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## General Principles of Transnationalised Criminal Justice? Exploratory Reflections

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### 1. Introduction

The identification of general principles of ‘transnational criminal processes’ is not a simple task. From the outset it is clear that two areas of law treated as distinct require consideration: European criminal law, on the one hand, and the offences of transnational criminal law. In the pursuit of legal precision, these are not areas which those who work in them are accustomed to amalgamating and treating as the same. These areas of study are acknowledged as distinct and diverse.

Transnational criminal law is defined as follows: ‘crimes of international concern — the so-called treaty crimes’;<sup>1</sup> however, ‘the treaty crimes excluded from the jurisdiction of the ICC.’<sup>2</sup> As Boister explains in his seminal article: ‘The normative transnational element is distinct from the normative international element that underpins offences like genocide because the threat suppressed is not sufficiently serious to engage a sufficient consensus in international society to use ICL to suppress it.’<sup>3</sup> He adds a commentary as to the nature of transnational criminal law: ‘It is an area of law where sovereignty is still a dominant value but somewhat contradictorily, interstate cooperation is often extensive although beyond the reach of the public eye.’<sup>4</sup>

European criminal law is a body of law encompassing crimes affected by the body of (supranational) Union law created in the former third pillar i.e. by the unanimous will of the Member States. As altered by the Treaty of Lisbon, this body of law is now a genuine area of Union law taking on greater shape and a larger remit as the Union continues to legislate, e.g. in relation to trafficking human beings,<sup>5</sup> market abuse,<sup>6</sup> etc. The currently formed area is that created under the former third pillar, the intergovernmental sector of EU work dedicated to cooperation in criminal matters between the treaties of Amsterdam and Lisbon. In fact, many of the provisions with which we are concerned relate to criminal procedure<sup>7</sup> or the

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1 N. Boister, ‘Transnational Criminal Law’, 2003 *EJIL* 14, no. 5, pp. 953-976, p. 953.

2 *Ibid.*, p. 962.

3 *Ibid.*, pp. 967-968.

4 *Ibid.*, p. 956.

5 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, OJ L 101, 15.4.2011, p. 1.

6 For the state of play see: <[http://ec.europa.eu/internal\\_market/securities/abuse/index\\_en.htm](http://ec.europa.eu/internal_market/securities/abuse/index_en.htm)> (last visited 9 September 2013).

7 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (2002/584/JHA), OJ L 190, 18.07.2002, p. 1. Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA). Council Framework

activities of agencies created at the European level (namely the European Police Office – Europol,<sup>8</sup> the European Judicial Co-operation Unit – Eurojust<sup>9</sup> and the European Commission's Anti-Fraud Unit – OLAF). In other words, this object of our focus is perhaps better described as European criminal justice.

These are two areas of significant diversity, featuring a multitude of differences in how law is created, applied, enforced and subjected to control. In-depth scholarly discussion of these legal disciplines usually occurs without any reference to the other. Nevertheless, in giving careful consideration to the question posed as to whether there are general principles which (should) underlie them, a nagging feeling that there is a valid point does arise. The fact is that European and transnational criminal law expose a suspect to a criminal justice process which is different in nature to a domestic one. This point is by no means well established as it is still domestic criminal justice authorities and bodies which play the central roles in such processes. They will result in 'normal' criminal trials in a domestic court. Nevertheless, the process in itself will potentially be bigger in scope than the criminal investigation an individual would usually face in his or her national jurisdiction. That, after all, is the very point. An investigation will potentially feature the bundled powers of many states possibly aided by supranationalised institutions drawing upon intelligence from all their constituent members (such as Interpol, or within the EU context, Europol). Such investigations may have exceptional consequences (e.g. an Interpol red flag) or they may lead to decisions being made by criminal justice officials unfamiliar with the expectations of that suspect. Ultimately if successful these transnationalised investigations may lead to pre-trial detention, trial and conviction in a state in which the suspect is a foreigner. At least in relation to the individuals who become subject to European or transnational criminal justice, it may be possible to speak of common effects. Could then perhaps a discussion of general principles be justified?

## 2. The potential for general principles

In what follows a few preliminary observations will be made in relation to such a search for general principles. Because, at least in the English language, the term transnational criminal law is fundamentally tied to the definition provided by Boister, in the discussion which follows the term *transnationalised criminal justice* will be used. This is intended to reflect the collective notion advanced by Sabine Gless whilst, at the same time, highlighting the need to consider institutional and procedural developments alongside the substantive law.

These areas of law must be recognised as operating in different ways and contexts. In the transnational law arena it is the national state and its respective criminal justice systems which remain central. As Boister points out:

'TCL relies on domestic law to flesh out the skeletal provisions of the suppression conventions. (...) The signatories of the suppression conventions assume that a common understanding of criminal law and punishment exists among state parties, yet this general grammar of criminal and penal policy is difficult to identify. In its stead, resort is frequently made to ideas about criminal law and punishment held by influential states. (...) Altering the substantive penal norms of domestic law through international law without paying attention to the other elements of a modern criminal justice system is problematic because it leaves these norms in a vacuum.'<sup>10</sup>

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Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (2003/577/JHA), OJ L 196, 2.8.2003, p. 45. Council of the European Union Inter-institutional File: 2010/0817 (COD). Outcome of Proceedings of: Working Party on Cooperation in Criminal Matters. Subject: Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European investigation order in criminal matters – Preamble, forms and annex related to Article 29.1. COPEN 104.

8 Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.5.2009, p. 37.

9 Whose precise status is difficult to fathom, see Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA), OJ L 63, 06.03.2002, p. 1 and Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009, p. 14.

10 N. Boister, *Transnational Criminal Law*, 2003 *EJIL* 14, no. 5, pp. 953-976, pp. 958-959.

This vacuum is particularly created where states simply adopt the criminalising norm as defined in a treaty and transpose this into domestic law without further attention being paid to integrating the offence into the broader normative framework of that domestic law or the assumptions which underline the respective criminal justice system.<sup>11</sup>

The fundamental point is that transnational criminal law only provides for legal frameworks within which domestic authorities can operate. Logic would dictate that these should be negotiated and adopted with care to fit into the cooperating context but in fact treaties often provide for impetus in contradiction to traditionally held values.<sup>12</sup> What transnational criminal law does, however, is to ensure there is a legal basis for investigation and prosecution across borders so that crimes lent priority by governments and then treaty law can be pursued. Interpol for example highlights its role dealing with crimes under the 1990 Convention on International Trade in Endangered Species (CITES)<sup>13</sup> perhaps providing a more exotic example of transnational crime. The protection of elephants and other endangered species, hunted for precious body parts, via the criminal law is only plausible upon the basis of uniform criminalisation in accordance with transnational law. The same is true of drug smuggling, terrorism and the control of nuclear materials crimes which perhaps come to mind more quickly as transnational crimes. It is, however, national agencies which investigate and prosecute these crimes. Their work is simply aided and given a framework by treaty law. As Boister<sup>14</sup> points out: ‘This highly informal goal-driven model championed by law enforcement officials uses flexible means, regards cooperation as crucial, and bases controls on levels of reasonable demand and reciprocity rather than legal principle.’<sup>15</sup> The framework created by transnational criminal law thus clearly pushes efficient prosecution not consideration of a suspect’s or indeed broader human rights.

The past years have seen the criminal justice-related work of the EU advance considerably with legislative initiatives to enhance the rights of victims<sup>16</sup> and against, for example, organised crime and terrorism.<sup>17</sup> In this way the EU has become established as an actor in the criminal justice arena with the related work going well beyond the traditional scope of transnational cooperation. The vast majority of Member States argued only a few years ago that the EU was in fact no more than their elected forum for multilateral action and that no constitutional or broader governance consequences flowed from this.<sup>18</sup> The cases of *Pupino*,<sup>19</sup> concerning the environmental directive<sup>20</sup> and ship-source pollution,<sup>21</sup> demonstrated this belief to have been false. Furthermore, the imbalance of actions taken – which have strongly favoured the punitive efficiency of criminal justice systems – has been subject to considerable criticism.<sup>22</sup>

Examples of the types of cases typical of European criminal justice are available via the Europol and Eurojust website with *Operation Golf* providing a prominent example. In this case a joint investigation

11 Thus e.g. the UNODC terrorism department is concerned above all with assisting signatory states to ensure that their legal definitions are compliant with the definitions laid down by UN resolutions. States seeking assistance are thus likely to pay greater heed to the law required by the UN than any demands made by the rationale and spirit of their own legal system.

12 Thus, for example, the Palermo Protocol expressly calls upon Signatory States to consider reversing the burden of proof in relation to confiscation and forfeiture.

13 See <<http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-WISDOM>> (last visited 9 September 2013).

14 Referencing Heymann’s alternative ‘prosecutorial’ model of international criminal cooperation: P. Heymann, ‘Two Models of National Attitudes toward International Co-operation in Law Enforcement’, 1990 *Harvard International Law Journal* 31, no. 1, pp. 99-107.

15 N. Boister, ‘Transnational Criminal Law’, 2003 *EJIL* 14, no. 5, pp. 953-976, p. 959.

16 Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA); 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.

