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# EU Policy to Guarantee Procedural Rights in Criminal Proceedings: Step by Step

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# EU Policy to Guarantee Procedural Rights in Criminal Proceedings: Step by Step

## **Cover Page Footnote**

International Law; Commercial Law; Law

# EU Policy to Guarantee Procedural Rights in Criminal Proceedings: “Step by Step”

*T.N.B.M. Spronken & D.L.F. de Vocht†*

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† Paper presented at the conference ‘The Future of the Adversarial System’

The University of North Carolina at Chapel Hill School of Law, April 1, 2011. Portions of this article have been adapted from the authors’ previous writings, including TARU SPRONKEN, EU: LETTER OF RIGHTS IN CRIMINAL PROCEEDINGS: TOWARDS BEST PRACTICE (2011). Dorris de Vocht obtained her J.D. (with honors) from Maastricht University in 2000. In 2009 she defended her doctoral thesis on criminal defense in Poland. She is currently Assistant Professor of Criminal law and Criminal Procedure at Maastricht University where she is involved in several courses on criminal (procedure) law. Her main research interest concerns procedural rights for suspects and defendants in criminal proceedings. Taru Spronken graduated in law at the University of Utrecht, the Netherlands in 1979 and wrote a doctoral thesis on criminal defense. She is currently Professor of Criminal Law and Criminal Procedure at Maastricht University, a practicing criminal defense lawyer, and a substitute Judge in the Court of Appeal of Den Bosch. The author has specialized in criminal procedure and human rights and is focussing her current research on the implications of EU cooperation in criminal matters for procedural rights.

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## I. Introduction

Over the last decade, the European Union has become increasingly active in matters of criminal justice, concerning both domestic cases and cases with a cross border dimension. However, criminal procedures vary enormously across European jurisdictions and so does the level of legal protection offered to suspects in criminal proceedings.

Initial attempts by the European Union to establish minimum procedural rights for suspects and defendants throughout the European Union failed in 2007 in the face of opposition by a number of Member States who argued that the European Convention on Human Rights<sup>1</sup> (hereinafter the Convention) and the enforcement mechanism of the European Court of Human Rights (hereinafter ECtHR) rendered EU regulation unnecessary.<sup>2</sup> With ratification of the Lisbon Treaty,<sup>3</sup> criminal defense rights appeared on the agenda again in order to increase mutual trust

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<sup>1</sup> European Convention on Human Rights, Nov. 4, 1950, C.E.T.S. No. 144 [hereinafter the Convention].

<sup>2</sup> See EUROPEAN UNION COMMITTEE, PROCEDURAL RIGHTS IN EU CRIMINAL PROCEEDINGS—AN UPDATE: REPORT WITH EVIDENCE, 2008-9, H. L. 84, at 5 (U.K.), available at <http://www.statewatch.org/news/2009/may/eu-hol-ec-procedural-rights.pdf>.

<sup>3</sup> See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

between Member States and thus improve the operation of mutual recognition.<sup>4</sup> In November 2009, the European Council adopted the Roadmap on Procedural Rights (hereinafter Roadmap), setting out a step-by-step approach to strengthen the rights of suspects and accused persons throughout the European Union.<sup>5</sup>

This article focuses on how procedural safeguards for suspects and defendants are protected by the Convention, as well as the increasing and sometimes competing impact of the European Union in this area. To set the context, first an outline will be given of a three-year research study on access to effective defense in criminal proceedings across nine European jurisdictions. These countries provide examples of the three major legal traditions in Europe: inquisitorial, adversarial, and post-state socialist. Next, current developments within the Strasbourg enforcement mechanism and the method by which EU policy is aimed to fill the gaps in human rights protection in the area of criminal procedural law will be discussed. Finally, special attention will be paid to two EU legislative proposals which are currently on the table: one on the right to information and the other, the right to legal assistance in criminal proceedings.

## II. Effective Criminal Defense in Europe

The research project, "Effective Defense rights in the European Union and access to justice: investigating and promoting best practice" was conducted over a three year period beginning in September 2007.<sup>6</sup> A team of thirty scholars and practitioners from nine jurisdictions cooperated closely in order to produce comparable information for analysis.<sup>7</sup> The jurisdictions involved in the study include Belgium, England and Wales, Finland, France, Germany, Hungary, Italy, Poland, and Turkey.<sup>8</sup> The results were recently published.<sup>9</sup> As stated in *Effective Criminal*

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<sup>4</sup> See *id.* at 64.

<sup>5</sup> See Resolution of the Council (EU), A Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, Nov. 30 2009, 2009 O.J. (c 295) 1 [hereinafter Resolution of the Council], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:6:2009:295:0001:0003:EN:pdf>.

<sup>6</sup> EVED CAPE, ET AL., EFFECTIVE CRIMINAL DEFENSE IN EUROPE 18 (2010).

<sup>7</sup> *Id.* at 17-19.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> See, e.g., *id.*

*Defense in Europe:*

One of the main premises underlying this research was that effective criminal defense does not only require adequate legal assistance, but also a legislative and procedural context and organisational structures that enable and facilitate effective defense as a crucial element of the right to fair trial. This argument is based on the premise that however good legal assistance is, it will not guarantee a fair trial if the other essential elements of fair trial are missing. Thus effective criminal defense has a wider meaning than simply competent legal assistance. It is therefore necessary to approach the assessment of access to effective criminal defense in any particular jurisdiction at three levels:

- a) Whether there exists a constitutional and legislative structure that adequately provides for criminal defense rights taking ECtHR jurisprudence, where it is available, as establishing a minimum standard.
- b) Whether regulations and practices are in place that enable those rights to be 'practical and effective'.
- c) Whether there exists a consistent level of competence amongst criminal defense lawyers, underpinned by a professional culture that recognizes that effective defense is concerned with processes as well as outcomes, and in respect of which the perceptions and experiences of suspects and defendants are central.

In order to provide a baseline for our examination, and assessment, of access to effective criminal defense we explore . . . the ECtHR jurisprudence on the rights set out in article 6 of the Convention, and also the jurisprudence on articles 5, 8 and 10 [of the] Convention where this concern the right to release during the pre-trial phase, confidential lawyer/client communication, and freedom of speech in the context of criminal procedure.<sup>10</sup>

It appeared from the analysis of each of the nine countries in

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<sup>10</sup> *Id.*

the study that the various rights and standards cannot be considered in isolation from each other. Each has a dynamic relationship with some or all of the other rights. For example, the ability of a defense lawyer to effectively advise his or her client, whether at the investigative or trial stage, will be dependent on the information that is made available to him or her by the investigating or prosecuting authorities, as well as the timing of such disclosure.<sup>11</sup>

Five major themes emerged from the country studies showing deficiencies in the mechanisms and judicial cultures that support effective criminal defense in practically all jurisdictions that were included in the study.<sup>12</sup>

First, legal assistance is problematic in many countries, especially with regard to access to legal assistance, the timeliness of the access, and the quality of legal assistance.<sup>13</sup>

Second, legal aid, closely linked to the right to legal assistance, often is ineffective due to slow, unclear, and complicated application methods.<sup>14</sup> In addition, availability, quality, and independence of criminal defense lawyers in legal aid cases proves to be inadequate, among other things, due to low remuneration provided for legal aid work.<sup>15</sup>

Third, interpretation and translation are not always guaranteed. In particular, many problems arise with regard to which documents will be translated and how the translation will be funded.<sup>16</sup>

The fourth theme concerns adequate time and facilities to prepare a defense.<sup>17</sup> Significantly, criminal investigations and proceedings are largely conducted according to the needs, interests, and schedules of the investigative and judicial authorities and do not take into account the needs of the suspect or accused.<sup>18</sup> This is especially the case in the initial stages of the

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<sup>11</sup> See CAPE ET AL., *supra* note 6, at 573-80.

<sup>12</sup> *Id.* at 581.

<sup>13</sup> *Id.* at 581-89.

<sup>14</sup> *Id.* at 590.

<sup>15</sup> *Id.* at 591-92.

<sup>16</sup> See CAPE ET AL., *supra* note 6, at 595-96.

<sup>17</sup> *Id.* at 597.

<sup>18</sup> *Id.*

investigation—of which are acknowledged as often having a determinative effect on the eventual outcome of a case.<sup>19</sup> Problems arise with regard to the way suspects are informed of their rights (such as the right to silence), lack of clarity as to the moment at which rights become effective, time to prepare for pre-trial hearings, and access to the case file, as well as with various forms of expedited proceedings that do not take into account the needs for an effective defense and provide no rights for independent investigation on behalf of the defense.<sup>20</sup>

The fifth and final theme concerns the excessive use of pre-trial detention, which in itself implies major concerns for the adherence to the presumption of innocence, but also impacts defense strategy.<sup>21</sup> The right to pre-trial release is weakly developed in most countries, and being in custody limits the ability of suspects to prepare their defense.<sup>22</sup> These problems are exacerbated by the fact that in many jurisdictions the material on which applications for detention are based is not disclosed to the accused, legal aid is, in practice, rarely available at this stage, and, if it is, lawyers tend to be reluctant to take the case because of low remuneration.<sup>23</sup> The study concludes with a number of recommendations to improve the shortcomings on the national level and calls for action on the EU level.<sup>24</sup>

In the next section we try to explain why the Strasbourg enforcement mechanism needs more action on the national level of Member States to ensure compliance with essential components of effective criminal defense and how EU regulations could support this process.

### **III. Rights of Suspects and Defendants within Europe: the European Convention on Human Rights**

Since the middle of the twentieth century, promoting the protection of human rights on the European continent has—at the international level—been primarily the task of the Council of

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<sup>19</sup> *Id.* at 598-99.

<sup>20</sup> *Id.* at 600-01.

<sup>21</sup> *See* CAPE ET AL., *supra* note 6, at 603.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 604-06.

<sup>24</sup> *Id.* at 613-31.



Europe. Shortly after World War II, the Council of Europe was established to promote human rights, democracy and the rule of law.<sup>25</sup> From a human rights perspective, one of its most important achievements is without a doubt the Convention, established in 1950 and binding on all current forty-seven Member States.<sup>26</sup>

As mentioned in the introduction, the Convention sets out fundamental rights for those who are charged with a criminal offense.<sup>27</sup> In this respect, the most important provision can be found in article six dealing with the right to a fair trial.<sup>28</sup> Also important for the protection of human rights in criminal cases are: article three (prohibiting torture),<sup>29</sup> article five (dealing with the right to freedom),<sup>30</sup> article eight (dealing with the right to privacy),<sup>31</sup> and article ten (regulating freedom of speech).<sup>32</sup> Any person who feels that his or her rights have been violated by a state which is party to the Convention may file a complaint with the ECtHR, seated in Strasbourg, France.<sup>33</sup>

#### A. Challenges Facing the Strasbourg System

The Convention is of vital importance for the protection of fundamental human rights in criminal proceedings within

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<sup>25</sup> See generally ROBIN C. A. WHITE & CLARE OVEY, JACOBS, WHITE, & OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 4 (5th ed. 2010) (discussing the history of the Convention) [hereinafter the Convention].

<sup>26</sup> See, e.g., *The Court in Brief* (European Court of Human Rights), available at [www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/](http://www.echr.coe.int/ECHR/EN/Header/The+Court/Introduction/Information+documents/), (select the "Download English Version" hyperlink under "The Court in Brief" heading).

<sup>27</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms arts. 5-7, amended June 1, 2010, C.E.T.S. No. 194 [hereinafter Convention for the Protection of Human Rights].

<sup>28</sup> See *id.* arts. 5-6.

<sup>29</sup> See *id.* art. 4.

<sup>30</sup> See *id.* art. 5.

<sup>31</sup> See *id.* art. 6.

<sup>32</sup> See Convention for the Protection of Human Rights, *supra* note 27, at 6. For general information on the Convention, see ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS (2010); D.J. HARRIS, ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2009); WHITE & OVEY, *supra* note 25.

<sup>33</sup> See, e.g., WHITE & OVEY, *supra* note 25. The ECtHR can also hear interstate complaints, but the option of filing a complaint against another state is rarely used by Member States. *Id.*

Europe.<sup>34</sup> Over the years, the Convention system has evolved into a well-known and lively human rights regime with the Strasbourg court and its sophisticated case law playing the leading role. Nonetheless, it is not all roses in Strasbourg: For the last fifteen years, Europe's main human rights protector has been confronted with complicated challenges threatening its authority and effectiveness.

For years, the Strasbourg institutions have been faced with a steadily increasing backlog of cases caused by the increasing number of Member States and the frequent use of the individual complaint procedure.<sup>35</sup> As a result of the current caseload, it may take years before the court reaches a final decision in any individual case.

