing common policies** remains an ongoing threat. The EU has had periods of time in which advances in European criminal law could be developed in a "win-win" spirit, e. g. in the area of environmental crime (ship source pollution). Nevertheless, since 2015 the crisis in migration and asylum is overshadowing the EU's domestic agenda and may still create a severe backlash with millions of migrants pressing across the Turkish-Greek border and the Mediterranean. Therefore, understanding the interplay between human rights and criminal law is more important than ever.

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3. TOWARDS A GENERAL PART OF SUBSTANTIVE CRIMINAL LAW

3.1. Introduction

114 The scope and content of the substantive EU criminal law legal acts – directives and Council FDs – shows that the **approximation (harmonisation) of criminal law** in the EU **has not progressed far**, as it covers only a very small number of offences and their definitions (*corpus delicti)*. The analysis of these legal acts allows us to point out several important aspects.

115 Firstly, EU legal acts on the issue of substantive criminal law, as a rule, are **not legislation of direct application** and do not have any direct effect on a citizen. These legal acts should be implemented in the national law by enacting, amending or supplementing the criminal law and/or other legal acts.

116 Secondly, EU legal acts often describe offences in **minimalistic definitions** and (or) grant **discretion to Member states to criminalise** some conduct more broadly or narrowly (or even make reservations (declarations)[99]. On 20 September 2011, the European Commission presented a framework for the further development of EU Criminal Policy under the Lisbon Treaty: the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law"[100] (further – Communication). In this Communication, the European Commission noted that "EU legislation regarding the definition of criminal offences and sanctions is limited to "minimum rules" under Article 83 of the Treaty. This

[99] As Asp (2012) 109 notes, "Member states are free to criminalise more than the ones required by the directive".

[100] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law". Brussels, 2011, COM(2011)573 final, 1–12.

limitation rules out a full harmonisation. At the same time, the principle of legal certainty requires that the conduct to be considered criminal must be defined clearly. <...> The key is the clarity for the national legislator about the results to be achieved in implementing EU legislation"[101].

117 Thirdly, the definition of the offence covers not only the conduct of the main perpetrator but **also, in most cases, ancillary conduct** such as instigating, aiding and abetting, as well as an attempt to commit the offence. Meanwhile, not all forms of criminal conduct have been precisely defined in the EU legal acts and their content is interpreted differently in the Member states (e. g., attempt, participation, etc.).

118 Fourthly, even less progress has been made in the **approximation of penalties and sentencing rules** for the offences provided for in EU legal acts and this approximation is mostly limited to requirements of the most general nature, i. e. that Member states have to take effective, proportionate and dissuasive criminal sanctions for a criminal conduct. The European Parliament has also emphasised that in conformity with Article 49(3) CFREU, the severity of the proposed sanctions should not be disproportionate to the criminal offence[102]. Furthermore, sometimes EU substantive criminal law determines more specifically which types (for example, imprisonment[103], fine[104], property confiscation[105], disqualification[106], etc.)

[101] *Ibd.* 8.

[102] European Parliament resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI). – OJ C264E of 13 September 2013, 7–11.

[103] For example, imprisonment by a maximum term of at least 4 years for insider dealing, recommending or inducing another person to engage in insider dealing and market manipulation offences are provided for in Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive). – OJ L 173 of 12 June 2014, 179–189.

[104] Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the Euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA. – OJ L 151 of 21 May 2014, 1–8.

[105] For example, the confiscation of instrumentalities and proceeds from criminal offences is provided for in Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. – OJ L 198 of 28 July 2017, 29–41.

[106] For example, a temporal or permanent disqualification from at least professional activities involving direct and regular contacts with children provided in the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. – OJ L 335 of 17 December 2011, 1–14.

and/or levels of sanctions (for example, trafficking in human beings should be punishable by a maximum penalty of at least 10 years of imprisonment in cases where that offence deliberately or by gross negligence endangered the life of the victim[107], etc.) are to be made applicable. However, the European Commission emphasised that "it is not the primary goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member States but rather to reduce the degree of variation between the national systems and to ensure that the requirements of "effective, proportionate and dissuasive" sanctions are indeed met in all Member States"[108].

119 Given such incompleteness and fragmentation of the EU substantive criminal law, the **EU legal acts themselves cannot be divided into elements of a general and special part of criminal law**. On the other hand, there is no doubt that these legal acts contain elements which are traditionally included in the general part of criminal law in most national criminal justice systems. Such elements may include rules on jurisdiction, participation (incitement, aiding and abetting), incomplete offence (the attempt to commit the offence), also "aggravating" or "mitigating" circumstances for the determination of the penalty, etc. In addition, as an element of the general part of criminal law, it is necessary to mention the institute of **legal person's liability for an offence**. Generally, all EU legislation covers offences committed by natural persons as well as by legal persons. However, in existing EU legislation on substantive criminal law, Member states have always been left with the choice concerning the type of liability of legal person for the commission of offence, as the concept of criminal liability of a legal person does not exist in all national criminal justice systems.

It should also be noted that new EU legal acts on substantive criminal law expand the regulation of institutes of the general part of criminal law.

[107] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing FD2002/629/JHA. – OJ L 101 of 15 April 2011, 1–11.

[108] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law". – Brussels, 2011, COM(2011)573 final, 9.

For example, Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive) introduced for the first time the institutes of **statute of limitation of criminal liability** and **statute of limitations of enforcement of a sentence**. Article 12 of the abovementioned Directive states that "Member states shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of criminal offences <...> for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively", and this period of time for criminal offences which are punishable by a maximum sanction of at least 4 years of imprisonment, should be at least 5 years from the time when the offence was committed. Meanwhile, the period of time of a statute of limitations of enforcement of a sentence should be for at least 5 years from the date of the final conviction for (a) a penalty of more than 1 year of imprisonment; or alternatively (b) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least 4 years of imprisonment, imposed following a final conviction for a criminal offence. Moreover, some EU legal acts regulate separate issues (such as property confiscation[109], significance of the conviction in other EU Member state[110], etc.) that, in national legal orders, are traditionally attributed to the general part of criminal law.

The doctrine of EU substantive criminal law[111] also assigned the principle of legality[112], as well as justifications and excuses, etc. to the institutes of the general part of criminal law. Finally, it should be noted that some authors point out certain principles without attributing them to a particular part of criminal law (although they have an impact on institutes of general part of criminal law), such as principle of subsidiarity[113], principle of consistency

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[109] Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. – OJ L 68 of 15 March 2005, 49–51.

[110] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member states of the European Union in the course of new criminal proceedings. – OJ L 220 of 15 August 2008, 32–34.

[111] See, for example, Klip (2016) 196–208 and 229–231.

[112] For self-study on the scope and content of the principle of legality, see also Kaiafa-Gbandi (2013) 97–108 and Asp (2012) 168–178.

[113] Mitsilegas (2016) 40–44; Asp (2012) 184–188.

and coherence[114], principle of *ultima ratio*[115], principle of guilt[116], principle of respect of national legal diversity[117], etc.

Assignment:

Please, compare institutes of the general part of the EU substantive criminal law with institutes of the general part provided in the Criminal Codes of Belarus and Ukraine.

3.2. Rules of jurisdiction

121 **Jurisdiction** as an issue of substantive criminal law means that a state makes its criminal law applicable to the conduct of a person, i. e., it makes this conduct a criminal offence under its national law[118]. In respect to jurisdiction rules, **the EU generally follows traditionally recognised jurisdictional principles** – territoriality principle, flag principle, active nationality (personality) principle, passive nationality (personality) principle, protective principle, principle of universal jurisdiction, active domicile principle and passive domicile principle. All jurisdictional principles (according to their description in the EU legal acts) may be **mandatory** (when the Member state has an obligation to introduce a certain jurisdictional principle) **or optional** (when the Member state has the right to introduce a certain jurisdictional principle). It should be noted that EU legislation recognises a territorial principle of jurisdiction as the basis of all other jurisdictional principles.

122 The **territoriality principle** means that a state can claim criminal jurisdiction over any situation which occurred within its national territory[119]. The place of commission of an offence (*locus delicti*) must be

[114] Blomsma and Peristeridou (2013) 127–128; Asp (2012) 206–212.

[115] For self-study on the scope and content of the principle of *ultima ratio*, see Lahti (2017) 60–63.

[116] Asp (2012) 178–182.

[117] Mitsilegas (2016) 14–19.

[118] For a comprehensive and consistent scientific study on various aspects of the jurisdiction, see Böse et al. (2013) and Böse et al. (2014).

[119] Satzger (2012) 14.

within the borders of the state. The territoriality principle in EU legislation is defined by the formula that "the offence is committed in whole or in part within its territory". An obligation to establish its jurisdiction over the offences where the offence is committed in whole or in part within Member state's territory is enshrined practically in all EU legal acts, for example, in Article 11(1) of the PIF Directive, Article 4(1) of the Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, Article 7 (1) of the Council Framework Decision 2003/568/JHA on combating corruption in the private sector, Article 8(1) of the Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, etc. It should be noted that the definition of the place where the offence has been committed (*locus delicti*) is left to the competence of legislation of the Member state.

123 The doctrine of EU criminal law[120] reasonably states that "legal acts stipulate an extension upon the basis of the means by which the offence is committed. Jurisdiction includes situations where the offence is committed by means of a computer system accessed from its territory, whether or not the computer system is on its territory[121]". Moreover, similar rules concerning the extension of the territorial principle are contained in Article 12(2) of Directive 2013/40/EU on attacks against information systems and replacing Council Framework Decision 2005/222/JHA which cover two situations: "(a) the offender commits the offence when physically present on its territory, whether or not the offence is against an information system on its territory; or (b) the offence is against an information system on its territory, whether or not the offender commits the offence when physically present on its territory". Meanwhile, Article 9 (2) of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law adds that when establishing jurisdiction where the offence is committed in whole or in part within

[120] Klip (2016) 209.

[121] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. – OJ L 335 of 17 December 2011, 1–14.

a Member state's territory, "each Member state shall take the necessary measures to ensure that its jurisdiction extends to cases where the conduct is committed through an information system and: (a) the offender commits the conduct when physically present in its territory, whether or not the conduct involves material hosted on an information system in its territory; (b) the conduct involves material hosted on an information system in its territory, whether or not the offender commits the conduct when physically present in its territory".

124 The **flag principle** which is closely related to the territoriality principle means that a state can claim criminal jurisdiction over any situation which occurred on board of its national ships or aircrafts. This principle is provided in Article 19 of the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, which states that "each Member state shall take the necessary measures to establish its jurisdiction over the offences <...> where: <...>; (b) the offence is committed on board a vessel flying its flag or an aircraft registered there".

125 The **active nationality (personality) principle** means that a state can claim criminal jurisdiction over any offence committed by a state's own national. The active nationality principle in EU legislation is defined by formula that "the offender is one of its national". An obligation to establish its jurisdiction over the offences where the offender is one of its national is enshrined in most EU legal acts. The doctrine of EU criminal law[122] reasonably states that "a special feature of active nationality principle is the status of the perpetrator as an official". The provisions concerning national officials and Community officials are provided in Article 7 of Convention on the fight against corruption involving officials of the European Communities or officials of Member states of the EU which oblige the Member states to establish its jurisdiction over the offences where, for example, the offender is one of its officials or the offender is a Community official working for an EC institution or a body set up in accordance with the Treaties establishing the European Communities which has its headquarters in the Member. Furthermore, Article 11(2) of the PIF Directive establishes rule on

[122] Klip (2016) 209.

jurisdiction that each Member state shall establish its jurisdiction in cases where "the offender is subject to the Staff Regulations at the time of the criminal offence".

126 The **passive nationality (personality) principle** means that a state can claim criminal jurisdiction over any offence committed abroad against its own national. This jurisdictional principle (which is optional for Member states to introduce) is provided in Article 10 (2) of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, and Article 17 (2) of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA which states that "Member state shall inform the Commission where it decides to establish further jurisdiction over the offences committed outside its territory, *inter alia*, where "the offence is committed against one of its nationals".

127 The **active domicile principle** means that a state can claim criminal jurisdiction over any offence committed by a person who has a permanent domicile in a state. Such jurisdictional principle is provided, for example, in Article 17 (2) of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA which states that a "Member state shall inform the Commission where it decides to establish further jurisdiction over the offences committed outside its territory, *inter alia*, where "the offender is an habitual resident in its territory", etc. Moreover, the doctrine of EU criminal law[123] points out that, for example, Article 10(2) of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, or Article 7 (1) (c) of Council Framework Decision 2003/568/JHA on combating corruption in the private sector infers a domicile principle for legal persons – "the offence

[123] Klip (2016) 214.

is committed for the benefit of a legal person established in its territory". Meanwhile, Article 9 (1) of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law provides, in principle, for the same rule, but uses a different wording: "the offence has been committed for the benefit of a legal person that has its head office in the territory of that Member state".

128 The **passive domicile principle** means that a state can claim criminal jurisdiction over any offence committed abroad against the person who has a permanent domicile in a state. Such jurisdictional principle is provided, for example, in Article 10 (2) of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, and Article 17 (2) of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA which states that "Member state shall inform Commission where it decides to establish further jurisdiction over the offences committed outside its territory, *inter alia*, where "the offence is committed against a person who is an habitual resident in its territory", etc.

129 The **protective principle** means that a state can claim criminal jurisdiction over any offence committed abroad against its genuine and vital interests[124]. Article 19 of the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, which states that "each Member state shall take the necessary measures to establish its jurisdiction over the offences where "the offence is committed against the institutions or people of the Member state in question or against an institution, body, office or agency of the Union based in that Member state".

130 The **principle of universal jurisdiction** means that a state can claim criminal jurisdiction over offences against the international community

[124] Böse et al (2013) 420.

as a whole[125] (regardless of where or by whom an offence has been committed). This principle is provided only in a few EU legal acts. For example, Article 8(2) of the Directive 2014/62/EU on the protection of the Euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA oblige the Member states whose currency is the Euro to take the necessary measures to establish its jurisdiction over the offences (for example, any fraudulent making or altering of currency or the fraudulent bringing into circulation of counterfeit currency) committed outside its territory, "at least where they relate to the Euro and where (a) the offender is in the territory of that Member state and is not extradited; or (b) counterfeit Euro notes or coins related to the offence have been detected in the territory of that Member state. For the prosecution of the offences <...> each Member state shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the acts are a criminal offence at the place where they were committed".

Basically, the rules of jurisdiction are defined in the same way in 131
the legal instruments of the CoE and the UN. Article 17 of the Criminal Law Convention on Corruption states that "each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over a criminal offence where: (a) the offence is committed in whole or in part in its territory; (b) the offender is one of its nationals, one of its public officials, or a member of one of its domestic public assemblies; (c) the offence involves one of its public officials or members of its domestic public assemblies or any person who is at the same time one of its nationals". Meanwhile, Article 15 UNTOC provides that "each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences when: (a) the offence is committed in the territory of that State Party; or (b) the offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed". Moreover, a State Party may also establish its jurisdiction over any such offence when: "(a) the offence is committed against a national of that State Party; (b) the offence is committed by a national of

[125] Böse et al. (2014) 99–103.

that State Party or a stateless person who has his or her habitual residence in its territory; or (c) the offence is: (i) <...> committed outside its territory with a view to the commission of a serious crime within its territory; (ii) <...> committed outside its territory with a view to the commission of an offence <...> within its territory".

Assignment:

Please, compare the rules of jurisdiction provided in the legal acts of EU substantive criminal law with the rules in the Criminal Codes of Belarus and Ukraine. Please, consider whether the harmonisation with the requirements of the EU legislation (directives, Council framework decisions and Conventions) would require changes to the criminal law of your country.

3.3. Participation

132 Participation is the intentional joint commission of a criminal act by two or more persons. Joint engagement makes it possible to better contemplate the methods required to commit a criminal act, and to select more effective instruments and means; it often makes it possible to commit more dangerous and serious criminal offences than one person would be able to commit, and to cause more serious criminal effects. The concerted actions of several persons also mean more opportunities to conceal the traces of a criminal offence, preclude detection, avoid liability and strengthen the resolve to continue criminal activities. Thus, even where all other conditions are identical, an offence committed in participation usually poses a more serious threat than an act committed by one person.

3.3.1. Incitement (instigation), aiding and abetting

133 Practically all EU legal acts (although using slightly different terminology) obligate Member states to establish criminal liability for participation in the commission of criminal offences. For example, Article 3 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework

Decision 2002/629/JHA[126] requires each Member state to take the necessary measures to ensure that **inciting, and aiding and abetting the commission of any of the criminal offences** foreseen in the above-mentioned Directives and Council Framework Decisions **are criminal offences**. Meanwhile, the terminology of Article 4 of Directive 2008/99 on the protection of the environment through criminal law is more specific because it emphasises the intentional nature of conduct and requires to take the necessary measures to ensure that "inciting, aiding and abetting the intentional conduct" are criminal offences.

134 Furthermore, EU legislation makes reference only to a few types of accomplices – a **perpetrator, an abettor (instigator) and other accomplices**. On the other hand, it does not provide a consistent definition of participation and its forms and types, also the types of accomplices (a perpetrator, an instigator and other accomplices). For example, Article 2 of Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence only indicates that the sanctions should also be applicable to any person who is the instigator or is an accomplice, etc. Generally, EU substantive criminal law leaves the definition of the modes of participation to Member states[127]. Moreover, some authors even state that the "EU can require that Member states should make sure that instigation is criminalised in relation to the offence in question – but not harmonise the concepts of instigation, aiding and abetting"[128].

135 Basically, **participation is defined in the same way in CoE and UN legal instruments**. Article 15 of the Criminal Law Convention on Corruption provides that "each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law aiding or abetting the commission of any of the criminal offences

[126] The same rule is provided in Article 7 of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, Article 8 of Directive 2013/40/EU on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, Article 5 of PIF directive, as well as, Article 3 of Council Framework Decision 2003/568/JHA on combating corruption in the private sector, Article 3 of Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking and Article 2 of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, etc.

[127] Klip (2016) 225.

[128] Asp (2012) 97.

established in accordance with this Convention". Meanwhile, Article 11 of the Convention on Cybercrime emphasises the intentional nature of participation in an offence and states that "each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, aiding or abetting the commission of any of the offences established in <...> Convention with intent that such offence be committed". Whereas Article 27 of the UN Convention against Corruption states that "each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention".

136 Thus, in this regard, both CoE and UN conventions and EU legal acts grant the Member states a discretion to apply the national provisions of their criminal laws to participation and its forms and types, as well as to the types of accomplices. It should also be noted that both CoE and UN conventions as well as EU legal acts do not directly provide for the concept of co-perpetrator and do not distinguish the organiser as a type of accomplice.

137 EU Member states usually provide in their national criminal laws the following types of accomplices: **perpetrator, abettor (assistant) and instigator** (for example, Germany, Poland, Netherlands, Finland, Estonia, Poland, Denmark, etc.). Some EU Member states (Latvia, Lithuania) additionally provide for the **organiser** as a type of accomplice (for, example, Article 24 of Criminal Code of Lithuania states that "an organiser shall be a person who has formed an organised group or a criminal association, has been in charge thereof or has co-ordinated the activities of its members or has prepared a criminal act or has been in charge of commission thereof". Moreover, some EU Member states defines in the general part of their criminal laws participation and its forms (for example, in Lithuania three forms of participation are distinguished: a group of accomplices, an organised group and a criminal association, in Latvia there is only the organised group, etc.).

138 From a CRIMHUM perspective, in the general part of criminal law, both Belarus and Ukraine describe in detail the types of accomplices (a perpetrator, an organiser, an instigator and abettor / assistant) as well as

the forms of participation (group of persons without prior consent, group of persons with prior consent, organised group and criminal organisation).

3.3.2. Criminal organisation

In order to strengthen the fight against organised crime in the EU legal area, Council Framework Decision 2008/841/JHA on the fight against organised crime was adopted which defines **one form of participation – a criminal organisation** and establishes the requirement to criminalise certain types of conduct related to a criminal organisation. According to the above mentioned Council Framework Decision, **criminal organisation** means: 139

"a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least 4 years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit".

This definition of the criminal organisation is fully compliant with UNTOC which states that an "**organised criminal group** shall mean a structured group[129] of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes[130] or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". 140

As mentioned before, Council Framework Decision 2008/841/JHA on the fight against organised crime requires each Member state to take the necessary measures to ensure that one or both of the following types of conduct related to a criminal organisation are regarded as offences: 141

"(a) conduct by any person who, with intent and with knowledge of either the aim and general activity of the criminal organisation or its intention to commit the offences in question, actively takes part in the organisation's criminal activities, including the provision of information or material means, the recruitment of new members and all forms of

[129] "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

[130] "Serious crime" shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

financing of its activities, knowing that such participation will contribute to the achievement of the organisation's criminal activities;

(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued, which if carried out, would amount to the commission of offences referred to in Article 1, even if that person does not take part in the actual execution of the activity".

142 It is important to note the fact that according to Article 3 of Council Framework Decision 2008/841/JHA on the fight against organised crime, committing an offence within the framework of a criminal organisation "may be regarded as **an aggravating circumstance**". This provision was implemented in most EU substantive criminal law legal acts which require criminalisation of certain types of criminal conduct, in two ways:

(a) by obliging the Member states to determine that a criminal offence committed within a criminal organisation is considered to be **an aggravating circumstance** in accordance with the applicable rules established by their legal systems (Article 8 of PIF Directive, Article 9 of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA); and

(b) by obliging the Member states to determine a **separate criminal offence** (more dangerous *corpus delicti)* which leads to more severe sanctions when an offence is committed within the framework of a criminal organisation, for example, "<...> an offence concerning trafficking in human beings is punishable by a maximum penalty of at least 10 years of imprisonment where that offence was committed within the framework of a criminal organisation" (Article 4 of the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA), "<...> fraudulent use of non-cash payment instruments, offences related to the fraudulent use of corporeal non-cash payment instruments are punishable by a maximum term of imprisonment of at least 5 years if they are committed within the framework of a criminal organisation" (Article 9 of Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment), crimes linked to trafficking in drugs and precursors are punishable by criminal penalties of a maximum of at

least 10 years of deprivation of liberty, where the offence was committed within the framework of a criminal organisation (Article 4 of Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking), offences related to illegal system interference and illegal data interference are punishable by a maximum term of imprisonment of at least 5 years, where they are committed within the framework of a criminal organisation (Article 9 of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA), etc.

Moreover, it should be mentioned that such a requirement is not established in some EU substantive criminal law legal acts, for example, in Directive 2014/57/EU on criminal sanctions for market abuse, Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, etc. EU Member states usually provide the definition of a criminal organisation in the general part of their national criminal laws (Lithuania, Latvia, Czech Republic, etc.) or in the special part (Estonia, Poland, Finland, etc.). For example, Section 21 of the Criminal Code of Latvia provides that "an organised group is an association formed by more than two persons which has been created for the purpose of jointly committing one or several crimes and the participants of which in accordance with previous agreement have divided responsibilities". 143

From a CRIMHUM perspective, both Belarus and Ukraine in the general part of their criminal law describe in detail the most dangerous form of participation – the criminal organisation. For example, Article 28 of the Criminal Code of Ukraine states that "a criminal offence shall be held to have been committed by a criminal organisation where it was committed by a stable hierarchical association of several persons (5 and more), members or structural units of which they have organised themselves, upon prior conspiracy, to jointly act for the purpose of directly committing grave or very grave criminal offences by the members of this organisation, or supervising or coordinating criminal activity of other persons, or supporting the activity of this criminal organisation and other criminal groups". 144

Assignment:

Please, find a definition of "criminal organisation" in the Criminal Code of Belarus. Please compare the definitions of the criminal organisation provided in Council Framework Decision 2008/841/JHA on the fight against organised crime, UNTOC and in the Criminal Codes of Belarus and Ukraine. Please consider whether harmonisation with the requirements of the Council Framework Decision and Convention would require changes to the criminal law of your country.

3.4. Incomplete offence

145 Practically all EU legal acts (although using slightly different terminology) obligate EU Member states to establish **criminal liability for incomplete offences** (e. g., preparatory and attempt stages of the criminal offence). This requirement in EU substantive criminal law is prescribed in the following way: Article 2 of Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence obliges each Member state to take the measures necessary to ensure that the sanctions provided by it are also applicable to any person who, *inter alia*, attempts to commit an infringement, Article 3 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA states that "Member states shall take the necessary measures to ensure that <...> attempting to commit an offence referred to in Article 2 is punishable", Article 7 of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA obliges the Member states to ensure that "an attempt to commit any of the offences <...> is punishable", Article 5 of the PIF Directive states that Member state shall take the necessary measures to ensure that an attempt to commit fraud affecting the Union's financial interests and misappropriation, when committed intentionally, are punishable as a criminal offence, Article 8 of Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA also requires attempt

to commit offences, for instance, related to the fraudulent use of corporeal non-cash payment instruments to be punishable as criminal offences, Article 3 of Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking states that necessary measures shall be taken in order to make the attempt to commit crimes linked to trafficking in drugs and precursors a criminal offence. Thus, it can be stated that EU legislation requires Member states to ensure that **attempt to commit certain criminal offences** established in previously mentioned Directives and Council FDs is considered **a criminal offence**. However, these legal acts do not provide the definition of an attempt to commit an offence. It should be noted that some authors state that "the concept of attempt has been left to the national legislator, since the EU should not deal with the questions of the general part of criminal law"[131].