17 Council Framework Decision of 24 October 2008 on the fight against organised crime, (2008/841/JHA); and Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

18 See e.g. the Member States’ submissions to Case C-176/03, *Commission v Council*, Judgment of the Court (Grand Chamber) of 13 September 2005, OJ C 315, 10.12.2005, p. 2.

19 Case C-105/03), Criminal proceedings against Maria Pupino, Judgment of the Court (Grand Chamber) of 16 June 2005.

20 Case C-176/03, *Commission v Council*, Judgment of the Court (Grand Chamber) of 13 September 2005, OJ C 315, 10.12.2005, p. 2.

21 Case C-440/05, *Commission v European Parliament*, Judgment of the Court (Grand Chamber) of 23 October 2007, OJ C 315, 22.12.2007, p. 9.

22 Even by former Commission Vice-President Frattini, who expressed his concern that the EU had developed an area of security although its mandate was to develop one of freedom, security and justice upon the occasion of a German Presidency conference on the failed Framework Decision on Fundamental Rights in Criminal Proceedings, 20.02.2007, Berlin, see <[http://www.bmj.bund.de/enid/68e692448b67b5925478ba1197305426,33d0e45f7472636964092d0933303334/Deutsche\\_EU-Praesidentschaft\\_2\\_\\_7/Verfahrensrechte\\_im\\_Strafverfahren\\_18q.html](http://www.bmj.bund.de/enid/68e692448b67b5925478ba1197305426,33d0e45f7472636964092d0933303334/Deutsche_EU-Praesidentschaft_2__7/Verfahrensrechte_im_Strafverfahren_18q.html)> (on-file with the author).

team also encompassing Europol agents was formed to counter an organised crime network trafficking human beings between Romania and the United Kingdom. Links were also identified to Belgium and Spain.<sup>23</sup> There are parallels with transnational investigations: Member State authorities remain central in conducting investigations and prosecutions but the involvement of Europol agents and the contribution of almost 1 million Euro of EU funds are significant differences. There can be little doubt that the density and frequency of the involvement of European bodies and agencies marks this area of law and criminal justice out as a specific phenomenon.<sup>24</sup>

European criminal law, however, more frequently affects investigations and the course of criminal justice within the Union by way of particular mechanisms provided to national authorities via European criminal law. In particular the European arrest warrant (EAW)<sup>25</sup> has revolutionised the former practice of extradition between EU Member States. Hinarejos, Spencer and Peers highlight a famous example: '[the] case of Hussein Osman, one of the July 21st bombers. After the unsuccessful attempt to blow up the London Underground in the summer of 2005 he fled by Eurostar to France and from there moved on to Italy. Under the EAW procedure he was returned to the UK in a matter of weeks – whereas under the previous system his extradition would have taken at least a year, and might have taken very much longer.'<sup>26</sup>

It is important to stress that in both contexts – EU and transnational – a specialised form of criminal law has been created justified by (and doubtlessly fundamentally desirable due to) the gravity of the crimes involved and the potential for suspects to evade justice as a result of the contrast between their mobility and the traditional territorial boundaries of agencies pursuing them. Transnational and European criminal law have developed to ensure a perpetrator may not evade (full) justice due to the internationalised nature of his or her crimes. They fundamentally aim to overcome the disadvantage at which the investigating and prosecuting agencies find themselves. Such legal contexts therefore do not aim and are not constructed to provide for general principles.

### ***2.1. Common traits: application to an individual***

Seen from another perspective, however, the central feature and point of such frameworks is that the identity of the perpetrator, including his or her nationality, becomes of lesser importance as a transnationalised investigative machinery gets under way and the logic of the relevant 'system'<sup>27</sup> takes over to ensure the suspect is charged and brought to justice before the appropriate court as dictated by the rationale of the set-up used. From a governance and criminal justice administration point, this is all well and good.

Undeniably, however, the subject of such investigations retains his or her identity and is likely to attach some importance to it. A suspect will remain a particular nationality and the subject or addressee of a particular constitution with the expectation of criminal process inherent to that. His or her knowledge and understanding of what is criminal will be influenced by this, the expectation of defence and procedural rights during an investigation and trial will be marked by this identity as will his or her expectation of what action he or she can undertake within the context of the criminal process. A number of European Union Member States including France, Italy and the Netherlands, for example, grant their suspected citizens a right to investigate their own cases in parallel to the police.<sup>28</sup> European

23 See <<https://www.europol.europa.eu/content/page/operational-successes-127>> (last visited 9 September 2013) and <<http://ec.europa.eu/anti-trafficking/entity.action?id=5c9c60a9-6b50-478d-808c-6a1b5ff58444>> (on-file with the author).

24 For greater detail see M. Wade, 'Institutions and Quasi-Institutions', in U. Sieber & M. Wade, *Structures of European Criminal Justice – Volume 1: Central Findings*, Duncker and Humblot, 2013 (in press).

25 Created via the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (2002/584/JHA), OJ L 190, 18.07.2002, p. 1. See also: COM(2011) 175 final. Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Brussels, 11.4.2011.

26 A. Hinarejos et al., 'Opting Out of EU criminal law: what is actually involved?', 2012, available at: <[http://www.cels.law.cam.ac.uk/Media/working\\_papers/Optout%20text%20final.pdf](http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf)> (last visited 9 September 2013), p. 33. For further examples see p. 32.

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

28 M. Wade, 'Part III – Present National Criminal Justice Structures, II.C.1.e.bb. – Active Participation in the Investigative Stage', in U. Sieber

and transnational criminal law pay little heed to this right, it is given to and expected by a significant number of the subjects of their investigations nevertheless.

Particularly the situation pertaining to European criminal law highlights this gulf between citizen and governance level. The EU context demonstrates that even successful, frequently-used instruments such as the European arrest warrant are subject to significant criticism for disproportionate use possibly endangering the human rights of suspected individuals. Such success furthermore stands in sharp contrast to the failed process relating to the Framework Decision on Fundamental Rights in Criminal Proceedings. The current difficult negotiations to measure D of the incremental approach adopted in consequence only seek to underline this point. The Union can criminalise, can facilitate arrest, the surrender of individuals and their trial and imprisonment in a foreign country. It cannot, however, ensure those people e.g. translation rights, let alone the access to a lawyer they may legitimately expect across the same territory.<sup>29</sup>

The classic argument of Member States guarding their sovereignty jealously is that there is no need for the Union to do this as such protections are provided by the Member States to their citizens.<sup>30</sup> This level of protection is regarded as suitable and sufficient because all EU Member States are also signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (known as the European Human Rights Convention, hereinafter ECHR). As such it is assumed all EU Member States share certain common values and general principles. The veracity of such assumptions is naturally key.

Concrete doubts have been raised in relation to the European arrest warrant because of the position it is increasingly demonstrated as placing citizens in. Evidence is emerging that citizens imprisoned or detained using the European arrest warrant are routinely deprived of rights and left extremely vulnerable by their linguistic isolation in foreign detention alone. Surrender following trials *in absentia* lead to long prison sentences being enforced without the surrenderee (who is frequently raising significant evidential or procedural issues) afforded the retrial promised to the surrendering state.<sup>31</sup> Clearly these citizens' rights are not sufficiently protected by the Member States in the course of criminal justice pursued via European criminal law nor does the ECHR provide sufficiently strong standards to ensure even such relatively simple rights provision is secured. Transnational law, whilst not featuring several of the mechanisms which contribute to the efficiency of the European arrest warrant,<sup>32</sup> is likely marked by precisely the same dangers. European law and transnational criminal law inherently bear the potential to endanger individual rights both in relation to substantive and procedural matters. Given that EU criminal justice and transnational criminal law are designed only to ensure the perpetrators of crimes are not able to evade justice, any potential they bear to create injustice raises sensitive issues as to their rationale. Argument concerning such matters must go to the very heart and legitimacy of these bodies of law and the institutions implementing them.<sup>33</sup> The fundamental question raised by this essay is whether the assumption of only minimal interference by transnationalised criminal justice processes can be regarded as acceptable.

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& M. Wade, *Structures of European Criminal Justice – Volume 1: Central Findings*, Duncker and Humblot, 2013, in press.

29 See e.g. C. Heard & D. Mansell, 'The European Arrest Warrant: The Role of Judges when Human Rights are at Risk', 2011 *New European Criminal Law Journal* 2, no. 2, pp. 133-147 and <[http://ec.europa.eu/justice/criminal/criminal-rights/index\\_en.htm](http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm)> (last visited 9 September 2013).

30 So the argument advanced by Ireland and reportedly also the UK in relation to German Presidency attempts to revitalise the Framework Decision on Fundamental Rights in Criminal Proceedings in 2006 – see M. Wade, 'Deep Rifts on Procedural Guarantees Mirrored at Conference in Berlin', 2007 *eu crim*, no. 1-2, p. 31, available at: <[http://www.mpicc.de/eu crim/archiv/eu crim\\_07-01.pdf](http://www.mpicc.de/eu crim/archiv/eu crim_07-01.pdf)> (last visited 9 September 2013). See also the arguments advanced by the Member States supporting the Council in Case C-176/03, *Commission v Council*, Judgment of the Court (Grand Chamber) of 13 September 2005, OJ C 315, 10.12.2005, p. 2. Case C 440/05, *Commission v European Parliament*, Judgment of the Court (Grand Chamber) of 23 October 2007, OJ C 315, 22.12.2007, p. 9.