The vast majority of current violations in the case law of the ECtHR concerns so-called "repetitive cases:" cases in which the court decides on matters which have already been dealt with in previous cases but which remain problematic because a concerned Member State has not (yet) taken the necessary steps to improve or adjust the situation.<sup>36</sup> An important example of such repetitive cases are the excessive delay-cases against a small number of countries (such as Italy and France) in which the ECtHR consistently finds a violation of the right to be tried within a

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<sup>34</sup> A. Stone Sweet & H. Keller, *The Reception of the ECtHR in National Legal Orders*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECtHR ON NATIONAL LEGAL SYSTEMS 3 (A. Stone Sweet and H. Keller eds., 2008) ("The European Convention on Human Rights is the most effective human rights regime in the world.").

<sup>35</sup> Compare EUROPEAN COURT OF HUMAN RIGHTS, EUROPEAN COURT OF HUMAN RIGHTS STATISTICS 2007, [www.echr.coe.int/ECHR/Homepage\\_EN](http://www.echr.coe.int/ECHR/Homepage_EN) (select "Reports" hyperlink; then "statistics" hyperlink; select "Previous Year" hyperlink under "Annual Statistics" heading; and then select "Statistics Compared to 2006" hyperlink) with EUROPEAN COURT OF HUMAN RIGHTS, EUROPEAN COURT OF HUMAN RIGHTS STATISTICS 1/1-30/9/11, [www.echr.coe.int/ECHR/Homepage\\_EN](http://www.echr.coe.int/ECHR/Homepage_EN) (select "Reports" hyperlink; then "statistics" hyperlink; then select "General Statistics" hyperlink underneath the "Statistics by Month" heading). To illustrate the increasing workload of the ECtHR: on December 31 2007, there were 79,400 pending applications (before a judicial formation), and on January 31, 2011, this figure was approximately 139,650. *Id.* This means that the number of pending applications has almost doubled in three years. *Id.*

<sup>36</sup> See, e.g., The Right Honourable The Lord Woolf, et al., Review of the Working Methods of the European Court of Human Rights, 66 (Dec. 2005), available at [www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOLFREVIEWONWORKINGMETHODS.pdf](http://www.echr.coe.int/NR/rdonlyres/40C335A9-F951-401F-9FC2-241CDB8A9D9A/0/LORDWOLFREVIEWONWORKINGMETHODS.pdf) [hereinafter The Lord Woolf].

reasonable time.<sup>37</sup>

Although it is for the Member States to uphold complaints by victims of manifest violations of the Convention and to make reparation for the consequences of violations,<sup>38</sup> the fact that repetitive cases have to be dealt with in Strasbourg shows that national systems are not well-adapted and that, quite often, judgments are not properly executed by States. In a way, this is closely connected to the nature of the Strasbourg case law: Decisions of the court are always inextricably bound up with the circumstances of a case, which makes it difficult to draw general conclusions from it. When the court finds that a Member State has violated its obligations as laid down in the Convention, it rarely happens that part of national law (or practice) is *in abstracto* declared incompatible with the Convention.<sup>39</sup> As a result, whether a judgment of the ECtHR will have actual consequences for the national legal system depends to a large extent on the interpretation of the national authorities, which have a substantial margin of appreciation in this respect.<sup>40</sup> Although the Council of Europe—through the Committee of Ministers—formally supervises the execution of judgments, bringing the national criminal justice system in compliance with the Strasbourg case law is primarily the responsibility of domestic authorities.<sup>41</sup>

In the long run, the large amount of repetitive cases and the

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<sup>37</sup> See *CAPE ET AL.*, *supra* note 6, at 550 (citing ECtHR, art. 6 § 1).

<sup>38</sup> See Convention for the Protection of Human Rights, *supra* note 27, art. 46 § 1 at 12.

<sup>39</sup> When dealing with alleged violations of article six of the ECtHR, the Court will always assess whether “the proceedings as a whole” were in accordance with fair-trial requirements. See *Bykov v. Russia*, App. No. 4378/02 Eur. Ct. H.R. ¶ 89 (2009), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/> (select “HUDOC” icon; then enter “Bykov v. Russia” into “Case Title” search field; then select “search icon; then follow “1.Case of Bykov v. Russia” hyperlink). Judgments of the ECtHR considering article six ECtHR will, therefore, never be based on one isolated incident during criminal proceedings.

<sup>40</sup> With regard to the specific subject of criminal defense rights, there is another characteristic of Strasbourg case law influencing its effectiveness. As a general rule, the ECtHR exercises restraint when it comes to the quality of the defense: It is a basic principle of ECtHR case law that the conduct of the defense is a matter between the defendant and his counsel in which national authorities and the ECtHR should not interfere. See, e.g., *Kamasinski v. Austria*, 13 Eur. Ct. H.R. 36 (1991).

<sup>41</sup> See, e.g., *WHITE & OVEY*, *supra* note 25, at 52.

court's growing backlog may have considerable consequences for the general role and function of the Strasbourg system. Essentially, they may cause the ECtHR to lose part of its authority as a mechanism for effective human rights protection. Already there seem to be signs of "fatigue," especially within certain western Member States with regard to the constant effort of fully implementing the requirements of the Convention.<sup>42</sup> In this respect, the system seems to be trapped in a vicious cycle because Member States do not (adequately) fulfill their Convention-obligations, and the repetitive nature of the case law increases. This, in turn, causes a threat to the authority of the ECtHR because of the growing perception that its judgments are simply old wine in new bottles.<sup>43</sup>

The current problems with the functionality of the Strasbourg system, however, do not prevent the court from delivering revolutionary judgments every now and then. Important examples in this respect are the 2009 *Salduz*<sup>44</sup> case concerning the right to legal advice before and during police interrogation,<sup>45</sup> and the *Rantsev*<sup>46</sup> case concerning states' obligations to prevent human trafficking.<sup>47</sup>

In certain Member States, some of the ECtHR's recent far-reaching case law has led to political debate on the question of whether the ECtHR exceeds the borders of its jurisdiction.<sup>48</sup> For

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<sup>42</sup> Chrisje Brants & Stijn Franken, *The protection of fundamental rights in criminal process – General Report*, 2 *UTRECHT L. REV.* 7, 49 (2009) ("The legislator, the administrator and the courts have other pressing needs pushing human rights to the background.").

<sup>43</sup> See, e.g., Costas Paraskeva, *Human Rights Protection Begins and Ends at Home: The 'Pilot Judgment Procedure' Developed by the European Court of Human Rights*, 3 *HUM. RTS. L. COMMENT.* (2007), available at <http://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/pilotjudgmentprocedure.pdf>.

<sup>44</sup> See *Salduz v. Turkey*, 49 *Eur. Ct. H.R.* 19 (2009).

<sup>45</sup> *Id.*

<sup>46</sup> *Rantsev v. Cyprus and Russia*, App. 25965/04 *Eur. Ct. H.R.* (2010), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/> (select "HUDOC" icon; then enter "Rantsev v. Cyprus and Russia" into "Case Title" search field; then select "search icon; then follow "1.Case of Rantsev v. Cyprus and Russia" hyperlink).

<sup>47</sup> See *id.*

<sup>48</sup> See, e.g., Adam Wagner, *Europe Sets Deadline for UK to Let Prisoners Vote, Or*

example, in the United Kingdom, there is a lively debate in politics and the media in which Strasbourg critics argue that the ECtHR is drifting away from its original task of dealing with traditional fundamental human rights violations (such as fair-trial issues) and is too often interfering in matters within the sovereignty of the Member States.<sup>49</sup> Recently, a similar discussion seems to be emerging in the Netherlands.<sup>50</sup>

For some time now, it has been agreed that facing the current problems of the Strasbourg system requires some sort of reform of the Convention mechanisms.<sup>51</sup> There are many different reform-proposals,<sup>52</sup> but the actual scope and contents of the measures to be taken are still subject to debate.<sup>53</sup> In 2010, a special ministerial conference was held on the future of the convention system in Interlaken, Switzerland.<sup>54</sup> The Interlaken Declaration concluded the conference, adopting an eight-point action plan as an instrument to provide political guidance for the process towards long-term effectiveness of the Strasbourg system.<sup>55</sup> Shortly after the Interlaken Conference, in June 2010, Protocol No. 14 to the Convention finally entered into force after Russia had “blocked” ratification for years.<sup>56</sup> The Protocol provides for several changes to the Convention aiming to increase the effectiveness of the system. Amendments include the introduction of the possibility to

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*Else*, U.K. HUM. RTS. BLOG (Nov. 23, 2010), <http://ukhumanrightsblog.com/2010/11/23/europe-sets-deadline-for-uk-to-let-prisoners-vote-or-else/>.

<sup>49</sup> *See id.*

<sup>50</sup> These discussions are closely linked to the fundamental question on the role of the ECtHR: Is it the court's primary task to provide individual protection or does it have a constitutional status? *See, e.g., Sweet & Keller, supra note 34, at 5-8.*

<sup>51</sup> *See, e.g., The Lord Woolfe, supra note 36.*

<sup>52</sup> *See id.*

<sup>53</sup> *See, e.g., id.*

<sup>54</sup> *See Helen Keller, et al., Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*, 4 EUR. J. OF INT'L L. 1025 (2011) (discussing the effectiveness of possible reform measures).

<sup>55</sup> High Level Conference on the Future of the European Court of Human Rights, Feb. 18-19, 2010, *Interlaken Declaration*, Feb. 19, 2010, available at [www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final\\_en.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf).

<sup>56</sup> *See generally* Convention for the Protection of Human Rights, *supra note 27* (providing evidence of ECtHR entering into force).

have admissibility decisions taken by a single judge (instead of the previous panel of three judges) and the introduction of a new admissibility criterion according to which a case may not be admissible if it is found that the applicant has not suffered “a significant disadvantage.”<sup>57</sup> It remains to be seen whether these measures will indeed improve the efficiency of the court and—even more importantly—the effectiveness of its case law.

### *B. Filling the Gap in European Human Rights Protection*

Although it is a general principle of ECtHR case law that the Convention is intended to guarantee rights that are not “theoretical and illusionary” but rights that are “practical and effective,”<sup>58</sup> the Strasbourg system does not seem to be able to adequately enforce this rule in the criminal justice systems of its Member States.

The research on the existing level of safeguards within the European Union described in Part II of this article clearly shows that a considerable number of European countries do not fulfill their obligations resulting from the Convention.<sup>59</sup> A study conducted prior to the Effective Criminal Defense project on the existing level of procedural safeguards in all twenty-seven EU Member States illustrates that certain fundamental rights such as the right to remain silent, to have access to the case file, and to call and/or examine witnesses or experts—all basic requirements of a fair trial in the Convention—are not provided for in the legislation of all Member States.<sup>60</sup> Also, it is clear that certain fundamental

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<sup>57</sup> *Id.*

<sup>58</sup> According to the ECtHR, this distinction is emphasized “*particularly so of the rights of the defense in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive[.]*” *Artico v. Italy*, A37, App. No. 6694/74, Eur. Ct. H.R. § 33 (1980) (emphasis added), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/> (select “HUDOC” icon; then enter “Artico v. Italy” into “Case Title” search field; then select “search icon; then follow “1.Case of Artico v. Italy” hyperlink).

<sup>59</sup> See, e.g., Taru Spronken, et al., Report on EU Procedural Rights in Criminal Proceedings (Sept. 8, 2009) [hereinafter EU Report], available at <http://arno.unimaas.nl/show.cgi?fid=16315> (providing research results showing lack of consistency with ECtHR obligations).

<sup>60</sup> See *id.* This study was carried out as a follow-up report to a similar study conducted by T. Spronken and M. Attinger a few years earlier. See Taru Spronken & Marelle Attinger, Procedural Rights in Criminal Proceedings: Existing Levels of

rights are guaranteed by law but at the same time it is doubtful whether their implementation in everyday practice corresponds to the Strasbourg standard.<sup>61</sup>

In short, it can be argued that the Convention has been successful in setting general (minimum) standards, but since it does not provide for clear guidelines on how to implement them, the practical and effective character of Convention rights leaves much to be desired. The current situation in practically all EU Member States shows that it is not realistic to claim that the Convention has succeeded in adequately protecting procedural safeguards in criminal proceedings in the Member States.

With the risk of being too pessimistic, even if the planned measures to increase the effectiveness of the Convention system will eventually result in a more efficient case management by the ECtHR, there is no reason to expect that this will drastically change the way the Convention standards are implemented in national criminal justice systems. In other words: improving the efficiency of the Strasbourg system—as important as it may be—does not necessarily mean that Member States will be more inclined to take all necessary action to prevent future violations.