146 The CoE conventions usually require to criminalise an attempt to commit a crime, for example, Article 11 of the Convention on Cybercrime states that "each Party shall adopt such legislative and other measures as may be necessary to establish **as criminal offences under its domestic law, when committed intentionally, an attempt to commit any of the offences** established in <...> this Convention". Meanwhile, the UN conventions provide the soft requirement to criminalise, in accordance with its domestic law, **not only the attempt, but also the preparation to commit a crime**, for example, Article 27 UNCAC states that "each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention", and also "the preparation for an offence established in accordance with this Convention". Thus, the CoE conventions and EU legal acts grant Member states a discretion to apply the national provisions of their criminal laws to an attempt to commit an offence (UN conventions – also to a preparation to commit an offence).

147 It should be noted that some EU legal acts impose an obligation on Member states **to criminalise certain conduct the substance of which constitutes only an attempt (or even preparation) to commit**

[131] Asp (2012) 97.

a certain criminal act, for example Article 7 of Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment, requires Member states to establish as a criminal offence the "producing, procurement for oneself or another, including the import, export, sale, transport or distribution, or making available a device or an instrument, computer data or any other means primarily designed or specifically adapted for the purpose of committing any of the offences referred to in points (a) and (b) of Article 4, in points (a) and (b) of Article 5 or in Article 6, at least when committed with the intention that these means be used, is punishable as a criminal offence"; Article 3 of Directive 2014/62/EU on the protection of the Euro and other currencies against counterfeiting by criminal law obligates to criminalise "the fraudulent making, receiving, obtaining or possession of (i) instruments, articles, computer programmes and data, and any other means peculiarly adapted for the counterfeiting or altering of currency; or (ii) security features, such as holograms, watermarks or other components of currency which serve to protect against counterfeiting", etc. In these cases, criminal liability, in principle, should be set for the preparation to commit fraud using non-cash payment instruments or to counterfeit non-cash-payment instruments or currency. Moreover, it should be noted that criminal liability for separate criminal offences the substance of which is preparation to commit another criminal offence should be set up as for a completed criminal offence. Such legal regulation is based on the fact that the general rule on the prosecution for preparation (even in case of grave or very grave offences) is not provided in the criminal laws of many countries of continental (for example, EU Member states – Germany, France, Denmark, Sweden, Croatia, Finland, Estonia, etc.) or Anglo-Saxon (England, etc.) legal systems[132].

148 Given the fact that Member states must implement the requirements of EU legislation in their national laws and criminalise preparation to commit certain acts as individual criminal offences, it raises a **serious question** (or even a legal problem) for those Member states (such as Netherlands, Czech Republic, Latvia, Lithuania, etc.) that provide in their Criminal Codes the general rule that **liability for preparation shall be limited to**

[132] Švedas (2010) 14.

grave and very grave offences. For example, Section 46 of the Criminal Code of Netherlands[133] states that "preparation to commit a serious offence which, by statutory definition, carries a term of imprisonment of eight years or more, shall be punishable, if the offender intentionally obtains, manufactures, imports, conveys in transit, exports or has possession of objects, substances, information carriers, spaces or means of transport intended for the commission of that serious offence". Meanwhile, Section 15 of Criminal Code of Latvia[134] provides that "the locating of, or adaptation of, means or instrumentalities, or the intentional creation of circumstances conducive to the commission of an intentional offence, shall be considered to be preparation for an offence if, in addition, it has not been continued for reasons independent of the will of the offender. Criminal liability shall set in only for preparation for serious or very serious offences". Similarly, Article 21 of the Criminal Code of Lithuania[135] defines preparation to commit an offence as a search for or adaptation of means and instruments, development of an action plan, engagement of accomplices or other intentional creation of the conditions facilitating the commission of the offence.

It should be noted that Ukraine and Belarus also provide a general rule concerning liability for the preparation to commit an offence. For example, Article 13 of Criminal Code of Belarus[136] states that "the preparation for crime shall mean the looking out or adapting means and tools, or otherwise intended conditioning of an offence. Preparation to commit a minor criminal offence does not give rise to criminal liability". Meanwhile, Article 14 of Criminal Code of Ukraine[137] provides that "the preparation for crime shall mean the looking out or adapting means and tools, or looking for accomplices to, or conspiring for, an offence,

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[133] Criminal Code of Netherlands. – https://www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf

[134] Criminal Code of Latvia. – https://www.legislationline.org/download/id/8266/file/Latvia_CC_1998_am2018_en.pdf

[135] Criminal Code of Lithuania. – https://www.legislationline.org/download/id/8272/file/Lithuania_CC_2000_am2017_en.pdf

[136] Criminal Code of Belarus. – protivpytok.org/zakon/rb/ugolovnyj-kodeks-respubliki-belarus

[137] Criminal Code of Ukraine. – https://www.legislationline.org/documents/action/popup/id/16257/preview

removing of obstacles to an offence, or otherwise intended conditioning of an offence. Preparation to commit a minor criminal offence does not give rise to criminal liability".

150 There are no doubts that such legal situation when the same conduct may be recognised as preparation to commit a grave and very grave offence or completed other offence not only contradicts the principle of legal certainty, but may also infringe the rights of the offender (because, as a general rule, an incomplete offence is punishable by a more lenient penalty than a completed offence). Moreover, the description of preparation as "any other intentional facilitation of the commission of an offence" means that the criminal law does not provide for all potential ways (forms) of preparation to commit offences[138]. Other types of facilitation of offences can include any intentional acts or omissions, if they make it possible to implement a criminal intention or significantly facilitate the commission of the intended offence. Keeping in mind that the preparation to commit a grave or very grave offence makes the person liable under general rules, the completely unclear definition of one of the forms of preparation in criminal law also raises serious doubts, as it is incompatible with essential principles of criminal law, such as principle of legal certainty, *nullum crimen sine lege*, etc.

Discussion:

Please, compare the definitions of preparation and attempt to commit an offence provided in the Criminal Codes of Belarus and Ukraine. Please, offer arguments "in favour" and "against" the general criminalisation of the preparation to commit an offence.

3.5. Liability of legal persons for offences

151 Liability of legal persons for committed crimes was for the first time mentioned in Recommendation No. R (88) 18 on the liability of enterprises for offences adopted by the Committee of Ministers of the Council of

[138] Lietuvos Respublikos baudžiamojo kodekso komentaras. Bendroji dalis (1–98 straipsniai). – Vilnius, 2004, 134.

Europe on 20 October 1988[139]. This Recommendation was designed to promote measures for rendering enterprises liable for offences committed in the exercise of their activities. Meanwhile, the **first obligatory legal act that provided for the liability of legal persons for offences** was the **CoE Convention** on the Protection of the Environment through Criminal Law. Article 9 of this Convention states that "each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence <...> has been committed by their organs or by members thereof or by another representative. Corporate liability shall not exclude criminal proceedings against a natural person". Moreover, traditional requirements of liability of legal persons for offences (which are provided for in the EU substantive criminal law legislation) have been established in the CoE Criminal Law Convention on Corruption.

152 In a different way the liability of a legal person is governed by **UN conventions** which allow State parties to choose the type of liability (criminal, civil or administrative) and to determine the conditions of liability. For example, UNCAC and UNTOC provide practically identical rules and state that "each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for <...> the offences established in accordance with <...> this Convention. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. Each State Party shall, in particular, ensure that legal persons <...> are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions".

153 In principle, all **EU legal acts** (although using slightly different terminology) require to envisage the liability of legal persons for their illegal acts. In fact, EU legal acts do not state directly that corporate liability should be criminal; they only require to provide for "effective, proportionate and deterrent" sanctions for legal person who committed an offence.

[139] Recommendation No. R (88) 18 on liability of enterprises for offences adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and explanatory memorandum. – https://rm.coe.int/16804c5d71.

154 Traditionally, EU legal acts[140] provide for the following conditions for a legal person's liability: "<...> legal persons can be held liable for any of the criminal offences <...> committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on: (a) a power of representation of the legal person; or (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person". Moreover, legal persons can be held liable where the lack of supervision or control by a person, having a leading position within the legal person, has made possible the commission, by a person under its authority, of any of the criminal offences for the benefit of that legal person".

155 Liability of legal persons shall not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences.

156 Finally, it should be mentioned that the **opinion of European states on the criminal liability of legal entities has changed substantially** over the last 25 years. The legal systems of the United Kingdom (England and Wales, Scotland, North Ireland[141]) and Ireland[142] established the criminal liability of legal entities a long time ago; the continental legal systems, however, did so only in recent years (Portugal – 1984, Sweden – 1986, France – 1994, Finland – 1995, Denmark – 1996, Belgium – 1999, Slovenia – 1999, Hungary – 2001, Estonia, Malta, Lithuania – 2002, Croatia, Poland, Bulgaria – 2003, Austria – 2005)[143].

Discussion:

Please determine whether a legal person can be held liable for administrative or tax infringements in Belarus and Ukraine. If yes, what are the conditions for

[140] For example, see Article 6 of Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the Euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, Article 2 of Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, Article 5 of Council Framework Decision 2003/568/JHA on combating corruption in the private sector and Article 6 of Council Framework Decision 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, Article 6 of the PIF Directive, etc.

[141] Delmas-Marty and Vervaele (2000a), 857–945, 947–988 as well as Delmas-Marty and Vervaele (2000b) 989–999.

[142] Gobert and Pascal (2011) 245–251 and 315–325.

[143] Durdević (2006) 79–80; Gobert and Pascal (2011) 207–348.

such liability of a legal person in Belarus and Ukraine? Please provide arguments "in favour" and "against" the criminal liability of a legal person.

3.6. Penalties and other criminal (non-criminal) sanctions

3.6.1. Introduction

A penalty is traditionally considered a state coercive measure imposed by a court on a person who has committed a criminal offence. The content of the penalty consists of restrictions of individual rights and freedoms and / or imposition of special obligations in the public interest. The **determination of the system of penalties and its separate types is in the exclusive competence of the state**, therefore it is practically impossible to find identical systems of penalties even in the criminal laws of the states which are very close according to their legal systems. Moreover, criminal laws of various states often provide other types of sanctions in addition to penalties. Given the significant differences between the national systems of penalties and other sanctions and its separate types, international law and EU legal acts generally set out only general requirements for penalties and other types of sanctions which are applicable to natural persons. 157

It is obvious that a legal person cannot be subject to many of the penalties that criminal law provides for a natural person, such as deprivation of liberty, public works, restriction of liberty, etc. Therefore, the legislature must provide for the types of penalties or sanctions that may be imposed on a legal person. International and EU requirements for penalties and sanctions imposed on a legal person are also limited by the fact that states have different approaches to the type of liability of a legal person. For these reasons, international and EU law establish only most general requirements or even recommendations on penalties or sanctions for legal persons. 158

3.6.2. Penalties and other criminal (non-criminal) sanctions for natural persons

159 In principle, the **CoE conventions lay down only very general requirements** for sanctions applicable to natural persons. For example, Article 13 (1) of the CoE Convention on Cybercrime states that "each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences <...> are punishable by effective, proportionate and dissuasive sanctions which include deprivation of liberty". Meanwhile, Article 19 (1) of the CoE Criminal Law Convention on Corruption, Article 23 (1) of the CoE Convention on Action against Trafficking in Human Beings provide practically the same requirement that "having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences <...>, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition".

160 Moreover, all the above mentioned CoE conventions provide a requirement that "each Party shall adopt such legislative and other measures as may be necessary to enable it **to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences** <...>, or property the value of which corresponds to such proceeds". In addition, the CoE Convention on Action against Trafficking in Human Beings also provides that "each Party shall adopt such legislative or other measures as may be necessary to enable the temporary or permanent closure of any establishment which was used to carry out trafficking in human beings, without prejudice to the rights of *bona fide* third parties or to deny the perpetrator, temporary or permanently, the exercise of the activity in the course of which this offence was committed".

161 The **UN conventions** also set out general requirements for the sanctions applicable to natural persons, for example, Article 11 (1) of the UNTOC states that "each State Party shall make the commission of an offence <...> liable to sanctions that take into account the gravity of that offence". An exceptional

example is the Rome Statute of the ICC which provides a concrete list of the following penalties that the ICC may impose on a person convicted of a crime: (1) imprisonment for a specified number of years which may not exceed a maximum of 30 years; or (2) a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person. In addition to imprisonment, the Court may order (1) a fine; and / or (2) a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties.

Meanwhile, **EU law** provides for **much more specific requirements** 162
for sanctions applicable to natural and legal persons. The European Commission has noted that "regarding sanctions, "minimum rules" can be requirements of certain sanction types (e. g. fines, imprisonment, disqualification), levels or the EU-wide definition of what are to be considered aggravating or mitigating circumstances. In each case, the EU instrument may only set out which sanctions have to be made "at least" available to the judges in each Member state"[144]. So, it means that EU substantive criminal law does not define the types of sanctions, nor does it divide into penalties and criminal measures, nor does classify penalties into main and additional. The first EU legal acts (joint actions and framework decisions) mostly contained a general requirement that penalties "should be effective, proportionate and dissuasive" and that, in serious cases, penalties involving the deprivation of liberty should "at least" be provided. In this respect, the European Commission's view should be mentioned that "<...> effectiveness requires that the sanction is suitable to achieve the desired goal, i. e. observance of the rules; proportionality requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim; and dissuasiveness requires that the sanctions constitute an adequate deterrent for potential future perpetrators. Sometimes, EU criminal law determines more specifically which types and / or levels of sanctions are to be made applicable. Provisions concerning confiscation

[144] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law". Brussels, 2011, COM(2011)573 final, 8.

can also be included[145]. Therefore, the EU Member states have an obligation (and discretion) to set the penalties and their sizes in accordance with the framework of penalties in place in the state concerned, and in accordance with specific types of penalties and the principles and logics of structuring the sanctions.

163 Current EU legislation provides for penalties and other criminal or non-criminal measures: (a) for natural persons – imprisonment, confiscation, disqualification, deportation and publication, etc.; (b) for a legal person – fine; exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; etc.

164 With respect to **imprisonment**, it should be mentioned that in 2002 the Council of the EU agreed to establish a system of penalty levels which consists of four levels of imprisonment: Level 1 – penalties of a maximum of at least between 1 and 3 years of imprisonment; Level 2 – penalties of a maximum of at least between 2 and 5 years of imprisonment; Level 3 – penalties of a maximum of at least between 5 and 10 years of imprisonment; and Level 4 – penalties of a maximum of at least 10 years of imprisonment (cases where very serious penalties are required). Moreover, the Council emphasised that "the definition of four levels does not imply that in every legal instrument all of them should be used, neither that all the offences defined in each particular legal instrument must be subject to the approximation of sanctions. It is noted that the levels referred to are minimum levels, and that nothing prevents the Member states from going further than those levels in their national law"[146]. Some authors even state that "Member state legislatures are very free as to how they choose to transpose these provisions in national law; not only can the maximum sentence be raised but there could also be inserted mandatory minimum or, on the contrary, very "lenient" alternative sentences. There is indeed nothing preventing a national jurisdiction from providing for any number

[145] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law". Brussels, 2011, COM(2011)573 final, 9.

[146] Council conclusions on the approach to apply regarding approximation of penalties of 24 and 25 April 2002, Brussels, 27 May 2002, 9141/02.

of alternative forms of punishment; fines, community works, compulsory treatment are only a few of the possibilities[147]. Meanwhile, more recent EU legislation sets forth further requirements, for example, the type of penalty – imprisonment and the range of the minimum-maximum size (term) of the imprisonment. The minimum-maximum size (term) of the imprisonment means that the Members states have the obligation to ensure that the maximum term of imprisonment provided under their legislation is, at least, equal to the minimum term of imprisonment required by EU legislation. The doctrine of EU substantive criminal law emphasises that "it is an obligation addressed to the legislator" and "it does not oblige courts to impose the maximum penalty, nor does it force the Member state to introduce a system of mandatory or minimum penalties"[148]. The analysis of EU legislation allows to distinguish such groups of penalties of minimum-maximum size (term) of imprisonment:

(a) a maximum sanction which provides for imprisonment (for example, Article 5 (2) of Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the Euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, etc.);

(b) a maximum term of at least 1 year of imprisonment (for example, Article 3 (2) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, etc.);

(c) a maximum term of at least 2 years of imprisonment (for example, Article 9 (2) of Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, etc.);

(d) a maximum of, at least, between 1 and 3 years of imprisonment (for example, Article 4 (1) of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, etc.);

[147] Fletcher et al. (2008) 203–204.

[148] Klip (2016) 358; Asp (2012) 125–127.

(e) a maximum of at least between 2 and 5 years of imprisonment (for example, Article 3 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, etc.);

(f) a maximum term of at least 3 years of imprisonment (for example, Article 3 (5) (i) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, etc.);

(g) a maximum term of at least 4 years of imprisonment (for example, Article 7 (2) of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), etc.);

(h) a maximum term of at least 5 years of imprisonment (for example, Article 4 (1) of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, etc.);

i) a maximum term of not less than 8 years of imprisonment (for example, Article 15 (3) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, etc.);

(j) a maximum of at least between 5 and 10 years of imprisonment (for example, Article 4 (2) of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, etc.);

(k) a maximum term of at least 10 years of imprisonment (for example, Article 4 (3) of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, etc.);

(l) a maximum term of not less than 15 years of imprisonment (for example, Article 15 (3) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, etc.).

It should be noted that several Council framework decisions and directives require the setting of stringent penalties for offences related to illegal trafficking in narcotic drugs and psychotropic substances, the counterfeiting of the Euro, trafficking in human beings, terrorism, etc. However, in this case it is not problematic as terrorism and the other aforementioned offences are very dangerous acts for which extremely stringent sanctions have to be provided. On the other hand, some of these requirements may lead to certain problems, since literal implementation of them may undoubtedly distort the entire national system, as all offences and penalties in the national Criminal Codes are structured so as to dovetail with the value of the interests protected, the dangerousness of the offence, etc. and, in this way, form a consistent and coherent system. The Manifesto Group also noted a similar case which does not comply with the Finnish criminal law system[149]. 165

Moreover, over time the minimum margin of imprisonment required in EU legislation has tended to increase, and this can also result in certain problems for national criminal law. Secondly, if the minimum sanction for a specific offence is determined to be at least three years, the maximum may no longer be four years because such minimum and maximum margins of imprisonment set in the sanction will not conform to the principle of individualisation of the penalty. This means that the minimum margin for imprisonment as defined in EU legislation has at the same time the effect of raising the maximum margin for imprisonment in the national criminal law. It should be emphasised that in accordance with the classification system defined, for example in the Lithuanian Criminal Code, the number of years of imprisonment established in the sanction determines more than the assessment of the gravity of the offence. If the maximum sentence for a deliberate offence exceeds 6 years, then the offence is considered a grave offence for which only actual imprisonment can be imposed[150]. In this respect, it is right to support the European Commission's view that "it is not the primary goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member states but rather to reduce the degree of variation between the national systems and to ensure that the 166

[149] European Criminal Policy Initiative (2009) 715.

[150] Švedas (2014) 160.

requirements of "effective, proportionate and dissuasive" sanctions are indeed met in all Member states"[151].

167 It is important to note that EU legislation obliges the Member states to envisage **non-custodial penalties and other criminal (or non-criminal) sanctions**.

168 The **fine as a penalty for natural persons** is mentioned only in Article 5 (5) of Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the Euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA which states that in relation to the offence of the fraudulent bringing into circulation of counterfeit currency "Member states may provide for effective, proportionate and dissuasive criminal sanctions <...>, including fines and imprisonment, if the counterfeit currency was received without knowledge but passed on with the knowledge that it is counterfeit".

169 With respect to **confiscation**, it should be noted that Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU states that "Member states shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings *in absentia*". Article 3 of the above mentioned Directive shall apply to criminal offences covered by, *inter alia*: (1) Convention drawn up on the basis of Article K.3(2)(c) of the TEU on the fight against corruption involving officials of the European Communities or officials of the Member states of the EU, (2) Council FD2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, (3) Council FD2003/568/JHA of 22 July 2003 on combating corruption in the private sector, (4) Council FD2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field

[151] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law". Brussels, 2011, COM(2011)573 final, 9.

of illicit drug trafficking, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042 – ntr18-L_2014127EN.01003901-E0018 (5) Council FD2008/841/JHA of 24 October 2008 on the fight against organised crime, (6) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council FD2002/629/JHA, (7) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council FD2004/68/JHA, (8) Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council FD2005/222/JHA, as well as other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein.

Furthermore, Article 5 of this Directive provides that "Member states shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct". Moreover, the Preamble of this Directive allows the Member states also to "determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct". 170

Extended confiscation (according to the requirements of this Directive) should be provided for (at least) such criminal offences as active and passive corruption in the private sector, as well as active and passive corruption involving officials of institutions of the Union or of the Member states; offences relating to participation in a criminal organisation; causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes if the child is over the age of sexual consent; distribution, dissemination or transmission of child pornography offering, supplying or making available child pornography, production of child pornography, etc. 171

172 With respect to **disqualification**, few EU legal acts oblige the Member states to provide temporary or permanent disqualification from professional activities. Article 4 (3) of Council Framework Decision 2003/568/JHA on combating corruption in the private sector obliges the Member states "in accordance with its constitutional rules and principles to ensure that where a natural person in relation to a certain business activity has been convicted of the conduct of active or passive corruption, that person may, where appropriate, at least in cases where he or she had a leading position in a company within the business concerned, be temporarily prohibited from carrying on this particular or comparable business activity in a similar position or capacity, if the facts established give reason to believe there to be a clear risk of abuse of position or of office by active or passive corruption". Meanwhile, Article 10 of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council FD2004/68/JHA states that "in order to avoid the risk of repetition of offences, the Member states shall take the necessary measures to ensure that a natural person who has been convicted of any of the offences <...> may be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children". As rightly pointed in the doctrine of EU criminal law[152], this also means that information on convictions must be accessible to employers and that the Member states must exchange this information. Moreover, Article 1 of Council FD2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence provides that where appropriate, the criminal penalties <...> may be accompanied by the following measures: <...> a prohibition on practising, directly or through an intermediary, the occupational activity in the exercise of which the offence was committed".

173 In addition, it may be mentioned that a few EU legal acts provide the obligation for the Member states to introduce **some special sanctions**, for example, Article 25 (1) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse

[152] Klip (2016) 360.

and sexual exploitation of children and child pornography, and replacing Council FD2004/68/JHA, – measures that allow **to block and "prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory**". Meanwhile, Article 1 of Council FD2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence provide that "where appropriate, the criminal penalties <...> may be accompanied by the following measures: <...> **deportation**" and Article 10 of the Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals states that "unless prohibited by general principles of law, the criminal penalties <...> may be accompanied by the **publication of the judicial decision** relevant to the case".

3.6.3. Penalties and other criminal (non-criminal) sanctions for legal entities

In principle, the CoE conventions lay down very general requirements for the sanctions applicable to legal persons, for example, Article 13 (2) of the CoE Convention on Cybercrime, Article 19 (2) of the CoE Criminal Law Convention on Corruption, Article 23 (2) of the CoE Convention on Action against Trafficking in Human Beings provides practically the same requirement that "each Party shall ensure that legal persons held liable <...> shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions or measures, including monetary sanctions". 174

Meanwhile, all the EU legal acts require the national legislator to establish "effective, proportionate and dissuasive sanctions" which for example shall include **criminal or non-criminal fines and other sanctions**, such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) the placing under judicial supervision; or (d) a judicial winding-up order. These requirements are provided in Article 3 (1) of Council FD2002/946/JHA on the strengthening of the penal framework to prevent the facilitation 175

of unauthorised entry, transit and residence, Article 6 (1) of the Council FD2003/568/JHA on combating corruption in the private sector, Article 6 of the Council FD2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, etc. It is important to note that EU legislation obliges Member states to foresee only criminal or non-criminal fines in their national systems, as regards other sanctions it is merely a recommendation.

176 Moreover, it should be mentioned that Article 13 (1) (e) of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council FD2004/68/JHA, and Article 7 (1) (b) of Council FD2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking provide possible sanctions for legal entities such as the "**temporary or permanent closure of establishments used for committing the offence**". What is more, Article 7 (1) of this Council FD provides for confiscation of property as sanction for legal entities while setting out that sanctions for legal persons shall include, for example, "the **confiscation** of substances which are the object of offences <...>, instrumentalities used or intended to be used for these offences and proceeds from these offences or the confiscation of property the value of which corresponds to that of such proceeds, substances or instrumentalities".

3.6.4. Sentencing rules

177 Traditionally, sentencing rules[153] in criminal law doctrine are defined as a set of rules and principles by which courts impose a fair and proportionate penalty for a concrete offence. Member states' experience in defining sentencing rules varies from detailed and precise rules to a small set of rules leaving the court a wide margin of discretion in selecting and imposing the penalty. Meanwhile, EU legislation defines sentencing rules in a fragmented and inconsistent way. Moreover, in separate legal acts, the same circumstances are sometimes described in different terms, for example, in principle mitigating circumstances are named as

[153] Klip (2016) 362.