31 See e.g. Fair Trials International, *Defence Rights in Europe*, 2012, available at: <<http://www.fairtrials.net/publications/policy-and-campaigns/defence-rights-in-the-eu-report/>> (last visited 9 September 2013).

32 Above all the absence of the double criminality requirement.

33 An argument famously raised in the international criminal law context, see e.g. *Prosecutor v Dusko Tadic* – Decision on the Defence Motion on Jurisdiction of the 10<sup>th</sup> August 1995, available at: <<http://www.icty.org/x/cases/tadic/tdec/en/100895.htm>> (last visited 9 September 2013). Note particularly the Court's emphasis that its subject-matters were 'beyond any doubt part of customary law' (Para. 19) and as such 'never crimes within the exclusive jurisdiction of any individual State' (Para. 44).

The traditional binding of criminal justice processes to nation states means they are set within particular constitutional contexts. The protective nature of many mechanisms within national criminal justice processes stems from precisely this constitutional context. It is this setting which defines the relationship between citizen and executive and the expectations of individuals as to their treatment during such processes. Transnationalised criminal justice, as mentioned above, seeks to alleviate the handicaps caused to transnational investigation by the binding of criminal justice agents to a territorial state. Transnational but particularly European criminal law may in doing so, however, now be viewed as raising these agents to a level beyond the nation state in respect of some key activities. This 'supranationalisation' of criminal justice agents, however, occurs in isolation. The criticisms of the mechanisms which provide for it indicate that these areas of law have resulted in criminal justice agents unfettered by their usual constitutional context, thereby exposing individuals subject to their decisions to unacceptable threats to their constitutional rights. Our attention must therefore turn to the legal consequence of these threats.

## **2.2. Transnationalised processes as legally different?**

Within the European Union context investigations are aided and supported by OLAF, Eurojust and Europol which, within the logic of their systems, appear above all as service institutions for the Member States' criminal justice agencies. They facilitate an overview of criminal phenomena, unprecedented and unachievable to any Member State,<sup>34</sup> they coordinate and guide, advise and facilitate the achievement of consensus amongst international groups of prosecutors.<sup>35</sup> Ultimately they support the investigation and successful prosecution of highly mobile and dangerous criminals. That is their function and there is evidence they perform it increasingly well. This reflects precisely the Member States' acknowledgment that their police forces and prosecutors require enhanced intelligence to be provided by Europol and in the future also Eurojust;<sup>36</sup> that investigations and prosecutions require co-ordination<sup>37</sup> and indeed that specialised legal knowledge (e.g. in relation to the financial regulations of the EU) may be necessary<sup>38</sup> for criminal justice processes to function within the EU context. There is quite explicitly, however, no acknowledgement of a system and thus not of a potential to systematically change the relationship between governance level and the individual thus governed by the enhanced powers of supranationalised criminal justice networks. Given the collective boost provided to Member State criminal justice authorities, however, unease at treating such investigations as legally the same creature as 'traditional' domestic ones is perhaps justified. A recent empirical study may be interpreted as highlighting this via the varying response rates of prosecutors and defence lawyers to whether or not a new system of criminal justice is emerging within the EU. The majority of both groups negate this. The proportion of defence lawyers doing so is, however, very significantly smaller than the group of prosecutors.<sup>39</sup>

Most importantly, the individual is left in a curious situation. The European Court of Justice has decreed that the activities of relevant EU agencies will only bear potential to be held accountable to the Court where they change the legal position of the individual concerned.<sup>40</sup> The definition of what changes

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34 Europol – e.g. TE-SAT 2012: Europol, 'EU Terrorism Situation and Trend Report', 2012, available at: <<https://www.europol.europa.eu/sites/default/files/publications/europoltsat.pdf>> (last visited 9 September 2013) and Europol, 'Trafficking Human Beings in the European Union', 2011, available at: <<https://www.europol.europa.eu/sites/default/files/publications/trafficking-in-human-beings-in-the-european-union-2011.pdf>> (last visited 9 September 2013). For OLAF e.g. OLAF, 'The OLAF Report 2011', 2012, pp. 27 et seq., available at: <[http://ec.europa.eu/anti\\_fraud/documents/reports-olaf/2011/olaf\\_report\\_2011.pdf](http://ec.europa.eu/anti_fraud/documents/reports-olaf/2011/olaf_report_2011.pdf)> (last visited 9 September 2012).

35 See Eurojust, 'Annual Report 2011', 2012, pp. 15 et seq. available at: <<http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202011/Annual-Report-2011-EN.pdf>> (last visited 9 September 2013).

36 See Art. 7 of the Europol Decision – Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), OJ L 121, 15.5.2009, p. 37, and Art. 13 of the Eurojust Decision – Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, 4.6.2009, p. 14.

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

38 Thus the creation of OLAF – see e.g. Art. 2(5)(c) of Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (1999/352/EC, ECSC, Euratom) and see OLAF 2012, supra note 34, pp. 27 and 29.

39 See M. Wade, 'The Defence and the Legitimacy of European Criminal Justice', 2013 *Journal of European Criminal Law*. In print.

40 See in particular: Case T193/04, *Hans-Martin Tillack v Commission of the European Communities*, Judgment of the Court of First Instance (Fourth Chamber), 4 October 2006.

an individual's legal position is, however, defined in accordance with a more traditional perspective which views formal decisions by domestic bodies as key. This, in turn, causes asymmetry where cases are being dealt with at a supranationalised or indeed in a transnationalised context. It is doubtlessly true that domestic authorities still make the formal decisions with greatest impact upon the individual. An investigation can, for example, only be started and charges only brought by domestic authorities. The processes which lead to such decisions are nevertheless strongly influenced by supranational agencies and possibly other (foreign – to the individual affected) national authorities when they are made in the course of or as a result of transnationalised proceedings. The question is whether the individual might not also potentially have influenced such processes, had he or she had the opportunity to do so. A further central consideration is whether this is not indeed legitimate and even desirable in some cases because of the way in which such precursor processes may end up affecting that individual.

Furthermore, one may question whether certain decisions regarded as not changing the legal position of an accused in domestic settings should not be regarded differently when supranationalised in such ways. For example, national systems do not recognise a decision determining jurisdiction as affecting the legal position of an individual. Such a decision will usually involve the transfer of a case from one court to another in the interests of justice – also the defendant's; it is a matter concerning the proper administration of justice, no more. It is therefore not a matter for legal debate.<sup>41</sup> When transposed to the supranational level, however, this question takes on a different dimension. An accused person has very significant interests relating to where s/he will be tried when a variety of countries is considered. The language of proceedings, the likelihood of pre-trial detention, the conditions and factual circumstances of that individual will all change enormously, depending upon where a conferring group of prosecutors decide to locate the trial.<sup>42</sup> S/he cannot, however, challenge this decision or indeed ensure his or her voice is heard. Eurojust at most facilitates such decision-making; formally the decision is one of the Member States or rather the Member State authority which lodges charges. For this reason the activity of the supranational body cannot be held accountable by the individual. Where this occurs after a coordination meeting at Eurojust, this formally domestic decision has, however, likely been very significantly influenced by the other Member States' representatives who make up this supranational entity. The desire of an individual to dispute or far better influence the decision-making process is more than obvious. The legitimate expectations of an individual to at least be heard where his or her interests are affected in such a manner is legally (and likely factually) ignored in such circumstances because our legal perspective has not adapted to the reality of transnationalised processes.

The defence right to carry out its own investigation may be viewed as similarly affected by supranationalisation. There are few grounds to believe this right to be anything but strongly aspirational even in domestic contexts, no matter how firmly grounded it may be. Even where a national jurisdiction lends its citizens such rights, they are likely to stand far behind any state investigation in resource terms alone.<sup>43</sup> Issues of investigative secrecy naturally also abound. Nevertheless, jurisdictions which allow investigations piggy-backing on the main police one: questioning of witnesses during this stage, viewing etc., undeniably change the position of their citizens when provision is made for transnationalised criminal investigations. There are many arguments against allowing individuals to have investigative rights in transnational settings, a number of citizens may nevertheless feel deeply disadvantaged in comparison to the expectations they have of criminal justice as informed by their domestic rights situation. And the central point is that this expectation is rooted in a constitutional rights setting stripped from that individual when his or her government supranationalises powers vested in it by that very constitutional context.

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41 M. Wade, 'Part III – Present National Criminal Justice Structures, II.G.1.', in U. Sieber & M. Wade, *Structures of European Criminal Justice – Volume 1: Central Findings*, Duncker and Humblot, 2013, in press.

42 Because although the Eurojust Decision (Art. 7(2) of the amended Eurojust Decision) confers powers to the College to make binding decisions as regards jurisdiction, it tends not to exercise these, allowing for informal decision-making, see European Parliament, 'The Future of Eurojust', 2012, pp. 96 and 100, available at: <<http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=73791>> (last visited 9 September 2013).

43 See e.g. P. Tak, 'The Criminal Justice System in the Netherlands', in U. Sieber & M. Wade, *Structures of European Criminal Justice – Volume 4*, Duncker and Humblot, 2013, in press.