So, if we agree that the current level of human rights protection in criminal proceedings is insufficient in practically all European countries and that this would call for additional legislation to provide for adequate standards of protection, the question remains: Where should this new legislation come from?

Over the last few years it has become more and more likely that the European Union is willing and able to fill the abovementioned gap in European human rights protection.<sup>62</sup> Given its original economic objectives, the European Union initially had no explicit ambitions in the field of human rights protection and was not, or rarely, active in the area of criminal

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Safeguards in the European Union (Dec. 12, 2005), *available at* <http://arno.unimaas.nl/show.cgi?fid=3891>.

<sup>61</sup> EU Report, *supra* note 59, at 111; *see also* CAPE, ET AL., *supra* note 6, at 8-9.

<sup>62</sup> For example, between 1960-1975 the court heard an average of two cases a year; in 2008 hundreds of cases were heard. European Court of Human Rights, Chronological List of Judgments, Advisory Opinions, and Published Decisions, <http://www.echr.coe.int/NR/rdonlyres/15E0E23D-8D4A-4B53-B483-9B443AB99AA3/0/ListeChrono.pdf> (last visited Nov. 27, 2011).

(procedural) law.<sup>63</sup> As will be discussed below, this picture has drastically changed over the last few years.

#### IV. EU Policy on Procedural Rights of Suspects & Defendants: Background and Recent Developments

The European Union is the result of the joining together of the European Coal and Steel Community (1951), the European Economic Community (1957), and the European Atomic Energy Community (1957).<sup>64</sup> The original goal of the EU was—and to a certain extent still is—to promote economic integration within Europe through the creation of an internal market.<sup>65</sup> Nonetheless, over time the European Union's activities have widely expanded outside its original scope.<sup>66</sup> With the expansion of its activities, the European Union has become increasingly involved in human rights matters.<sup>67</sup>

Presently, even criminal law which is traditionally considered to be a field of law belonging to the exclusive domain of national governments, has become an important field of the EU's activity.<sup>68</sup> The developments in the area of European criminal law are moving forward so quickly that one could argue that, "the European Union is gradually creating a criminal justice system of its own."<sup>69</sup> Before focusing on the emergence of an EU policy on procedural rights of suspects and defendants, this article will discuss the development of criminal law as a topic of EU law.

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<sup>63</sup> *Id.*

<sup>64</sup> See RICHARD MCALLISTER, EUROPEAN UNION: AN HISTORICAL AND POLITICAL SURVEY 13, 18 (2d ed. 2010) (discussing the treaty process in forming the European Union).

<sup>65</sup> See *id.* at 2-3 (discussing the motives for consolidations).

<sup>66</sup> See *id.* at 3 (discussing the scope of EU activities and how they have remained open ended and imprecise).

<sup>67</sup> See, generally, e.g., A EUROPE OF RIGHTS: THE IMPACT OF THE ECtHR ON NAT'L LEGAL SYSTEMS, *supra* note 34.

<sup>68</sup> See, e.g., *Criminal Justice*, EUROPEAN COMMISSION, [http://ec.europa.eu/justice/criminal/index\\_en.htm](http://ec.europa.eu/justice/criminal/index_en.htm) (last visited Nov. 27, 2011).

<sup>69</sup> ANDRE KLIP, EUROPEAN CRIMINAL LAW: AN INTEGRATIVE APPROACH 13 (2009).



A. *The Emergence of Criminal Law as a Topic of EU Law (pre-Lisbon)*

Criminal law became a topic of EU law for the first time with the entering into force of the Maastricht Treaty in 1993.<sup>70</sup> This treaty established the so-called “three-pillar structure” of the European Union.<sup>71</sup> In the third pillar, “Justice and Home Affairs,” criminal law was the main enforcement mechanism.<sup>72</sup> Nonetheless, given the intergovernmental (international legal) character of this third pillar, it had its limitations. For example, the main legal instrument was the framework decisions which—other than the directive—did not have direct effect.<sup>73</sup> Furthermore, decisionmaking was done primarily through unanimity, which meant that Member States maintained control and were able to block initiatives which they considered incompatible with their national criminal justice systems.<sup>74</sup>

In the years after 1993, the activities of the European Union in the field of criminal law were further developed and deepened.<sup>75</sup> The Treaty of Amsterdam (which entered into force in 1999) made fundamental changes to the Maastricht Treaty and inter alia introduced the Area of Freedom Security and Justice (hereinafter AFSJ) to replace the former third pillar-title, “Area of Justice and Home Affairs.”<sup>76</sup> In 1999, European criminal law policy received new impetus at the European Council of Tampere by introducing mutual recognition as the cornerstone of judicial cooperation in criminal matters.<sup>77</sup>

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<sup>70</sup> *Id.* at 151.

<sup>71</sup> *Id.* at 17.

<sup>72</sup> *Id.* at 18.

<sup>73</sup> A framework decision is binding only as to the result to be achieved: the choice of form and methods is left to the national institutions. *See id.* at 53. Nonetheless, with regard to the (direct) effect of framework decisions, reference should be made to the famous *Pupino* case in which the European Court of Justice made clear that the principle of interpretation in conformity with Community Law is (also) binding in relation to third pillar law. *See, e.g.*, Case C-105/03, Criminal proceedings against Maria Pupino, 2005 E.C.R. I-5285 ¶ 18.

<sup>74</sup> *Cf.* Treaty of Maastricht on European Union art. 130, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter TEU] (describing decision making in EU industrial decision making).

<sup>75</sup> KLIP, *supra* note 69, at 17-18.

<sup>76</sup> *See* Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1, 7 (1998).

<sup>77</sup> Presidency Conclusions, Tampere European Council, VI (Oct. 15-16, 1999). In

*B. Proposal for a Framework Decision on Certain Procedural Rights (2004)*

Over the years, the emergence of criminal law as a topic of EU law has led to many achievements concerning police and judicial cooperation such as the European Arrest Warrant<sup>78</sup> and the European Evidence Warrant.<sup>79</sup> In sharp contrast, there has been little to no progress, until recently, in developing similar instruments for the creation of common standards for the protection of suspects and defendants in criminal proceedings.

Before the Lisbon Treaty entered into force, the European Union made one unsuccessful attempt to create a standard for procedural safeguards for suspects and defendants.<sup>80</sup> In 2004, the European Commission presented a proposal for a Council Framework Decision to set common minimum standards with regards to certain procedural rights applied in criminal proceedings throughout the European Union.<sup>81</sup> The original proposal contained the right to legal advice (including legal aid), the right to free interpretation and translation, specific attention for persons who cannot understand the proceedings, the right to communication and/or consular assistance, and the right to information (including the duty to inform a suspected person of his rights in writing).<sup>82</sup>

For many years, the proposed Framework Decision was the subject of heated debate among Member States. One of the main arguments of the opponents was that the Convention already provides for procedural safeguards in criminal proceedings and that there was no need for the European Union to create another

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addition to mutual recognition, the Tampere Conclusions listed approximation of substantive and procedural law as key objectives of Justice and Home Affairs. *Id.*

<sup>78</sup> European Arrest Warrant, 2008 O.J. (L 1901/1).

<sup>79</sup> European Evidence Warrant, 2008 O.J. (L 350/72).

<sup>80</sup> Procedural Rights Proposal, *infra* note 81 and accompanying text.

<sup>81</sup> *Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union*, at 9, COM (2004) 328 final [hereinafter Procedural Rights Proposal]. This Framework Decision followed a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the EU. *Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, COM (2003) 75 final (Feb. 19, 2003).

<sup>82</sup> Procedural Rights Proposal, *supra* note 81, at 2.

set of rules on this subject.<sup>83</sup> In addition, some opposing Member States argued that there was no legal basis in the EU treaties for such a proposal and that the European Union therefore did not have the competence to deal with the issue of procedural rights.<sup>84</sup> Several revised (and much more limited) counter-proposals were introduced, but due to the difficulties of the negotiation process, none of them were ever adopted.<sup>85</sup> Eventually, in 2007, no further action was planned on the procedural-rights topic and the matter—at least temporarily—disappeared from the EU's agenda.<sup>86</sup>

The failed negotiations on the 2004 proposed Framework Decision made it painfully clear how difficult it was to reach political agreement on whether and how the European Union should set a separate set of standards for procedural rights in criminal proceedings. After 2007, however, awareness grew regarding how the current discrepancies in levels of procedural safeguards between Member States could seriously affect the realization of an area of freedom, security and justice.<sup>87</sup> After all, mutual recognition—as the cornerstone of cooperation in criminal matters—relies on mutual trust and confidence and can therefore be seriously hindered by divergent standards for suspects' procedural rights.<sup>88</sup>

As a result of this consciousness, the subject of procedural rights recently resurfaced on the political agenda. As will be discussed below, since the Lisbon Treaty entered into force, it may be expected that realization of EU legislation in this field will be less problematic in the near future than before.

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<sup>83</sup> See, e.g., EUROPEAN UNION COMMITTEE, *BREAKING THE DEADLOCK: WHAT FUTURE FOR E.U. PROCEDURAL RIGHTS?*, 2006-7, H.L. 20, at 15 (U.K.) (reporting that the Attorney General expressed concerns the proposed policy was an “unnecessary duplication” of the ECtHR).

<sup>84</sup> *Id.* at 22.

<sup>85</sup> *Id.* at 10.

<sup>86</sup> See *id.* at 10.

<sup>87</sup> See generally GISELE VERNIMMEN-VAN TIGGELEN ET AL., *THE FUTURE OF MUTUAL RECOGNITION IN CRIMINAL MATTERS IN THE EUROPEAN UNION* (2009) (discussing specific issues towards mutual recognition by Member States).

<sup>88</sup> See *id.*; see also Conny Rijken, *Re-Balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters*, 47 COMMON MKT. L. REV. 1455, 1456 (2010) (finding that the application of the European Arrest Warrant in practice shows Member States try to find ways of not being obliged to cooperate with a Member State they do not trust).

### C. *The Treaty of Lisbon (2009)*

The Treaty of Lisbon entered into force on December 1, 2009.<sup>89</sup> In form, the Treaty of Lisbon incorporates the Treaty on European Union (hereinafter TEU)<sup>90</sup> and the Treaty on the Functioning of the European Union (hereinafter TFEU) and, thus, provides the platform for the European Union.<sup>91</sup> With regard to criminal and criminal procedure law in general—and more specifically the protection of rights of suspects and defendants—the Treaty of Lisbon has at least three important consequences.

First, the Treaty has introduced several institutional changes that significantly simplify the decision making process in the field of criminal law. Pursuant to the Treaty of Lisbon, the three pillar system has been abolished leaving the European Union with one institutional structure for all areas of activity; the directive then became its main legislative tool; and majority voting (instead of unanimity) its main voting mechanism.<sup>92</sup> This is important because, as the fate of the 2004 Framework Decision was made painfully clear, the unanimity-rule dominating pre-Lisbon decision making on third pillar issues made it virtually impossible to reach consensus on procedural rights matters.<sup>93</sup> Also, the directive is a more influential legislative tool than the framework decision, because *inter alia* according to the direct effect doctrine of the European Court of Justice (hereinafter ECJ), unimplemented or poorly implemented directives can actually have direct legal force.<sup>94</sup> In addition, when the provisions of a directive are “unconditional and are sufficiently precise,” they leave the Member State no room for interpretation; further, the provisions must be strictly complied with.<sup>95</sup>

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<sup>89</sup> French and Dutch voters rejected an earlier version of the treaty in 2005. *Q&A: The Lisbon Treaty*, BBC NEWS (Jan. 17, 2011), <http://news.bbc.co.uk/2/hi/europe/6901353.stm>.

<sup>90</sup> TEU, *supra* note 74.

<sup>91</sup> Paul Craig, *The Lisbon Treaty, Process, Architecture and Substance*, 33 EUR. L. REV. 137, 140 (2008).

<sup>92</sup> *Id.* at 142-43.

<sup>93</sup> See, e.g., *The Unanimity Problem: The European Union Cannot Easily Cope with a Country that Says No*, THE ECONOMIST, June 28, 2008, at 60.

<sup>94</sup> KLIP, *supra* note 69, at 48 (“[T]he Directive must be strictly complied with.”).