"mitigating circumstances"[154], "special circumstances"[155] or "particular circumstance"[156].

178 EU legislation analysis allows us to distinguish the following **essential aspects** of sentencing rules: general principles of Union law – principle of proportionality of the penalty and the principle of *lex mitior,* aggravating circumstances and mitigating circumstances.

179 The **general principles** of EU law must be applied in all cases without any exception, while aggravating or mitigating circumstances are not covered by all EU legal acts. For example, Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council FD2001/413/JHA, Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the Euro and other currencies against counterfeiting by criminal law, and replacing Council FD2000/383/JHA, Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council FD2005/222/JHA, Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse, etc. does not provide for either mitigating or aggravating circumstances.

180 The **principle of proportionality of the penalty** became the general principle of EU law since it is provided in Article 49 (3) CFREU: "the severity of penalties must not be disproportionate to the criminal offence". The doctrine of EU criminal law states that the content and role of the principle of proportionality of the penalty differs from the content and role of the proportionality principle, since its main purpose is to ensure that the penalty reflects the seriousness of the offence and the offender's guilt. Therefore, this principle requires that there must not be any fixed penalties and also that "when assessing the penalty, the seriousness of the

[154] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council FD2002/475/JHA and amending Council Decision 2005/671/JHA. – OJ L 88 of 31 March 2017, 6–21.

[155] Council FD2008/841/JHA of 24 October 2008 on the fight against organised crime. – OJ L 300 of 11 November 2008, 42–45.

[156] Council FD2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking. – OJ L 335 of 11 November 2004, 8–11.

conduct should be a red line for considerations regarding the offender's personality. On the basis of these ideas, <...> their duration depends on the potential threat posed by the offender, and not on the seriousness of the offence"[157]. The principle of proportionality of the penalty must be taken into account both by the legislature of the Member state when defining sanctions in criminal law and by the court when imposing a penalty for a concrete offence.

181 The **principle of *lex mitior*** is also a part of general principles of EU law since the CFREU prohibits the imposition of a heavier penalty "than the one that was applicable at the time the criminal offence was committed". Moreover, if a later criminal law provides for a lighter penalty, then this penalty shall be applicable.

182 Traditionally, **aggravating circumstances** in criminal law doctrine are defined as the circumstances in which a more severe penalty must be imposed. Few EU legal acts provide for a general obligation to define a certain circumstance as aggravating, for example, Council FD2008/841/JHA of 24 October 2008 on the fight against organised crime – "the fact that offences <...> have been committed within the framework of a criminal organisation, may be regarded as an aggravating circumstance", Council FD2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law – "racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties". Other EU legal acts provide a variety from one aggravating circumstance up to a list of few aggravating circumstances. For example, Article 8 of the PIF Directive (providing that "where a criminal offence referred to in the Directive is committed within a criminal organisation it shall be considered as an aggravating circumstance". Meanwhile, Article 6 of Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law provides a list of 4 aggravating circumstances: (a) the offence was committed within the framework of a criminal organisation; (b) the offender is an obliged entity and has committed the offence in the exercise of its professional activities; (c) the

[157] Martin (2017) 39.

laundered property is of considerable value; (d) the laundered property derives from one of the offences referred in this Directive.

183 The most comprehensive list of aggravating circumstances is provided in Article 9 of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council FD2004/68/JHA which includes 7 circumstances: (a) the offence was committed against a child in a particularly vulnerable situation, such as a child with a mental or physical disability, in a situation of dependence or in a state of physical or mental incapacity; (b) the offence was committed by a member of the child's family, a person cohabiting with a child or a person who has abused a recognised position of trust or authority; (c) the offence was committed by several persons acting together; (d) the offence was committed within the framework of a criminal organisation; (e) the offender had previously been convicted of offences of the same nature; (f) the offender has deliberately or recklessly endangered the child's life; or (g) the offence involved serious violence or caused serious harm to a child. It should be noted that this Directive also contains a very important provision according to which "circumstances may be recognised as aggravating circumstances only in case if they (following circumstances) do not already form part of the constituent elements of the offences".

184 Moreover, indirectly one more aggravating circumstance – **previous conviction** is provided in Council FD2008/675/JHA of 24 July 2008 on taking account of convictions in the Member states of the EU in the course of new criminal proceedings. Article 3 of this Council FD carries the general obligation "in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member states <...> are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law". The essence of this obligation is that the previous foreign conviction has the same legal significance for the determination of type and level of the penalty as a national conviction.

185 **Mitigating circumstances** in criminal law doctrine are traditionally defined as the circumstances in which a more lenient penalty must be

imposed (or an offender may even be exempted from a penalty). It should be noted that mitigating circumstances are provided only in three EU legal acts, two of which allow to **reduce a penalty** and one – **to reduce or exempt from a penalty**. First, Article 4 of the Council FD2008/841/JHA of 24 October 2008 on the fight against organised crime provides for **"special circumstances"** which allow the Member state to take the necessary measures to ensure that the penalties may be reduced or that the offender may be exempted from penalties if he "(a) renounces criminal activity; and (b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to: (i) prevent, end or mitigate the effects of the offence; (ii) identify or bring to justice the other offenders; (iii) find evidence; (iv) deprive the criminal organisation of illicit resources or of the proceeds of its criminal activities; or (v) prevent further offences <...>". Second, Article 15 of the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council FD2002/475/JHA and amending Council Decision 2005/671/JHA provides **"mitigating circumstances"** which allow "to reduce the penalties if the offender: (a) renounces terrorist activity; and (b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to: (i) prevent or mitigate the effects of the offence; (ii) identify or bring to justice the other offenders; (iii) find evidence; or (iv) prevent further offences <...>". Third, Article 5 of the Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (which is called as particular circumstances) provide for **"particular circumstances"** according to which "each Member state may take the necessary measures to ensure that the penalties <...> may be reduced if the offender: (a) renounces criminal activity relating to trafficking in drugs and precursors, and (b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to (i) prevent or mitigate the effects of the offence, (ii) identify or bring to justice the other offenders, (iii) find evidence, or (iv) prevent further offences <...>".

Furthermore, some authors[158] also attribute the non-imposition of penalties on victims who have been involved in criminal activities to sentencing rules in accordance with Article 14 of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council FD2004/68/JHA, etc. 186

Sentencing rules receive very little attention in the CoE conventions, some of which provide a **list of aggravating circumstances**, for example, Article 24 of the Convention on Action against Trafficking in Human Beings states that the following circumstances are regarded "as aggravating circumstances in the determination of the penalty for offences <...>: (a) the offence deliberately or by gross negligence endangered the life of the victim; (b) the offence was committed against a child; (c) the offence was committed by a public official in the performance of her/his duties; (d) the offence was committed within the framework of a criminal organisation". Moreover, Article 25 of the same Convention provides the possibility to take into account final sentences passed by another State when determining the penalty. 187

Meanwhile, the Rome Statute of the ICC sets out some essential sentencing principles and rules to be applied by the ICC. For example, in determining the penalty, the ICC shall take into account such factors as the **gravity of the crime** and the **individual circumstances of the convicted person**. In imposing a penalty of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime. Moreover, when a person has been convicted of more than one crime, the Court shall impose a penalty for each crime and a joint penalty specifying the total period of imprisonment. This period shall be no less than the highest individual penalty pronounced and shall not exceed 30 years imprisonment or a life imprisonment. 188

Assignment:

Please, compare the institutes of penalties and other criminal (non-criminal) sanctions for natural persons, also sentencing rules provided in the EU

[158] Klip (2016) 368.

substantive criminal law with those institutes provided in the General Part of the Criminal Codes of Belarus and Ukraine.

Please, compare the institutes of penalties and other criminal (non-criminal) sanctions for legal persons, also sentencing rules provided in the EU substantive criminal law with those institutes provided in the special laws (administrative, tax, etc.) of Belarus and Ukraine.

3.7. Important take-away points

189 EU legal acts on substantive criminal law themselves are **not divided into elements of a general and a special part of criminal law.** On the other hand, there is no doubt that these legal acts contain elements which are traditionally included in the general part of criminal law in most national criminal justice systems. Such elements include **rules on jurisdiction, participation** (incitement, aiding and abetting), **incomplete offence** (the attempt to commit the offence), **legal person's liability for an offence, property confiscation, significance of the conviction in another EU Member state**, also **"aggravating" or "mitigating" circumstances for the determination of the penalty**, etc. It should also be noted that new EU legal acts on substantive criminal law expand the regulation of elements of the general part of criminal law, for example, the PIF Directive introduced for the first time the elements of a **statute of limitation of criminal liability** and **statute of limitations of enforcement of a sentence**.

190 Some elements of a general part of criminal law **are defined precisely and in detail** in EU legal acts (e. g., rules of jurisdiction, conditions of legal person liability for an offence, et.). Other elements (e. g., attempt, participation, etc.) **have not yet been precisely defined** and their content is interpreted differently in the Member states.

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4. SELECTED AREAS OF CRIMINAL LAW REFORM[159]

4.1. Introduction

As part of their endeavour to enhance co-operation on justice, freedom and security, the EU and Ukraine are devoting a prominent place to the **fight against corruption and organised crime**. Article 3 AA, in the section on "Principles", reads as follows: 191

"The Parties recognise that the principles of a free market economy underpin their relationship. The rule of law, good governance, the fight against corruption, the fight against the different forms of trans-national organised crime and terrorism, the promotion of sustainable development and effective multilateralism are central to enhancing the relationship between the Parties". 192

This principle is further developed in Title III of the AA, devoted to "Justice, Freedom and Security". Here, parties commit to establish far-reaching co-operation amongst themselves "in combating and preventing criminal and illegal activities, organised or otherwise[160]. In addition, both commit to engage in the relevant regional and international co-operation frameworks and to ratify the United Nations Convention against Transnational Organised Crime (UNTOC), the United Nations Conventions against Corruption (UNCAC) and other relevant international instruments[161]. Therefore, with Ukraine there is very broad and strong treaty basis to place organised crime and corruption at the heart of the reform process. Obviously, there is no similarly explicit basis for enhancing co-operation with Belarus. Here, obligations flow directly from international law, where applicable.

[159] An earlier version of this chapter was published under the title "Human Rights in Combating Organised Crime and the Problem of 'Illegal' Migration in Europe" in Journal of the Belarusian State University. Law. 3 (2020) 23-28.

[160] Article 22 (1) AA.

[161] Article 22 (4) AA.

4.2. Anti-corruption law

Illicit enrichment

A is a public official. He works for a municipality as head of the Public Tender Commission. All roadwork and major repair commissioned by the municipality have to go through public tendering. While he preserves a modest image for himself, his wife and daughter display on Instagram pictures of lavish vacations in Dubai and East Asia, the price range of which obviously exceeds A's salary as a public official. Based on anonymous informers, the Prosecution Authority starts investigating A for illicit enrichment. In the course of the trial, A finally reveals that he financed the trips from cash that his late father had bequeathed on him, leaving him the code for a bank safe. A did not mention this at first because the cash money was outside the regular inheritance and he tried to avoid paying inheritance tax on the money. The court acquits A, but very soon thereafter the tax authority initiates proceedings for tax fraud of which A is later convicted. Does forcing A to reveal the origin of the funds under the illicit enrichment offence amount to a human rights violation?

Whistle blowing

B is a staff member in the office, which is serving the municipality's Public Tender Commission. Under the laws of the country, any knowledge of suspicious transactions must be communicated via internal channels first. B fears that his supervisor A may be involved in crooked tender deals and that A would suppress this information and retaliate against him, if his participation in the deals becomes known. He therefore decides to contact the local newspaper and to share his observations. When the paper publishes the allegations, an investigation is started. In addition, the disciplinary committee of the municipality decides to launch an investigation into B's conduct because he violated the law that obliges any whistle blower to make disclosure via internal channels first. In the end, the disciplinary committee decides to censure B's conduct and enter a negative remark into his file that diminishes his chances for promotion. Does the law that required B to internally disclose the information first represent a violation of his human rights?

4.2.1. Introduction

Criminal law reform in the area of anti-corruption has been based to a large extent on international law. At first glance, this area seems quite **disconnected from human rights**. Although it is generally understood that corruption and human rights are related in that corruption can have a negative impact on the delivery of public goods and services, or, in the words of the Office of the High Commissioner, corruption can be "best seen as a structural obstacle to the enjoyment of human rights"[162], the relationship remains vague and contentious[163]. There is so far (only) one incident of **corruption litigation before a human rights court**: in the ECOWAS Community Court of Justice action was brought against Nigeria by an anti-corruption civil society organisation claiming that high levels of corruption at the Universal Basic Education Commission were systematically depriving Nigerian school children of their right to education[164]. It is also important to note that despite the grave humanitarian consequences of corruption (e. g. in post-conflict situations) it is not among the crimes for which the ICC has jurisdiction. 193

In the following sections, let us take a short look at the history of the criminalisation of corruption, followed by a discussion of two topics, which do have a more pronounced human rights dimension: the criminalisation of illicit enrichment and the structuring of tools for whistle blowing. 194

4.2.2. A short history of the criminalisation of corruption

Over the past 30 years, the United States have been a very influential agenda-setter for developing a network of anti-corruption conventions in various regional fora, ultimately leading to the adoption and entry into force of UNCAC[165]. 195

[162] See <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx>.

[163] Barkhouse et al. (2018), Gebeye (2012), Peters (2015).

[164] *The Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v President of the Federal Republic of Nigeria and Another*, ECW/CCJ/APP/12/07, 30 November 2010, available at <http://www.worldcourts.com/ecowasccj/eng/decisions/2010.11.30_SERAP_v_Nigeria.htm >. For a more detailed background, see Mumuni (2016).

[165] Excellent materials for self-study can be found at Ferguson (2017).

196 The **1977 U.S. Foreign Corrupt Practices Act (FCPA)** stands at the beginning of this anti-corruption movement and is still driving it to a large extent. Originally adopted as a reaction to the Watergate Scandal and the realisation that U.S. corporations had been using bribery both domestically and abroad with practically no limits[166], U.S. lawmakers made it an offence for certain classes of persons and entities connected to the U.S. to make payments to foreign government officials to assist in obtaining or retaining business. This prohibition lies at the heart of the changes that rocked the legal landscape in anti-corruption for decades to come.

197 Following a storm of protest from U.S. companies who pointed out that bribing foreign public officials to gain government contracts abroad was a standard practice at the time, the U.S. Government vowed that it would embark on a major foreign policy initiative to **establish anti-bribery norms in all relevant regional systems and also on the universal level**. The first and most straightforward result of this initiative was the adoption of the so-called OECD Anti-Bribery Convention, which entered into force in 1999[167], followed by the 2009 Recommendation for Further Combating Bribery[168]. Beyond this somewhat narrow focus on bribing foreign public officials, the U.S. was instrumental in creating more broadly framed regional conventions against corruption (including, *inter alia*, bribery, but going significantly beyond), such as the Inter-American Convention against Corruption[169] adopted in 1996, the CoE Criminal Law Convention against Corruption[170] and the Civil Law Convention against Corruption[171], both adopted in 1999, the African Union Convention on Preventing and Combating Corruption[172], adopted in 2003. Finally, it was UNCAC that became the crowning achievement of this foreign policy agenda.

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166 For more details, see Gorman (2015).

167 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. For details see <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

168 For details, see the commentary by Pieth et al. (2014).

169 <http://oas.org/juridico/english/corr_bg.htm>.

170 <https://rm.coe.int/168007f3f5>.

171 <https://rm.coe.int/168007f3f6>.

172 <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>.

4.2.3. Criminalisation in practice

198 UNCAC has been ratified by 187 countries (as of 6 February 2020) across the globe. It is by far the most influential international anti-corruption instrument[173]. **State parties to UNCAC are required to criminalise** certain types of conduct; furthermore, they are called upon to consider criminalising a few other types of conduct. The following offences are mandatory to be criminalised ("each State Party shall adopt…"):

(1) Bribery of national public officials (Article 15)

(2) Bribery of foreign public officials and officials of international organisations (Article 16)

(3) Embezzlement, misappropriation or other diversion of property by a public official (Article 17)

(4) Laundering of the proceeds of crime (Article 23)

(5) Obstruction of justice (Article 25)

(6) Liability of legal persons (Article 26)

(7) Participation and attempt (Article 27)

199 In addition, UNCAC encourages State Parties ("shall consider adopting…") to introduce the following offences:

(1) Trading in influence (Article 18)

(2) Abuse of functions (Article 19)

(3) Illicit enrichment (Article 20)

(4) Bribery in the private sector (Article 21)

(5) Embezzlement of property in the private sector (Article 22)

(6) Concealment (Article 24)

200 The tableau of prescriptions thus appears to be very broad, but it should also be considered that in a variety of regional contexts and also under the OECD Anti-Bribery Convention, a number of obligations to criminalise have already been adopted.

Assignment:

Please find the charts of ratification for the following conventions on the internet: 1) UNCAC, 2) OECD Anti-Bribery Convention, 3) Council of Europe Criminal Law Convention

[173] For a comprehensive commentary, see Rose et al. (2019).

Please draft a comparative chart to determine whether (and if so, when) Belarus and Ukraine joined which convention. Is there a convention that one / both countries did not join? If so, do you see the criminalisation obligations of this convention covered by other conventions, which were ratified? Please pay attention also to the list of reservations and declarations that either Belarus or Ukraine may have entered.

201 In fulfilling the obligation under international law to criminalise certain types of conduct, each State party to a convention will, of course, be careful to adjust the wording of the offence to the constitutional framework of fundamental rights, its national criminal law traditions and doctrinal models. We shall discuss this below using the example of the criminalisation of illicit enrichment.

202 Thinking of ways how a human rights dimension can be reflected in the context of criminalisation, there is, of course, the **possibility that criminalisation by a national lawmaker may go "too far"**, e. g. by criminalising conduct that was not even envisaged by the relevant international convention. One typical example is **gift-giving**. The main UNCAC criminalisation obligation regarding bribery of national public officials uses the term "undue advantage" without defining it. At what stage does a courtesy to a public official, e. g. a bouquet of flowers, become an "undue advantage"? UNCAC itself answers this question only indirectly in the section dealing with codes of conduct for public officials. According to Article 8 (5) UNCAC, State parties are asked to consider setting up systems of declarations for public officials when they receive "substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials". It can thus be argued that UNCAC itself provides for an understanding that advantages become "undue" when they may cause a conflict of interests. Therefore, there is obviously a threshold of "normal" gift-giving that does not trigger the risk of conflicts of interest. National lawmakers would normally come to the same conclusion even without consulting UNCAC. In most countries, there is the doctrine that conduct may only be criminalised, if it displays a societal danger and carries a certain gravity, especially when the alternative is adopting an administrative offence. When plans to criminalise certain conduct go "too

far", there are normally safety mechanisms in the national legal traditions that prevent this from happening. In the extreme case, however, it could be argued that criminalising "normal" conduct would present a violation of the right to self-determination (Art. 1 ICCPR).

203 In criminalising bribery, an interesting issue with some significance for human rights is that a number of countries in the post-Soviet tradition **distinguish between bribery of public officials and bribery in the private sector**. This very same distinction is also expressed in the distinction between mandatory criminalisation in the public sector (Article 15 UNCAC) and optional criminalisation in the private sector (Article 21 UNCAC). In essence, when looking at the actual act of offering and accepting an undue advantage, there is outwardly not much difference between public and private corruption. The public official's integrity may rest on his public function as a public servant; the private "official" may be bound to a code of conduct via the obligations in his or her labour contract and in his or her specific job description, e. g. as a purchasing agent for the company. For a public official to be seen as fulfilling his or her duties in an objective and impartial manner is paramount for public office to function properly. In the private sector, with the current drive towards corporate integrity, any kind of wrongdoing may damage the reputation of the company and have an effect on its market position. So, as seen from the point of view of the corporation, the issue is not any less important. It could therefore be argued that the distinction between criminalising bribery in the public and in the private sector is no longer relevant.

204 There is, however, an important aspect in national doctrine that **traditionally distinguishes** the two offences. It is commonly held that **the "legal interest"** (*Rechtsgut*) behind the offence of bribery in the public sector is the upholding of the high reputation of public office as an essential precondition for the functioning of the state; corporate bribery, by contrast, is viewed as a distortion of competition, with the upholding of a competitive market environment being the "legal interest" behind criminalisation. From the point of view of the presumed offender, would this distinction in legal interests justify a different criminal sanction or a different severity of sanction, depending whether the bribe was accepted in public or in private office? Looking at this from a human rights perspective, could the difference

in position (public vs. private) be used by the lawmaker as a **legitimate point of distinction to deny equal treatment**? There is not a ready answer to this question, but in principle it becomes clear that translating concepts from international law into domestic criminal law poses a lot of challenges which often do have a hidden human rights dimension.

Solution: The OECD Anti-Bribery Convention was neither ratified by Belarus nor Ukraine (ratification status as of May 2018). However, Article 5 of the CoE Criminal Law Conventions obliges State Parties to criminalise the bribery of foreign public officials. Neither Belarus nor Ukraine raised an objection against this or added a relevant declaration. Likewise, Article 16 UNCAC was accepted by both countries.

4.2.4. Illicit enrichment

205 A controversial case of optional criminalisation under UNCAC is the offence of "illicit enrichment" (Article 20 UNCAC)[174]. According to this provision, "subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish, as a criminal offence when committed intentionally, illicit enrichment, i. e., a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income".

Assignment:

Please sketch the main points in the discussion around the offence of illicit enrichment in your country. Has the national lawmaker attempted to devise any qualifications or special conditions that would make the offence more easily reconcilable with the constitution and human rights law?

[174] In Ukraine, for instance, the relevant provision in the Criminal Code had been declared unconstitutional by the Constitutional Court in February 2019. As a result, there was a storm of protest from Western donor countries, pointing out that 40+ countries worldwide have implemented this provision. However, from among the G7 countries, not single one had implemented the provision for exactly the same reasons as the Constitutional Court was referring to. For a critique on this double-standard, see Stephenson (2019).

In criminalising illicit enrichment, **human rights law comes in from the procedural side**. According to Article 14 (2) ICCPR, "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law"[175]. In addition, according to Article 14 (3) (g) ICCPR, he "must not to be compelled to be a witness against himself or to plead guilty". This principle is generally more broadly understood as a protection against any kind of self-incrimination[176]. 206

Procedurally, it is often argued that the offence of illicit enrichment would shift the burden of proof to the suspect, thus violating the **presumption of innocence**. This argument is crude because it does not consider the nuances of the criminal procedure system in a given country[177]. **For an adversarial system**, reconciling the presumption of innocence with illicit enrichment arguably does not pose a major problem[178]. While it would always be incumbent on the prosecution to show the so-called ingredients of illicit enrichment, i. e. that there has been a significant increase of assets in a given time without a reasonable explanation, the defence would need to show that there is an explanation for this fact. The presumption of innocence is thus more of a formal concept: as a matter of course, the defendant will be considered innocent as long as he has not exhausted the possibility to prove that there is a reasonable explanation for the increase in assets. When he ultimately fails to give this explanation, the judge will be ready to make his judgement and confirm the guilt. 207

In an inquisitorial system of criminal law, the presumption of innocence has a more substantive quality. While using the term "defendant" in the adversarial system indicates the procedural role as "party" to the trial most clearly, the "suspect" in the inquisitorial system is the citizen who is foremost to be considered substantively innocent until proven guilty. Procedurally, he or she can therefore be carefree up until the very end of 208

[175] The same idea is expressed in Article 6 (2) ECHR.

[176] Unlike other regional human rights conventions, the ECHR does not recognise the right not be compelled to testify against oneself. However, the principle was recognised in the ECtHR judgement *John Murray v. the United Kingdom* of 8 February1996, Reports 1996-I, p. 49, para 45.

[177] For further references to the literature, see Perdriel-Vaissiere (2012).

[178] However, it should be noted that the U.S. have refused to implement illicit enrichment legislation for constitutional reasons. See the reference to the U.S.' reservation regarding the illicit enrichment provision of the Inter-American Convention against Corruption at Muzila et al. (2012) 64.

the trial, choosing to remain silent and not to contribute to the findings that are presented against him or her by the Prosecution. The issue with illicit enrichment is therefore not so much that it shifts the burden of proof, as this burden is always on the prosecutor, but that it **inverts the presumption of innocence to a presumption of guilt**. In a system of criminal procedure, which is geared to establishing the material truth, every use of presumptions is problematic, as the material truth cannot be simply presumed, but needs to be positively established (otherwise the suspect will be free).

209 It is on this topic of the use of presumptions in criminal law that the ECtHR in ***Salabiaku v. France*** came up with a **solution from a human rights point of view**: resort to presumptions in fact or law is compatible with the presumption of innocence as long as (a) the primary responsibility for proving matters of criminal substance against the accused rests with theProsecution (i. e., there is no reversal of the burden of proof onto the defendant), and (b) the presumptions are rebuttable. Likewise, the Hong Kong Court of Appeal ruled that the offence did not trigger any reversal of the burden of proof since the burden of proving the "ingredients" for the establishment of the crime remained upon the Prosecution and the defendant can reverse the presumption[179].