The existence of transnationalised criminal justice bodies illustrate even powerful and rich states and their criminal justice systems as impotent in some investigations. Europol, Interpol, Eurojust and OLAF provide expertise and analysis to aid national prosecutors and investigators in cases with international dimensions. Europol and Eurojust go further, providing potential funding for joint investigation teams as well as legal expertise, practical support and advice as to how these can be set up and run.<sup>44</sup> How realistic is it to expect an individual to investigate in parallel to such processes? What value does his or her government's promise that his/her rights are being secured bear? It is not suggested that this is an easy question to answer nor indeed the rights constellation which must be lent greatest attention. Nevertheless, it is presented as a good example of the gulf between individuals' entirely legitimate expectations and the position they are left in by transnationalised criminal justice processes.

These legal areas have in common that they expose individuals to investigations which by their nature should perhaps be regarded as a different animal. The rights and expectations individuals have will invariably be factually rendered less important as their ability to assert them diminishes.<sup>45</sup> In some cases, the failure to conceive rights anew in the transnationalised context is likely to challenge the feeling and perception of justice and fair process not only in the eyes of the suspect but also in broader society.<sup>46</sup>

The situation becomes no less complex if viewed in this broader perspective. It is not only suspects who are rights holders in the criminal justice context. As recognised by the European Union in specific legislation and indeed the broader global community via the Rome Statute,<sup>47</sup> victims too are important rights bearers. Their identity, expectations and legal entitlements are of significant relevance. As national systems raise expectations of participatory rights<sup>48</sup> (and indeed the EU emerges as a legislative actor for crime victims<sup>49</sup>), simultaneous provision for streamlined transnationalised systems in which these are stripped away is likely to cause consternation and controversy. Transnationalised criminal justice structures in fact also focus upon cases involving large numbers of sometimes particularly vulnerable victims whose compensation interests are particularly significant.<sup>50</sup>

### 3. Quo vadis?

The European criminal justice context is particularly marked by controversy as to the legitimacy of its functioning.<sup>51</sup> Increasingly voices can be heard decreeing that we are developing the wrong kind of European Union. Transnational criminal justice is perhaps not as factually prone to controversy because transnational conventions end in national trials and the processes leading to them are far less visible to the ordinary citizen. The frequency with which criminal justice is now Europeanised, the backdrop of controversy over the loss of sovereignty by European Union Member States and the density of bodies and agencies involved in European criminal justice means it is subject to intense scrutiny. In what follows particular attention will therefore be paid to the European situation as a well-developed example of transnationalised criminal justice which, however, provides many examples of problems which exist in

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44 See e.g. <<https://www.europol.europa.eu/content/page/joint-investigation-teams-989>> (last visited 9 September 2013).

45 This will not always be true of transnationalised criminal justice cases. Prosecutors in the EuroNEEDs study understandably often assert that European criminal cases are brought against powerful or socio-economically advantaged suspects who can afford a very good defence. It is interesting, however, to note in the European criminal justice context that the EuroNEEDs study features 9% of prosecutorial interviewees asserting that cases involving mutual recognition cause problems for the defence and that they have noticed this because European cases are easier to handle than domestic ones – see M. Wade, 'The Defence and the Legitimacy of European Criminal Justice', 2013 *Journal of European Criminal Law*. In print.

46 See e.g. the Justice in Europe Campaign of Fair Trials International – available at: <<http://www.fairtrials.net/justice-in-europe/>> (last visited 9 September 2013).

47 Participatory rights and the right to have their interests considered are thus provided for, e.g. in Arts. 15(3), 19(3) and 54(1)c and 54(2)c of the Rome Statute.

48 See e.g. the UK Victim's Charter – available at: <<http://www.gm-probation.org.uk/files/victims-charter2835.pdf>> (last visited 9 September 2013).

49 See e.g. Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) and European Parliament (2011) 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.

50 Imagine e.g. a trafficking in human beings case – a classic example of European and transnational focus.

51 See e.g. the Justice in Europe Campaign of Fair Trials International, supra note 46, though note also its Interpol-related campaign: <<http://www.fairtrials.net/interpol/>> (last visited 9 September 2013).



parallel, albeit in watered-down form, in transnational criminal law. This essay then hopes to suggest at least a theoretical approach to considering how a solution to such problems may be approached.

The European Union-created criminal justice setting is currently subject to unprecedented political kick-back with unquantifiable emotional reactions marking criticism of it. Any UK citizen, particularly speaking in the European context, must weigh his or her words carefully should critical commentary not be mistaken for the apparent rejection of European criminal justice currently embodied by the UK Government.<sup>52</sup> For this reason, explicitly: in terms of the current understanding of and knowledge about criminal phenomena and to ensure the effective and comprehensive investigation and prosecution of relevant crimes, European development is to be embraced. There can be little doubt that criminal justice in Europe currently relies upon the European Union to achieve it.<sup>53</sup> For precisely which crimes and which contexts this is the case are matters requiring critical debate. That a better balance is required in the use of mechanisms introduced via European criminal law stands beyond doubt. This is, however, not to doubt the fundamental legitimacy of those mechanisms.

The relevant question here is not whether to throw the baby out with the bathwater but whether there is any legal mechanism for ensuring the strived for balance is achieved in European criminal justice and indeed whether this in turn might be applicable to the further transnationalised criminal justice settings? If, as is the case in the European Union, the Member States claim to be protecting their citizens' rights even where powers to investigate and prosecute are transnationalised, is there any way to hold them to this legally? This is of interest not only to the individual, affected citizen but ultimately also to the supranational governance level at which activity is taking place because its legitimacy is at stake.

The ability of executive decision-makers to dictate what can and cannot be done at the supranational (in this case European Union) level is fundamentally dangerous to that governance level. Ultimately the constituent executive organs (i.e. the Member States' governments) are free to take credit for any activity undertaken at EU level but at the same time at liberty also to blame that very level for any problems which ensue. The case could not be clearer than in relation to EU criminal justice. The very forces which deny the Union the right to regulate defence rights in criminal proceedings are the same ones which also criticise the EU for its failings as a balanced criminal justice forum.<sup>54</sup> We thus see the Member States' control of the content of Union work as ultimately damaging to the reputation of the Union. In relation to the criminal justice wing of Union work, we now witness this discrepancy as potentially throwing its entire existence into question.<sup>55</sup>

This EU debate is one which essentially relates to the sovereignty of EU Member States<sup>56</sup> and their desire to protect their national identity in this regard. Similar debates are a strong tradition in the international law context. Cryer, for example, describes diverse scepticisms towards international law as sharing 'a fear that international law might be used to fetter their States absent their express consent.'<sup>57</sup> Just as the EU Member States appear in part reluctant to trust the EU, so Cryer highlights the Rome Statute as expressing a deep mistrust of judges and a resulting self-regulating restrictiveness in the latter's activities which he criticises as overly deferential. As he points out 'There are other audiences for the court than states, and legitimacy in their eyes is also important.' A statement no less applicable to the EU: it is not

52 See e.g. A. Travis, 'Why does Theresa May want to opt-out of 130 European Justice Measures?', *The Guardian*, 15 October 2012, available at: <<http://www.guardian.co.uk/politics/2012/oct/15/theresa-may-european-justice>> (last visited 11 September 2013).

53 See A. Hinarejos et al., 'Opting Out of EU criminal law: what is actually involved? 2012', available at: <[http://www.cels.law.cam.ac.uk/Media/working\\_papers/Optout%20text%20final.pdf](http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf)> (last visited 11 September 2013).

54 See e.g. 'MPs urge Cameron to opt-out of EU laws on Policing', *The Telegraph*, 5 February 2012, available at: <<http://www.telegraph.co.uk/news/uknews/9062967/MPs-urge-Cameron-to-opt-out-of-EU-laws-on-policing.html>> (last visited 11 September 2013) and A. Travis, 'Why does Theresa May want to opt-out of 130 European Justice Measures?', *The Guardian*, 15 October 2012, available at: <<http://www.guardian.co.uk/politics/2012/oct/15/theresa-may-european-justice>> (last visited 11 September 2013).

55 The exercise of the Protocol 36 opt out by the UK clearly undermining any EU-wide criminal justice system for example.

56 Thus discussion relating to legal aid is considered especially sensitive in binding the budgets of Member States. It is interesting to note, however, that Union resources were found to fund JIT projects but no such activity has been taken in relation to defence rights. There is, of course, no obvious potential Union agency to undertake the administration of such funds nor e.g. to apply to DG Justice programmes to funnel funds into such activities. This stands in contrast to the Eurojust initiatives which successfully applied for funding to DG Home Affairs to further support such activity – see <<http://eurojust.europa.eu/Practitioners/Eurojust-Support-JITs/JITS-Funding/Pages/jits-funding-project.aspx>> (last visited 11 September 2013).

57 R. Cryer, 'Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources', 2009 *New Criminal Law Review* 12, no. 3, pp. 390-405 p. 391.

only a governance level serving its Member States. A direct relationship with individuals sees these now also citizens of the Union alongside their bearing the nationality of their Member State. What meaning this holds in relation to the criminal justice activities of the Union is surely worthy of exploration?