<sup>95</sup> *Id.*

As a result, it is fair to say that the Lisbon Treaty has considerably strengthened the legislative powers of the European Union in the field of criminal (procedure) law. More specifically, the above-mentioned institutional changes make it easier for the European Union to draw up, through directives, minimum rules on the rights of individuals in criminal procedures.<sup>96</sup>

Secondly, as a result of the Treaty of Lisbon, it is now possible for the European Union to accede to the Convention.<sup>97</sup> Debate about the accession of the European Union to the Convention had been going on for years, but had not yet led to any concrete steps.<sup>98</sup> Official talks regarding the EU's accession started in July 2010, and the European Commission has proposed negotiation directives, but it is a complicated process which is expected to take several years.<sup>99</sup> Nonetheless, once accession is realized, it is beyond doubt that this will have far-reaching consequences for the European system of human rights protection.

Third, when the Treaty of Lisbon entered into force, the Charter of Fundamental Rights of the European Union (hereinafter

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<sup>96</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 82 § 2(b), Mar. 30, 2010, 2010 O.J. (C 83/47). The treaty further stated:

To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern...

(b) the rights of individuals in criminal procedure. . . . Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

*Id.*

<sup>97</sup> Also, the fundamental rights as guaranteed by the ECtHR and as they result from the constitutional traditions common to the Member States now constituting general principles of European Union law. *See* TEU, *supra* note 74, art. 6 §§2-3.

<sup>98</sup> *See, e.g.*, FLORENCE BENOÎT RHOMER & HEINRICH KLEBES, COUNCIL OF EUROPE LAW: TOWARDS A PAN-EUROPEAN LEGAL AREA 132 (Council of Europe Publishing English ed. 2005).

<sup>99</sup> Press Release, Eur. Union, European Comm'n and Council of Eur. Kick Off Joint Talks on EU's Accession to the Convention on Human Rights (July 7, 2010), available at <http://europa.eu/rapid/> (select "Search Complete Database" hyperlink; then type 1P/10/906" into "Reference" search criteria; then select "Search;" and select title of press release).

CFREU) became legally binding.<sup>100</sup> Although there is debate on the added value of the CFREU to the Convention,<sup>101</sup> it is a fact that it creates a new, separate set of rights, freedoms, and principles which can be used by the ECJ and national courts to interpret EU law.<sup>102</sup> The CFREU includes, among other things, the right to a fair trial and respect for the rights of the defense.<sup>103</sup>

An important side-effect of the developments mentioned above is that the protection of human rights within Europe is becoming more and more complex. With the European Union expanding its activities in human rights protection, the division between the legal orders of the European Union on the one hand and the Council of Europe on the other has become increasingly unclear.<sup>104</sup> The complementary relationship between both organizations raises many complex legal questions on how the two organizations could and should coexist in the near future.<sup>105</sup> For example, an important

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<sup>100</sup> TEU, *supra* note 74, art. 6 §1.

<sup>101</sup> *See, e.g.,* KLIP, *supra* note 69, at 213 (“The added value of the Charter is limited because it does not offer much more or different rights than those that were already protected under the ECtHR”).

<sup>102</sup> *Charter of Fundamental Rights*, EUROPA (June 5, 2010), [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/combatting\\_discrimination/](http://europa.eu/legislation_summaries/justice_freedom_security/combatting_discrimination/) (select “Charter of Fundamental Rights” hyperlink) (“[W]ith the entry into force of the Lisbon Treaty, the charter was given binding legal effect.”).

<sup>103</sup> The right to an effective remedy and the right to a fair trial are laid down in article 47 of the Charter of Fundamental Rights of the European Union:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Charter of Fundamental Rights of the European Union art. 47, Dec. 13, 2000, 2000 O.J. (C 364) 1 [hereinafter CFREU]. Article 48 deals with the “[P]resumption of innocence and the rights of the defense”: “(1) Everyone who has been charged shall be presumed innocent until proved guilty according to law; (2) Respect for the rights of the defense of anyone who has been charged shall be guaranteed.” *Id.* art. 48.

<sup>104</sup> MALTE BROSIG, COOPERATION OR CONFLICT?: PROBLEMATIZING ORGANIZATIONAL OVERLAP IN EUROPE 31 (David J. Galbreath & Carmen Gedhard eds., 2010).

<sup>105</sup> *See, e.g.,* *Accession to ECtHR, Article 267 TFEU and the Role of National Courts*, ADJUDICATING EUROPE: JUDICIAL DEVELOPMENTS IN EUROPEAN LAW (June 7,

issue is how the different rights as mentioned in the Convention, in the CFREU, and in the expected new legislation to be promulgated by the European Union will relate to each other. It is clear that the rights of the CFREU have to be interpreted consistently with the Convention rights,<sup>106</sup> but, in practice, this might not be as easy as it seems. Surely, the two acts are based on the same values and principles, but their wordings differ.<sup>107</sup> This may raise confusion as to their interpretation. The same will be true for the rights of the Convention and their relationship with future regulations of the European Union on procedural safeguards in criminal proceedings. Another aspect of the matter which could add to the confusion on how European and ECtHR norms relate to each other is the fact that both legal orders have different scopes; after all, a large group of European countries are only bound by the Convention and are not members of the European Union.<sup>108</sup> Therefore their citizens will—within their national borders—only be protected by the Strasbourg standards for the protection of suspects in criminal proceedings and not by similar EU procedural safeguards.

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2010), <http://adjudicatingeurope.eu/blog/?p=461>.

<sup>106</sup> The CFREU relationship with the Convention is defined in article 52 of the CFREU which reads as follows:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

CFREU, *supra* note 103, art. 52 §3. A reference to the case law of both the ECtHR and the European Court of Justice, was included in the Preamble. *Id.* at 8. With this provision however, many questions remain unanswered (such as: which rights are equivalent to those in the ECtHR and what is the relationship between the Charter and the Strasbourg case law. For these and other problems with article 52 section 3 of the CFREU, see Lorena Rincón-Eizaga, *Human Rights in the European Union. Conflict between the Luxembourg and Strasbourg Courts Regarding Interpretation of Article 8 of the European Convention on Human Rights*, 11 *INTERNAT'L L.: REVISTA COLOMBIANA DE DERECHO INTERNACIONAL* 119, 148-49 (2008).

<sup>107</sup> Compare CFREU, *supra* note 103, prml. (recognizing the communal duty to protect human rights) with ECtHR prml. (recognition individual member states obligations to preserve human rights).

<sup>108</sup> Cf. Viviane Reding, Vice President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, The EU's Accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe (Mar. 18, 2010), available at [ec.europa.eu/commission2010-2014/reding/pdf/speeches/speech\\_20100318\\_1\\_en.pdf](http://ec.europa.eu/commission2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf).

The upcoming role of the European Union in guaranteeing citizens effective protection of fundamental rights not only raises questions about the relationship between the two different legal orders, but also complicates the relationship between the two corresponding control mechanisms: the ECtHR in Strasbourg and the ECJ in Luxembourg. With the Treaty of Lisbon's entrance into force, the Convention has become part of EU law and is therefore subject to control by the ECJ.<sup>109</sup> Furthermore, the Luxembourg Court will also be able to apply and interpret procedural safeguards as laid down in the CFREU and any EU legislation in this field.<sup>110</sup> Additionally, when the European Union accedes to the Convention, the ECtHR and its control mechanisms will also apply to EU acts.<sup>111</sup> This means that it will be possible for the ECtHR to examine whether the application and implementation of EU legislation is in conformity with Strasbourg standards. What if the ECJ's interpretation of ECtHR norms differs from the interpretation given by the Strasbourg Court and vice versa?<sup>112</sup>

With these complex legal questions on the relationship between the two different legal orders and their respective control mechanisms, there is a growing risk of confusion and legal uncertainty. Whether and how these questions will be answered in the near future remains to be seen, but it is beyond doubt that clarity on these matters is of paramount importance for the future effectiveness of European human rights protection.

#### *D. The Roadmap on Procedural Rights (2009)*

A few months before the Treaty of Lisbon entered into force,

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<sup>109</sup> Cf. Treaty of Lisbon, *supra* note 3, art. 1 (describing the pre-eminence of the ECtHR).

<sup>110</sup> Rincón-Eizaga, *supra* note 106, at 127.

<sup>111</sup> See *EU Accession to the European Convention on Human Rights*, COUNCIL OF EUROPE, <http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention> (last visited Nov. 27, 2011).

<sup>112</sup> From a procedural point of view, it might be possible that a question on procedural rights is—for example in a preliminary ruling—answered in a certain way by the ECJ and subsequently brought before the ECtHR. Until now, the two courts generally respect and follow each others judgments but there are already numerous examples of divergent interpretations, for example on the right to respect for private and family life. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 art. 8, May 13, 2004, [2004] C.E.T.S. 194; see also, Rincón-Eizaga, *supra* note 106, at 134.



the matter of procedural rights was explicitly put back on the EU's agenda by the European Commission.<sup>113</sup> Subsequently the Presidency of the Council of the European Union presented the Roadmap in which Member States agreed that measures at the European level were necessary.<sup>114</sup> The Roadmap formulated strategic guidelines for developing an area of freedom, security, and justice in Europe for the period 2010-2014.<sup>115</sup> It specifically mentioned that EU action in the field of procedural rights is essential "for the purpose of enhancing mutual trust within the European Union" and to complement and balance existing EU policy on law enforcement and prosecution.<sup>116</sup> Furthermore, the Roadmap stressed that there was room for further action on the part of the European Union "to ensure full implementation and respect of Convention standards and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards."<sup>117</sup>

The Roadmap was adopted by the European Council over December 10-11, 2009, as an explicit part of the Stockholm Programme containing guidelines for a future common policy in the field of justice and home affairs.<sup>118</sup> In the Stockholm Programme the European Council stated:

The protection of the rights of suspected and accused persons in criminal proceedings is a fundamental value of the Union, which is essential in order to maintain mutual trust between the Member States and public confidence in the Union. The European Council therefore welcomes the

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<sup>113</sup> *Communication from the Commission to the European Parliament and the Council, An area of freedom, security and justice serving the citizen*, COM (2009) 262 final (June 10, 2009) [hereinafter *An Area of Freedom*].

<sup>114</sup> Memorandum from Presidency of Council of European Union to the Delegations, Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings (July 1, 2009) [hereinafter *Roadmap Memo*], available at <http://register.consilium.europa.eu/pdf/en/09/st11/st11457.en09.pdf>.

<sup>115</sup> *Id.* ¶ 8.

<sup>116</sup> *Id.* ¶ 10.

<sup>117</sup> Resolution of the Council, *supra* note 5, ¶ 2.

<sup>118</sup> Memorandum from the European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens*, 2010 O.J. (C 115) 1 [hereinafter *Stockholm Memo*].

adoption by the Council of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which will strengthen the rights of the individual in criminal proceedings when fully implemented. That Roadmap will henceforth form part of the Stockholm Programme.<sup>119</sup>

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

- Measure A: Translation and Interpretation.
- Measure B: Information on Rights and Information about the Charges.
- Measure C: Legal Advice and Legal Aid.
- Measure D: Communication with Relatives, Employers and Consular Authorities.
- Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable.
- Measure F: A Green Paper on Pre-Trial Detention.<sup>120</sup>

According to the step-by-step approach chosen in the Roadmap, these matters should be dealt with one at a time.<sup>121</sup>

The least controversial subject of the Roadmap, the right to translation and interpretation, was adopted by the European Parliament in October 2010.<sup>122</sup>

The European Parliament is currently discussing the second measure, and is considering a proposal for a directive on the right to information in criminal proceedings.<sup>123</sup> Originally, Member States wanted to limit the scope of this directive only to suspects

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<sup>119</sup> *Id.* § 2.4.

<sup>120</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, 2010 O.J. (L 280) ¶ 10 [hereinafter RITCP].

<sup>121</sup> Stockholm Memo, *supra* note 118, at § 3.1.1.

<sup>122</sup> See RITCP, *supra* note 120, ¶¶ 1-7.

<sup>123</sup> See *Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings*, COM (2010) 392.

and defendants in cross border cases.<sup>124</sup> This led to heavy criticism since such a limitation would result in differential treatment between and discrimination among citizens of the European Union.<sup>125</sup> The draft proposal was adopted by the European Commission in July 2010, offering a right to information to all suspects and defendants, and is not limited to cross border cases.<sup>126</sup> The European Commission has also addressed Measure C of the Roadmap by adopting a draft proposal on the right to legal advice.<sup>127</sup>

In the remainder of this paper, we will analyze in more detail the development of EU regulations on the right to information in criminal proceedings (Measure B of the Roadmap) and the right to legal assistance (Measure C of the Roadmap).