210 It is clear that whenever a national system of criminal law switches from one model to the other, it will create grey areas and difficult choices will come up. Normally, these choices will be couched in terms of constitutional law because fair trial rights (to which the presumption of innocence belongs) are mostly laid down also in the constitutions. However, behind the constitutions invariably stand the human rights obligations of the specific country. Therefore, in the extreme case, sentencing a person for illicit enrichment might give him or her the possibility of bringing a human rights complaint. So far, there has been no human rights court in the world yet that has pronounced a judgement on an illicit enrichment sentence. However, several constitutional courts have dealt with the issue[180].

[179] *Attorney General v. Hui Kin-hong*, Hong Kong Court of Appeal, 1995.

[180] See Muzila et al. (2012) for further references.

Discussion of the case on illicit enrichment

It appears that from an illicit enrichment point of view it seems incompatible with A's right to be presumed innocent that he was forced to declare the origin of the money. However, it could more easily be argued that by forcing him to give the declaration he was compelled to provide evidence against himself. This is not necessarily a human rights violation either. It could be argued that public servants, in assuming a position of trust, have subjected themselves to specific legal requirements and to administrative and criminal sanctions that arise from the abuse of that trust. Moreover, where countries have an established income and asset disclosure regime, they also have established the principle that public officials must provide personal information that may be self-incriminating. In this context, providing evidence regarding the sources of income and assets to the court does not appear as a significant additional burden[181].

4.2.5. Whistle blowing

UNCAC does not use the term "whistle blowing", but **in Article 33** ("Protection of Reporting Persons") it provides: 211

"Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention".

Assignment:

Please check whether in your national legislation whistle blower protections have been established. Do you find them reasonable?

Openness and transparency are values in anti-corruption which have a game-changing quality. The same values when applied to organisations (both private and public) are discussed when it comes to encouraging people to report on violations that they may have come across as staff, public servant, etc. The demand to implement whistleblower legislation has recently acquired a strong momentum, but it has also encountered 212

[181] Muzila et al. (2012) 32.

a number of difficulties. In corporate settings and in public administration, whistleblowing is tightly connected to the idea of codes of conduct and a culture of integrity. However, legislators are called upon to establish reliable systems and prevent individual organisations from arbitrarily defining their own approaches.

213 On the global level, apart from UNCAC the **G20 Action Plan against Corruption** calls upon states to establish legal frameworks for whistleblower protection, leading to the G20 Anti-Corruption Action Plan "Protection of Whistleblowers" adopted in 2017[182]. Earlier in the European context, the CoE's Criminal Law Convention against Corruption had imposed an obligation "to provide effective and appropriate protection", but the provision lacked the necessary details[183]. Clarifications were only provided by the 2014 Committee of Ministers Recommendation (2014)7 which includes 29 Principles and an Explanatory Memorandum[184].

214 Without going into the details of these different recommendations and their applicability in different cultural settings, the international discussions have recently crystallised around the **European Commission's proposal for a Directive "On the protection of persons reporting on breaches of Union law"**[185]. While limited to Union law and thus not applicable to national law governing the various public and private organisations, the proposal has elicited a large number of comments and position papers not only from the anti-corruption community, but also from labour rights representatives, employers' unions and so on. This consultation process finally led to adoption of the **Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report**

[182] <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

[183] Article 22 Criminal Law Convention: "Each Party shall adopt such measures as may be necessary to provide effective and appropriate protection for: a) those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities; b) witnesses who give testimony concerning these offences".

[184] <https://rm.coe.int/16807096c7>

[185] COM(2018)218 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1586338620813&uri=CELEX:52018PC0218>. See also the related Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee of the same day, COM(2018) 214 final, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0214>.

breaches of Union law[186]**,** adopted on 23 October 2019 and entered into force on 16 December 2019[187]. Member States have until 17 December 2021 to transpose it into their national laws.

There is one line of criticism that is particularly relevant in the given context of openness and transparency. It is the human rights perspective from which **whistleblowing is seen as an act of freedom of expression**, protected both by Article 19 ICCPR and Article 10 ECHR. As such, any system of whistleblowing limiting or discouraging the reporting would have to be justified (provided by law and necessary, including being proportionate) in the interest of the rights and reputations of others, for the protection of national security, public order or of public health and morals[188]. However, in the final version of the Directive, Article 3 (2) remained fairly rigorous in giving Member states the possibility to curtail whistleblowing with regard to national security and essential security interests. 215

In an earlier letter dated 5 March 2019, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, together with the OSCE Representative of Freedom of the Media, criticised[189] the Directive's **lack of sensitivity in giving room to proportionality**, even advocating that reporting on certain matters such as criminal offences and human rights or international humanitarian law violations, corruption, public safety and environmental harm and abuse of public office should presumptively always be in the public interest[190]. The final version of the Directive did not follow this suggestion. On the contrary, in the area of defence procurement it even takes the opposite view. It mandates that the Directive shall not apply to reports on breaches of procurement rules involving defence or security aspects, "unless they are covered by the relevant acts of the European Union"[191]. 216

[186] Available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32019L1937>.

[187] See, e. g., Dilling (2019) and Schmolke (2020).

[188] Article 19 (3) ICCPR. See also the slightly different wording of Article 10 (2) ECHR.

[189] In summarising his criticisms, the UN Special Rapporteur referred to his earlier report to the UN General Assembly in the context of whistleblowing. See UN General Assembly Doc. A/70/361 of 8 September 2015.

[190] <https://freedex.org/wp-content/blogs.dir/2015/files/2019/03/OL-OTH-11.2019–1.pdf>

[191] Article 3 (2) Directive (*ibd.*).

217 A second issue that has created lively discussions was whether the Directive would insist on **requiring whistleblowers first to report internally** (or to use a dedicated external channel) **before going public**. Public disclosure, seen as the most straightforward way of using one's freedom of expression, has raised a lot of eyebrows, and there have been many attempts to limit the Directive's protection to those whistleblowers who follow the course of internal reporting first. The compromise found in the Directive's version that went into first reading is that public disclosure while maintaining the protection of the Directive is possible only under two circumstances: either the whistleblower has exhausted internal and external reporting channels without having received an answer within a reasonable timeframe not exceeding three months unless there is a risk of retaliation, or the whistleblower turns to public disclosure directly, having reasonable grounds to believe that the breach may constitute an imminent or manifest danger for the public interest[192].

218 In the final version of the Directive, the **reference to the risk of retaliation** was taken up and transformed into an additional ground which allows a whistleblower to keep the protection of the Directive. According to Article 15 (1) lit. b) (ii), this may be the case where the person has reasonable grounds to believe that "in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach".

219 The concern about freedom of expression can also be seen in a new provision that was added to the final Directive as Article 15 (2): "This Article shall not apply to cases where a person directly discloses information to the press pursuant to specific national provisions establishing a system of protection relating to freedom of expression and information".

Discussion of the case on whistle blowing

Any legal regulation that forces a whistle blower to first use internal channels places prima facia a limitation on this person's freedom of expression under Article 19 ICCPR and Article 10 ECHR. It is therefore necessary to show that the

[192] Article 15 (1) b) draft Directive

limitation is justified by one of the recognised exceptions, i. e. that it is necessary for respect of the rights and reputations of others, for the protection of national security, of public order or of public health and morals. Important guidelines for interpreting the national security exception are laid down in the so-called Tshwane Principles[193].

4.2.6. Conclusion

Although necessarily selective, the topics raised show that even in the field of anti-corruption that is usually thought of as being quite distant from human rights, the latter do have a significant relevance. National legislation will usually be measured by constitutional principles and fundamental rights and freedoms, but behind this normative dimension there stands another "super-normative" dimension: human rights. For a well-informed and balanced legal analysis, it is indeed often useful to go back to those first origins and to build the argument from there. 220

4.3. Human trafficking and the smuggling of migrants

Smuggling of migrants

On 15 April 2019, the Minister of the Interior of Italy ordered[194] *law enforcement authorities to monitor the 'Mare Jonio' vessel, operated by the Italian NGO 'Mediterranea' and performing search and rescue (SAR) operations in the Mediterranean. Later, the Italian Financial Guard seized the 'Mare Jonio' vessel and charged the crew with aiding and abetting irregular migration. On 29 June 2019, the Captain of the 'Sea Watch 3' vessel – Carola Rackete – contravened the Minister's docking ban and entered the Lampedusa port, due to an emergency situation on the vessel. The ECtHR had previously declined to*

[193] Open Society Justice Initiative (2013), available at <https://www.justiceinitiative.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>.

[194] <http://www.interno.gov.it/sites/default/files/direttiva_del_ministro_n._141001418_15_aprile_2019.pdf>

impose interim measures under Rule 39 of the Rules of the Court on Italy, which would have required the rescued migrants to be allowed to disembark in Italy. The President of the ECHR found that there were no exceptionally serious and urgent reasons to do so, given that vulnerable individuals (children and pregnant women) on board had already been allowed to disembark. However, according to Rackete, after the long waiting there was hysteria onboard and passengers were trying to jump into the water and swim to Italy. After having forced her way into the port of Lampedusa, the Captain was arrested and accused of facilitating irregular migration[195].

Article 12 (1) of the Italian Legislative Decree no 286/1998[196] *provides: "Whoever promotes, directs, organises, finances or transports foreigners to the territory of the State, or carries out other conduct directed to illegally obtaining their entry into the territory of the State is subject to imprisonment from one to five years and a fine of 15.000 euro for each third-country national helped". Doing so for financial gain or profit is considered an aggravating circumstance (Art. 12 (3ter) lit. b). According to Art. 12 (2), "Without prejudice to the provisions of Article 54 of the Criminal Code, the activities of rescue and humanitarian assistance provided in Italy towards foreigners in need, however present in the territory of the State, do not constitute a crime".*

Is it correct, under international and EU law, to charge captain and crew of a humanitarian SAR operation with facilitating irregular migration?

4.3.1. Introduction

221 Next to corruption, the threat of transnational organised crime has become a potent force in mobilising lawmakers over the past 20 years. Undoubtedly, the spectre of East European organised crime groups, no longer contained by the Cold War and supposedly set free to roam across Europe, had been used as a wake-up call for tougher measures against "borderless crime", but it also to demand long-overdue investment into police forces, their infrastructure

[195] Information based on the EU Agency for Fundamental Rights (FRA) Quarterly Bulletin 3 *Migration : Key Fundamental Rights Concerns* 1.4.-30.6.2019 p. 15, available at <https://fra.europa.eu/en/publication/2019/migration-overviews-july-2019>.

[196] Legislative Decree no 286/1998 of 25 July 1998 "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (GU18 August 1998 No. 191 – Supp. Ordinario No. 139).

and equipment all over Europe. Unlike the fight against corruption, however, the issue of legal measures against transnational organised crime had hardly been "prepared" by using the comparative experience of various regions. Indeed, there are **no regional instruments under international law** that would be dedicated specifically to the fight against transnational organized crime. Instead, the international community chose to move directly onto the universal level and negotiated and adopted UNTOC, signed in December 2000 and entered into force in 2003. Currently, there are 190 parties to this Convention (as of 26 July 2018)[197].

UNTOC is thus the main instrument in the global fight against transnational organised crime, with three additional protocols supplementing the Convention: 1) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Anti-THB Protocol), 2) Protocol against the Smuggling of Migrants by Land, Sea and Air (UN Anti-Smuggling Protocol), and 3) Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. We shall take a closer look at the first and second protocol, in particular with a view to the question, how trafficking in human beings (THB)[198] and smuggling of migrants are distinguished and what human rights implications the regulation of the two areas entails. For wider human rights issues in combating transnational organised crime see the literature in the footnote[199]. 222

4.3.2. Trafficking in human beings

Whereas the UN Anti-THB Protocol is a clear expression of concern over transnational organised crime, there are a few other tributaries that flow, metaphorically speaking, into the river of the **international legal framework against THB**, as we know it today[200]. Slavery is perhaps the oldest type of practice that is conceptually linked to THB. The Slavery 223

[197] <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en>. For a commentary, see McClean (2007).

[198] The term "human trafficking" is used interchangeably. However, the attribute "human" does not refer to the supposed humaneness of the activity, but to the object of the trafficking, i. e. human beings.

[199] Obokata (2019).

[200] Generally, see also the controversy between Hathaway (2008) and Gallagher (2009).

Convention of 1926 defines slavery as the "status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercise"[201]. The notion of slavery is obviously closely linked to the practice of slave trade, comprising "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery"[202]. According to the Global Slavery Index 2018, an estimated 40.3 million people were enslaved globally in 2016, with North Korea having the most slaves at 2.6 million (one in 10)[203]. Given these numbers, it would have been more logical from a human rights point of view to consider modern slavery the major target for international initiatives and include into this approach both slave trade ("black trade") and THB ("white trade"). By focusing only on those who are trafficked transnationally, a large number of modern slavery situations is now actually outside the main focus of international initiatives[204].

224 Still, in the particular **post-UNTOC consensus on THB**, as it emerged, a few other European initiatives stand out that were developed against the background of the legally binding provisions of the UN Anti-THB Protocol.

1) The **CoE** has perhaps the longest pedigree of dealing with THB, however, it originally took a different angle. As early as 1991, it emphasised the dangers of trafficking for **sexual exploitation**, focusing on the risks for children and young adults[205]. Later, the notion of sexual exploitation was broadened to include the issue of **violence against women**[206]**.** In this way,

[201] Art. 1 (1) Slavery Convention, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx>.

[202] Art. 1 (2) Slavery Convention. Slave trade is to be criminalised under Art. 3 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>.

[203] <https://www.globalslaveryindex.org/2018/findings/highlights/>

[204] Hathaway (2008) 7 speaks of "unjustified privileging" of victims of trafficking over those who are in a slavery situation without having been trafficked earlier. See also the response by Gallagher (2009).

[205] Committee of Ministers' Recommendation No. R (91) 11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults. Available at <https://archive.crin.org/en/library/legal-database/council-europe-recommendation-no-r-91–11-concerning-sexual-exploitation.html>.

[206] Committee of Ministers' Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, Recommendation Rec (2001) 16 on the protection of children against sexual exploitation and Recommendation Rec (2002) 5 on the protection of women against violence.

the Committee of Ministers became the driver of an anti-THB agenda that finally led to the adoption of the Convention on Action against Trafficking in Human Beings in 2005 (CoE Anti-THB Convention). The Convention entered into force in 2008 with a total of 47 ratifications and accessions, including from Ukraine and Belarus as a non-member of the Co E.

2) In 2002, the **EU** adopted a **Framework Decision on combating THB**[207]. The history of this initiative goes back to the same idea of protecting children from sexual exploitation[208] and subsequently widened to comprise the full agenda of anti-THB. In the recitals to the Decision, the EU explains that "the important work performed by international organisations, in particular the UN, must be complemented by that of the European Union". This earlier framework was later replaced by Council Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims[209].

3) Finally, in 2003 the **OSCE** set up the post of the Special Representative and Coordinator for Combating Trafficking in Human Beings to help participating States develop and implement effective policies for combating human trafficking. The Office of the Special Representative is in charge of watching over the implementation of the OSCE Action Plan to Combat Trafficking in Human Beings, which was adopted in the same year[210]. In doing so, the OSCE, through its dedicated infrastructure[211], has become most active in trainings and simulations, fostering international co-operation.

Subsequently, the UN, on the initiative of Belarus, also adopted a Global Plan of Action to Combat Trafficking in Persons[212]. 225

The human rights dimension of THB manifests itself in two areas. First, by **reducing the trafficked person to a commodity**, the practice of 226

[207] Council FD2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203 of 1.8.2002, 1. For a background, see Galli (2013).

[208] Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children, OJ L 63 of 4.3.1997, 2.

[209] OJ 2011, L 101 of 15 April 2011, 1. See also Obokata (2016).

[210] Decision No. 557 of the OSCE Permanent Council PC.DEC/557 of 24 July 2003, available at <https://www.osce.org/what/trafficking/55512>.

[211] See <https://www.osce.org/combating-human-trafficking> for a full picture.

[212] Resolution of UN General Assembly A/RES/64/293 of 12 August 2010, available at <https://www.unodc.org/documents/human-trafficking/United_Nations_Global_Plan_of_Action_to_Combat_Trafficking_in_Persons.pdf>.

trafficking is essentially at odds with human dignity (even if the source of the commodification of human beings is not the state, but a private party!)[213]. The UN Anti-THB Protocol defines trafficking as any type of recruitment, harbouring or physical relocation, not necessarily via state boundaries, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation[214]. The hallmark of this definition is therefore the involuntary submission into dependency from the point of view of the victim and the perpetrator's goal of using the person for purposes of exploitation. The central rule is to criminalise this type of conduct[215] including the attempt to commit it, participation and aiding and abetting[216]. Both UN Anti-THB Protocol and CoE Anti-THB Convention are also unanimous in that consent of the victim of trafficking to his or her intended subsequent exploitation shall not remove the criminality of the perpetrator[217]. Secondly, human rights are expressed in the **requirement to State parties to create conditions, which are safe and conducive to the well-being of the victims of trafficking** ("protection and promotion of rights")[218].

227 In transforming these prescriptions into national law, there is little disagreement about the first part, i. e. the criminalisation. The second part, by comparison, is more contentious, as State parties may be hesitant to commit significant resources to the well-being of persons who are in most cases not its citizens. As the CoE explains in the Preamble to the Anti-THB-Convention, there is still a need to prepare a comprehensive international legal instrument focusing on the human rights of the victims of trafficking[219].

[213] This is clearly spelled out in the Preamble to the CoE Anti-THB Convention: "Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being; ...".

[214] Article 3 lit. a) UN Anti-THB Protocol.

[215] Article 5 (1) UN Anti-THB Protocol and Article 18 CoE Anti-THB Convention.

[216] Article 5 (2) UN Anti-THB-Protocol and Article 21 CoE Anti-THB Convention (omitting joint participation).

[217] Article 3 lit. b) UN Anti-THB Protocol and Article 4 lit. b) CoE Anti-THB Convention.

[218] Article 6 ff. UN Anti-THB Protocol and Article 10 ff. CoE Anti-THB Convention.

[219] Preamble last recital, CoE Anti-THB Convention.

4.3.3. Smuggling of migrants

228 The smuggling of migrants has gained prominence primarily after the events of the Arab Spring and the unleashing of conflicts in the Middle East and North Africa. It would be wrong to say that the adoption of the UN Anti-Smuggling Protocol had been an entirely theoretical exercise, but when the Protocol entered into force in 2004 the whole thrust of problems emerging in the years hence could not be anticipated. There is **not yet another binding legal instrument beyond the UN Anti-Smuggling Protocol** that would create a more advanced legal framework in a universal context. Indeed, so far there is only the **UN Global Compact for Safe, Orderly and Regular Migration (GCM)**, adopted by Resolution of the UN General Assembly on 19 December 2018, which creates a more elaborate (but legally non-binding) framework.

Assignment

Please verify whether the two supplemental protocols to UNTOC on THB and the smuggling of migrants are ratified by Belarus and Ukraine. Also, please find out which positions Belarus and Ukraine have taken in the GCM negotiations.

229 In theory, there are a few features that distinguish THB from smuggling migrants. On the one hand, the smuggling of migrants necessarily involves the crossing of a state border and is by its nature irregular (if not illegal according to that state's laws). On the other hand, agreeing to be smuggled is a voluntary decision, not affected by deceit, threat, coercion or even violence. The legal definition of smuggling thus focuses on the "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident"[220]. It is therefore wrong to speak of "victims of smuggling", as the migrants who contract a smuggler are his clients. However, a situation of smuggling can easily turn into THB when the smuggler takes advantage of the helplessness of his or her clients, deceiving them and bringing them into a situation where they are subject to exploitation.

[220] Article 3 lit. a) UN Anti-Smuggling Protocol.

230 Using the framework established above for THB, despite the fact that there is no cogent human rights background and in the face of academic criticism[221], there is obviously **agreement about the need for criminalisation of human smuggling**. Article 6 (1) lit. a) UN Anti-Smuggling Protocol calls on State parties to adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit, the conduct of "smuggling of migrants". In addition, the UN Anti-Smuggling Protocol calls for the criminalisation of the attempt to commit an act of smuggling migrants, participating as an accomplice and / or organising or directing the commission of the act[222]. The second dimension, i. e. **protection and promotion of the rights of migrants**, is the much more critical one. Despite the fact that certain rights of migrants are regulated in a variety of International Labour Organisation (ILO) conventions[223], the issue has become enormously contentious. In general, the rights-based approach to migration is heavily contested by the securitisation approach which sees migrants first and foremostly as a security threat to be countered by means of law enforcement The GMC is the latest attempt by the UN to define common principles and ensure a human rights-based approach to the legal position of migrants. However, a number of populist governments have rejected the GMC and actively work against it.

231 The question, which lies at the heart of this approach is whether it is **permissible to criminalise migrants themselves**, i. e. those who agree to be smuggled, and for which conduct exactly[224]. There is not, as in the case of THB, the objectification of a victim, i. e., the turning of him or her into a commodity to be used for the purposes of exploitation. On the contrary, the migrant takes advantage of his or her legal capacity to engage in a transaction with a smuggler, with the major difference being that the individual migrant is hardly able to set the conditions for the deal. From an

[221] Hathaway (2008) 25 argues that the initial focus on THB created a "legal slippery slope" for criminalising human smuggling as well.

[222] Article 6 (2) UN Anti-Smuggling Protocol.

[223] Migration for Employment Convention (Revised), 1949 (No. 97), Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Equality of Treatment (Social Security) Convention, 1962 (No. 118), and Domestic Workers Convention, 2011 (No. 189).

[224] See also Mitsilegas (2016) 92.

aiding and abetting point of view, the migrant would clearly be criminally liable for the criminal conduct of the smuggler. Assuming that his bid to be smuggled is causal for the smuggler's decision to engage in the transaction, the migrant would thus incur criminal responsibility. However, the UN Anti-Smuggling Protocol is straightforwardly clear on this question:

"Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol"[225].

232 However, this statement, as welcome as it may seem from a human rights point of view, does not prevent countries from establishing the **crime of illegal entry and illegal residence**. Even in the EU, as the case of the Return Directive shows, there is an ongoing conflict between those who interpret the Return Directive broadly to limit Member states in their freedom to use criminal law as a means of deterring illegal entry or residence, and those who seek to advance the residual competences of the Member states in the area of public order and security[226].

233 A second set of issues that has become important for Europe is whether under the current global rules it is permissible for EU Member states to **criminalise the facilitation of migration by NGOs** who conduct humanitarian SAR operations in the Mediterranean. As we have just seen, the UN Anti-Smuggling Protocol allows for the criminalisation of aiding and abetting in human smuggling, including participating as an accomplice. To hold an NGO and its respective crew aboard ship criminally liable for operating in tacit agreement with smugglers is probably something nobody would argue against. However, this is a constellation that police and criminological research have not come across in practice. Instead, the question raised by many across Europe is whether the uncoordinated presence of SAR operations in the Mediterranean is not *de facto* facilitating the business model of human smugglers. By increasing the chance of being rescued and taken to EU Member states to claim asylum, the humanitarian NGOs are indeed making it more attractive to risk one's life and hope for a lucky outcome.

[225] Art. 5 UN Anti-Smuggling Protocol.

[226] For more details on the de-criminalising effects of the Return Directive, see 2.3.1. in this book.

234 **In EU law**, the so-called **"Facilitators' Package"** provides for a regulatory approach in line with the UN Anti-Smuggling Protocol. The Package includes, on the one hand, **Council Directive 2002/90/EC of 28 November 2002**, defining the facilitation of unauthorised entry, transit and residence (Facilitators' Directive)[227]. On the other hand, it includes **Council FD2002/946/JHA** of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (Facilitators' FD)[228]. For competence reasons, it is the Directive that sets the task of harmonising the Member states' definition of the offence of facilitation of unauthorised entry, transit and residence until 5 December 2004[229], and it is the FD that defines the Member states' obligations to create a legal framework for prosecution and cross-border co-operation[230], to become effective by the same date.

235 The central provision of Article 1 of the Directive, entitled "General infringement", reads as follows:

"1. Each Member State shall adopt appropriate sanctions on:

(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned".

236 When it comes to facilitating irregular entry, one difference between the Facilitators' Directive and the UN Anti-Smuggling Protocol is that the former **changes the wording from "participating as an accomplice"**

[227] OJ L 328 of 5 December 2002, p. 17–18, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0090>.

[228] OJ L 328 of 5 December 2002, p. 1–3, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002F0946>.

[229] Based on Article 79 (2) (c) TFEU.

[230] Based on Article 83 (2) TFEU.

to "intentionally assisting". Arguably, both terms are coming from the realm of international and European law and need to be transposed into national law to be able to ascertain what exactly is meant. Being an accomplice indicates the need for a criminal conspiracy, at least in the sense of a mutual agreement. "Intentionally assisting" is arguably less because it describes only the one-sided perspective of the facilitator. A criminal enterprise like smuggling could thus be intentionally assisted even without a conspiracy between the facilitator and the main perpetrators of the crime.