The criminal justice-related remit assigned to the EU thus far to, above all, regulate repressive powers but not equivalent ones defending the liberty of citizens<sup>58</sup> is in core not only a governance (and existential public relations) problem for the Union but fundamentally a greater threat to individual rights still.<sup>59</sup> If it is true that the executive branches of Member States control Union policy (and given the traditional and still criticised factual need for unanimity in criminal justice-related measures,<sup>60</sup> it is difficult to argue anything else) this effectively means that the supranationalisation of repressive criminal justice powers within the EU context is a tool for the undermining of individual rights. When a government (such as the UK during its presidency in 2005)<sup>61</sup> can steer the Union towards the criminalisation of acts (such as e.g. glorification or the public provocation of terrorism or endangerment)<sup>62</sup> which sit uncomfortably in the context of other Member States' national criminal law context; or subject citizens to extradition to foreign criminal justice systems for acts protected by freedom of expression provisions in their constitutional setting (so e.g. the famous example of denying the holocaust online in Denmark by virtue of the European arrest warrant negating the need for double criminality for 'computer-related crime') without so much as facing questions as to the legitimacy of its acts – which undermine the constitutional balance of the now obliged Member State(s) – this means the Union provides a constitutional loop-hole.

It is precisely such a loop-hole which the European Court of Justice sought to close by drawing 'inspiration from the constitutional traditions common to the Member States' in the *Kadi* case.<sup>63</sup> The European Court of Justice would appear to be recognising (and searching for) a legal mechanism to limit the activity of the Council and therewith the executive representatives of the Member States acting at EU level.<sup>64</sup>

The need to view transnationalised governance institutions as legally different can perhaps be sensed in other contexts however. The German *Bundesverfassungsgericht* (Federal Constitutional Court), for

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58 The work being done on the roadmap and under the European supervision order provides the notable exception to this trend though the slow progress of such legislation compared to that of repressive measures does somewhat underline the point. The subjugation of the EU's legislative mandate to work in relation to individual rights in criminal proceedings 'to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters' only (Art. 82(2)b TFEU), is telling.

59 Thus the speed of adoption of the EAW and the European investigation order (EIO – see Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European investigation order in criminal matters. Explanatory Memorandum (2010/C 165/02), OJ C 165, 24.6.2010, pp. 22-39) cannot only be contrasted with the failed Framework Decision on Fundamental Rights in Criminal Proceedings and the incremental approach now taken via the Roadmap (see supra), but also e.g. relating to the European supervision order which should have been implemented in national law by the 1<sup>st</sup> of December 2012 – see Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11.11.2009, p. 20 and 'FTI The European Supervision Order: Key Facts', available at: <<http://www.eucriminalaw.com>> (last visited 11 September 2013). Simple measures to secure liberty which clearly were not afforded similar priority as repressive measures to secure and facilitate investigations and prosecutions.

60 See e.g. V. Reding, 'A European Union grounded in justice and fundamental rights', 2012, available at: <[http://europa.eu/rapid/press-release\\_SPEECH-12-918\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-12-918_en.htm?locale=en)> (last visited 11 September 2013).

61 See the declaration of the UK Presidency of the EU 2005 – 'UK Presidency, Justice and Home Affairs Purpose Statement, 2005', available at: <<http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1079979841177>> (last visited 11 September 2013).

62 See Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, Brussels, 6.11.2007, COM(2007) 650 final and M. Borgers, 'Framework Decision on Combating Terrorism: Two Questions on the Definition of Terrorist Offences', 2012 *New Journal of European Criminal Law*, no. 1, pp. 68-82, available at SSRN: <<http://ssrn.com/abstract=2083453>> (last visited 11 September 2013).

63 Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of the Court (Grand Chamber) of 3 September 2008, Para. 5.

64 Although its position has changed by virtue of the co-decision procedure which has now become standard post-Lisbon – meaning that the European Parliament is drawn into the legislative procedure – the effectiveness of the Parliament as a counter-balance is yet to be achieved. That is not to belittle its position in extreme cases such as the S.W.I.F.T. context – see e.g. R. Turner, 'European Parliament rejects S.W.I.F.T. deal', 2010, *DW*, available at: <<http://www.dw.de/european-parliament-rejects-swift-deal-for-sharing-bank-data-with-us/a-5239595>> (last visited 11 September 2013). It is undeniably, however, still an institution developing its teeth. The same can be said for the mechanism developing the role of national parliaments in ensuring accountability. Clearly both of these changes bear significant potential to change the nature of the Union from an executive-steered governance level – see e.g. A Horvathova, 'EU Criminal Law and the Treaty of Lisbon – Where Shall We Go Now?', 2010, available at SSRN: <<http://ssrn.com/abstract=1836754>> (last visited 11 September 2013). It seems fair to say this effect has, however, not yet materialised.

instance, is well known for the watchful eye it places upon the German executive in policing the boundaries of what powers may be transferred to the supranational governance level. A number of cases have called upon the German legislature to amend ratifying/adopting acts to ensure their 'cost' to the German citizen is kept as low as possible. Centrally the focus has been upon the loss of democratic influence. The court, however, also reserves the right to examine the fundamental rights protection provided by the European governance level.<sup>65</sup> Above all the *Bundesverfassungsgericht* maintains a watchful eye upon the relationship between the state, citizen and the EU and has often indicated that this changes fundamentally if certain powers are transferred to the EU and removed from their usual constitutional setting.

The problem is, as demonstrated all too clearly by the *Kadi* case, that governments' use of international governance levels is sometimes marked precisely by a desire to remove certain executive activity from its usual constitutional context. It is not necessarily only by accident that executive agents are left unfettered by their traditional constitutional context. The basic problem of unchecked, collective executive will driving internationalisation applies to all internationalised criminal justice 'systems'. International law exists purely by the will of the legal representatives of sovereign nation states: a collective of executives. At the supranational level these operate largely independently of the usual checks and balances of their respective system. Legislature and judiciary (even the *Bundesverfassungsgericht*) are understandably loath to require a breach of international obligations and thus deferential to treaty law.<sup>66</sup> Therefore where collective executives demonstrate above all punitive will, this too will become the nature of transnationalised criminal justice. Only in the international criminal justice context in relation to the creation of the International Criminal Court for which negotiators were aware that they were creating an entire system, can a more balanced approach be perceived.

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

The fundamental problem is, of course, that within the context of representative democracies, there can be no denying that the legislature bears powers to alter such rights provided they are not made constitutionally inalienable. There is no stasis relating to the rights of individuals facing criminal proceedings. A change of this nature should, however, be subject to legislative discussion and, if necessary, the higher threshold required for constitutional change.<sup>67</sup> As such a citizen within democratic societies has a reasonable expectation to have a broad and public discussion of such changes to which he or she can also contribute if so desired. Full representations or protests by groups representing broad sections of society will normally be provided for. This surely is our expectation of the democratic process?

The European context has, for example in the cases highlighted above (the European arrest warrant and the European investigation order but arguably also with the creation of Europol and Eurojust), provided for such far-reaching change without a possibility for input in anything but lobbying documentation or critical commentary by single Member States' NGOs.<sup>68</sup> In other words, the European citizen appears currently to be subject to Europeanised executive powers, but has no equivalent voice with which to respond or hold these accountable. This forms the fundamental argument of those criticising

65 See e.g. D. Halberstam & C Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"', 2009 *German Law Journal*, no. 8, pp. 1241-1257.

66 See BBC, 'Lisbon passes German court test', 2009, available at: <<http://news.bbc.co.uk/1/hi/world/europe/8125742.stm>> (last visited 11 September 2013) and M. Wade, 'The Constitution says yes [but...] to the Lisbon Treaty – The Judgment of the Second Senate of the Federal Constitutional Court of 30 June 2009', 2009 *eu crim*, no. 1-2.

67 All EU Member States for instance reserve the right to make criminal law and criminal procedure law as a matter for Parliament itself indicating its importance – see M. Wade, 'Part III – Present National Criminal Justice Structures', in U. Sieber & M. Wade, *Structures of European Criminal Justice – Volume 1: Central Findings*, Duncker and Humblot, 2013, in press.

68 Though organisations such as Fair Trials International and Statewatch campaign in relation to developments – see e.g. <<http://www.fairtrials.net/justice-in-europe/>> (last visited 11 September 2013), B. Hayes, "'The Future of Europol' – more powers, less regulation, precious little debate', 2006, available at: <<http://www.statewatch.org/news/2006/oct/future-of-europol-analysis.pdf>> (last visited 11 September 2013) and S. Peers, 'Europol: The final step in the creation of an "Investigative and Operational" European Police Force', 2007, available at: <<http://www.statewatch.org/news/2007/jan/europol-analysis.pdf>> (last visited 11 September 2013).

developments at the European level.<sup>69</sup> Acknowledgement of this defect was demonstrated by e.g. the inclusion of national parliaments in the scrutiny of EU legislation by provisions of the Lisbon Treaty.<sup>70</sup> Until such mechanisms are implemented to effectively provide for dialogue, the EU's vulnerability to be used for one-sided legislation will remain. Any use of the Nobel Peace Prize-winning European Union as conceived by the European Court of Justice in *Kadi* to effectively undermine fundamental rights must nevertheless be seen as fundamentally wrong. There is no vision advocating the EU as a liberty-restricting Union. So is there a mechanism to bind the members of the Council of the European Union to this spirit of the Union?