#### V. Measure B: Information on Rights & Information about the Charges

The suggestion to inform suspects and accused persons of their basic rights was—at the European Union level—addressed for the first time by the European Commission in its Green Paper of February 19, 2003, on *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*.<sup>128</sup> The European Commission stated that it is important for both the investigating authorities and the persons under investigation to be fully aware of existing rights and suggested to institute a scheme requiring Member States to provide suspects and defendants with a written note of their basic rights—a Letter

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<sup>124</sup> See *id.* ¶ 4.

<sup>125</sup> See, e.g., Open Letter from international human rights organizations to European Commissioner for Justice Viviane Reding (June 29, 2010), available at <http://www.soros.org/initiatives/brussels/news/criminal-proceedings-call-20100629/Open-letter-20100629.pdf>.

<sup>126</sup> See *id.* art. 1.

<sup>127</sup> *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, COM (2011) 326 final (June 8, 2011) [hereinafter Legal Aid Proposal] available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0326:FIN:EN:PDF>.

<sup>128</sup> *Commission Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union* (Feb. 19, 2003) [hereinafter Legal Access Proposal], available at [http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003\\_0075en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0075en01.pdf).

of Rights.<sup>129</sup> According to the European Commission, this suggestion received a “favourable response” during its consultations period prior to the Green Paper.<sup>130</sup> In the proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union of April 28, 2004,<sup>131</sup> the European Commission proposed a written Letter of Rights notifying suspects of their rights to be introduced as one of the common minimum standards to be regulated in a framework decision.<sup>132</sup> To require Member States to produce a short, standard written statement of basic rights and to make it compulsory for all suspects at the earliest possible opportunity—especially before the first police interrogation—in a language that the suspect would be able to understand, was, according to the European Commission, a “simple and inexpensive way to ensure an adequate level of knowledge.”<sup>133</sup> Article 14 of the proposed framework decision contained the following text:

1. Member States shall ensure that all suspected persons are made aware of the procedural rights that are immediately relevant to them by written notification of them. This information shall include, but not be limited to, the rights set out in this Framework Decision.

2. Member States shall ensure that a standard translation exists of the written notification into all the official Community languages. The translations should be drawn up centrally and issued to the competent authorities so as to ensure that the same text is used throughout the Member State.

3. Member States shall ensure that police stations keep the

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<sup>129</sup> *Id.* § 8.1.

<sup>130</sup> *Id.*

<sup>131</sup> *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*, COM (2004) 328 final (Apr. 28, 2004) [hereinafter *Procedural Rights Proposal*].

<sup>132</sup> *Id.* ¶ 24. Other common minimum standards are access to legal advice, access to free legal interpretation and translation, special features for vulnerable suspects, and access to consular assistance. *Id.* ¶¶ 43, 26, and 77.

<sup>133</sup> *Id.* ¶ 45.

text of the written notification in all the official Community languages so as to be able to offer an arrested person a copy in a language he understands.

4. Member States shall require that both the law enforcement officer and the suspect, if he is willing, sign the Letter of Rights, as evidence that it has been offered, given and accepted. The Letter of Rights should be produced in duplicate, with one (signed) copy being retained by the law enforcement officer and one (signed) copy being retained by the suspect. A note should be made in the record stating that the Letter of Rights was offered, and whether or not the suspect agreed to sign it.<sup>134</sup>

As there was insufficient consensus between Member States,<sup>135</sup> the original draft framework decision was significantly diluted.<sup>136</sup> At the end of 2006, a more limited compromise proposal was put forward by the Austrian Presidency, listing general rights such as the right to information, the right to legal assistance, and the right to interpretation.<sup>137</sup> In this proposal the concept of a written Letter of Rights was abolished and the right to information was phrased in general terms in article 2:

1. Member States shall ensure that any person subject to criminal proceedings is provided with effective information, in a language which he or she understands, on the nature of the suspicion and of the fundamental procedural rights that he or she has.

2. This information shall be delivered as soon as these rights become relevant.

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<sup>134</sup> *Id.* art. 14, ¶¶ 1-4.

<sup>135</sup> *Proposal for a Council Framework Decision on the right to interpretation and translation in criminal proceedings*, SEC (2009) 916, at 46 (July 8, 2009).

<sup>136</sup> *Id.*

<sup>137</sup> Memorandum from the Presidency to COREPER/Council, *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union* art. 2 (May 19, 2006), available at <http://register.consilium.europa.eu/pdf/en/06/st09/st09600.en06.pdf>.

3. The information referred to in paragraph 1 shall include in particular information on the right to legal assistance, the right to such assistance free of charge and the right to free interpretation and translation.<sup>138</sup>

Nevertheless, even a more watered-down version that did not include the third paragraph of the proposed article 2,<sup>139</sup> could not find agreement.<sup>140</sup>

On the eve of the Lisbon Treaty's enforcement, the Swedish Presidency took up the issue of procedural safeguards by presenting the aforementioned Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings which provided for a step-by-step approach.<sup>141</sup> According to the Roadmap, the second step, Measure B is described as follows:

Short explanation: The suspect or defendant is likely to know very little about his/her rights. A person that is suspected of a crime should get information on his/her basic rights in writing[, ideally by way of a letter of rights]. Furthermore, that person should also be entitled to receive information about the nature and cause of the accusation against him or her. The right to information should also include access to the file for the individual concerned.<sup>142</sup>

#### *A. Research Project: An EU-Wide Letter of Rights*

To gain insight in the matter, a study has been conducted into the way suspects in the EU Member States are informed in writing of their rights in criminal proceedings.<sup>143</sup> In this study, a

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<sup>138</sup> *Id.*

<sup>139</sup> Memorandum from the Presidency to COREPER (Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union) art. 2, U.N. Doc No. E/82/07DROIPEN30 (Apr. 2, 2007) available at <http://www.statewatch.org/news/2007/apr/eu-crim-proced-8182-07.pdf>.

<sup>140</sup> *Id.*

<sup>141</sup> See generally Roadmap Memo, *supra* note 114 (outlining procedural safeguards in criminal proceedings).

<sup>142</sup> *Id.* at 5.

<sup>143</sup> TARU SPRONKEN, EU-WIDE LETTER OF RIGHTS IN CRIMINAL PROCEEDINGS:

normative framework has been developed based on the jurisprudence of the ECtHR to establish standards and a legal basis for information that should be given to the suspect in the initial phase of police investigations.<sup>144</sup> Finally, a model has been designed for an EU-wide Letter of Rights to be applicable throughout the European Union that was intended to function as an inspiration for initiatives on the national level as well as on the EU level. The research concluded in July 2010.<sup>145</sup>

The study revealed that in seventeen (of the twenty-seven) EU Member States suspects are informed of their rights by a Letter of Rights or a similar standardized form.<sup>146</sup> In the documents that were gathered, twelve topics could be identified that were addressed, although in different compounds and with different frequency.<sup>147</sup> “All documents contain information on legal assistance, although to a lesser extent information on legal aid” is provided.<sup>148</sup> Also, the right to silence, to have contact with trusted persons, the right to interpretation and translation, medical care and consular assistance are dealt with in a considerable number of Letters of Rights and similar forms.<sup>149</sup> With lesser frequency access to the file, information on charge or suspicion, detention and custody, provisions for vulnerable suspects, conditions of detention, and participation in proceedings are mentioned.<sup>150</sup>

There were major differences “as to how and in what kind of format the information is provided. In some Member States information on rights is included in a standardised [sic] form of the record of the questioning of the suspect by the police,”<sup>151</sup> which clearly functions as a “checklist for the interrogating officer who has to read out the rights to the suspect. The suspect has to sign the form in order to record that the interrogating officer has

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TOWARDS BEST PRACTICE (Intersentia 2011).

<sup>144</sup> *Id.* at 43-46.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 17.

<sup>147</sup> *Id.* at 39-40.

<sup>148</sup> SPRONKEN, *supra* note 143, at 40.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

performed his duty to caution the suspect.”<sup>152</sup> Other Member States provide information in the form of leaflets or brochures that obviously are meant to be handed out to suspects.<sup>153</sup>

In many cases the rights are formulated in very formal and legal language, even using lengthy quotations of legal provisions, which are probably very difficult to understand for lay people.<sup>154</sup> Nonetheless, there are also examples of more or less successful efforts to draft the information in a more simple and understandable form.<sup>155</sup> Where juveniles are concerned, it has to be borne in mind that on average within the European Union, children from the age of fifteen years are considered criminally liable.<sup>156</sup> Some Member States, however, apply diverging age limits.<sup>157</sup> Letters of Rights should also provide understandable information for this category of especially vulnerable suspects.

Only a few Member States have the Letter of Rights available in different languages—a detriment to the effectiveness of a Letter of Rights for foreign suspects. England and Wales, Germany, Sweden, and Belgium are noticeable exceptions to this rule providing for a Letter of Rights (respectively written information) translated in more than forty languages.<sup>158</sup> Interviews conducted with practitioners provide evidence that Member States using a Letter of Rights appear to have a well-organized procedural framework to support it. The effectiveness of the Letter of Rights and its procedural framework is, however, very dependent on the way it is brought into practice. The attitude of the police is pivotal to the question of whether or not the Letter of Rights is given in accordance with the underlying legal obligations.<sup>159</sup> In general, the attitude of the police towards the Letter of Rights is that it is considered a nuisance, rather than a valuable procedural right for

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<sup>152</sup> *Id.* (examples in the Czech Republic, Luxembourg, and Estonia.)

<sup>153</sup> SPRONKEN, *supra* note 143, at 40.

<sup>154</sup> *Id.* at

<sup>155</sup> *See id.* (comparing the Letters of Rights of Austria, Germany, Luxembourg, and Spain).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (“[F]or example in Cyprus, children from the age of seven can be considered liable and in France, children from the age of ten are criminally liable”).

<sup>158</sup> SPRONKEN, *supra* note 143, at 41.

<sup>159</sup> *Id.*



the defense.<sup>160</sup> This means that the Letter of Rights is treated as a formality, which gets in the way of the interrogation.<sup>161</sup>

Consequently, in the opinion of interviewed lawyers, police often negatively impact the effectiveness or value of the Letter of Rights,<sup>162</sup> for example, by discouraging the person deprived of his or her liberty to exercise his or her defense rights, not explaining these rights adequately, or by starting with informal chats before informing about the defense rights.<sup>163</sup> It therefore seems that in many Member States adequate instructions as to how and when to make the Letter of Rights available to the person deprived of his liberty is lacking.

The model for an EU-wide Letter of Rights that has been developed within the abovementioned study addresses the situation where a person is deprived of his or her liberty because he or she is suspected of having committed a criminal offence. The model contains the core basic rights that are applicable from the first contact of the suspect with the police in relation to a criminal investigation and are based on the norms that derive from the Convention and other international treaties.<sup>164</sup>

#### *B. Proposed Directive on the Right to Information in Criminal Proceedings*

At the moment of finalizing the results of the Letter of Rights study, the European Commission presented a proposal for a directive on the right to information in criminal proceedings, including an indicative Model Letter of Rights inspired by the model developed in the Letter of Rights study.<sup>165</sup> The most striking difference between the model and the proposed directive is that the latter originally did not address the right to silence. This gave rise to criticism from the Council and from within the European Parliament and subsequently led to the proposal that a suspect should also be informed of his or her right to silence.<sup>166</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> SPRONKEN, *supra* note 143, at 41.

<sup>164</sup> *Id.* app. I.

<sup>165</sup> *See, e.g.,* app.I; also SPRONKEN, *supra* note 143, at 44 (internal citation omitted).

<sup>166</sup> Cf. Comm. on Civil Liberties, Justice and Home Affairs, Draft Rep. on 467th

The fact that the right to silence was not included in the first draft of the proposed directive is a good example of the difficulties that are faced when trying to draft practical rules for implementation of procedural safeguards aimed at application throughout the European Union. Evidently, the right to silence is considered to be one of the fundamental features of the concept of fair trial as formulated by the ECtHR and is applicable immediately upon arrest or before the first questioning of a suspect.<sup>167</sup> Therefore, it is quite astonishing that this right would not be included in a directive setting minimum standards. Member States might be hesitant to include the right to silence in the first draft due to possible national restrictions or exceptions to the right to silence. For example, in England and Wales adverse inferences may be drawn from using the right to silence.<sup>168</sup> Also, in some Member States the right to silence does not apply in situations where a person is not yet suspected of an offense.<sup>169</sup>

## VI. Measure C: Right to Legal Advice and Legal Aid

In the Roadmap Procedural Safeguards Measure C, concerning Legal Advice and Legal Aid are explained as follows:

The right to legal advice (through a legal counsel) is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure full equality of access to the aforementioned right to legal advice.<sup>170</sup>

In June 2011, the European Commission adopted a draft proposal for a directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest.<sup>171</sup>

The objective of the directive is to lay down rules governing the

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Sess., Dec. 8-9, 2010, U.N. Doc.COM (2010) 0392 (Dec. 20, 2010) (amending original draft to include a right to silence).