The second surprising feature of the Facilitators' Directive is that it 237
treats the ***means rea*** **requirement of intent "to obtain, directly or indirectly, a financial or other material benefit"** coming from the UN Anti-Smuggling Protocol in a nuanced way: In the case of facilitating irregular entry an intention to obtain financial gain is no longer needed which makes any humanitarian SAR mission potentially criminally liable. The counterbalance to this is found in para (2): Member states may optionally exclude criminal liability in case of humanitarian assistance missions.

Given the fact that the UN Anti-Smuggling Protocol purports to define 238
minimum requirements for criminalisation, it is clear that the EU, despite speaking of "supplementing" other relevant instruments[231], is going beyond such minima by allowing the criminalisation of facilitative conduct that is not conspiracy-based and not done with intent to receive a financial or other material benefit[232].

Discussion of the case of the smuggling of migrants

The charge of facilitating irregular migration, as brought under the criminal law of Italy, is difficult to reconcile with human rights law[233]. It needs to be granted that the criminalisation obligations in the UN Anti-Smuggling Protocol are minimum requirements. In particular, there is nothing to prevent a state, when criminalising the facilitation of the smuggling of migrants, from dropping the mens rea requirement of intending to obtain, directly or indirectly, a financial or other material benefit. The UN Protocol's requirement

[231] Para. 5 Preamble Facilitators' Directive (*ibd.*).

[232] For a more broadly defined criticism, see Mitsilegas (2019) 77.

[233] For a more fundamental perspective, see Carrera et al. (2019).

for such a subjective element does indicate, however, that it had been the idea of the negotiators to keep humanitarian SAR missions outside the scope of criminalisation[234].

At the same time, the Italian legislator adopted the optional exception clause for humanitarian missions from Article 1 (2) of the Facilitators' Directive in an idiosyncratic way: it entered a proviso by which the exception would only be granted for rescue missions in the territorial waters of Italy, but not on the high seas. This limitation, however, is said to be without prejudice to Article 54 of the Italian Criminal Code, which exempts from sanctions acts that have been necessary to avert the risk of a serious danger. All in all, the Italian case law on this issue is still in flux[235]*. Arguably, the transposition of the Facilitators' Directive exception into national law must be seen in the light of positive human rights obligations. When the life or health of migrants is in danger, members of an SAR operation must be able to bring the concerned person to a safe port without running the risk of being criminalised for this. Only where there is no direct and immediate danger to life or health may legislators of member states decide to impose criminal sanctions.*

Interestingly, in Objective 8 GCM State parties commit to ensure "that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful". In the given situation, Italy has refrained from committing to the GCM.

4.3.4. Conclusion

239 In the areas of THB and the smuggling of migrants, we see a strong desire by states to create for themselves, via international agreements, the authority to criminalise certain conduct, albeit in a coordinated fashion and with a view to facilitating judicial co-operation. What

[234] Mitsilegas (2019) 69; European Parliament (2018) 30: "It seems that the intention of the drafters of the UN Protocol, who insisted on a material or other financial benefit requirement, was at least partly to avoid criminalising family members, civil society organisations and individuals acting out of solidarity with refugees, asylum seekers and irregular migrants".

[235] Trevisan and Moeller (2019) 7: "The legal framework and case law show that the Italian legal system fails to sufficiently distinguish between criminal facilitation and humanitarian assistance. Art. 12 par. 2 of the law n. 286/1998 fails to provide any robust definition and is seldom accepted by the Courts. Such a wide margin of interpretation left to prosecutors to criminalise various acts without criminal intent is detrimental to the protection of civil society organizations who uphold the rights of refugees and other vulnerable groups".

becomes clear from the foregoing is that such **international or EU law criminalisation obligations are *leges imperfectae*** in that they rely in their transposition to a large degree on the doctrinal approaches of the national criminal law. For example, concepts such as "aiding and abetting" are taken from common law and used internationally in a rather carefree manner. When it comes down to national law, there is no blueprint what "facilitation" means and how it will fit into the concepts of national criminal law.

Thus, analysing selected issues of criminal law reform in the light of the interplay between international law, in particular human rights law, and European law is a fruitful approach, but it is not sufficient to exhaust the problems. What is needed to see is how the concepts are transposed into national law and what the courts' approach will be, possibly even asking the CJEU for a preliminary ruling. 240

4.4. Monitoring and peer-review mechanisms

4.4.1. Introduction

A deeper understanding of criminal justice reform issues in the areas of corruption, THB and smuggling in migrants can be developed by examining the various monitoring and peer-review mechanisms. As it is uncommon to agree to a system of sanctions for non-implementation, most of the recent conventions, particularly from the CoE family, have created specific follow-up mechanisms such as **monitoring rounds**. These rounds, often focusing on one or the other topical issue, ask states to report on their level of implementation, dispatch monitoring missions that may also hear shadow reports from relevant civil society organisations, and compile reports that are replied to by the respective state. These reporting mechanisms are important for giving civil society a voice; they also create wider publicity around criminal justice reform issues. It is perhaps overly optimistic to expect a race to the top, as states are hardly ambitious to 241

excel in fulfilling their obligations. However, by and large, the mechanism is useful in pinpointing weaknesses and creating "reminders" how to improve a situation.

4.4.2. Corruption

242 The most comprehensive and impactful system of monitoring so far has been established under the CoE Criminal and Civil Law Conventions against Corruption: the Group of States against Corruption **(GRECO)**[236]**.** It is now in its fifth evaluation round, devoted to issues of preventing corruption and promoting integrity in central governments as well as in law enforcement agencies. With regards to criminalisation, the Third Evaluation Round which started on 1 January 2007 is particularly relevant. It is interesting to note that while Ukraine has undergone a rigorous examination of its national laws and the evaluations and compliance reports have been widely published[237], Belarus has been fairly secretive and it only much belatedly (in December 2017) published a summary of the evaluation report[238]. It should also be noted that due to their absence to the OECD Anti-Bribery Convention neither Belarus nor Ukraine have produced any country reports in the OECD system[239].

243 **UNCAC**, by comparison, takes a less intrusive approach and limits its review activities to an intergovernmental peer-review. In the so-called Implementation Review Mechanism (IRM), in accordance with the terms of reference, each State party is reviewed by two peers – one from the same regional group -, which are selected by a drawing of lots at the beginning of each year of the review cycle. In each review cycle, each State party must undergo review once, and must perform between one and three reviews of other states. The timing of when each state is undergoing review, or acting as reviewing state, is determined by drawing of lots. The first cycle of the IRM started in 2010 and covers, *inter alia*, the issue of criminalisation. In line

[236] <https://www.coe.int/en/web/greco>.

[237] <https://www.coe.int/en/web/greco/evaluations/round-3>.

[238] <https://rm.coe.int/third-evaluation-round-summary-of-the-evaluation-report-on-belarus-inc/168076d562>.

[239] <http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>.

with the more considerate approach of the IRM, only executive summaries are published[240].

4.4.3. THB and smuggling of migrants

The CoE Anti-THB Convention created a monitoring system that follows the example of GRECO and is called Group of Experts on Action against Trafficking in Human Beings **(GRETA)**[241]**.** It is now in its third evaluation round. Belarus has so far completed only the first round[242], Ukraine is done with the second round already[243]. 244

In the UN system, a review mechanism for UNTOC and its supplementary protocols was envisaged in Article 32 UNTOC, but unlike the IRM for UNCAC, it took the Conference of Parties to UNTOC more than 10 years to come up with a mechanism. In fact, it was only in October 2018 that the Conference established the detailed legal basis[244]. It generally follows the model of the UNCAC IRM in that it is a **purely intergovernmental, non-intrusive process that is non-adversarial and non-punitive.** There will be self-assessment questionnaires for each of the instruments in the preparatory phase, followed by country reviews performed by two other states that are State parties to UNTOC. Unlike the CoE monitoring system, the reviews are not based on "topics" chosen on a needs-based approach, but on a clustering exercise, that combines in advance all provisions of the relevant instruments into certain topical clusters. The first cluster, e. g., will deal with criminalisation and jurisdiction. While this UNTOC IRM is only taking shape, there are of course no relevant findings yet. 245

Finally, it should be mentioned that there have been no country visits by the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings to Belarus and Ukraine so far. 246

[240] For Belarus <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1801383e.pdf>, for Ukraine <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1257230e.pdf>.

[241] <https://www.coe.int/en/web/anti-human-trafficking/home>.

[242] <https://www.coe.int/en/web/anti-human-trafficking/belarus>.

[243] <https://www.coe.int/en/web/anti-human-trafficking/ukraine>.

[244] Resolution 9/1, see <https://www.unodc.org/unodc/en/organized-crime/intro/revew-mechanism-untoc.html>.

4.4.4. Conclusion

247 Having an eye on the various monitoring systems is a good way of keeping track of the progress in implementing the prescriptions of international law. However, it should be noted that the design of monitoring mechanisms is quite varied: **while GRECO and GRETA are leading the field, the UNCAC and UNTOC IRMs are lagging behind**. It is indeed striking to see that the two universal conventions which were hailed for being ground-breaking on their relevant topics are being reviewed by State parties with such tardiness.

4.5. Important take-away points

248 Looking into selected areas of criminal law reform continues the narrative of Chapter 2 in a more real-life type of approach. While earlier we saw that human rights can lead both to criminalisation and de-criminalisation, we see that in several areas of crime there is an overwhelming tendency to **use criminal law as part of some overall securitisation strategy**. Human rights are interwoven into the respective proposals, but often only to the extent that the initiatives pay lip-service to them. In order to **"go against the grain"** and create a robust methodology for analysing innovations in criminal law, it is therefore necessary to develop a strong human rights focus.

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5. HARMONISATION OF THE LAW OF CRIMINAL PROCEDURE

This chapter has been omitted in accordance with Ukrainian legislation

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6. VICTIMS IN CRIMINAL PROCEEDINGS

6.1. Introduction

249 The role of victims in criminal proceedings can be understood as a sub-topic of reform in criminal procedure law, so it is connected to the reforms discussed in the foregoing chapter. At the same time, progressive voices call for strengthening the position of the victim outside the criminal procedure framework, i. e. in restorative justice. This development will be discussed in the following chapter.

250 Every crime has a victim. This is even true in the case of corruption[245] which some call a "victimless crime". But even outside the field of corruption, **victims are often invisible** due to the emphasis on the relationship between the state and the offender. Historically, in the pre-modern era victims of crime were quite central to the justice process, seeking recovery of their losses from the offender by pursuing different forms of prosecution. Adversarial criminal procedure systems, as they are typical for common law countries, have retained many features of this original approach. On the European continent, by contrast, offences against co-citizens became subsumed under offences against the sovereign or the state. Therefore, the right to punish (*ius puniendi, Strafanspruch*) is now held to be vested in the state. It was only in the last decades of the previous century, beginning roughly in the 1970s, that the role of victims began to attract the attention of scholars of criminology, effectively creating the field of victimology, and of criminal law and criminal procedure.

251 The **human rights dimension of the victim's position** in criminal procedure is somewhat blurred. It was most likely the issue of access to justice that presented the victim's position in the light of human rights. Even in "classical" national systems, some categories of victims (victims of

[245] See 4.2. in this book.

domestic violence, child victims, victims of gender-related discrimination) have found it traditionally harder to make their voices heard and to be treated by the criminal justice system with fairness and respect. Discrimination among different groups of victims has therefore become a major concern in the debate over access to justice. Another point of concern, from a human rights point of view, is the issue of secondary or even repeat victimisation. This is an issue primarily in the area of violent crimes, often committed vis-à-vis women or children. While the state bears no immediate responsibility for the crimes committed in society, it is called upon, under general principles of human rights, to maintain and develop a criminal justice system that is sensitive to the needs of the weakest. Asking a victim of crime to give testimony against the offender and then subjecting her to cross-examination can have serious psychological consequences, forcing the victim to "re-live" the moment of transgression. Hence, a number of innovations have been introduced into criminal procedure to prevent such secondary victimisation effects from taking place while preserving the validity of the victim's testimony as witness.

Human rights are also used to argue against the strengthening of the rights of victims. Proponents of this position argue that by giving the victim more procedural rights, the equality of arms as a human right of the accused, flowing from the fair trail principle (Article 6 para 3 ECHR), would be undermined. The idea is that by strengthening the position of the victim, the accused is confronting not only the prosecutor, but also the victim and that in general the punitive tendency of the criminal trial will be reinforced. Whether this is in fact the case depends on a number of additional factors and not least the dominant ideology of criminal justice. National systems that uphold the absolute necessity of punishment may indeed reinforce the punitive tendencies of criminal proceedings when a victim who is seeking justice and possibly revenge is given a strong position. By contrast, in systems that emphasise special or general prevention the strengthening of victims rights may open the door to restorative justice and a "peaceful" resolution of the conflict outside the court. Those are the main factors when comparing national approaches to the issue of victims' rights[246]. 252

[246] For a broad comparative approach see Braun (2020).

6.2. The role of the EU in the debate on victims' rights

6.2.1. Legal background to the field of victims' rights

A is accused of robbery. His victim B has been summoned to stand as witness at the trial. Following the taking of the evidence, according to the procedural rules, A has the last word before the judges resign to deliberate on the judgement. B is not satisfied with this rule. He petitions the judges to give him the last word, as he in his role as victim considers himself entitled to impress on the court the full consequences of the offence which he has suffered. Should the "right to the last word" be given to the victim?

253 When the Maastricht Treaty created the three-pillar structure of the EU, there was nothing to indicate that cooperation in justice and home affairs would also include the mandate of addressing the issue of victims of crime. The Amsterdam Treaty of 1997 called for the development of an AFSJ, but without any ambition in harmonising the criminal procedure law of the Member states. Still, the Action Plan on how best to implement the provision of the Treaty of Amsterdam on an AFSJ[247] pronounced that within five years following the entry into force of the Treaty the question of victim support should be addressed[248]. This rather careful agenda was outpaced by the European Council of Tampere in 1999 which called upon Member states to draw up minimum standards in the protection of victims[249].

254 It was thus much earlier than anticipated that the EU adopted its first legal act on victims' rights: the **Council FD2001/220/JHA on the standing**

[247] OJ C19 of 23.1.1999, 1.

[248] Para. 51 Action Plan *ibid.*: "The following measures should be taken within five years of the entry into force of the Treaty: (c) address the question of victim support by making a comparative survey of victim compensation schemes and assess the feasibility of taking action within the Union."

[249] Para. 32: "Having regard to the Commission's communication, minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims." The Tampere Conclusions are available at <https://www.europarl.europa.eu/summits/tam_en.htm>.

of victims in criminal proceedings of 15 March 2001[250]. Its focal point is expressed in para (4) of the Preamble:

"Member States should approximate their laws and regulations to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present."

Indeed, the **idea of the "cross-border victim"** is most central to understanding the EU's approach: from victim support it went with one stride into embracing the cross-border dimension of victim protection, by emphasising the differences in legal protection in the various Member states[251]. Thus, it is not the issue of discrimination, but of inequality which became the central "call to arms" for the EU. In a situation in which the expansion of the AFSJ was not without criticism, the issue of strengthening victims' rights seemed to be the "fastest selling point" because everybody could potentially fall victim to a crime and everybody would appreciate if in this situation the rules between the Member states would be at least similar. In this way, victims' rights became a door opener to the reform of criminal procedure in the Member states, but also a slippery slope. While a lot of issues in victims' protection are uncontroversial (except perhaps from a financial point of view) and relate to the wider criminal justice response, the position of the victim in pre-trial, trial and post-trial touches the criminal process very deeply and stirs up a lot of national sensibilities about how justice should be achieved. 255

The FD is most interesting for what it purports not to achieve: according to its Preamble, the provisions of this FD "do not (...) impose an obligation on Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings"[252]. It calls for respect and recognition (Article 2), the right to receive information (Article 4), communication safeguards (Article 5), specific assistance (Article 6) and a right to protection (Article 8) and compensation (Article 9). The **"hot potato" of the standing of the victim in criminal proceedings** is barely touched: Article 3 para (1) calls for each Member state to "safeguard the possibility for victims 256

[250] OJ L 82 of 22.3.2001, 1.

[251] Groenhuijsen and Pemberton (2009) 44.

[252] Para 9 of the Preamble (ibid.)

to be heard during proceedings and to supply evidence". This is presumably the lightest touch possible, and it comes with a call on Member states "to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure"[253].

257 The next major[254] step in the development of the EU's legal framework for protecting victims' rights was **Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime**, and replacing Council FD2001/220/JHA[255]. It represents not merely a "lisbonised" version of the preceding FD, but a far more substantial and far-reaching attempt to bring Member states in line with the EU's proclaimed goal of enhancing the role of victims[256].

258 The Directive comes with a record of 72 recitals in its Preamble and is structured into four chapters:

1) General provisions;
2) Provision of information and support;
3) Participation in criminal proceedings;
4) Protection of victims and recognition of victims with specific protection needs;
5) Other provisions.

259 While massively expanding the safeguards for victims outside criminal proceedings, the provisions of Chapter 3 dealing with participation in criminal proceedings are very conservative. Undoubtedly, the very difficult experience with transposing the earlier FD into national criminal procedure law has left its mark. According to the empirical assessment of *Groenhuijsen and Pemberton*[257], progress is very difficult, as the idea of enhancing victims' rights in criminal proceedings is somehow similar to opening Pandora's box. This has well been recognised by the drafters of Directive 2012/29/EU. In recital (20), they explain:

[253] Article 10 para (1) ibid. See on this topic in more detail Chapter 7, 7.3.2.

[254] There is also Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ L 261 of 6 August 2004, 15). This Directive, however, addresses only a relatively minor detail in the framework of compensations.

[255] OJ L 315 of 14 November 2012, 57.

[256] Pemberton and Groenhuijsen (2012).

[257] Groenhuijsen and Pemberton (2009) 51.

"The role of victims in the criminal justice system and whether they can participate actively in criminal proceedings vary across Member States, depending on the national system, and is determined by one or more of the following criteria: whether the national system provides for a legal status as a party to criminal proceedings; whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply to determine the scope of rights set out in this Directive where there are references to the role of the victim in the relevant criminal justice system."

As for **participation in criminal proceedings**, Chapter 3 starts by reiterating the requirement already established in the 2001 FD that Member states shall ensure that victims "may be heard during criminal proceedings and may provide evidence"[258]. In the 2012 Directive, however, this requirement is qualified by stating that "the procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law"[259]. It is hard to make sense of this proviso. The fact that it is ultimately national law to determine the procedural rights of victims goes without saying, as the harmonisation of national law is the entire point in this exercise. Beyond stating the self-evident, the proviso can also be read as an announcement of surrender: if national law is to prevail, then what point is there in calling for the implementation of such rights? A second important right that has not been covered by the earlier FD, is the victims' right to a review of a decision not to prosecute[260]. Finally, Chapter 3 calls for the right to safeguards in the context of restorative justice services (Article 12)[261], the right to legal aid (Article 13), to reimbursement of expenses (Article 14), to return of

260

[258] Article 10 (1) Directive 2012/29/EU.

[259] Article 10 (2) ibid.

[260] Article 11 ibid.

[261] See also 7.3.2. in this book.

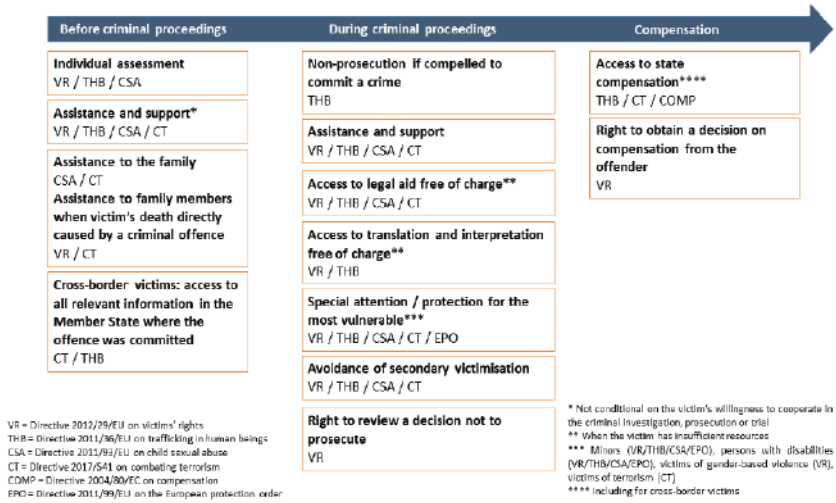
property (Article 15) and the right to a decision on compensation from the offender (Article 16).

261 Member states were required to transpose Directive 2012/29/EU until 16 November 2015 and the Commission was ordered to present a report on the Member states' compliance with the Directive by 16 November 2017[262].

6.2.2. Current state of play and policy initiatives

262 As the EU's initiative to protect victims' rights is not just limited to "regular" victims, but takes account of especially vulnerable groups[263], there have been a number of initiatives outside the 2012 Directive which also deserve mentioning. The following chart is taken from a recent assessment commissioned by the European Parliament[264]:

Graph 1 – Main victims' procedural rights established in EU legal texts



263 It gives a good overview of the various rights inside and outside criminal proceedings. However, **implementing these rights is not**

[262] Article 29 ibid.

[263] See earlier 5.3.2. in this book.

[264] European Parliament Research Service (2017) 22.

straightforward. When the EU Commission missed its Article 29 deadline to report on the implementation by 16 November 2017, the European Parliament commissioned a scholarly study on the implementation of the Directive by the end of 2017[265], followed by a critical report, prepared on behalf of the Committee on Civil Liberties, Justice and Home Affairs as well as on behalf of the Committee on Women's Rights and Gender Equality. The rapporteurs were critical of the EU Commission's failure, but even more so of the Member states' record. According to their count, only 23 out of 27 Member states had officially transposed Directive 2012/29/EU into national law, some of them offering only partial or even selective solutions[266].

264 Finally, after significant delays, the Commission published its **Article 29-report** on 11 May 2020, stating that there are 21 on-going infringement procedures for incomplete transposition of the Directive, thus covering the largest part of all Member states[267]. In its appraisal of the state of implementation in the procedural part, the Commission is surprisingly benign. Referring to Article 10 of the Directive, it states that "applicable procedural rules are left to national law" and finds fault only in the lack of safeguards for the hearing of child victims[268]. It concludes by stating that the "full potential of the Directive has not been reached yet. The implementation of the Directive is not satisfactory. This is particularly due to incomplete and/or incorrect transposition"[269]. Finally, on 24 June 2020, the Commission unveiled the **first EU Strategy on Victims' Rights (2020–2025)**[270]**.** It is based on a two-pronged approach: empowering victims of crime and working together for victims' rights. Obviously, the goal of empowering victims would also include the strengthening of their procedural rights. But the Strategy is completely silent on this. Instead, "empowering victims" is limited to (1) effective communication with victims and a safe environment for victims to report crime, (2) improving

[265] European Parliamentary Research Service (2017).

[266] European Parliament (2018) 11.

[267] EU Commission (2020a), 3.

[268] EU Commission (2020a). 5.

[269] *Ibd.* 9.

[270] European Commission (2020b).

support and protection of the most vulnerable victims, and (3) facilitating victims' access to compensation.

265 It appears that in the latest thinking of the Commission, an "everything but" approach has taken hold that avoids the thorny issue of strengthening victims' rights in criminal proceedings. At the same time, there is new academic research on the issue how well various criminal procedure systems around the world are able to accommodate the required changes[271]. Its author *Braun* concludes[272].

"Systematic expansion of victims' participatory rights cannot occur in a legal vacuum. Without a changed understanding of crime and justice and a related attitude change towards the victims' role in criminal procedure, it appears likely that victims' procedural rights will continue to be modified in a piecemeal fashion through numerous reform acts in the future leading to an even more disjointed legal landscape."

266 To present a glimpse into this reform laboratory, let us turn to the legal situation in France as a special case study.

6.3. The place of the victim in the French criminal justice system

6.3.1. Introduction

267 Under French law, the victim of a criminal offence occupies a very special place, as it can be actively involved in the criminal trial and obtain legal redress before the criminal courts. In fact, the **victim is a real actor in the criminal trial**, alongside the Public Prosecutor and the offender. This specific place of the victim has been created through history[273], though it is consistent today with the contemporary concerns of the legislator[274]. It also finds a theoretical basis in victimology[275].

[271] Braun (2019).

[272] Braun (2019) 286.

[273] Laingui and Lebigre (1979) 86; Carbasse (1990) 133.

[274] Ambroise-Castérot and Bonfils (2018) 170.

[275] Gassin, Cimamonti and Bonfils (2011) 28; see also Lopez (1997) and Vérin (1981) 895.