Turning to transnational criminal law, this problem may be regarded as both greater and lesser. On the one hand, the lesser frequency of legislation and its ad hoc nature means it should be subject to potentially more rigorous Parliamentary scrutiny. It is, after all, entirely dependent upon transposition into domestic law. Nevertheless, transnational law arrives with the momentum of international obligation and without the sense of being part of a system. There is not even an overriding spirit to guide what should be; purely bundled executive will is presented for transposition once it has become international law.

How then can the law express the right of an individual not to be subjected to such executive will, merely because it comes in the form of transnationalised law? Is there any means of asserting that the unbalanced nature of the fledgling EU criminal justice system and of transnational law is currently wrong or let alone unlawful?

In seeking the answer to such a question one must search for a common legal tradition or basis; inspiration as sought also by the European Court of Justice from 'constitutional traditions common to the Member States'. This is a reference to legally important but not particularly concrete tools. This instrument of the European Court of Justice may be one to inspire, it is alas not one upon which to base an appeal against concrete measures being enforced via transnationalised criminal justice. Whilst the Court could plausibly draw upon general agreement that a measure freezing all financial assets must be accompanied by an opportunity to appeal against it, the detailed provisions of transnationalised criminal justice undoubtedly require a more detailed and coherent source of regulation.

Whenever possible in rights-related matters, the Court draws upon the ECHR. In some cases this may indeed provide a legally superior route to determining common values within the broader European context and therefore demanding specific rights protection mechanisms, also in transnationalised proceedings. This is certainly true for some values and mechanisms. The case of *Salduz v Turkey*<sup>71</sup> for instance has provided a clear requirement of access to legal advice during police custody as a concretisation of fair trial rights unless exceptional circumstances speak against allowing such access.<sup>72</sup> A strong line of case law upholds the complete prohibition of torture or degrading treatment or punishment clearly demonstrating this as a common value.<sup>73</sup> ECHR case law is further instructive in determining more detailed requirements flowing from such fundamental principles, for example when a charge must be viewed as criminal or several concrete requirements of the principle of equality of arms.<sup>74</sup>

The Court, however, naturally operates post facto and in relation to cases of all sorts. Not only those of relevance to the nitty-gritty of criminal justice systems cooperating closely in transnationalised settings. Ultimately even amongst the EU Member States, there is such divergence in rights standards flowing from constitutional values<sup>75</sup> that it would be illusionary to expect the ECHR, even through the jurisprudence of the Strasbourg Court, to provide a sufficiently tight system of rights protection to accompany transnationalised processes.

69 So e.g. J. Russell in his speech to the European Parliament, 'A Green Approach to European Criminal Justice', Workshop, 6 December 2012, available at: <<http://www.janalbrecht.eu/home.html>> (last visited 11 September 2013).

70 See e.g. A Horvathova, 'EU Criminal Law and the Treaty of Lisbon – Where Shall We Go Now?', 2010, available at SSRN: <<http://ssrn.com/abstract=1836754>> (last visited 11 September 2013).

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

72 Para. 55 of the Judgment

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

74 See e.g. S. Trechsel, *Human Rights in Criminal Proceedings*, 2005, pp. 36 et seq. and pp. 94 et seq.

75 See S. Carrera et al., 'The Court of Justice of the European Union as a Fundamental Rights Tribunal', CEPS Paper in *Liberty and Security in Europe*, no. 49/August 2012, p. 5.

A further source of imprecision is the margin of appreciation<sup>76</sup> applied by the Court when interpreting whether or not a state's rights-securing mechanisms comply with the Convention. The Court's deference to executives' judgements in difficult situations means that the ECHR and its jurisprudence will not always provide for a clear standard. The Strasbourg Court looks at rights in situations in which they are tested rather than to make a concrete declaration of the norm. Not surprisingly this leads to an imprecision or watering down of the standards set. Thus, for example, the seemingly concrete requirement that a detainee is informed immediately of the facts forming the basis of the charge against him or her was watered down by the case of *Fox, Cambell and Hartley v United Kingdom*.<sup>77</sup>

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

Values determined under the ECHR are therefore subject to interpretation within the specific setting as well as to the margin of appreciation. Its jurisprudence is criticised for being insufficiently specific in any case. The ability to use ECHR jurisprudence to develop specific mechanisms of protection suitable for ensuring rights are respected in proceedings across a number of jurisdictions is asking too much. The ECHR was, after all, not conceived as a mechanism of harmonisation. Even where the Court can develop specific requirements – as it has done e.g. in the case of *Salduz v Turkey*, it cannot do so at a rate which keeps pace with transnationalised criminal justice, especially not in the European Union context.

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

To wait for Court jurisprudence determining values is, of course, a highly inefficient method of rights protection. The better approach would be to ensure that repressive transfers of power are accompanied by an appropriate, rights-securing context. Within the EU setting the history of the procedural rights framework decision<sup>78</sup> and the ongoing negotiations of the Roadmap,<sup>79</sup> clearly demonstrate that negotiation is necessary to achieve this. There may well be common traditions and values to be determined amongst the EU Member States via legal comparison and other methods. The problem is that a few Member States

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

77 [1990] ECHR 18, especially Para. 41.

78 Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, 28.4.2004, COM(2004) 328 final and Wade 2007, supra note 30.

79 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance) (2009/C 295/01), OJ C 295, 4.12.2009, p. 1. See further <[http://www.ecba.org/content/index.php?option=com\\_content&view=category&layout=blog&id=65&Itemid=22](http://www.ecba.org/content/index.php?option=com_content&view=category&layout=blog&id=65&Itemid=22)> (last visited 11 September 2013).

dispute the legitimacy of the EU framing rights declarations. The question of interest in this paper – and independent of legal developments at the EU level – is whether the fact that these Member States deemed the EU a suitable venue to pass the European arrest warrant did not also inherently see them legitimising and indeed requiring a rights-protecting framework in which this could operate?

This paper is asserting that this must have been the case; otherwise the EU is a constitutional loop-hole. The assertion is thus that legally there should in fact be a mechanism for insisting that the governments which agreed to the European arrest warrant must also agree to an appropriate mechanism of rights protection. The need for such a conclusion becomes all the more important for less coherent contexts in which transnationalised criminal law and justice operates. Whilst it might conceivably be plausible to determine a set of common constitutional values via deductive mechanisms within a European setting, any such notion seems unfeasible in broader contexts. Even attempting to identify such a tool for the transnational context as found under the United Nations goes well beyond the scope of this paper. It is suggested that in such settings only negotiation amongst state signatories will produce a desired result. The position of each citizen of each of those states as rights holders who will lose protections via transnationalisation demands, however, that this is required. Citizens remain citizens of their constitutional setting and these demand that their governments secure protections, even when endowing others with executive powers. In what follows a reflection with European scope as to how such a demand might be cased is pursued. It is acknowledged that this is likely to be of limited utility; useful perhaps for both the supranational law of the European Union and transnational law created by European bodies. It may, however, have relevance to broader contexts and will hopefully provide at least a useful example of how such demands might be formulated.

#### **4. Social contract theory as a framework for considering deficits in transnationalised criminal justice**

The venture undertaken in this essay can be no more than a philosophical exercise; a thought experiment. At this level, at least for the European context, the values of the Enlightenment present themselves as potentially useful. One plausible source of inspiration from that context is provided by social contract theory. An important feature certainly of British, German and French constitutional philosophy it centrally postulates an idea that a citizen surrenders powers to government contingent upon benefitting from this surrender. Social contract theory is frequently used to question the fundamental legitimacy of supranationalisation due to the consideration of democratic representation it contains.<sup>80</sup> It provides a framework within which to think about rights and government. Because these are cased within the notion of contract, however, more detailed questions such as those explored here can also be accommodated. Ideas such as the assignment of rights and privileges gained under this arrangement are part of or easily incorporated into the social contract idea. Therefore this approach bears potential as an analytical tool of governance more generally, also multilevel in nature as is our concern here. The issue of interest here relates to the assignment of the power over citizens held by their state to another sovereign, for the purposes of the most accessible example, the European Union, but additionally any other authority created or alternative sovereign assigned powers under transnationalised law.

As Freeman points out, the notion of the social contract rests upon the idea of the voluntary consent to become subject to the political power of another. ‘What individuals have consented to [,however,] differs radically according to the particular values of the contract theorist.’<sup>81</sup> Hobbes is resolute in the surrender of rights by citizens within the context of the social contract to the point of defending absolutism. Once the Commonwealth is created the sovereign cannot be replaced without his consent and is owed absolute obedience<sup>82</sup> Hobbes thus looks unlikely to provide any basis for useful analysis in our context. Locke, on the other hand, is recognised as placing the social contract in a context of limited constitutionalism. Men give up their state of nature and a part of their liberty only for good

80 See D. Esty, ‘Good Governance at the Supra-national Scale: Globalising Administrative Law’, 2006, Faculty Scholarship Series. Paper 428. p. 1515, available at: <[http://digitalcommons.law.yale.edu/fss\\_papers/428](http://digitalcommons.law.yale.edu/fss_papers/428)> (last visited 11 September 2013).