<sup>167</sup> *Id.* at 23.

<sup>168</sup> SPRONKEN, *supra* note 143, at 28.

<sup>169</sup> *Id.*

<sup>170</sup> Roadmap Memo, *supra* note 114, at 5.

<sup>171</sup> *See generally* Legal Aid Proposal, *supra* note 127.

rights of suspected and accused persons and persons subject to an European Arrest Warrant to have access to a lawyer in criminal proceedings against them, and the right of suspects and accused persons who are deprived of their liberty to communicate upon arrest with a third party.<sup>172</sup>

The design of the proposed directive is ambitious. The aim is that the directive should apply from the time a person is made aware by the competent authorities of a Member State that he or she is suspected or accused of having committed a criminal offence and establishes that all suspected and accused persons should have access to a lawyer as soon as possible—at the latest upon deprivation of liberty before the start of the questioning.<sup>173</sup> Access to a lawyer must be granted upon and during questioning and in principle no derogations of this right should be possible.<sup>174</sup> Article four of the proposed directive expressly states that the lawyer shall have the right to be present at any questioning and hearing and shall have the right to ask questions, request clarification, and make statements that must be recorded.<sup>175</sup> In addition, the confidentiality of meetings between the suspect or accused person and his or her lawyer and any other form of communication should be ensured.<sup>176</sup> The proposed directive contains detailed conditions for the waiver of these rights.<sup>177</sup>

The proposed directive is based on recent Strasbourg case law that has confirmed the importance of legal assistance for a proper defense in all its aspects and has made clear that the right to legal assistance arises immediately upon arrest.<sup>178</sup> This case law is also referred to as the *Salduz* Doctrine.<sup>179</sup> Especially in the early stages of the criminal investigation, it is the task of the lawyer, amongst other things, to ensure respect for the right of the accused not to

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<sup>172</sup> *Id.* at 5.

<sup>173</sup> *Id.*

<sup>174</sup> *See id.* at 7.

<sup>175</sup> *Id.* at 17.

<sup>176</sup> Legal Aid Proposal, *supra* note 127, at 18.

<sup>177</sup> *See id.* at 7-8, 18-19.

<sup>178</sup> *See Salduz v. Turkey*, 49 Eur. Ct. H.R. 19, 427-38 (2008).

<sup>179</sup> *Id.*; *see also* Legal Access Proposal, *supra* note 128, at 13-14 (describing the application of the *Salduz* Doctrine).

incriminate himself.<sup>180</sup> The ECtHR has stressed that the principle of equality of arms requires that a suspect, starting from the first police interrogation, must be afforded the whole range of interventions that are inherent to legal advice such as discussion of the case, instructions by the accused, the investigation of facts, search for favorable evidence, preparation for interrogation, support of the suspect, and control of the conditions under which a suspect is detained.<sup>181</sup> The ECtHR has even set standards for sanctioning breaches of the right to legal assistance by ruling that incriminating statements obtained from suspects who did not have access to a lawyer may not be used as evidence.<sup>182</sup>

This directive will probably be more difficult to negotiate than the previous two on the right to interpretation and translation and on the right to information; first, the impact on the jurisdictions that still have strong inquisitorial features will be immense. There are many Member States where the right for a lawyer to be present during interrogations is not safeguarded,<sup>183</sup> where access is not granted immediately upon arrest,<sup>184</sup> or where access can be restricted when the interests of the investigation so require.<sup>185</sup>

Another hurdle will be the directive's financial consequences for the Member States. The right to legal assistance is inextricably bound up with the right to legal aid.<sup>186</sup> This is a controversial issue on which there is no conformity within the EU Member States; this includes mechanisms to ensure that legal advice is available, minimum requirements regarding eligibility for legal aid as well as minimum quality criteria and remuneration for lawyers providing legal assistance paid for by the state.<sup>187</sup> The proposed directive

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<sup>180</sup> SPONKEN, *supra* note 143, at 55.

<sup>181</sup> CAPE ET AL., *supra* note 6, §4.3, at 38-40.

<sup>182</sup> See *Salduz*, 49 Eur. Ct. H.R. at 438; see also *Sebalj v. Croatia*, 49 Eur. Ct. H.R., at 438 (2011).

<sup>183</sup> See, e.g., EU Report, *supra* note 59, at 52 (explaining the policies of the Netherlands, Belgium, and Ireland).

<sup>184</sup> See *id.* at 12 (citing policy implementations of Austria, Germany, Denmark, Hungary, Ireland, Luxembourg, and Sweden).

<sup>185</sup> See *id.* (stating supervision of communications policies in Austria, Belgium, The Netherlands, Poland, Romania, Czech Republic, Spain, Sweden and the United Kingdom).

<sup>186</sup> *Id.* at 88-89.

<sup>187</sup> *Id.* at 84.

does not seek to regulate the issue of legal aid that has been postponed to a later stage.<sup>188</sup> Nevertheless, it can hardly be expected that when negotiating the right to access to a lawyer Member States will not have the financial consequences in the backs of their minds.

To illustrate what kind of challenges will have to be taken up, the following sections give an overview of the way legal assistance is dealt with in the European countries that were examined in the research project Effective Criminal Defense in Europe mentioned above.

#### A. Belgium

In Belgium there is a constitutional right to legal assistance.<sup>189</sup> Nonetheless, there are only limited rights to legal assistance during interrogation by the police or by an investigating judge, seemingly in breach of the *Salduz* Doctrine.<sup>190</sup> As a rule, such interviews are currently not even audio-recorded.<sup>191</sup> The police are permitted to interrogate during the twenty-four hours following arrest,<sup>192</sup> and there is discussion as to whether this should be extended to forty-eight hours.<sup>193</sup>

There is a system of “first” and “second” line legal aid.<sup>194</sup> All trainee lawyers are required to do some work for the bureau.<sup>195</sup> There is a means test and a merits test.<sup>196</sup> A single person is eligible for free legal aid if they have a monthly net income below €865 and, subject to a contribution, up to €1,112.<sup>197</sup> Remuneration is low and slow, being made retrospectively on the basis of points per element of a case.<sup>198</sup> Thus, the average remuneration per case

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<sup>188</sup> *Id.*

<sup>189</sup> CAPE ET AL., *supra* note 6, §2.2.2, at 78-79.

<sup>190</sup> See *Salduz v. Turkey*, 49 Eur. Ct. H.R. 19, 437 (2008).

<sup>191</sup> EU Report, *supra* note 59, at 355-56.

<sup>192</sup> See CAPE ET AL., *supra* note 6, §2.2.2, at 79.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* §1.4, at 71 (showing that the first line legal aid is advice from a ‘house of justice’. Second-line assistance is obtained from a Legal Aid Bureau).

<sup>195</sup> See *id.*

<sup>196</sup> SPRONKEN, *supra* note 143, at 53-54.

<sup>197</sup> See CAPE ET AL., *supra* note 6, §1.4, at 72.

<sup>198</sup> *Id.* at 72.

for the Flemish bar appears to be as low as €367.<sup>199</sup> There is a lack of research into the roles played by Belgian lawyers and other criminal justice actors. The majority of defense lawyers appear to adequately represent their clients. Nonetheless, there also seems to be a minority who are not specialized in this field and who are deemed ignorant and incompetent by the judiciary. This may be caused by the lack of minimum quality requirements and the fact that legal aid cases are often dealt with by trainee lawyers.

### *B. England and Wales*

In England and Wales, there is a statutory right to consult a lawyer privately at any time during detention at a police station.<sup>200</sup> Approximately half of all detainees are thought to ask for it, and the majority also receive it.<sup>201</sup> Legal assistance at the police station is provided free of charge regardless of the financial circumstances of the suspect.<sup>202</sup> Recent changes have been made to this scheme,<sup>203</sup> and there is a concern that the government may intend to restrict the availability of legal aid.<sup>204</sup> Access to a lawyer can be delayed in specified circumstances for up to thirty-six hours, but in practice this rarely happens.<sup>205</sup> There are practical problems with the operation of the police station legal advice scheme because of the lack of private telephone facilities in police stations.<sup>206</sup> Additionally, there may be difficulties with regard to privacy concerning consultations in prisons or at courts due to inadequate facilities.<sup>207</sup>

It is likely that around one third of defendants in magistrates' courts and a significantly higher proportion in the higher courts receive legal aid.<sup>208</sup> Annual expenditure on criminal legal aid was

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* §2.2.2, at 122-23.

<sup>201</sup> *Id.* at 124.

<sup>202</sup> See CAPE ET AL., *supra* note 6, §2.2.2, at 72.

<sup>203</sup> See *id.* at 124-25.

<sup>204</sup> *Id.* at 115.

<sup>205</sup> *Id.* at 124; see also *R v. Samuel* [1988] 1 Q.B. 615.

<sup>206</sup> See CAPE ET AL., *supra* note 6, §2.2.2, at 127.

<sup>207</sup> *Id.* at 127; see *R v. Condon* [1997] 1 W.L.R. 827.

<sup>208</sup> CAPE ET AL., *supra* note 6, §2.2.2, at 127 (citing MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2006, 2007, Cm. 7373 (U.K.)).

€1.4 billion in 2007-2008.<sup>209</sup> Expenditure peaked in 2006 but has been falling since then.<sup>210</sup> It appears likely that around six percent of all solicitors and forty percent of all barristers undertake criminal work (there is a split legal profession).<sup>211</sup> The level of remuneration for legal aid work is controversial and may be of particular concern to solicitors and more junior barristers.

### C. Finland

In Finland, a suspect or defendant has a right to representation, which need not be carried out by a lawyer.<sup>212</sup> Legal aid is guaranteed by the Finnish constitution and international human rights conventions.<sup>213</sup> Legal aid has a “dual nature”—it is provided through public legal aid offices and private attorneys, who may or may not be members of the Finnish Bar.<sup>214</sup> The fact that a lawyer need not be a member of the bar association raises issues about the quality of what are sometimes graphically described as “wild lawyers.”<sup>215</sup> Eligibility for legal aid is set at a net income of less than €1,500 per month for a single person.<sup>216</sup> Approximately eighty percent of the population is estimated to be eligible.<sup>217</sup> Assistance from a publicly funded private practitioner may be available in all serious cases but not in more straightforward ones, such as drunk driving.<sup>218</sup> The court may appoint a public defender without applying a means test in certain types of cases, even against the wishes of the suspect.<sup>219</sup> A criminal suspect or defendant in custody is entitled to legal representation free of charge.<sup>220</sup> A public defender is free;

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<sup>209</sup> *Id.* at 115.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 116 (citing LEGAL SERVICES COMMISSION, ANNUAL REPORTS AND ACCOUNTS, 2006/07, H.P. 716 (U.K.)).

<sup>212</sup> See CAPE ET AL., *supra* note 6, §2.2.2 at 177.

<sup>213</sup> *Id.* at 174 (citing SUOMEN PERUSTUSLAKI [CONSTITUTION], Ch.2, § 21 (Fin.)).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 175.

<sup>216</sup> *Id.*

<sup>217</sup> See CAPE ET AL., *supra* note 6, §2.2.2 at 176 (internal citations omitted).

<sup>218</sup> *Id.* at 176.

<sup>219</sup> *Id.* at 177.

<sup>220</sup> See *id.* (citing HENRIKKA ROSTI, JOHANNA NIEMI, & MARJUKKA LASOLA, LEGAL AID AND LEGAL SERVICES IN FINLAND 94, (Research report No. 237, 2008)).

whereas a private lawyer's services are means-tested.<sup>221</sup> In practice, suspects tend to choose private lawyers.<sup>222</sup> Indeed, private lawyers constituted around two-thirds of all appointments in 2007.<sup>223</sup> Basic remuneration is €100 per hour, with a basic maximum from the end of 2009 of eighty hours, down from the former limit of up to one hundred hours, although an extension of another thirty hours may be available in difficult cases.<sup>224</sup>

#### *D. France*

In France, when a suspect was held *Garde a Vue* prior to a change of the procedural law (following the *Salduz* judgment of the ECtHR), a right to consultation with a lawyer was allowed for an arbitrary period of thirty minutes prior to the initial police interview.<sup>225</sup> On April 15, 2011, the full court of the *Cour de cassation* ruled that the new rights of the suspect to be informed of their right to silence and to have a lawyer present during the interrogation should take effect immediately, without the need for legislation.<sup>226</sup> Although this led to chaotic situations in which lawyers attended interrogations at police stations,<sup>227</sup> it is not clear yet how lawyers will take up their new task. The role of the defense lawyer has been dismissively described as that of a "tourist" or "social worker."<sup>228</sup> Legal aid is organized through the local bar and predominantly utilizes inexperienced lawyers or

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<sup>221</sup> *Id.*

<sup>222</sup> CAPE ET AL., *supra* note 6, § 2.1 at 179 (citing MARJUKKA LITMALA, KARI ALASAARI, & CHRISTA SALOVAARA-KARSTU, OIKEUSAPU-UUDISTUKSEN SEURANTATUTKIMIKSEN OSARAPORTTI II 36 (Helsinki: Oikeuspoliittisen tutkimuslaitos 2007)).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 179 (citing Legal Aid Act, 2002, art. 257 (Fin.)).