France did not wait for Directive 2012/29/EU to take an interest in the rights of victims[276]. French law is generally more protective of victims than the Directive. Indeed, for the past 30 years, the legislator worked hard to improve the rights of victims of criminal acts. As a matter of fact, a compensation fund for victims of an offense has been established[277]. More recently, the information of victims about their right has been reinforced[278] and the assistance of a victim support association has been offered[279]. More fundamentally, the Preamble of the CCP, as part of the guiding principles of criminal procedure, states that "the judicial authority ensures the victims' information and the guarantee of the victims' rights during any criminal proceedings". The victim has moved on to (sometimes) become the Public Prosecutor's equal and sometimes the offender's equal. Like the Public Prosecutor, the victim can trigger the criminal trial, even when the Public Prosecutor has decided not to prosecute[280]. Like the offender, the victim is entitled to the assistance of a lawyer and may have access to the file[281]. 268

Under French law, the **effect of the strong standing of victims is quite relative**, depending on his or her motives. Recent studies have highlighted that, depending on the circumstances and the type of offence, victims seek either reparation for their injuries or punishment of the culprit[282]. Yet, the criminal procedure precisely allows victims of an offense to seek reparation for their injuries before the criminal courts and to participate in public prosecution. 269

[276] Vergès (2013) 135.

[277] See Couvrat (1992) 157.

[278] Particularly Art. 53–1 and 75 CCP.

[279] The Law of 15 June 2000 provides for the possibility of the Public Prosecutor to have recourse to a victim assistance association to provide assistance to the victim of the offense.

[280] Art. 1er and 418 *et seq.* CPP.

[281] Law of 22 March 1921, now article 114 last paragraph CPP.

[282] A study by Tremblay (1998) 18 showed that the decision of citizens to submit an offence to public attention (denunciation, complaint, etc.) depends directly on the seriousness of the facts. Another study found that victims seeking redress by filing a complaint are sometimes more strongly motivated to punish the perpetrator, sometimes they intend to seek damages, generally, but not exclusively depending on the seriousness of the offence. Thus, in the case of theft, the search for reparation is generally more decisive than the punishment of the culprit (73 % of complaints are for restorative purposes, compared with 59.9 % in a vindictive approach). Conversely, in the case of sexual offences, the desire to punish the culprit is far more decisive than the reparation (100 % of the complaints pursue the punishment of the culprit, against 60 % in favour of reparation). See Zauberman and Robert (1995) 63 and 145.

270 Under French law, the victim has a dual place before the criminal courts: the victim can claim reparation for its injuries; it can also actively participate in the criminal trial. These two dimensions are often jointly exercised. But they can also be independent, where the victim seeks legal redress without actually participating in the criminal trial, or conversely, where the victim plays a real role in the criminal trial, without seeking redress.

6.3.2. The civil status of the victim before criminal courts

271 The victim of an offence may seek compensation for the damage which is directly and personally caused by the offence. This type of **civil action** ("*l'action civile*") is quite common in a number of countries. But in France, the victim has the possibility to choose taking civil action before the criminal courts. In fact, the exercise of civil action before criminal courts is governed by rules that sometimes fall under civil law and sometimes under criminal law.

272 The civil action belongs to those who have been directly and personally victims of the criminal offence. The **active subjects** are therefore the victims themselves, their successors and assigns, or even their relatives (indirect victims). Victims are mostly natural persons, but they can also be legal persons, such as an association, a company, a foundation. Moreover, the case law allows the civil action of legal persons acting in a collective interest that they represent and / or defend, such as environmental and protection associations, professional orders and unions. Finally, the civil action also belongs to the subrogated third parties, i. e. insurance companies who take over from the real victim they have compensated in order to seek redress from the offender. The list of persons who can undertake the civil action is therefore broad. The same applies to the passive subjects.

273 **Passive subjects** are the ones against whom the civil action is being exercised. Firstly there is the offender. It is he or she who is responsible for the damage caused and who must repair it. Civil action may also be undertaken against the persons who are liable for the acts of the offenders, such as the parents for the acts of their child, or as the principal for the acts of its agent. More generally, the civil action is often undertaken against the insurer of the person responsible, at least in the area of unintentional

offenses (intentional offenses not being insured). Here again, the civil action is understood in a broad sense. The same views apply to compensation.

The civil action **aims at redressing the damage caused**. This is provided for by Article 2 CCP. However, this matter has led to an important debate on the nature of the civil action[283]. The majority view currently considers that the sole purpose of civil action is to redress the damage resulting from the criminal offense. In that case, if the victim has a certain power as an actor in the criminal trial, it is something different. In fact, there is a distinction between the civil action and the civil party constitution allowing the victim to participate in the criminal trial. This is the view of the Criminal Chamber of the Court of Cassation which explained: 274

"The main purpose of which is to initiate public proceedings with a view to establishing the guilt of the alleged perpetrator of an offence which has caused harm to the complainant, that right (to set up a civil party) constitutes a prerogative attached to the person and which may aim only at the defence of his honour and consideration, *regardless of any reparation by means of civil action*"[284].

This distinction is also recognised by the ECHR in a judgement of 7 August 1996[285] which states that "French law distinguishes between the constitution of a civil party proper and the civil action for compensation for the damage suffered as a result of the infringement." Thus, with regard to the civil action itself, its purpose is only reparation, whether the action is brought before the criminal courts or the civil courts. 275

As stated in Article 2 CCP, the purpose of a civil action is to remedy the harm caused by a criminal offence, i. e. compensation for the various damages[286]. From this point of view, civil action is basically a civil liability 276

[283] Bonfils (2000).

[284] Court of Cassation, Criminal Chamber of 16 December 1980, Bulletin no. 348, *Recueil Dalloz* 1981, IR, 217 with comment by F. Derrida ; see also Court of Cassation, Criminal Chamber of 8 June 1971, Bulletin crim. no. 182, *Recueil Dalloz* 1971, 594 with note by Maury ; Court of Cassation, Criminal Chamber of 19 Oct. 1982, Bulletin no. 222, *Recueil Dalloz* 1983, IR, 381 with comment by F. Derrida ; Court of Cassation, Criminal Chamber of 20 Sept. 2006, no. 05-87229, Bull. crim. n° 230, *Recueil Dalloz* 2007, 187 with comment by Ambroise-Castérot ; Court of Cassation, Criminal Chamber of 30 Oct. 2006, Revue pénitentiaire et de droit pénal 2007, 379 with comment by Ambroise-Castérot.

[285] ECtHR, *Hamer vs. France*, 7 August 1996, *Recueil Dalloz* 1997, 205 with comments by J.-F. Renucci, *Revue de science criminelle* 1997, 468, comments by R. Koering-Joulin, *Juris-Classeur Périodique* 1997, I, 4000, n°16.

[286] Casanova (2015) 18 ; Lacroix (2015) 12.

action. But precisely because of its origin, civil action may be brought, at the choice of the victim, before the civil or criminal courts. This is called the victim's right of option which is provided for in Articles 3 and 4 CCP. The victim makes this choice in a totally free manner, but the choice is in principle irrevocable (this is the principle *electa una via*[287]).

277 Civil action and public action have in common that they are based on the commission of a criminal offence. This explains their ties which are dominated by the **principle of the primacy of the criminal over the civil**. The idea of this principle is to prevent criminal and civil decisions from contradicting each other, and to this end French law provides for the primacy of the criminal over the civil. This translates into two complementary rules. The first is the authority of the criminal over the civil, according to which the criminal decision (on the public action) is binding on the judge responsible for the civil action, and even if the court seized of the civil action is the civil judge. The judge who is hearing the civil action cannot contradict what was finally decided by the criminal judge. If the criminal judge has upheld the existence of an offence and convicted its perpetrator, this decision will impose itself on the civil action and result in the conviction of the perpetrator to repair the damage caused to the victim. Conversely, if it has been found that no offence has been committed, or that the perpetrator had good reason to commit it and that his act was justified, the civil action will be declared unfounded. The principle of the primacy of the criminal over the civil induces a second rule, complementary to the first. This is the rule "the criminal holds the civil in the state", requiring the judge who is hearing the civil action to stay the proceedings pending the decision of the criminal judge (Article 4 CCP). In other words, to avoid a possible contradiction between the decisions, the judge hearing the civil action will have to wait until the criminal judge has ruled.

278 Civil action is a legal action. It must be brought either by way of a summons before the civil courts or by way of the constitution of a civil party, before the criminal courts. In practice, the victim most often chooses to bring the civil action before the criminal courts, since it then benefits from the evidence gathered by the investigative and prosecution authorities and saves a second trial before the civil courts. In addition, by acting before

[287] Freyria (1951) 213.

the criminal courts, the victim acquires the status of civil party which gives him an important right to review the conduct of the criminal trial.

6.3.3. The criminal status of the victim in criminal courts

The victim may, even independently of the civil action, actively participate in the criminal trial. This extraordinary power which can make the victim almost the equal of the public prosecutor, must be specified as to its conditions and its exercise. 279

Only the victim of the offence can become a civil party. Most of the time, these are people who are also civilian victims and as such can exercise civil action. But the people who can carry out the civil action are considered more broadly than the people who can take part in the criminal trial. For example, if insurers can claim compensation for damages they have indemnified against their insured, they cannot actively participate in the criminal trial. The same difference occurs when considering passive subjects. Indeed, the participation of the victim in the criminal trial is only envisaged against the perpetrator of the offence and not against his children, his heirs, his insurers, etc. 280

The victim can participate actively in the criminal trial **only before the criminal courts**. This is obvious, and constitutes a major difference with civil action for which the victim has an option between civil and criminal proceedings. But since only the criminal courts have jurisdiction, it is essential that public action is not prescribed. This is why it is sometimes not possible for the victim to go to the criminal court, while it is possible to go to the civil courts. 281

In principle, the criminal trial is initiated by the public prosecutor under the principle of the timeliness of prosecutions. This means that the public prosecutor, when informed of the commission of an offence, has the choice to prosecute or not. It is because the prosecutor's office can therefore dismiss a case without further action that the **victim has the possibility of initiating a criminal trial**, like the public prosecutor's office. The victim has two different paths. In the matter of contravention (infractions) and tort, it may directly refer the matter to the court of judgment by a direct summons; the court will then consider the prosecution, without preliminary investigation 282

before, and often even without investigation. In matters of misdemeanors and felonies, the victim has the possibility to lodge a complaint with the constitution of civil party, and to refer it to an investigating judge; it does not therefore directly refer it to the court of judgment but triggers the opening of an investigation, and it is the investigating judge who may, later, refer the matter to the court of judgment. In both cases, it is a very powerful power (and very dangerous for suspects) that is framed by the CCP. For this reason, the victim is normally required to pay a sum of money to guarantee the civil fine to which he or she can be sentenced if he or she has initiated unnecessary or slanderous proceedings. Moreover, the victim who would have been reckless and who would have triggered an unjustified criminal trial may in turn be prosecuted.

283 The victim, whether he or she has initiated the criminal trial or not, can **actively participate in the proceedings**. It becomes a civil party and therefore a party to the criminal trial. As such, it has substantially the same rights as the defence or the public prosecutor. It may request documents (reconstitution, confrontation, expert opinions, etc.), exercise recourse (for example, appeal), file submissions and plead. The victim can be assisted by a lawyer and is entitled to access the prosecution file under the same conditions as the defence. It must be informed of its rights at every stage of the procedure, beginning at the time of the investigation. During the investigation, all procedural documents must be notified to the victim so that it may, if necessary, act. The victim can even participate in the search for evidence. It is a real part and not, as in the American system, for example, a witness. Moreover, and precisely for this reason, it does not take the oath.

6.3.4. Conclusion

284 In France, the victim is treated satisfactorily overall, and even much more satisfactorily than in most countries. The victim has the opportunity, if it wishes, to initiate the criminal trial, and to play a real role in it. I t can also take advantage of the criminal trial to seek and obtain redress. But this considerable place which is thus granted to the victim must be contained, so that the criminal trial remains first and foremost that of the offender.

6.4. Important take-away points

The EU has embarked on a far-reaching policy of strengthening the position of victims in the entire sphere of criminal justice. By choosing the "cross-border victim" as its starting point, it uses victims' rights as a door opener for the harmonisation for criminal procedure rules. It is probably fair to say that this strategy has backfired because Member states are more than hesitant to change the fundamental structures of their criminal proceedings. In the end, an "everything but" approach emerged in which the Commission is aggressively pushing for strengthening victims rights outside criminal proceedings, but leaving the fundamental principles of national law untouched. 285

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7. RESTORATIVE JUSTICE IN CRIMINAL CASES

7.1. Introduction

Jason Reed was sentenced to five years in prison after admitting to more than 50 unsolved burglaries. Shortly after, he expressed his wish to start afresh and make amends. He was asked if he would like to take part in Restorative Justice. Although understandably nervous, Jason was keen to participate:

"My personal resolve wasn't enough to stop me from returning to prison last time. I knew I needed to fully engage my emotions by meeting my victims and I knew that hearing directly from them would be a powerful experience."

Full assessments were completed to make sure that everyone was 100% committed to the process. In the end, five of Jason's victims, involved in three different crimes, agreed to meet him. The three men and two women had all been affected in different ways and had different motivations for wanting to take part. One found that the conference stirred up more emotions than she expected and over the course of the three conferences, there were tears, anger, apologies, acceptance and even forgiveness. The consistent message from the victims was that they wanted Jason to accept the help and support available to him and turn his life around so that he wouldn't re-offend when he was released. Meeting his victims had a huge impact on Jason and he took it upon himself to commit to compensating his victims for things he had stolen. He saw this as an important step in continuing to make amends for the harm he had caused. He is now using the money he makes from his job in prison to pay back his victims in instalments.

Jason said: "This was real, not just theory. For these people, I was the big bogeyman and because I have a conscience, the meetings were hard. Restorative Justice is powerful stuff. It was something I needed to do and am glad I did it"[288].

[288] This case was published in the communicative material on RJ that the Ministry of Justice of the UK launched on the occasion of the International Restorative Justice Week 2013, available at <https://webarchive.nationalarchives.gov.uk/20131210200137/http://www.justice.gov.uk/downloads/victims-and-witnesses/restorative-justice/restorative-justice-booklet-web.pdf>.

As it has been already discussed in the Introduction to this book, the legal systems of Belarus and Ukraine are influenced by current international and European developments in the field of criminal justice, in particular with respect to the rule of law and human rights. In a period of crisis of repressive policies worldwide in which "current theories and practices of justice do not adequately meet socio-political challenges of our times"[289], Restorative Justice (RJ) is currently promoted in many countries' legal systems and practices in an **effort to make their criminal policies more effective**. This topic has a particular relevance for post-Soviet countries, such as Belarus and Ukraine, where the punitive mentality, inherited from the Gulag system, is still very strong. In these countries, it has been outlined that "instead of searching for alternative ways of sentencing, such as community-based measures, the 'adequate' response to rule-breaking is to lock up the rule-breakers for as long as possible and increase the capacity of the prison system"[290]. In fact, in both Ukraine and Belarus, there is a continuously **increasing interest** in RJ in recent years, and RJ-related projects have been initiated and implemented in the two countries, supported by international and European bodies. 286

In **Ukraine**, the Ukrainian Centre for Common Ground (UCCG), a local NGO, is a reference point for the development of RJ. Since 2003, it has initiated the first RJ-related pilot project in Ukraine, implemented in Kyiv and in five more regions of the country, in partnership with national institutions (the Supreme Court, the Academy of Judges, etc.). The aim of this initiative is to promote mediation between victims and offenders, adapted to local conditions and to develop its interaction with the legal system[291]. The European Commission has been supporting the development and implementation of RJ in Ukraine during 2003–2005 through the AGIS project on "meeting the challenges of introducing victim-offender mediation in Central and Eastern Europe" (JAI/2003/AGIS/088)[292]. 287

[289] Aertsen (2017) 1.

[290] Fellegi (2005) 67. This punitive mentality is also visible in the rate of prison population. According to the data available on the site of the World Prison Brief, while the prison population per 100 000 individuals is 95 in Belgium and 104 in France, this figure is 343 in Belarus and 148 in Ukraine.

[291] Koval and Zemlyanska (2005).

[292] Fellegi (2005).

288 In **Belarus**, during the period 2017–2018, the project "Advancing Best Practice in Juvenile Justice in Belarus" has been implemented with the support of the Solicitors International Human Rights Group (SIHRG)[293]. In the aftermath of this project, an international conference on RJ in juvenile criminal justice took place in the Belarusian capital with the support of UNICEF. In this international event, Ivan Noskevich, the Chairman of Belarus' Investigative Committee, declared:

"Abandoning criminal law measures in the context of restorative justice is one of the ways to realize the interests of both a child and the society at large. Therefore, our legal framework should cover the issues of restorative justice more thoroughly"[294].

289 The aim of this chapter is to provide a general overview of RJ in criminal cases, focusing on the European continent. It starts with a general presentation of RJ as a new proposition for dealing with criminal behaviour: what is its basic concept and what practices does it propose? In which criminal cases can it be used? (Section 1). Then, an overview of the international and the European RJ policy will be provided (Section 2) which has much influenced domestic legislation in European countries: what restorative practices are currently implemented in European countries and how? (Section 3). Section 4 concludes with some reflections on the future of RJ: what are the main challenges to overcome?

7.2. What is Restorative Justice?

7.2.1. Definitions

290 Even though the modern RJ movement emerged in criminology during the 1970s[295], its basic concept has ancient roots and is based on the rituals

[293] See <https://sites.google.com/a/sihrg.org/solicitors-international-human-rights-group/belarus-project>.

[294] Available at <https://sk.gov.by/special/en/news-en/view/ivan-noskevich-abandoning-criminal-law-measures-in-the-context-of-restorative-justice-is-one-of-the-ways-to-6605/>.

[295] Van Ness and Strong (2015), Braithwaite (2002).

and the traditions of indigenous and ancient civilisations[296]. There are several definitions of RJ, but there is no consensus due to its continuously evolving nature in both theory and practice[297]. The most commonly used ways to define RJ in literature follow either a "purist" approach, focusing on **RJ as a process**, or a "maximalist" approach, focusing on the **restorative outcomes** of RJ processes.

According to the "purist" concept, RJ can be defined as follows:

"a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future"[298].

The "maximalist" concept interprets RJ as:

"every action that is primarily oriented toward doing justice by repairing the harm that has been caused by crime"[299].

Despite the different approaches regarding the definition of the concept[300] within the RJ movement, all RJ scholars and advocates agree on its basic values and *ratio:* to "turn the page" on the way we conceptualise and how we react to an offence. 291

7.2.2. A new way of conceptualising and responding to criminal offences

Criminal law perceives the criminal act as a violation of an impersonal and general rule of law which protects a **general and abstract legal good**. This violation confronts the offender with the State which undertakes to punish him/her. The restorative approach interprets crime as an act causing **harm and human pain on a personal, inter-personal (relations) and social (civil society) level**. By focusing on the real rather than the legal consequences of a criminal act on people's lives, imposing a sentence – as the main and dominant response – turns out to be insufficient because it 292

[296] In fact, one of the RJ movements proponents, the Australian criminologist John Braithwaite, claims that "restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples", see Braithwaite (1999).

[297] Cunneen and Goldson (2015); Daly and Proietti-Scifoni (2011).

[298] Marshall (1996) 37.

[299] Bazemore and Walgrave (1999) 48.

[300] Johnstone and Van Ness (2007).

fails to take into account the individual and social dimensions of the act[301]. The question then arises to restore, to repair – as much as possible – the problematic situation in every way.

293 To better achieve the abovementioned goal, to restore the harm caused by an offence, RJ proposes an **active involvement (engagement)** of all directly (or indirectly) affected stakeholders (victims, offenders, civil society members) in **RJ processes-encounters**, **guided by values** such as respect for human beings, solidarity, truth, active responsibility, etc., **and principles.** RJ encounters:

- presuppose the creation of a safe and secure space for a "face to face" confrontation and dealing with the real consequences of the crime and, thus, they are **confidential**;
- take place only after sufficient **information** and adequate **preparation** of all the parties involved;
- presuppose the stakeholders' **voluntary participation**;
- are facilitated by impartial specially trained professionals as third-parties (generally referred as "**facilitators**").

294 Depending on the persons involved, RJ encounters can take several **forms**[302]**,** such as:

- victim-offender mediation (VOM);
- conferencing;
- circles (sentencing/peacemaking).

295 The last two forms can include – beyond the victim and the offender as in VOM – family members on both sides, so the encounter takes the form of a conferencing) or civil society members, so it takes the form of circles (see the diagram below).

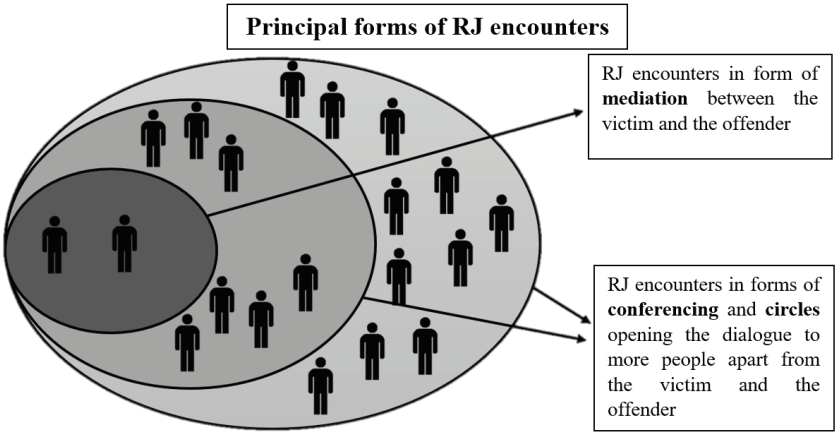
296 The outcome of RJ encounters may vary: it can rely on a **symbolic** (e. g., remorse, apologies, recognition of victim's position and suffering, community service, etc.), on a **relational** and / or a **material** basis (e. g. monetary compensation).

297 In addition, by offering to the persons concerned by a criminal *factum* the opportunity for active involvement (engagement) in order to discuss and to make decisions on the aftermath of the offence, RJ promotes and

[301] *Ibd.* 181

[302] McCold (2006).

encourages their **empowerment** which is a central concept in RJ theory. In fact, RJ promotes the empowerment and the engagement of both victims and offenders[303]. Engagement and empowerment of the victims mean to put their needs and their voice in the centre of the attention rather than considering them as a secondary issue of the criminal process[304]. As for the offenders, empowerment and engagement means to offer them the opportunity to develop understanding for others' harm and to take full responsibility for their wrongdoing. All in all, **inclusive processes** are at the center of RJ philosophy. That is because RJ advocates consider that repressive judicial procedures which promote the exclusiveness of people and are central in our western justice systems promote disempowerment of the stakeholders of an offence (victims and offenders)[305].



7.2.3. In case of which criminal offences can it be used?

As it has been pointed out[306], "the seriousness of a crime cannot be an *a priori* argument to exclude offenders and victims of serious crimes from 298

[303] Larson and Zehr (2007) 41–58.

[304] Thus, RJ goes beyond the recognition of procedural rights to the victim of an offence.

[305] Larson and Zehr (2007) 43.

[306] Walgrave (2008)133. For the use of RJ in serious cases see also Aertsen (2004), Umbreit et al. (2002), Liebmann (2007).

restorative interventions" because in such cases there is more suffering for victims who are thus "more in need of restoration". In fact, the restorative approach **does not concern only trivial offences but also serious crimes**[307], including domestic violence and sexual offences[308], homicide, large-scale violence[309], etc. Even though RJ for serious offences is more widely developed and implemented in countries such as USA, Canada, Australia, New Zealand etc., in the last twenty years there have also been important RJ developments in serious criminality in Europe. In fact, RJ is currently used in European countries not only for less serious offences and in the field of juvenile justice[310], but also for serious cases such as homicide, gender-based violence, even for political violence and terrorism[311]. In addition, there are empirical studies demonstrating that the RJ approach can be **effective even in serious cases**, especially regarding victims' satisfaction and empowerment[312], as well as offenders' desistence from re-offending[313].

7.2.4. Restorative Justice and criminal justice reform

299 Despite the strong influence from abolitionist (prison reform) thinking in criminology[314], RJ advocates currently seek to collaborate with agencies of conventional justice systems towards a **more humane way of dealing with crimes**. RJ does not necessarily aim to replace retribution because it has different goals. In fact, "retributive and restorative elements are not considered mutually exclusive; rather, both should be viewed as interlinked and necessary to achieve justice"[315]. However, RJ aims either to prevent retribution by providing arrangements that make it unnecessary, or, in

[307] Committed by both juveniles and adults and involving both juvenile and adult victims.

[308] Mercer, Madsen, Keenan, Zinsstag (2015)

[309] For instance, we note the use of the RJ approaches for genocide in Rwanda and for apartheid in South Africa in the frame of Truth and Reconciliation Commissions.

[310] International Juvenile Justice Observatory(2018).

[311] Ragazzi (2016), Varona Martínez (2017).

[312] Vanfraechem, Aertsen and Willemsens (2010).

[313] Lauwaert and Aertsen (2015), Sherman et al. (2015), Shapland, Robinson and Sorsby (2011), Sherman and Strang (2007), Latimer, Dowden and Muise (2005).

[314] Christie (1977).

[315] Suzuki and Hayes (2016), see also Zehr (2002).

addition to punishment – when this last is absolutely necessary as *ultimum refugium* -, to complete it, in order to make it more meaningful.