81 M. Freeman, *Lloyds’ Introduction to Jurisprudence*, 2008, p. 106.

82 T. Hobbes, *Leviathan*, 1651, Chapter 18, p. 1.

reason: ‘The purpose of government was the protection of human entitlements (...) a theory of political authority which countenanced resistance to unjust authority.’<sup>83</sup>

Above all Locke emphasises that even the supreme power within a commonwealth cannot be ‘absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another.’<sup>84</sup>

Fundamentally, citizens are viewed as subjecting themselves to power for good reason and power is thus vested conditionally with citizens retaining the right to retract power, if the sovereign does not use it correctly. As Locke explains:

‘The reason why men enter into society is the preservation of their property; and the end while they choose and authorise a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power and moderate the dominion of every part and member of the society. For since it can never be supposed to be the will of the society that the legislative should have a power to destroy that which every one designs to secure by entering into society, and for which the people submitted themselves to legislators of their own making; whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty (...).’<sup>85</sup>

Locke therefore clearly regards the social contract as having bounds which when broken by government, release citizens from their obligations under it. In other words the social contract sets boundaries for legitimate government and a legislature (and even more so an executive as Locke goes on to assert) only retains its legitimacy; holds to its part of the social contract as long as it stays within those bounds. Locke sees the social contract as served by the tacit consent of citizens.<sup>86</sup> European Union citizens’ position as subjects of a social contract to their Member States as well as the Union is unproblematic. The key point, however, is that no absolute power over the liberty of subjects may be assumed.

Locke’s analysis and concretisation of rights goes on to relate to property and is so of little specific relevance to our purposes. The central question is what can be derived from his ideas as to what citizens consent to and what, if any, checks this need to consent can lead to in terms of the assignment of powers under the contract.

If a citizen entrusts his right to punish for crime and his right to liberty to a sovereign should he break the law of the land, then this is a high level of trust passed to a sovereign. The administration of criminal justice is unquestionably a matter of great sensitivity and the ‘protection of human entitlements’ a complicated and delicate matter within and by it.

Within supranationalised criminal justice systems, governments stand accused of acting without sensitivity in assigning only repressive powers to supranationalised structures as outlined above. The question is whether such assignment can be valid when analysed within the theoretical context of the social contract. For our intents and purposes the question is not to challenge the potential for states

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83 M. Freeman, *Lloyds’ Introduction to Jurisprudence*, 2008, p. 107.

84 J. Locke, *The Two Treatises of Government*, 1823, Para. 135 of the Second Treatise.

85 J. Locke, *The Two Treatises of Government*, 1823, Para. 222 of the Second Treatise.

86 For a summary see M. Freeman, *Lloyds’ Introduction to Jurisprudence*, 2008, p. 108.

to assign such powers should the efficient protection of their citizens necessitate this. Indeed a case could be made for the sovereign's duty to do so. If a sovereign cannot e.g. take the measures necessary to protect citizens from for instance a terrorist attack, then the purpose of government is thrown into question should such a government not undertake steps to ensure effective protection. Nevertheless, in legitimately protecting its citizens, a government can only act within certain bounds. It cannot, for example, assume absolute power over the liberties of its citizens.

The relevant enquiry is whether or not – given the delicate nature of balance achieved within national criminal justice systems over centuries – individual powers can legitimately be plucked from that systematic context and assigned to another sovereign? Many of the criticism of and protests against e.g. EU criminal justice measures are that they ignore the broader context of the executive measures they facilitate across borders. Utilising the idea of a social contract, we can recognise the surrender of powers to a sovereign as contingent and thus that some powers are bundled with citizens' rights. Consequently any assignment of power to another sovereign is contingent upon the simultaneous assignment of a duty to protect these contingent rights. Otherwise assignment is a means of undermining the 'contract'. Such actions of bad faith in the social contract sense cannot but serve to delegitimise the state so acting in its relations with its citizens.

Indeed where governments assign only repressive powers without assigning rights, the question is whether they are not asserting absolute power over a citizen's liberty and thereby rescinding their legitimate power over that citizen. Reactions to miscarriages of justice and indeed fundamentally the negotiated progress of the Enlightenment have led to citizens effectively expressing their non-consent to criminal justice systems which carry a disproportionate risk of convicting the innocent.<sup>87</sup> Throughout Europe, aided also by the jurisprudence of the European Court of Human Rights, criminal justice systems have developed to achieve a balance of rights and coercive powers thought to minimise this.<sup>88</sup>

The notion that a correct balance can be found is testified to because government draws its legitimacy in depriving citizens of their rights to self-defence (the *Gewaltenmonopol*) only by protecting their liberty. Furthermore, the demand for rational government (or in Locke's terms government marked by 'reason') illustrates this. To run too high a risk of subjecting innocent persons to coercive measures is not only an impermissible (and potentially consent-negating) interference with their right to liberty. It is also the fallacious focus of state power on the wrong person and therefore not on the true danger to human entitlements. In order to fulfil its function, Government must ensure the direction of its power at the correct addressee, i.e. its genuine effectiveness.

European Union justice and home affairs measures are regularly subject to criticism for overly exposing innocent citizens to a risk of treatment as guilty: lengthy pre-trial detention by virtue of being a foreigner after being surrendered via European arrest warrant proceedings, lengthy imprisonment following convictions *in absentia* leading to surrender via European arrest warrant proceedings with the contingent promise of a re-trial given to the surrendering state ignored.<sup>89</sup> Above all, the lack of any provision for internationalised equality of arms because the defence have none of the facilitating mechanisms or institutions afforded to the prosecution is heavily criticised.<sup>90</sup> Whilst the EU context is the furthest developed in this regard and thus most systematically used and subject to criticism, transnationalised criminal justice more generally bears features whose procedures (or the lack of them) risk exposing innocents to punishment: Interpol red flags provide a clear example.<sup>91</sup> The United Nations provision for the so-called 'smart sanctions' (here viewed as criminal in nature due to their function

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87 Thus public outcries following miscarriages of justice led to changes in the law restricting executive power as for example in the UK in 1984 with the Police and Criminal Evidence Act aiming to curtail the ability of the police e.g. to suppress evidence and exert undue pressure on suspects as had been found to be the case in several terrorism-related cases. See e.g. A. Ashworth, *The Criminal Process*, 1998, p. 21.

88 Thus the *Salduz* decision, *supra* note 71, provides a more recent, high-impact example of where this balance must be. This case is a clear expression of a European consensus that normally police interrogation must be accompanied by access to legal advice. The reform of criminal justice processes to provide for this, e.g. in France and the Netherlands, is demonstrative of this accepted consensus.

89 See <<http://www.fairtrials.net/justice-in-europe/>> (last visited 11 September 2013) and 'FTI The European Supervision Order: Key Facts', available at: <<http://www.eucrimallaw.com>> (last visited 11 September 2013).

90 See e.g. the criticism by the European Criminal Bar Association: <[http://www.ecba.org/content/index.php?option=com\\_content&view=category&layout=blog&id=75&Itemid=25](http://www.ecba.org/content/index.php?option=com_content&view=category&layout=blog&id=75&Itemid=25)> (last visited 11 September 2013).

91 <<http://www.fairtrials.net/interpol/>> (last visited 11 September 2013).



and purpose) as a counter-terrorist measure – and the initial failure to foresee any procedure for redress should a mistaken or incorrect entry be made – is another.<sup>92</sup> In Locke's terms, one may surely question whether the agreement to surrender citizens tried *in absentia* to countries with a record of not honouring promised retrials or to those regularly subjecting European arrest warrantees to periods of pre-trial detention viewed as unacceptable in the surrendering jurisdiction, let alone procedures providing for the comprehensive freezing of financial assets are not in fact exercising absolute power over their citizens' liberties. If this is concluded to be the case, the vocabulary of the social contract clearly allows us to decree this an illegitimate exercise of power.

According to Locke a citizen retains the right to defend his or her life under the social contract and the crux of our concern: a right to liberty is referred to in general terms in his work. What one may demand that government protects to what extent, remains a matter of interpretation and the reading of modern circumstances into old texts. As a matter of good governance – which must be the aim for which citizens surrender their rights ('the protection of human entitlements') – one can, however, utilise the framework provided by Locke to make a case that the assignment of power to prosecute must be accompanied by a duty to ensure no disproportionate risk of that power being exercised to the onerous detriment of innocents or indeed disproportionately. Given that the EU meanwhile has also assigned parallel citizenship to the citizens of its Member States, an independent evaluation of the exercise of its powers in social contract terms is also an interesting prospect which, however, goes beyond the scope of this paper.

The concept of 'good government' is one associated more closely with Rousseau whose work provides further food for thought in this context. As Fouisneau emphasises 'the general will – that is, the sense of the general interest – needs to be forged, shaped, and strengthened by specific institutions that are always linked to a concrete society, to a particular history and to determinate places. This particularization of the general will is (...) a condition for the very possibility of a republican government.'<sup>93</sup> The development of the above argument on this basis would be to contend that our concepts of criminal justice and the processes of achieving it have been forged over centuries and, as a principle of good government, cannot be legitimately overturned by the executive acting on the supranational stage.