<sup>225</sup> *Id.* at 223.

<sup>226</sup> Arrêt no. 589-592, Cour de Cassation, [supreme court for juvenile matters] crim; Apr. 21, 2011, Bull. Crim., No. 4, (Fr.), *available at* [http://www.courdecassation.fr/jurisprudence\\_2/assemblee\\_pleniere\\_22/presidence\\_relatif\\_19793.html](http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/presidence_relatif_19793.html). This proceeding followed a finding by the ECtHR that the accused's rights had been violated. *See Brusco v. France*, App. No. 1466-07 (2010), *available at* <http://www.echr.coe.int> (follow "HUDOC" hyperlink; then search "Brusco v. France" in "Case Title" search box; then select "search" icon; then select "1. AFFAIRE BRUSCO V. FRANCE" hyperlink) (finding France in violation of the *Salduz* requirements).

<sup>227</sup> CAPE ET AL., *supra* note 6, at 225.

<sup>228</sup> *Id.* at 223.



trainees.<sup>229</sup> Problems of confidential consultation between lawyers and their clients persist through the instruction stage, with little opportunity for private consultation.<sup>230</sup> Criminal legal aid expenditure in 2006 was just over €100 per case.<sup>231</sup> Eligibility for free legal aid for someone with no dependants is set at a net income of below €911 a month.<sup>232</sup> This is just below the level of the minimum wage.<sup>233</sup> Remuneration is significantly below private rates, as well.<sup>234</sup> Interestingly, some disrespect for legal aid lawyers was reported by defendants themselves because of the low status and remuneration of legal aid lawyers.<sup>235</sup>

### *E. Germany*

In Germany, there is mandatory legal representation in some serious cases.<sup>236</sup> In less serious cases, there may also be discretionary legal representation.<sup>237</sup> In the case of mandatory representation, a lawyer is appointed by the court, although the court will often take note of the defendant's preference.<sup>238</sup> The state scheme guarantees payment to counsel on the basis of recouping the cost from the defendant.<sup>239</sup> The scheme is geared to representation at the trial stage.<sup>240</sup> Eligibility for legal aid is set at just under €1,000 a month for a single person.<sup>241</sup> The state does not seek to recover the legal aid costs if the defendant is acquitted or if the defendant's income is below the minimum.<sup>242</sup> In

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<sup>229</sup> *Id.* at 224 (citing Stuart Field & Andrew West, *Dialogue and the Inquisitorial Tradition: French Defense Lawyers in the Pre-Trial Criminal Process*, 14 CRIM. L.F. 272, 314 (2003)).

<sup>230</sup> *Id.* at 226.

<sup>231</sup> *Id.* at 217.

<sup>232</sup> *Id.* at 215.

<sup>233</sup> See CAPE ET AL., *supra* note 6, at 216.

<sup>234</sup> *Id.* at 217.

<sup>235</sup> *Id.* at 218.

<sup>236</sup> See *id.* at 277.

<sup>237</sup> See *id.*

<sup>238</sup> See CAPE ET AL., *supra* note 6, at 278 (citing STRAFPROZEBORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, §142 (Ger.)).

<sup>239</sup> *Id.* at 262.

<sup>240</sup> *Cf.* at 264.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* (citing STRAFPROZEBORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], Apr.

exceptional cases requiring mandatory representation, the court may appoint a lawyer even where the defendant has himself appointed one.<sup>243</sup> This can happen when judges suspect that retained counsel may “drop out” or because the appointed lawyer “ideologically” sides with the defendant or delays the proceedings.<sup>244</sup> State authorities are bound to assist a defendant with his or her choice of counsel.<sup>245</sup> This assistance requires more than simply providing a list of lawyers and extends to providing guidance.<sup>246</sup> There are privately organized regional networks of lawyers who operate emergency schemes to provide assistance, sometimes with the support of the regional bar association.<sup>247</sup> There is no available information about overall expenditure on criminal legal aid.

#### *F. Hungary*

Hungary has a system of mandatory legal representation in a range of circumstances including, where it applies, during the investigative stage and at trial.<sup>248</sup> Representation is mandatory during certain special procedures, such as expedited and in absentia hearings.<sup>249</sup> As a result, in 2006 and 2007, over seventy percent of defendants were represented by a lawyer.<sup>250</sup> If defendants have no pre-existing lawyer, the prosecution will often not wait while one is identified but will proceed with the investigation in his or her absence.<sup>251</sup> Defense counsel must be appointed before the first interrogation, but evidence suggests that attendance at such interrogations is variable over the country and only occurs in around one-third of cases nationally.<sup>252</sup> This

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7, 1987, BUNDESGESETZBLATT, at §467, para. 1, (Ger.).

<sup>243</sup> See CAPE ET AL., *supra* note 6, at 278.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 279.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 302.

<sup>248</sup> See CAPE ET AL., *supra* note 6, at 333 (citing 1978. évi IV. törvénya Büntető Törvénykönyvről (Act IV of the 1978 Civil Code) (Hung.)).

<sup>249</sup> *Id.* at 334-35 (citing 1978. évi IV. törvénya Büntető Törvénykönyvről (Act IV of the 1978 Civil Code) (Hung.)).

<sup>250</sup> *Id.* at 335.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

statistic appears to reflect a very short period—in one district, an average of only thirty minutes—between notification to the lawyer and the start of an interrogation.<sup>253</sup> Notification to the defense lawyer is often made by fax rather than telephone, and the police interview may commence without direct contact with the lawyer.<sup>254</sup> A crucial systemic problem in this scheme is that defense lawyers are chosen by the investigating authorities.<sup>255</sup> This has resulted in an overly close relationship between some defense lawyers and the prosecution (those who give them work).<sup>256</sup>

There is credible evidence of low quality of appointed lawyers, whose approach is reportedly less thorough than those lawyers retained directly by their clients.<sup>257</sup> If the appointed lawyer does not attend trial in a relatively straightforward case, the judge will appoint another lawyer on the spot.<sup>258</sup> To anticipate this, the Budapest Bar Association operates a scheme under which trainees—with law degrees but who have not passed the bar exam—take turns in being on duty to pick up such cases.<sup>259</sup> Some judges have questioned the quality this representation provides.<sup>260</sup> The maximum time that a representative has to study the file in such circumstances is half an hour.<sup>261</sup> Additionally, trainees provide defense in local courts theoretically under the professional supervision of their supervisor.<sup>262</sup> Thus, trainees undertake a considerable proportion of assistance and representation during the interrogation stage and in local courts.<sup>263</sup> Questions arise as to the quality of such representation since neither the Ministry of Justice

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<sup>253</sup> CAPE ET AL., *supra* note 6, at 336.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 337.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 337 (citing ANDRAS KADAR, PRESUMPTION OF GUILT: INJURIOUS TREATMENT AND THE ACTIVITY OF DEFENSE COUNSELS IN CRIMINAL PROCEEDINGS AGAINST PRE-TRIAL DETAINEES, (Budapest: Hungarian Helsinki Committee, 2004)).

<sup>258</sup> CAPE ET AL., *supra* note 6, at 338.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* (citing 1998. évi XIX. törvénya Büntető Törvénykönyvről (Act XIX of the 1998 Civil Code) (Hung.)).

<sup>263</sup> See CAPE ET AL., *supra* note 6, at 338

nor bar associations monitor quality.<sup>264</sup> A 1999 study, for example, suggested inadequate standards of representation by lawyers appointed to act for juveniles.<sup>265</sup> Payment of defense lawyers in legal aid cases is made strictly based on regulated fee requests.<sup>266</sup> This payment scheme fragments any overall accountability for the proper working of the system as a whole.

Where defendants are in detention, there are practical restrictions on contact between them and their lawyers: telephone calls are limited, and prisons can be a long way from the lawyer's office, impeding physical access.<sup>267</sup> Some prisons have only one interview room.<sup>268</sup> As a consequence, busy lawyers cannot always see their client, even when they do attempt to visit them in prison.

### *G. Italy*

In Italy, a suspect generally cannot be questioned by the police in the absence of a lawyer, regardless of the gravity of the case.<sup>269</sup> Legal assistance is mandatory in all cases.<sup>270</sup> The police or prosecutor must appoint a lawyer if the suspect does not have one.<sup>271</sup> Ex officio lawyers are appointed by the bar association from a pool of lawyers who have attended a specified course.<sup>272</sup> The appointment is made using a computer-based system that matches competence with the requirements of the case.<sup>273</sup> The suspect or defendant is required to pay the costs of the lawyer, except where his or her annual income is below €9,300.<sup>274</sup> There are no "taper-like" arrangements to mitigate the effect for those suspects or defendants who are just over the financial limit. Moreover, a lawyer must pursue the debt vigorously against his or

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<sup>264</sup> *Id.* at 340; *see also* CSABA FENYVESI, THE DEFENSE COUNSEL: ABOUT THE DEFENSE COUNSEL'S ROLE AND STATUS IN THE CRIMINAL PROCEDURE 338 (Budapest-Pecs: Dialóg Campus Kiadó 2002).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 342.

<sup>267</sup> *Id.*

<sup>268</sup> *See* CAPE ET AL., *supra* note 6, at 354.

<sup>269</sup> *Id.* at 395.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 396.

<sup>272</sup> *Id.* at 387.

<sup>273</sup> *See* CAPE ET AL., *supra* note 6, at 412.

<sup>274</sup> *Id.*

her clients in order to secure state payment of the fee in the case of default.<sup>275</sup> This can affect lawyer-client confidence. Legal aid fees are low, the average being between €1,000-€1,500 per case, which is around one-fourth of the private rate.<sup>276</sup> There is, however, a practice in less serious cases to appoint pro bono lawyers for either political or ethical reasons.<sup>277</sup>

The number of grants and the cost of legal aid have grown rapidly in recent years.<sup>278</sup> In the decade following 1996, the cost of legal aid rose from €4 million to €70 million.<sup>279</sup> Legal representation is required at trial and judges will appoint a lawyer ex officio if the defendant has not done so.<sup>280</sup> Culturally, Italian defense lawyers act adversarially.<sup>281</sup> Lawyers must be members of the bar association, which requires successful completion of the bar examination.<sup>282</sup> There is a voluntary association of criminal practitioners, the Penal Chamber, which is organized nationally as well as locally.<sup>283</sup> A voluntary code of professional conduct drafted by the Penal Chamber supplements the compulsory national bar association code.<sup>284</sup>

#### *H. Poland*

In Poland, responsibility for granting legal aid rests with the court and there is concern that judges may be influenced by budgetary considerations.<sup>285</sup> There is no separate legal aid budget, and there is a lack of statistical information on legal aid.<sup>286</sup> There is, in principle, a right to be represented by a lawyer at all stages of

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<sup>275</sup> *Id.* (noting that court appointed counsel “must carry out every step to obtain their payment. . . even. . . sue their client”).

<sup>276</sup> *Id.* at 388.

<sup>277</sup> *Id.* at 389.

<sup>278</sup> See CAPE ET AL., *supra* note 6, at 388.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 396-97.

<sup>281</sup> See *id.* at 397 (explaining that it is common for defense lawyers to “attack virtually every point of the prosecutor’s argument, even if it is supported by very strong evidence indicating the defendant’s guilt”).

<sup>282</sup> *Id.*

<sup>283</sup> See CAPE ET AL., *supra* note 6, at 398.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 432-33.