All in all, RJ provides a critical and innovative[316] reflection on the question of justice *in abstracto* and of criminal policies *in concreto*, in order to **balance the needs of victims, of offenders and of modern societies**. Currently, the propositions of the RJ movement figure in all international and national agendas oriented towards the modernisation of criminal policies in order to: 300

- reduce incarceration and prison over-population;
- reduce recidivism and fear of crime;
- encourage offenders to take active responsibility for their criminal behaviour;
- encourage the (re)integration of the offenders;
- support victims' needs and empowerment;
- seek redress for victims;
- promote democratic conflict-handling methods and civil society cohesion;
- improve human rights' implementation.

7.3. What are the international and European legislative developments?

7.3.1. United Nations' policy

Recognising the significant growth of RJ, the UN adopted in 2002 **ECOSOC Resolution 2002/12** entitled "Basic principles on the use of restorative justice programmes in criminal matters"[317]. Article 2 of this document defines RJ "processes" as any "process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. 301

[316] Zehr (1990).

[317] Following UN Resolution 2002, a new Resolution 2016/17 was adopted by ECOSOC in 2016 "Restorative Justice in Criminal Matters", completed by Resolution 27/6 (2018) of the Commission of Crime Prevention and Criminal Justice on RJ.

Restorative processes may include mediation, conciliation, conferencing and sentencing circles."

In addition, the Resolution provides in Article 3 a definition of restorative "outcomes" as any "agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender".

302 Four years later, in 2006, the UNODC, based on the above-mentioned basic principles, published a **Handbook on Restorative Justice Programmes** in its Criminal Justice Handbook Series. A second revised edition of this UNODC Handbook was published in May 2020[318]. The revised edition, following current developments in theory and practice of the RJ movement, has a new chapter 6 devoted to RJ responses to serious crimes in general and to certain types of them in particular, such as inmate relationship violence, sexual violence, violence against children and hate crimes.

7.3.2. European policy

303 In Europe, the emergence of RJ-related legislation and practices (mostly in the form of mediation) started mainly in the 1980s and 1990s, influenced by different perspectives: either with the aim to rehabilitate and to reintegrate the offenders or to strengthen victims' rights and their role in criminal proceedings[319]. Following the increasing development of RJ theory and practice worldwide, the EU and the CoE adopted relevant legislative policies over the last twenty years.

304 In 1999, the CoE adopted **Recommendation No. R (99) 19** on "mediation in penal matters". This Recommendation was the first official document that guided various countries in Europe to create a **legal basis** and to develop the practice of VOM in both juvenile and adult criminal justice, concretising basic principles and standards for its implementation. It also suggested the expansion of mediation and other RJ practices (including conferencing) in

[318] Available online <https://www.unodc.org/documents/justice-and-prison-reform/20-01146_Handbook_on_Restorative_Justice_Programmes.pdf>.

[319] Aertsen (2004).

criminal justice as generally available services that should be provided at all stages of criminal proceedings.

305 In order to support victims' rights and victim policies in European countries, the EU also promoted mediation in criminal cases with the **Council FD2001/220/JHA** on the standing of victims in criminal proceedings (Article 10)[320]. The importance of this binding legal instrument is that it obliged EU Member states to adopt corresponding national legislations.

306 Council FD2001/220/JHA was replaced by the famous **Victim's Rights Directive 2012/29/EU** of the European Parliament and Council, establishing minimum standards on the rights, support and protection of victims of crime. With this legal document, the EU adopted a more clear and **victim-oriented position on RJ**. It recognised that RJ is an important means to take into account the needs and the interests of victims as well as to achieve reparation in the aftermath of a crime; it also recognises that **safeguards** to prevent secondary and repeated victimisation are required (recital 46). In particular, the Directive provides a definition of RJ in its Article 2 (1) lit. d):

"any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party".

307 Furthermore, Article 4 lit. j) recognises the victim's right to receive information "without unnecessary delay, from their first contact with a competent authority" regarding "the available restorative justice services." In order to prevent victims from "secondary and repeat victimisation, intimidation and retaliation", Article 12 provides five conditions to safeguard RJ services:

a) "the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time;

b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement;

c) the offender has acknowledged the basic facts of the case;

[320] See also Groenhuijsen and Pemberton (2009). For more details, see 6.2.1. in this book.

d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings;

e) discussions in restorative justice processes that are not conducted in public are confidential and are not subsequently disclosed, except with the agreement of the parties or as required by national law due to an overriding public interest."

308 In addition, it calls on Member states to "facilitate the referral of cases, as appropriate, to RJ services, including through the establishment of procedures or guidelines on the conditions for such referral". The Directive also promotes a special training on victims' needs "for lawyers, prosecutors and judges and for practitioners who provide victim support or restorative justice services" (recital 61).

309 More recently, the CoE adopted a revised **Recommendation CM/Rec (2018)8** concerning RJ in criminal matters. This document focuses on RJ rather than on mediation and points out that "Restorative Justice should be a generally available service. The type, seriousness or geographical location of the offence should not, in themselves, and in the absence of other considerations, preclude restorative justice from being offered to victims and offenders" (Basic Principle 18).

310 It also provides and elaborates more detailed **basic principles and standards** for RJ practices while proposing to implement them not only in criminal cases, but also in the day-to-day work of criminal justice agencies and professionals (rule 57). Thus, it "goes further than the 1999 Recommendation in calling for a **broader shift in criminal justice** across Europe towards a more **restorative culture and approach** within criminal justice systems"[321].

Assignments:

What is the importance of the legislative recognition of RJ by the UN, the CoE and the EU?

Why has the EU in your opinion adopted a more victim-oriented position on RJ?

How can international and European policy on RJ influence Ukraine and Belarus, considering their membership in the UN, Ukraine's membership in the CoE and the AA between Ukraine and the EU?

[321] Commentary to Recommendation CM/Rec(2018)8, p.2.

How do you understand the call of the Rec. CM/Rec (2018)8 for "a broader shift in criminal justice (...) towards a more restorative culture and approach within criminal justice systems"?

7.4. What is the current image of Restorative Justice in European countries?

In 2015, a comparative study on RJ in criminal cases in Europe was published[322], drawing on developments and the experience of 36 European countries,including Ukraine. This study made it clear that the development of RJ on the European continent differs from country to country. Even before binding legal provisions in the EU took effect[323], advanced RJ legislation could be found in some European countries[324]. Later, when the abovementioned international standards and recommendations from the UN and the CoE as well as the binding legal initiatives of the EU took effect, there was a remarkable impact on national legislation. 311

7.4.1. National evolutions on the legislative level

Currently, **legislation** related to RJ exists in **almost all European countries**. Nevertheless, the legal context and the **position of RJ** within national legislations **differs**. There are European countries which have introduced relevant legal provisions in their CC such as Bulgaria and Spain; other countries have introduced RJ in their CCP, such as Austria, France[325] and Slovenia. Finally, a third group of countries, e. g. Germany, 312

[322] Dünkel, Grzywa-Holten and Horsfield (2015).

[323] Willemsens (2008).

[324] For instance, the Mediation Act 2006 in Finland, the Municipal Mediation Service Act 1991 in Norway, establishing a National Mediation Service for both civil and criminal cases and the Youth Justice Act 2006 in Belgium, recognising the possibility for both VOM and sentencing circles for juvenile cases.

[325] The French legislator, in particular, has attributed a central and quite symbolic position to RJ within the CCP. In fact, Article 18 of the Law n° 2014–896 of 15 August 2014 on 'the individualisation of sentences and the strengthening of the efficacy of penal sanctions' (known also as "Taubira Law") introduced Article 10–1 entitled "De la justice restaurative" in Subtitle II of the Preliminary Title of the Code. For more details, see Cario and Sayous (2018).

Belgium, Hungary and Poland, have introduced legal provisions on RJ in both their CC and CCP. In addition, many countries have completed their legal provisions on RJ with other documents, statements of practice and guidance of legal or quasi-legal force, such as circulars (France), departmental circulars (Austria, Finland) or parliamentary resolutions (Poland).

313 All in all, for achieving **reparation** and/or **reconciliation**, national legislation recognises two possible "access points" through which RJ practices can enter into criminal proceedings: either through legal regulations on court diversion, giving the prosecutor a "third option", or through legal provisions on court mitigation. However, it is important to note that "in the legal sense, reparation and reconciliation, as outcomes, can also be achieved without there necessarily having been a restorative process (like VOM or conferencing) involved, as the law makes no such requirements in the majority of cases"[326]. In fact, in many eastern European countries[327], included Ukraine, there are legal provisions for other "reconciliation" processes in which a prosecutor or a judge helps the victim and the offender to reach an informal solution. However, "such practices should not be confused with actual VOM, as they lack an important hallmark of VOM – the impartiality of the facilitator"[328].

314 Finally, the **intervention of RJ practices in criminal proceedings** refers to the possibility of restorative outcomes to connect to and to have an effect on the criminal procedure. In other words, to act as a mitigating factor (extenuating circumstances) in sentencing. Thus, in order for RJ to have a real impact on criminal policy by giving the judge the possibility to refrain from convicting or sentencing, the interference of RJ practices in criminal proceeding is crucial. Whilst the legislative provisions of some countries offer this opportunity[329], there are countries where this option is not possible or even forbidden. For instance, in France, the circular of 15 March 2017 regarding the implementation of RJ, as a complement to the

[326] Dünkel, Grzywa-Holten and Horsfield (2015) 1036.

[327] For instance, in Greece, Lithuania, Montenegro, Serbia, Slovakia, etc.

[328] Dünkel, Grzywa-Holten and Horsfield (2015) 1036–1037.

[329] As it is the case in Belgium, in Croatia, in Denmark, in Spain, in Estonia, in the Netherlands, in Portugal, in Finland, in Sweden, in Switzerland, etc.

legal provision of RJ in Article 10–1 of the French CCP, takes a clear position against the interference of RJ in criminal proceedings.

Assignment: Do you know the Ukrainian legal provisions related to RJ for criminal cases?

In the Ukrainian CC of 2001 there is explicit use of the term "reconciliation" only in the Article 46, according to which the judge can use the outcome of a victim-offender "reconciliation" process to close a criminal proceeding, but only for minor cases. Articles 44, 45 and 47 of the same Code allow the use of such processes of reconciliation for first-time offenders. There are no explicit provisions, though, regarding mediation, that is to say provisions regarding the process to reach reconciliation. Article 46 is rarely used probably due to the fact that it "is poorly understood by the judiciary and it also lacks a well-established procedural framework for implementation"[330]*. The rationale of Ukrainian legal provisions related to RJ is mainly focused on the offender (both juvenile and adult) and on its rehabilitation*[331]*. In 2004, the Plenum of the Supreme Court of Ukraine adopted a Resolution on "Practice application by Ukrainian courts in cases of juvenile crimes" in which there are some provisions for the use of RJ in juvenile criminal justice*[332]*. In 2010, a new draft Law on mediation was developed by the UCCG*[333]*.*

7.4.2. National evolutions in practice

National legal recognition of RJ has enormously contributed to the **general growth** of RJ in practice. RJ is currently more and more accepted by judicial authorities and legal professionals. In addition, it is implemented in more serious cases and/or as an additional tool in conventional justice systems. However, the **implementation** of RJ practices is **highly heterogeneous** on the European continent. Furthermore, despite the existence of legal provisions on RJ, the use of RJ has still **limited impact** within the criminal policies of most European countries[334]. 315

[330] Fellegi (2005) 62.

[331] *Ibd.*

[332] Koval and Zemlyanska (2005).

[333] Khoronzhevych (2011).

[334] Dünkel, Grzywa-Holten and Horsfield (2015)1059–1061.

316 The most common RJ practice (in the form of encounter) implemented in almost all European countries is **VOM**[335]. VOM in Europe seems to be implemented mostly based on victims' perspectives and needs. Nevertheless, some other forms of **RJ practices** (e. g., conferencing) have been reported, but only in thirteen countries[336]. Furthermore, VOM is provided as a **general service** for criminal cases, that is to say at every stage of the criminal proceedings and for all types of offences, only in five European countries[337]. There is public **funding** for RJ practices in some countries[338], but this is not the case everywhere in Europe. VOM services are provided nationwide only in several countries[339], whereas in others VOM services have been established and available only in certain regions of the country[340]. In some countries there is also the possibility to implement RJ practices after sentencing inside of **prisons**[341]. Finally, the body referring cases to RJ services also varies in European countries: it can be the police, the public prosecutor or the judge, social services, prison or probation services, etc[342].

7.5. The future of RJ: challenges and institutional support

7.5.1. Conceptualisation issues and legal culture

317 Both research and practice demonstrate that RJ has a valuable potential for criminal policies, offering new opportunities and opening up new

[335] *Ibd.*1055.

[336] In Germany, in England and Wales, in Austria, in Belgium, in Scotland, in Hungary, in Ireland, in Northern Ireland, in Latvia, in Norway, in the Netherlands, in Poland and in Ukraine.

[337] In Belgium, in Denmark, in the Netherlands, in Finland and in Sweden.

[338] For instance, in Austria, in Belgium, in Hungary, in Finland, in Poland, etc.

[339] For instance, in Germany, in Austria, in Belgium, in Denmark, in Hungary, in Czech Republic, in Finland, in Poland, etc.

[340] For instance, in Bulgaria, in Croatia, in Ireland, in Serbia, in Ukraine, etc.

[341] For instance, in Germany, in Belgium, in Spain, in Finland, in Norway, in the Netherlands, in Portugal, in Italy etc. See also Johnstone (2014).

[342] To present some examples of this diversity, penal mediation in Belgium can be proposed by the public prosecutor, whereas VOM and other RJ services can be proposed by Probation Services in Austria and the Czech Republic, by local municipalities in Norway, in Finland and in Sweden and by NGOs in France and in Belgium.

directions. However, in order to achieve a real reform in criminal justice systems and to not leave the potential of RJ underdeveloped, European policy makers, criminal justice agencies, legal professionals and researchers should deal with **challenges** and **critical issues**.

318 Its international character and the intrinsic values of RJ have made it an attractive concept and practice worldwide, whilst its **concrete definition** remains a challenge for scholars and practitioners. RJ basic literature has been elaborated mostly by academics and scholars from the common law legal culture which differs from the legal tradition of the Romano-Germanic heritage, known also as **civil law legal culture** (mostly in continental Europe). The fundamental difference lies in the importance given to written law (prevalence of the principle of legality) by the jurists of the civil law legal culture[343]; the positivist tradition of the Romano-Germanic legal heritage makes judicial proceedings of civil law legal culture less flexible and, thus, more bureaucratic. This makes conceptualisation and implementation of RJ more difficult.

319 Whilst in some European countries[344] professionals of criminal justice (judges, lawyers, police officers etc.) seem to be positive towards RJ[345], the establishment of a legal base for RJ has also provoked reactions[346], distrust and several questions[347] to legal professionals in other European countries. Therefore, despite the institutionalisation of RJ and the implementation of various relevant programs, RJ in Europe is not used to its full potential[348]. RJ in Europe is mostly associated with VOM, whereas other RJ practices that involve family or civil society members (conferencing, circles) are not widely practiced. In addition, on the European continent RJ is not available for all offenders and victims or it is used mainly or exclusively for minor offences. This is partly due to the strong connection of its institutionalisation to the bureaucratic nature and the legal culture of our criminal systems, as

[343] Cuniberti (2014).

[344] Such as in Belgium and in the northern European countries

[345] Vanfraechem, Aertsen and Willemsens (2010) 77.

[346] This is the case in France, for instance. See Rabut-Bonaldi (2015).

[347] Especially the connection of RJ principles to principles of criminal proceedings such as the presumption of innocence, the right to a fair trial, the principle *ne bis in idem*, the principle of proportionality, etc.

[348] Dünkel, Grzywa-Holten and Horsfield (2015) 1064.

mentioned above. Thus, **new legal knowledge**, adapted to European legal cultures has to be developed[349] and basic academic education and research on RJ – especially in the European Law faculties – is needed.

7.5.2. Needs for the development of a Restorative Justice policy

320 The development of RJ policy depends, *inter alia*, on the political, economic, cultural and legal background of a country. However, one of the most important difficulties for the implementation and the development of RJ practices in many European countries is the **lack of central state funding**[350]. In addition, despite the fact that there is some important and encouraging qualitative research being done regarding the effectiveness of RJ worldwide, there is little or fragmented data from quantitative research[351] which complicates our image of what and how RJ is applied, especially in Europe. In fact, the RJ movement has to deepen, to improve and to intensify empirical research because the role of evidence-based policy is of vital importance for the promotion of RJ. Accordingly, **public awareness** on RJ and the possibility for European citizens to have access to it, is also very important: "Politicians are unlikely to promote RJ if there is no public demand for it"[352].

Assignments:

Why is the development of RJ more difficult in countries with a civil law legal culture?

What do you consider the main challenges for the development of RJ in your country?

Do you think that there is any potential for the development of RJ through international exchange of information and knowledge?

[349] Von Hirsch (1998) has also pointed out that "the literature of restorativism needs not yet greater enthusiasm but more reflection".

[350] The lack of funding is one of the reasons why the offer of RJ services is sporadic in some countries.

[351] Dünkel, Grzywa-Holten and Horsfield (2015) 1059.

[352] *Ibd.*1077.

7.5.3. The European Forum for Restorative Justice[353]

The European Forum for Restorative Justice (EFRJ) is a reference point for the development of RJ in Europe and beyond. It is the largest **international network** of professionals, researchers, governmental and non-governmental organisations in the field of RJ. Founded in 2000 in Leuven (Belgium), it promotes international exchange of knowledge for the development of effective and **high-quality RJ practices**, mainly in criminal cases, based on **high-level research**[354]. Given the strong research data on the effectiveness of RJ, the EFRJ's firm position is that every person should have the right to access RJ services at any time and in any case. 321

The EFRJ also aims to **influence international and European legislation and policy** as well as various national legislations on RJ, promoting its greater implementation and its intervention in criminal cases[355]. In addition, the EFRJ has launched and coordinates the European Restorative Justice Policy Network (ERJPN) which consists of representatives of the Ministries of Justice and policy makers from various EU countries (and beyond). The purpose of this initiative is to raise awareness among the European policy makers on developments and research findings regarding RJ and, thus, to support the implementation of RJ policies in participating countries. 322

7.6. Important take-away points

RJ is a way to respond to criminal behaviour going beyond the logic of punishment and retaliation; it rather focuses on repairing the harm provoked by the commission of a criminal act through active involvement of those who have been affected by it. It proposes to take into consideration and to balance both a) the victim's needs and interests and b) the offender's 323

[353] Official website <https://www.euforumrj.org/en>.

[354] Currently, there are more than five working groups in charge of this purpose, consisting of notable researchers and professionals from all around the world.

[355] In fact, the EFRJ has served as a consultant expert to various legislative committees such as the Recommendation CM / Rec (2018) 8 as well as the revision of the UN Handbook on RJ programmes, etc.

position, promoting also c) the civil society's cohesion; thus, it is larger than both the rehabilitative approach focusing on the offender and the victims' movements. There is not a specific category of offences in which RJ can be implemented; in fact, empirical evidence shows that RJ practices can be efficient and have positive results for both victims and offenders in serious cases. They can take place during all stages of criminal proceedings, and even within prisons.

324 RJ is currently promoted by international and European instruments within national legislations and almost all European countries have RJ-related legislation. VOM is the dominant RJ practice in Europe while other RJ practices also exist. There are RJ initiatives in both Belarus and Ukraine, supported by international and European bodies. In Ukraine, RJ initiatives are influenced by a rehabilitative, reintegrative approach to offenders, over punishment and retribution. There is RJ-related legislation in the Ukrainian legal system, on "reconciliation", but there is no concrete legal provisions on mediation and other RJ practices yet. However, despite the absence of a concrete legal frame, VOM and forms of RJ conferencing are available in Ukraine, but not nationwide.

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8. NEGOTIATED SETTLEMENTS AS AN ALTERNATIVE TO PUNISHMENT

8.1. Introduction

Bargaining and deals are not new to criminal procedure. The quest for efficiency and the perceived simplicity of minor offences are incentives for **simplified prosecution procedures**[356]. At the dawn of the 21st century the French Senate issued a comparative law study[357] which illustrated that a large number of countries had already chosen to implement settlement tools with or without conviction as an outcome. One may be surprised to realize that despite numerous European criminal acts no statute has ever been passed in order to frame those alternative measures. Even specific Directives such as 2010/64/EU[358], 2012/3/EU[359] and 2013/48/EU[360] remain oddly silent about criminal settlements. Nonetheless, Directive 325

[356] See Recommendation No R (87) 18 of the CoE Committee of Ministers to member States concerning the simplification of criminal justice (17 September 1987): "delays in the administration of criminal justice might be remedied (...) by out-of-court settlements by authorities competent in criminal matters and other intervening authorities, as a possible alternative to prosecution". This solution was recommended "in particular for minor offences" (page 3).

[357] *Le plaider coupable – Étude de législation comparée – The plea bargaining – Comparative law study* (2003) n° 122, Sénat, Service des études juridiques, French Senate Edition, Les documents de travail du Sénat Coll., Série Législation comparée, (online). For an updated list see ECHR (2014) Case of *Natsvlishvili and Togonidze v. Georgia*, application no. 9043/0,5 § 62.

[358] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L of 280 of 26 October 2010, 1.

[359] Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142 of 1 June 2012, 1.

[360] Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294 of 6 November 2013, 1.

2016/343 on the strengthening of the presumption of innocence[361] refers in its "whereas" at para (41) to "simplified" procedures as a case in point where the right to be present at the trial cannot be exercised. Likewise, the recent Regulation 2017/1939 establishing the EPPO[362] includes a provision dedicated to simplified prosecution procedures[363].

326 This lack of precise guidance leaves much latitude for EU Members states, and indeed the French example might be an instructive one. Having decided in 2004 to implement a plea bargaining mechanism[364], a 2016 Statute went even farther by enacting an original deferred prosecution agreement (DPA) whose roots can obviously be found in U.S. legislation[365]. The example from French law may also be interesting because Regulation 2017/1939 mentions such a solution in a common criminality field: bribery. Above and beyond, how we handle corruption transactions might outline some (r)evolution in the scope of punishment.

327 The so-called "Sapin II" Act[366] intended to raise the French anti-bribery law to the highest standards known in the world. To do so French Parliament created new compliance obligations, edited the international influence peddling crime, launched a brand-new anti-bribery authority (Agence Française Anticorruption, AFA) and implemented a **settlement agreement inspired by the famous U.S. DPA model**. Thus, the December 9, 2016 Act enacted a settlement allowing companies suspected of bribery to benefit from the termination of prosecution. In return for certain requirements, these legal entities can therefore, through a *convention judiciaire d'intérêt public* (CJIP)[367] escape prosecution without admitting a charge. Lessons can already be drawn after three years of CJIP practice.

[361] Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65 of 11 March 2016, 1.

[362] Regulation 2017/1939 of 12 October 2017 implementing enhanced co-operation on the establishment of the European Public Prosecutor's Office, OJ L 283 of 31 October 2017.

[363] See Article 40 (*ibd.*).

[364] Law no 2004–204 of 9 March 2004 on the adaptation of the judicial system to developments in criminality.

[365] Within the broad literature see Kaal and Lacine (2014–2015).

[366] Law no 2016–1691 of 9 December 2016 on "transparency, combatting corruption and modernization of economic life" (commonly called "Sapin II Law").

[367] It might be translated as "public interest judicial agreement".

328 The acknowledgement of CJIPs actually **fuels a double dynamic in criminal law**. On the one hand, the very notion of punishment is challenged by this new tool, as the "public interest fines" substantially exceed the usual amounts of fines imposed by the criminal courts. On the other hand, a true revolution of repression appears to be taking shape: the idea is reactivated that a judicial punishment is not necessary when a settlement ensures the effectiveness of the public reaction[368]. If European criminal law does not clearly foster a consent solution, there is actually no legal obstacle in the EU criminal field for a penalty to efficiently settle a situation.

8.2. The unbearable effectiveness of punishment

8.2.1. CJIP legislation in France

329 At a time when the French Government proposes to extend the CJIP to environmental matters[369], it seems appropriate to reconsider the past three years. The continuous extension of the scope of application of CJIPs[370] (briberies *ab initio* in 2016[371], tax fraud in 2018[372], environment in 2020?) attests to the satisfaction that CJIPs have created. This should not be surprising. The **quest for effectiveness – or efficiency** – has become

[368] Even the ECtHR "subscribes to the idea that plea bargaining, apart from offering the important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners" (ECHR (2014) *Natsvlishvili and Togonidze v. Georgia*, § 90).

[369] Bill no. 283 on the European prosecution office and specialized criminal justice, registered to the Presidency of the French Senate January 29, 2020, ordinary session 2019–2020.

[370] Under the original scheme, the following offences and related offences could be settled by a CJIP: active corruption and influence peddling committed by a private individual; active corruption and influence peddling regarding a foreign public official – corruption of a member of a foreign judicial institution – influence peddling regarding a member of a foreign judicial institution – active and passive private corruption – active and passive corruption in sport – active corruption of a member of a judicial institution – active influence peddling regarding a member of the judicial institution – tax fraud.