As Bertram explains 'For Rousseau, (...) citizens who resist or protest against the abuse of government in the civil state do so in the name of the social pact; should that abuse reach the point where the social pact is no more, they return to a state of natural liberty.'<sup>94</sup> Rousseau thus provides a stronger argument that governments (and indeed governance levels) must remain within the bounds of the social contract if citizens are to be expected to honour it (and not descend into legitimate anarchy). The criticism heaped upon particularly European criminal justice and the sense of wrong expressed in relation to it and other forms of transnationalised criminal justice should be recognised as a warning that our governments are approaching a breach of the social contract – if not already in breach of it – via a, (an) at least negligent, betrayal of constitutional values. Couched in Lockean and Rousseauian terms, they are thereby undermining the legitimacy of their claim to govern because they do so without consent.

The idea of the social contract is valuable here because it provides us with a framework (which has been influential in key states whose constitutions serve as exemplary for others) within which to analyse the kinds of powers being transferred via transnational and supranational European criminal law. By viewing these kinds of powers as conditionally lent, one can identify them as part of a governance bundle out of which singular elements cannot simply be isolated. The social contract idea demonstrates governments' powers as limited by responsibility; the broader constitutional context of those powers. For constitutional values to hold, even transnationalised criminal justice must be infused by general principles inspired by the latter, secured by governments acting within the bounds of the 'contract' they have with their citizens. Viewed from this perspective, transnationalised criminal justice without general principles is an illegitimate form of governance created by executives undermining and arguably

92 Joined Cases C-402/05 P and C-415/05, *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, esp. Paras. 93 and 97.

93 L. Foisneau, 'Governing a Republic: Rousseau's General Will and the Problem of Government', 2010 *Republics of Letters* 2, no. 1, available at: <<http://rofl.stanford.edu/node/70>> (last visited 11 September 2013).

94 C. Bertram, *Rousseau and the Social Contract*, 2003, p. 166.

in breach of the very promises made to the citizens by their states which form the very basis of those executives' legitimate power within their respective states.

The attempt to extrapolate social contract theory to the supranational level is clearly marked by difficulty. In the international law context Thomas Franck has used the construct to identify the nation states as the characters in a state of nature that associate in a community to which they delegate certain powers so as to secure in return the benefits of peace, order and mutual support.<sup>95</sup> In relation to the individual Franck, however, regards the rules emerging from global discourse as being rooted in a universal sense of fairness.<sup>96</sup> He predicts citizens will turn to international law and institutions to facilitate their fair access to political power and participation in societal decisions.<sup>97</sup> Above all legitimacy is gained through the bargain struck by nation states and the extent to which those addressed by the rules and rule-making institutions of international law perceive those rules as coming into being and operating in accordance with the generally accepted principles of the correct process. Even taking this approach, however, holds some value for the issue at hand. The transnationalised criminal justice contexts appear so strongly to facilitate citizens becoming subject to processes defined entirely by their executives collectively striving for efficiency at the expense of fairness. Analysed in these terms, transnationalised criminal justice mechanisms cannot be seen as anything but a pending crisis of legitimacy. Where a supranational structure like the EU gains the status of conferring citizenship, the requirement upon it to provide for good governance must in turn grow even stronger.

The legitimacy of supranational constructs such as the UN and the EU is fundamentally based upon principles citizens and governments agree as bearing such importance they must be protected by the international or a regional community. The aspirational texts of the UN Charter<sup>98</sup> and the EU treaties<sup>99</sup> broadly sketch these institutions as rights-enhancing, peace-securing organisations. The fury expressed by human rights lawyers that the framework of such institutions is abused to provide a legal basis for controversial measures such as the 'smart sanctions' is nothing but an assertion that states are acting *ultra vires*; utilising organisations established (and accepted by citizens) for one purpose to achieve an entirely other. Assuming their legitimacy rests within their original mandate, such international organisations must strive to protect these, if they are to survive.

## 5. Conclusion

The assignment of powers to investigate, prosecute and indeed adjudicate at a supranational level are doubtlessly legitimate acts of good governance securing the rights, interests and indeed entitlements of citizens in many contexts. As Boister phrases it 'we might conclude that very shocking or state-implicated harmful conduct which threatens general human interests has to be suppressed by humanity acting as a whole. Going down the scale, harmful conduct that crosses borders or threatens cross-border morality may only require affected states to act together. Finally, harmful conduct that only affects interests within states can be dealt with adequately by states acting alone.'<sup>100</sup>

Assignment along the lines of transnational, European and indeed international criminal law is indicated as a necessary part of good government. It, however, appears incomplete as it currently stands. If the development of criminal justice systems in European countries is analysed within the terms of the social contract, centuries of 'negotiation' can be identified. The products of these, although dynamic in nature, clearly highlight the consent of citizens to punishment via criminal justice processes as contingent upon the risk of unsafe convictions or indeed unjustified deprivations of liberty being minimised. The resulting social contracts detail the requirements placed upon the executive in order to pursue the goal of criminal justice via processes fundamentally marked by (at least the striving for) fairness and balance within each of these nation states. This theoretical view thus identifies powers to investigate

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95 T. Franck, *Fairness in International Institutions*, 1995, p. 28.

96 *Ibid.*, p. 85.

97 *Ibid.*, p. 89.

98 See e.g. Art. 1(3) of the United Nations Charter.

99 See e.g. Arts. 2 and 3(2) of the Treaty of the European Union.

100 N. Boister, 'Transnational Criminal Law', 2003 *EJIL* 14, no. 5, pp. 953-976, p. 969.

and prosecute as part of a bundle of inter-dependent powers and duties. It consequently highlights that the legitimate assignment of such powers can only occur under consideration of this bundle as a whole. States endangering their citizens' rights via partial assignment are shown to breach their social contract. In doing so they in turn naturally not only negate the legitimacy of their own rule but also undermine the legitimacy of the very international structures created by them to perform tasks the executives of nation states cannot achieve alone. Social contract theory thus provides us with a useful tool to discuss which constitutional values and resulting rights form general principles of transnationalised criminal justice.

The end result of transnationalised criminal justice processes is still the trial and potential conviction of an individual who may be arrested, extradited, imprisoned or otherwise restricted in his or her rights during the course of such proceedings. As such they must be infused by constitutional principles of some kind. The question which is currently presented to us is whether the executives which readily utilised these international governance mechanisms, will stand by them firmly enough to determine and implement the general principles which will secure their legitimacy in the eyes of the citizens they now also govern. A jurisprudential duty upon governments to do so can arguably be found. Social contract theory can naturally only provide us with a very broad conceptual basis upon which to discuss such scenarios. It is doubtlessly an abstract and loose argument to wield. As a constitutional fundamental, however, it at least provides some terms with which to express the deep sense of wrong that lawyers (and others) feel when confronted by the executive over-reach of criminal justice as currently marked by internationalisation.

In one famous, all too recent commentary, Dick Marty asserted:

'It is frankly shocking to see that an international organization whose purpose it is to affirm the principles of peace, tolerance and justice uses itself means that do not respect the fundamental principles at the base of any restriction of individual freedom in any civilized country: the right to be heard, the right to appeal to an independent tribunal, that to a fair trial, the principle of proportionality. The Parliamentary Assembly of the Council of Europe can certainly not remain indifferent in the face of such abuses.'<sup>101</sup>

Our question must be whether law provides any mechanism able to counter such executive abuse of power within transnationalised criminal justice structures. If constitutions are to hold any meaning, then surely it must be that they provide such mechanisms? The question is whether Locke's right to withdraw tacit consent or Rousseau's postulated right to protest is sufficiently strong to demand efficient government which remains mindful of its duties at all times? Or whether constitutions inspired by these concepts do not provide legal tools to that effect? The findings of the Venice Commission are an all too pointed reminder that a legal path must be found to ensure internationalised criminal justice is infused with general principles. A phrase from the echelons of international criminal law as humanity's highest moral instance resonates 'if these men be immune, then law has lost its meaning, and man must live in fear' intoned Benjamin Ferencz to the *Einsatzgruppen* trial at Nuremberg.<sup>102</sup> Paraphrased it can also serve as a warning of the danger executive power wields if not properly serving justice; if executive powers are deemed to be exercisable above the law, then again, law loses its meaning; in the extreme with dire consequences.<sup>103</sup> This cannot be the purpose of international bodies and agencies tasked with achieving criminal justice. Their very existence demands that the context in which they operate is marked by the general principles their charters aspire to and that these be recognised and enforced. ¶

101 D. Marty presenting the report of the Venice Commission on reverse renditions (European Commission for Democracy through Law, 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners', 2006, available at: <<http://www.venice.coe.int/docs/2006/CDL-AD%282006%29009-e.pdf>>, on-file with the author) to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe 2006.

102 Benjamin Ferencz 29 September 1947 in the *Einsatzgruppen* trial in Nuremberg, cited by Antonio Cassese in his fourth report as President of the ICTY to the UN General Assembly 1997 – see H. Verrijn Stuart & M. Simons, *The Prosecutor and the Judge*, 2009, available at: <<http://dare.uva.nl/document/165445>> (last visited 11 September 2013), p. 9.

103 So e.g. for the Algerian Six, ostensibly under the protection of the Constitutional Court of Bosnia Herzegovina but still amongst the first detainees to arrive in Guantánamo despite the Court's direct orders that the men not be surrendered. See A. Maljević, 'Extraordinary Renditions – Shadow Proceedings, Human Rights and "the Algerian six" – The War on Terror in Bosnia and Herzegovina', in M. Wade & A. Maljević, *A War on Terror?*, 2009.