[371] Article 22 of Law no 2016–1691 (2016).

[372] Law no. 2018–898 of 23 October 2018 on the fight against fraud – Article 25.

the legislative reform's mantra for many years. If not for the title of recent French legislation[373], the relevant laws' sections[374] often summon this virtuous but nebulous notion. The notion of effectiveness is highly relative, even to the extent that the law never tries to define its meaning. In politics, however, effectiveness is not without historicity. As *Michel Foucault* sets forth in his "The Birth of Biopolitics"[375], the rise of the political economy led governments to substitute the concept of justice with utility and efficiency[376]. Tax is of course a topical example: when a country opts for a tax, the question is no longer whether the levy is right but whether it will be effective. Which impact will this levy have on the economic activity? This framework of thinking is obviously **supported by the "Law and economics" approach**, i. e. the economic analysis of law which has entered jurisprudence a half century ago[377]. Any political intervention must therefore now go through this questioning: what is the economic efficiency of such a tool mobilised for such a goal? Even though the issue is not raised in terms of legitimacy but as an economic strategy, it does not necessarily imply that the law is unable to support or guide the tool[378]. The law will indeed offer a vector to a tool granted by economic analysis: in the search for a liberal technology of government, it appeared that the regulation by legal form constituted an instrument more effective than the wisdom or the moderation of the rulers[379]. For instance, because "market abuse harms the integrity of financial markets and public confidence in securities, derivatives and benchmarks", criminal punishment must exist according to Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse.

[373] Law no. 99–515 of June 23, 1999 strengthening the efficiency of criminal proceedings; Law no 2014-896 of August 15, 2014 relating to the individualisation of sentences and strengthening the effectiveness of penal sanctions; Law no. 2016-731 of 3 June 2016 strengthening the fight against organised crime, terrorism and their financing, and improving the efficiency and guarantees of criminal proceedings.

[374] See among others Law n ° 2011–267 of March 14, 2011 chapter V–Law no 2013–1117 of 6 December 2013: Chapter IV; Law no. 2019–222 of 23 March 2019 and 2018–2022 programming of reform for justice: Title IV.

[375] Foucault (2008).

[376] Page 42 in the French edition.

[377] See the founding study by Becker (1968).

[378] Bentham (1811).

[379] Foucault (2004) 326.

As one might expect, European competition law offers a relevant illustration for the efficiency of settlements[380]. Regulation (EC) No 622/2008 of 30 June 2008[381] asserted that if a party is prepared to acknowledge its participation in a cartel, "a settlement procedure should therefore be established in order to enable the Commission to handle faster and more efficiently cartel cases". Article 11 (4) reads: 330

"The Commission may decide at any time during the procedure to discontinue settlement discussions altogether in a specific case or with respect to one or more of the parties involved, if it considers that procedural efficiencies are not likely to be achieved".

Efficiency was the reason why the Commission decided to initiate a settlement process within this scope. The law offers a very steady framework in this regard since offender's rights are listed and protected[382].

8.2.2. The CJIP's effectiveness

The economic analysis of the French CJIP highlights **its primary virtue**. Beyond a compliance monitoring penalty, the **amounts of fines** that companies agree to pay so as to terminate bribery or tax prosecutions are eloquent: millions and even billions of euros manage to close deals[383]. Under economic analysis, determining the efficiency of a tool or an 331

[380] See Stephan (2009).

[381] Amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases. See also Amendments to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (2015/C256/02).

[382] For criminal plea bargaining and defence rights see ECHR (2014), *Natsvlishvili and Togonidze v. Georgia*. Especially in § 92 the Court states that a plea bargain should be "accompanied by the following conditions: (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review".

[383] CJIP "PNF *vs* HSBC", November 14, 2017: €300,000,000: CJIP "Nanterre DA *vs* SAS Kaefer Wanner", Nanterre February 15, 2018: €2,710,000; CJIP "Nanterre DA *vs* SAS Set Environnement", Nanterre Feb. 14, 2018: €800,000; CJIP "Nanterre DA *vs* SAS Poujaud", May 4, 2018: €420,000; CJIP "PNF *vs* Société Générale SA", May 24, 2018: €250,000,000; CJIP "PNF *vs* Carmignac Gestion", June 20, 2019: €30,000,000; CJIP "PNF *vs* SARL Google France and Google Ireland Limited", Paris September 3, 2019: €500,000,000; CJIP "PNF *vs* SAS Egis Avia", November 28, 2019: €2,6000,000; CJIP "Paris DA *vs* Bank Of China", January 10 2020: €3,000,000; CJIP "PNF *vs* Airbus SE", Paris January 29, 2020: €2,083,000,000. All the CJIPs can be found at the AFA's website: <www.agence-francaise-anticorruption.gouv.fr>.

institution consists of studying the way in which individuals allocate scarce resources to goals for which there are alternatives[384]. Like any government department, the Ministry of Justice must respect "financial performance" rules since the "organic" finance law was issued on 1 August 2001[385]. No one can dispute that the means of the judiciary are limited[386], and nobody can deny that prosecution is a public authority action: it is therefore possible to apply economic analysis[387] to determine whether or not this intervention is effective. It is quite easy to postulate that the CJIP is highly effective in the new public management frame[388]: a light allocation of police's and prosecutor's time and staff ultimately resulting in huge fines without risks of long and uncertain trials.

332 However, one question may come up: if EU competition law offers a precious precedent to the French CJIP initiative, no one will dispute that EU competition law is not criminal law. As provided for in Article 23.5 of Council Regulation (EC) No 1/2003 of 16 December 2002[389], the Commission decisions on cartels are not "of a criminal law nature". Yet economic analysis remains relevant in the criminal field.

8.3. Crime and punishment

8.3.1. The economic sanction: structure

333 Economic analysis sheds light on the public action process. And in the criminal field the CJIP is obviously a success through law and economics

[384] Foucaut (2004) 228.

[385] See Du Luart (2005).

[386] According to the CoE European Commission for the efficiency of justice (CEPEJ), France devotes a little more than 0.19% of its GDP to justice, the European average being 0.28%. This represents 65.88 € per inhabitant, the European average being around 57.7 €. Per capita, this still leaves France behind Andorra (99.15), Austria (107.27), Belgium (82.30), Denmark (83.74), Finland (76.51), Germany (121.88), Iceland (110.97), Italy (75), Luxembourg (157.26), Monaco (163.82), the Netherlands (119.23), Norway (80.63), Slovenia (89.7), Spain (79), Sweden (5118.59), Switzerland (214.85), the UK (78.67) Scotland (82.74). See *Studies n° 26*, 2018, p. 301 (ISBN978-92-871-8566-2).

[387] See Harnay (2004).

[388] See Miansoni (2012) 448.

[389] On the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

theory. Above all, the CJIP is likely to change the notion of punishment itself. Criminal law is obviously a punishment law. However, nowadays **in France criminal law is mostly formalised as a law of guilt**: punishment can hardly be comprehended apart from guilt. EU law seems to support this conviction-based point of view. Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the EU's financial interests by means of criminal law claims, "Insofar as the Union's financial interests can be damaged or threatened by conduct attributable to legal persons, legal persons should be liable for the criminal offences, as defined in this Directive, which are committed on their behalf"[390]. And the Directive also requires to punish bribery: "Member States shall take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences"[391].

The CJIP then raises a question because **here the settled punishment is neither necessarily based on the acknowledgement of the facts, nor a conviction in the words of the law**: a CJIP does not carry a conviction and has neither the nature nor the effects of a conviction judgment[392]. And no one could reasonably assert that bribery and tax frauds are minor offences. Hence criminal liability could not explain the evolution driven by the CJIP and its settlement strategy. If, on the other hand, one accepts to **dissociate guilt and punishment**, the CJIP – as any out-of-court settlement – may reveal its rationality. The Frankfurt School had perfectly elaborated the contrivance in the desire to apply legal reasoning to a social reality: according to this School, "no penal theory (...) is able to explain the introduction of certain types of punishments in the overall social process." In their introduction to "Punishment and Social Structure", *Rusche and Kircheimer* state that liberal theories are powerless because they confront guilt and punishment as a legal computation dilemma in which an individual is perceived as a free moral agent[393]. The recommended method is as follows: one must get rid of the ideological veil of the punishment and its legal appearance. Punishment must be described in its concrete relations: 334

[390] Directive (EU) 2017/1371 (16)

[391] Article 4 (*ibd.*)

[392] See CJIP "PNF vs Airbus" (2020) p. 5.

[393] Rusche and Kircheimer, (1994)121–122.

"The bond, transparent or not, that is supposed to exist between crime and punishment prevents any insight into the independent significance of the history of penal systems. It must be broken. Punishment is neither a simple consequence of crime, nor the reverse side of crime, nor a mere means which is determined by the end to be achieved. Punishment must be understood as a social phenomenon freed from both its juristic and its social ends"[394].

335 If guilt is not the key point in order to understand punishment's evolution, then should we guide the analysis to the intensity of criminal practices "as they are determined by social forces" and economic bases?[395] While the fight against crime is obviously important, which the authors did not deny, **the key factor in criminal structures would lie in the production relationships of a society**. We might think that the CJIP could be the subject of such an approach in order to determine into which penalty structure it fits. This postulates that it is more useful to look at the response (the punishment) than at the cause (the crime). In other words, even if it is impossible to evacuate any circumstances relating to the offence as such, the Frankfurt School invites us to shed light on the reaction. The fact that the CJIP is gradually moving from an anti-bribery implement to a tool against tax fraud and environmental damage, goes in this direction.

336 As regards EU law, despite the fact that Directive (EU) 2017/1371 of 5 July 2017 does not mention any settlement process, Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced co-operation on the establishment of the EPPO provides such an alternative. Simplified prosecution procedures are indeed set out in article 40 "with a view to finally dispose of the case"[396]. Conditions are of course specified[397], but acknowledgement of the facts is not needed. EU law then admits that a crime does not need a trial nor a conviction to put an end to the legal action. We must highlight that the EPPO shall be competent in respect of the criminal offences affecting the financial interests such as embezzlement, tax fraud...

[394] Rusche and Kircheimer [1939] 1968, 5.

[395] Rusche and Kircheimer (1994) 123–124.

[396] Article 40 (3) *ibd*.

[397] Actually, conditions are pretty general. For instance, it is claimed that "the use of the procedure would be in accordance with the general objectives and basic principles of the EPPO as set out in this Regulation". So, Article 40 provides that "The College shall, in accordance with Article 9(2), adopt guidelines on the application of those grounds".

and bribery[398]. In the future, the EPPO practice will of course enhance the social and economic forces on the edge of business criminality. Therefore, we should not forget the social specificity of the offender interested in CJIP.

8.3.2. Economic delinquency: texture

337 The punishment's structural approach is definitely of interest when the focus is on white collar crime. We have known since *Edwin Sutherland's* studies that white-collar crime has many similarities with regular crime[399]. The white-collar criminal looks in many respects like any offender: he is unscrupulous and sees in every person a tool to satisfy his own and only interests. He has no interests for the feelings nor the wishes expressed by others. White-collar crime like any other form of crime is persistent: deterrence does not seem very effective. However, according to *Sutherland*, a business offender presents specificities: he often has a sharpened sense of social status and knows how to plan his actions. Criminal rationality leads to target victims who do not resist and fields of activities where detection is low and evidence hard to report. In addition to this, *Sutherland* observes that companies tend to set up a policy to "smooth out" disputes because it is *always* possible to spot a weak link in the chain leading to conviction. In this regard, *Sutherland* insists[400] on the compromise, the settlement understood as a business strategy for the purpose of terminating a lawsuit, even if it means... bribery!

338 Both analyses undertaken by the Frankfurt School and *Sutherland* invite us to wonder which structure of punishment has been invented to curb economic and financial crime. If any social group engages in any form of delinquency, the judicial institution has to make a choice as enforcement cannot be infinite. This choice could be understood thanks to the **"differential administration of illegalities" notion**. According to *Foucault*, "A penal system must be conceived as a mechanism intended to administer illegalities differentially, not to eliminate them all"[401].

[398] See Article 22 for the material competence of the EPPO.

[399] See Sutherland (1983) 227.

[400] *Ibd.* 238.

[401] Foucault (1999) 89.

The French philosopher observed that various illegalities were subject to a relative benevolence during the French "*ancien regime*". However, in the late eighteenth century, the arbitration between the illegalities has gradually but very substantially changed. Illegalities linked to property (rather popular) stopped to face the same kindness since this crime was likely to damage the production devices. On the other hand, the illegality of rights (essentially fraud and embezzlement) assigned mostly to the bourgeoisie, was dealt with a tighter game of impunity.

339 Impunity was and still is "the possibility of getting round its own regulations and its own laws, of ensuring for itself an immense sector of economic circulation by a skillful manipulation of gaps in the law – gaps that were foreseen by its silences, or opened up by *de facto* tolerance. And this great redistribution of illegalities was even to be expressed through a specialisation of the legal circuits: for illegalities of property – for theft – there were the ordinary courts and punishments; for the illegalities of rights – fraud, tax evasion, irregular commercial operations – special legal institutions applied with transactions, accommodations, reduced fines, etc. The bourgeoisie reserved to itself the fruitful domain of the illegality of rights"[402].

340 If this framework obviously needs some updating, especially on the types of illegalities[403], it remains to this day a powerful analytical tool. The differential administration of illegalities can without any doubt bring to light the social structure at work behind many criminal practices.

341 Following the Frankfurt School method, one might see a criminal practice appear by looking at the CJIP's punishment. As a matter of fact, this practice – while formally meting out punishment – ensures the offender's protection.

8.3.3. Evolution of penalty

342 Approaching criminal law by its essence – the punishment – is quite interesting when it comes to CJIP. Many innovations lie in this new settlement tool, both thanks to the law itself and to practice. The way **"public interest fines"** are calculated surprises even the French criminal

[402] *Ibd.* 87.

[403] See in the French literature Lascoumes (1996) 83.

lawyer. The penalties negotiated within the CJIP framework are starkly different both in their amount and in their assessment compared to the fines that French judicial courts have been adjudicating for many years. Penalties settled in CJIPs are more than the simple addition of a classical fine plus a confiscation. The **CJIP gives birth to an innovative settlement penalty**. Under Article 41–1–2 of the French CCP, "the amount of this fine is set in proportion to the benefits derived from the misconduct, up to a limit of 30 percent of the average annual turnover calculated by reference to the previous three annual turnovers known on the date on which the misconduct was recorded". This legal provision is *per se* surprising. First of all, the upper limit is not fixed but indexed to turnover. Yet in French criminal law, statutes usually define maximum fines that judges cannot exceed.

343 Above all, in practice an additional penalty may be stipulated in the agreement even though the law does not mention such an option. *Ab initio*[404] this was linked to the exceptional seriousness of the alleged facts. This *ultra legem* invention allows prosecutors to increase or (rarely) lower the fine imposed on the basis of a balance between aggravating and mitigating factors. In the *Airbus* case (2020) the National Financial Prosecutor (PNF) applied a 225 % multiplier coefficient to the calculated fine! This led to a €2,083,000,000 penalty. We are therefore far from the classic fine with an upper limit, and from the simple confiscation of the offender's goods.

8.4. War and peace

8.4.1. Revolution of enforcement

344 The CJIP bears the name of a revolution, physically speaking: the law returns to an earlier point. The repressive law of the CJIP refers in fact to the **transactional justice** known in the Middle Ages during the Frankish era, a German law-inspired justice. The idea of compromising to put an end to conflict through a formalised process and resulting in the payment of a sum of money is nothing new. At a time when the modern state did not yet

[404] CJIP "PNF *vs* HSBC" (2017), § 43.

exist, there was a lack of specialised justice intended for the punishment of "criminals". The intelligibility of this practice must be related to the fact that there was no criminal law intended to punish infringements of the common good (the criminal was not an offender who broke social bonds). In early medieval times, the practice was still "civilian", the regulations allowed to terminate disputes with, if possible, the least possible bodily injury. This was a preferable option at a time when the privileged activity of the princes was to wage war. If the settlement calls for reciprocal concessions, one question remains: what does the money actually buy? **The settlement logic is to put an end to the dispute with money**. To read *Foucault*, this transaction actually boils down to buying peace: compensate the damage inflicted on a member of another tribe permits you to avoid war[405], the *wergeld* replaced the *faida*.

345 This idea of redeeming war similarly appears in the CJIP practice, but, naturally, in another form. The spirit on the other hand remains by isomorphism. The economic war between many states poorly conceals unconfessed issues. Bribery, tax fraud and money laundering are serious risks for companies if they are suspected or indicted: the dissolution or worse, denial of access to financial markets and exclusion from public contracts can be imposed by judges. Those punishments equal economic death. It is therefore quite important for these large corporations to redeem economic peace when judicial war is waged by prosecuting authorities or regulators. Going further, one may even be tempted to move beyond the simple repressive hypothesis.

8.4.2. Repressive hypothesis

346 Criminal law is certainly used to punish, and the CJIPs are an almost blinding demonstration. But beyond the halo, this tool also serves to protect certain companies, and especially French companies. The "Airbus CJIP" mentions three times the no 68–678 statute issued on July 26, 1968, also known as the "blocking statute". The PNF exchanged and negotiated with its foreign partners while ensuring to respect the commercial confidentiality of the concerned company. Undesired disclosure was then prevented.

[405] See Foucault (2015) 116.

Under the December 9, 2016 Act the AFA has the power to monitor institutions subject to anti-corruption compliance. It can also sanction them. The AFA is above all the appointed authority to represent French companies abroad in the event of legal proceedings or investigations[406]. 347

Of course, the **CJIP** provides a penalty commensurate to the level of the wrong committed. But it also **affords to protect French companies on a larger scale of the great trade war that states are waging.** On this vast chessboard, companies can appear like pawns in a struggle that is partly beyond them. Each wrongdoing ascribed to a foreign economic flagship can be the opportunity, even the pretense to punish in order to weaken a competitor. The economic struggle between Airbus and Boeing cannot leave any regulator indifferent, let alone a prosecution office. So each breach of the law could be used to indirectly advantage a national industrial or financial champion. The law obviously becomes a weapon in this war. The rise of French anti-corruption law must therefore also be understood in this global economic perspective enlightened by "reason of State". **Punishing French companies in France is an effective way of protecting them from a disproportionate enforcement of foreign law.** The French authorities (PNF and AFA) can play an important role on the international negotiation stage, if they demonstrate that they punish with firmness. The negotiations conducted with the U.S. Department of Justice (DoJ), both regarding the French bank *Société générale* (2018) and *Airbus* (2020), illustrate this trend. French authorities show to their foreign counterparts that they also have the legal means to harshly punish companies, foreign corporations included. The "HSBC" (2017) and "China Bank" (2020) CJIPs prove that the French weapons are able to weaken foreign companies operating in France. 348

Settlements thus allow French authorities to gain legitimacy. And this legitimacy can then be mobilised when negotiating a local settlement in a dispute about a French company. In other words, **punishing severely sends a strong signal in order to, sooner or later, negotiate the French treatment of certain cases.** The threat operated by the French prosecution services is such that there is now an obvious risk for our international "partners": French justice might fall heavily on their businesses. Any 349

[406] See law no 2016–1691 art. 3–5o.

foreign prosecuting authority knows from now on that the French judiciary is able to heavily punish any company that breaches French anti-bribery regulations. The Paris Criminal Court ruling against UBS[407] fosters a similar logic since the bank has been ordered to pay a record €4.5 billion penalty for tax fraud. It attests that from now on the courts also know how to punish in exorbitant proportions. In the first place, this decision is likely to encourage companies to conclude a CJIP rather than to risk a lawsuit. We know that a bad settlement is better than a good trial. In second intention this ruling especially reinforces the international image of the French criminal justice.

350 One might not think that the DoJ is inclined to abandon its DPAs and American procedures simply because the indicted company will pay a heavy fine to the French and American treasuries. This simple financial perspective obviously plays a role since the American authorities save themselves time while recovering hard cash. Perhaps this perspective should not be given a more important role than it really has. Would this also be a concession that would call a trade-off when a US company is under French scrutiny?

8.4.3. Punish in order to protect

351 Such is the incredible revolution that runs through criminal business law! *Sutherland's* research work seems not to have suffered through time. Business criminality is recognised again and again by its lack of *stricto sensu* criminal litigation or criminal conviction. Everything suggests that the evolutions vectorised by criminal law do not manage to call into question this idea, which is more than 70 years old. Business crime is not like any crime[408]... in its judicial treatment. The CJIP is unfortunately able to feed into this approach despite its obvious successes. The fulfillment of the obligations imposed on the company terminates legal prosecution without any conviction of the legal person[409]. In this sense, the CJIP like any other settlement process redeems another war that could be waged before criminal courts and is likely to have for the interested company a disastrous reputation effect. If *von Clausewitz* asserted that "war is the continuation of

[407] TGI Paris, Feb. 20, 2019, no 11055092033.

[408] Sutherland (1944), 132–139

[409] Individuals can be prosecuted.

politics by other means", can we dare to say that (criminal) politics might be a continuation of war by other means?[410]

Reputational damage can be substantial for a company. And there is no doubt that for Google Inc. it is better to accept a CJIP than being officially convicted of tax fraud. Would the CJIP have been accepted if Google did not estimate its activities had to be taxed under transfer pricing? Whatever the reasons, it is factually true that Google was not convicted in France because of those alleged frauds. 352

8.5. Conclusion

The configuration of French criminal law has been substantially altered by CJIP. Only economic analysis, in the broad sense, is able to describe the evolution and the revolution underway. **CJIP is the name given to the differential administration of illegalities** that turns its back on both classical schools of retributive and deterrence theories[411]. Despite its penalties CJIP is not really about punishing a misuse of liberty or a moral failing. It is not so much a matter of pursuing a prophylactic virtue of the punishment as utilitarian theory wishes. CJIP is just the cost of a risk. The founder of the law and economics approach himself explained this very clearly in 1965: "Entry in illegal activities can be explained by the same model of choice that economists use to explain entry into legal activities, that offenders are (at the margin) 'risk preferers'. Consequently, illegal activities 'would not pay' (at the margin) in the sense that the real income received would be less than what could be received in less risky legal activities. The conclusion that 'crime would not pay' is an optimality condition and not an implication about the efficiency of the police or courts"[412]. 353

This standpoint is still up to date. For instance, in the very specific field of the financial markets Regulation (EU) No 596/2014 mentions "the need for fines to have a deterrent effect"[413]. And Directive 2014/57/EU provides 354

[410] See Foucault (1976) 123.

[411] Hart (1959–1960) 1–26.

[412] Becker (1968) 213.

[413] See para. (71).

that Member states "shall take the necessary measures to ensure that a legal person held liable pursuant is subject to effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines". Article 9 adds that it may include other sanctions, such as exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; temporary or permanent closure of establishments which have been used for committing the offence... which is much more than a CJIP settlement permits to impose within the bribery field.

355 Economic analysis includes into the sentence calculation the global cost of repression. But if the offender is an economic agent whose failure might cause a systemic risk, then it is assumed that the penalty will never be likely to put an end to delinquency. The agent will be satisfied to pay in the name of the "too big to fail" principle. Prosecution is still an option. But what would be the benefits if the suspect can be cleared after a very long trial? This is the price for economic analysis. More realistic than ethic, more financial than social, the French CJIP is the dawn of a criminal justice which favours mathematical efficiency over crime prevention. In France its next surge in the environmental field should be questioned as it reminds us of the "emissions trading scheme" and the right to harm as long as you pay for it.

8.6. Important take-away points

356 As early as 1987 the CoE stated that delays in the administration of criminal justice might be remedied by, *inter alia*, out-of-court settlements. If EU criminal law does not officially promote this recommendation, recent tools such as the Regulation (EU) 2017/1939 of 12 October 2017 on the EPPO leave a precious margin of flexibility to Member states. Business law has always been a specific field for settlement. Even if a white-collar crime has been committed *Sutherland* underlined in 1944 that this did not necessarily lead to conviction thanks to what *Michel Foucault* used to call a "differential administration of illegalities".

357 French authorities implemented in 2016 a criminal settlement tool in order to terminate prosecution against legal persons suspected of or indicted for bribery or tax fraud. This new transaction, the so-called

CJIP, has shaken the French law as the fines imposed substantially exceed what courts usually rule. Nonetheless, three years of practice emphasise a real success despite no acknowledgement of the facts nor conviction. So far, many famous companies have accepted huge fines and monitoring penalties. The CJIP has quickly become a very effective weapon in the hands of prosecutors. And of course, law and economics tend to validate such a scheme since time and money are saved and the hazard of the trial is removed. At a time when French authorities plan to extend the CJIP to environmental crimes, it seems appropriate to reconsider this settlement penalty as a new punishment that makes money extinguish the possibility of a legal war that might weaken a national flagship. In other words, settlement punishments are opportunities for companies to put an end to criminal and economic lawsuits.

The forthcoming EPPO will benefit from criminal settlements if provided 358
by the Member states' law. Does this mean that because of a blurred EU criminal law, Member states can promote a "pay for serious economic crimes" principle? The question is worth asking and actually leads to reflect upon the very notion of punishment and its actual (r)evolution.

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