<sup>286</sup> *Id.* at 433.

criminal proceedings, and a suspect must be informed of this right.<sup>287</sup> Nonetheless, legal aid does not cover the period prior to the first court hearing concerning pre-trial detention.<sup>288</sup> Thus, police interviews may be conducted in the absence of legal representation.<sup>289</sup> The courts may employ expedited proceedings, in which legal representation is required.<sup>290</sup> Communication between a lawyer and his or her client can be supervised during the first fourteen days of pre-trial detention.<sup>291</sup> The legality of this practice has been upheld by the Constitutional Court, but there is doubt as to whether the ECtHR would come to the same conclusion.<sup>292</sup> There is, apparently, relatively little concern amongst members of the Polish Bar Association about this lack of confidentiality.<sup>293</sup> This is mainly because such supervision is not carried out on a large scale and lawyers do not consider postponing the first in-depth consultation with his or her clients until after the first fourteen days have passed to be problematic.<sup>294</sup>

Representation during the period immediately following arrest is rare and, as noted, is not funded by legal aid.<sup>295</sup> The court may order mandatory defense in some circumstances, for example, where the accused is a minor.<sup>296</sup> In practice, legal assistance in these circumstances is free of charge to the accused.<sup>297</sup> Otherwise, representation may be free if the suspect or defendant is unable to pay, but there is no clear means test.<sup>298</sup> Thus, in practice, defense representation often depends upon the prosecutor's ability to identify whether the accused is eligible for legal aid.<sup>299</sup> This has been criticized as giving the prosecutor too much discretion.<sup>300</sup>

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<sup>287</sup> *Id.* at 442

<sup>288</sup> See CAPE ET AL., *supra* note 6, at 445.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 452.

<sup>292</sup> *Id.* at 453.

<sup>293</sup> See CAPE ET AL., *supra* note 6, at 453

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 445.

<sup>296</sup> *Id.* at 446.

<sup>297</sup> *Id.* at 447.

<sup>298</sup> CAPE ET AL., *supra* note 6, at 448.

<sup>299</sup> *Id.* at 447.

<sup>300</sup> See *id.* (noting that prosecutors may not inform the defendant of the "conditions,

Lawyers are appointed from a bar association list, without regard to specialization, and there is no appeal against the appointment decision.<sup>301</sup> This can mean that an inexperienced lawyer is appointed to represent a client in a complex case. Only qualified lawyers can represent defendants in court, but law clinics may be used for advice.<sup>302</sup> Mandatory appointment of a lawyer does not mean that his or her attendance at hearings prior to the main trial is mandatory;<sup>303</sup> thus, representation may be lacking at procedural hearings prior to trial. All members of the bar have a duty to provide legal representation,<sup>304</sup> but the numbers that actually do are unknown. Minimum fees are regulated by ministerial decree for separate elements of cases,<sup>305</sup> and remuneration levels are less than for private cases.<sup>306</sup> There are indications, supported by research, that the quality of legal assistance is low.<sup>307</sup> Although reform of the legal aid system has been contemplated,<sup>308</sup> it is currently stalled.<sup>309</sup>

### *I. Turkey*

In Turkey, there is a right to representation at hearings following arrest.<sup>310</sup> Nevertheless, such hearings have been criticized as being more about providing a safeguard against ill-treatment than anything else.<sup>311</sup> A further safeguard against abuse is provided by a rule that a statement by the defendant in the absence of a lawyer cannot be accepted as the basis for conviction

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procedure, and right . . . to request free legal assistance”).

<sup>301</sup> *Id.* at 472.

<sup>302</sup> LEGAL CLINICS IN POLAND- LEGAL CLINICS FOUNDATION [http://www.fupp.org.pl/index\\_eng.php?id=standards](http://www.fupp.org.pl/index_eng.php?id=standards) (last visited Nov. 27, 2011).

<sup>303</sup> *Id.* at 446.

<sup>304</sup> CAPE ET AL., *supra* note 6, at 450.

<sup>305</sup> *Id.* at 451.

<sup>306</sup> *Id.*

<sup>307</sup> *See id.* (reporting that the Helsinki Foundation for Human Rights receives many complaints about appointed lawyers, primarily regarding the “lack of action by... the lawyer” including lawyers failing to maintain communication with their clients).

<sup>308</sup> *Id.* at 480.

<sup>309</sup> CAPE ET AL., *supra* note 6, at 481.

<sup>310</sup> *Id.* at 498.

<sup>311</sup> *Id.*

unless confirmed to the court.<sup>312</sup> There was some suggestion in interviews conducted for the research that the police circumvent the requirement of legal representation through a series of strategies designed to elicit information from the suspect before the formal interview conducted in the presence of a lawyer.<sup>313</sup> There are often practical problems in finding a room in which a confidential consultation between a lawyer and his or her client can be conducted.<sup>314</sup> There are even reports that some police officers are deliberately obstructive.<sup>315</sup> Research in Istanbul suggested that there was legal representation in only ten percent of cases for courts of general jurisdiction; this rose to just over forty percent of cases in the superior courts.<sup>316</sup> Around three-quarters of those sentenced to imprisonment were not represented at trial.<sup>317</sup>

Legal aid is available without a means test from the time of first detention through appeal, but expenditure on criminal legal aid is less than €1 per capita.<sup>318</sup> This low level of expenditure suggests, among other things, low levels of remuneration. Indeed, the fee for an aggravated felony, for example, is only €215.<sup>319</sup> Legal aid is managed by local bar associations, without any supervision by the Ministry of Justice.<sup>320</sup> Both judges and prosecutors have expressed dissatisfaction with the quality of defense representation.<sup>321</sup> To an extent, this concern is shared by lawyers themselves who admit, at least collectively, to failings such as delays and low motivation.<sup>322</sup> Ordinary professional

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<sup>312</sup> *Id.* at 499.

<sup>313</sup> *Id.* at 516-17 (describing police techniques such as “chat[ing] up” or “patroniz[ing]” the suspect after he asked for a lawyer in an attempt to solicit a confession).

<sup>314</sup> See, e.g. INT’L INITIATIVE, TURKEY CROSSED THE RUBICON 7 (2009), available at <http://www.freedom-for-ocalan.com/english/download/initiative-analysis-02.pdf> (referencing the particularly small consultation room in prison in Turkey for Abdullah Ocalan thus not allowing enough space for three lawyers).

<sup>315</sup> CAPE ET AL., *supra* note 6, at 518.

<sup>316</sup> *Id.* at 518-19.

<sup>317</sup> *Id.* at 518.

<sup>318</sup> *Id.* at 505.

<sup>319</sup> *Id.* at 508.

<sup>320</sup> CAPE ET AL., *supra* note 6, at 506.

<sup>321</sup> *Id.* at 508.

<sup>322</sup> *Id.* at 509.



disciplinary proceedings provide the only form of quality control. In legal aid cases, the accused has no right to dismiss his or her lawyer.<sup>323</sup> Furthermore, late payments under the legal aid scheme caused a nearly year-long boycott of the system by the Istanbul Bar Association from June 2009 to March 2010 that further restricted access to legal aid in some areas of Turkey.<sup>324</sup>

## VII. Conclusion

As the overview of the state of affairs in the European countries discussed above demonstrates that effectiveness of criminal defense does not simply depend upon whether suspects have access to legal assistance. Effective criminal defense relies on the presence of, and interrelationship between, a range of principles, laws, practices, and cultures. It is of paramount importance that rights are expressed in sufficient detail and are supported by appropriate enforcement mechanisms and judicial cultures. Thereby, it has to be taken into account that defendants are mostly poor, which requires an adequate legal aid system. In order to be practical and effective, all components have to be in balance and require appropriate timing. For example, without access to interpretation and translation, it is hard to imagine how a defendant who does not speak the language could actually participate in the proceedings or communicate with his lawyer. Also, the right to silence cannot protect the suspect from making incriminating statements when he is not aware or informed of this right before his or her interrogation. Finally, without a properly functioning legal aid system access to adequate legal advice is illusory for most suspects.

National governments clearly have an important role to play in establishing the legislative context within which effective criminal defense is possible. Evidentiary and procedural rules and effective enforcement mechanisms are fundamentally important in ensuring access to effective criminal defense. Similarly, national governments have an important responsibility to establish

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<sup>323</sup> *Id.* at 518.

<sup>324</sup> See *Turkey 2010 Progress Report* (European Commission, Commission Staff Working Document SEC (2010) 1327, 17-18, Nov. 9, 2010), available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2010/package/tr\\_rapport\\_2010\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/tr_rapport_2010_en.pdf).

structures and provide resources to ensure that free legal assistance as well as free interpretation and translation services are available in a timely fashion to those who cannot pay for these services themselves.

Over the last few years, it has become increasingly clear that the Strasbourg human rights regime is not sufficiently able to make sure that national authorities take all the responsibilities mentioned above. The Convention and the ECtHR jurisprudence that flows from it has been, and continues to be, of crucial importance in establishing European standards in relation to effective criminal defense. Nevertheless, there are important limitations to the Strasbourg Convention mechanism.<sup>325</sup> Some of them are practical, such as the backlog of cases waiting to be heard. Others are more systemic, such as the ex post nature of the application process and the weak mechanisms for ensuring compliance with ECtHR decisions. Furthermore the ECtHR has largely, and rightly, been reluctant to go beyond formulating broad requirements when it comes to certain crucial elements of effective criminal defense such as the standards of criminal defense lawyers.<sup>326</sup>

The fact that the current level of human rights protections in criminal proceedings is insufficient in practically all existing EU Member States shows that additional action at the European level is necessary and should be taken as soon as possible. As described in this paper, the European Union has recently taken up this task developing a policy on procedural rights for suspects and defendants in criminal proceedings.

The upcoming role of the European Union in guaranteeing citizens effective protection of fundamental rights and its relation to the existing Strasbourg mechanism raises many complicated legal questions. These mainly concern the future relationship between the two legal orders and their corresponding control mechanisms. From a practical point of view, however, the most important question is whether the European Union will be able to

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<sup>325</sup> See Gert Vermeulen & Laurens van Puyenbroeck, *Approximation and Mutual Recognition of Procedural Safeguards of Suspects and Defendants in Criminal Proceedings Throughout the European Union*, 4 EU & INT'L CRIM. CONTROL: TOPICAL ISSUES 43, 49 (2010).

<sup>326</sup> See CAPE ET AL., *supra* note 6, at 43.

effectively improve the level of protection offered to suspects in criminal proceedings.

Although, at this stage, there are still many uncertainties on how the EU policy on procedural rights will develop, it can be argued that the European Union potentially has far more possibilities to enforce human rights standards than the Strasbourg institutions do. After all, with its powerful legislative tools and effective control mechanism, the European Union is better equipped than the Council of Europe to ensure that national authorities establish the legislative framework to make effective criminal defense possible. The Treaty of Lisbon has enhanced the role of the ECJ in relation to procedural rights and allows for minimum rules to be adopted in relation to rights of individuals. This has opened the way to enforcement mechanisms which have a different character than the ex post complaints to the ECtHR and can be of additional value to the Strasbourg control mechanism. The EU enforcement mechanism operates in a different way and provides for the general competence of the ECJ concerning questions of interpretation of the Treaty of Lisbon.<sup>327</sup> Every national court may ask the ECJ in criminal proceedings to give a preliminary ruling on a relevant issue.<sup>328</sup> In addition the European Commission has the power to bring a case against a Member State for failing to fulfill its obligations under the Treaty.<sup>329</sup> A finding that a Member State has not brought its national legislation into compliance may result in financial penalties imposed by the ECJ.<sup>330</sup> These possibilities will be especially relevant when directives on procedural safeguards have been adopted.

Only the future will tell whether the European Union's potential in this respect can and will be fully used. To a large extent this will depend on the scope and contents of the legislative instruments foreseen in the Roadmap on Procedural Rights. Obviously, the step-by-step strategy chosen in the Roadmap has at least one advantage: Small bits will be easier to swallow than the bigger portion which was served to the Member States in the 2004 proposal for a Framework Decision. Nevertheless, there might

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<sup>327</sup> TEU, *supra* note 74, art. 267.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* art. 268.

also be a downside to the step-by-step approach. After all, most of the procedural rights of suspects are complementary to each other; and, therefore, it remains to be seen whether it is wise to deal with them separately.

The negotiations on the development of an EU policy on procedural rights are at a crucial stage right now.<sup>331</sup> Since Measures B and C both concern rather controversial topics on which there is little conformity between Member States, it remains to be seen whether and how the planned directives will in fact force national authorities to create the necessary conditions for effective criminal defense. Only if this is the case, the European Union will be able to fill the gaps which Strasbourg left open by actually providing suspects and defendants with rights that are practical and effective.

### VIII. Appendix I

Model EU-Letter of Rights:

You are entitled to keep this letter of rights with you during your detention

If you are deprived of your liberty by the police because you are suspected of having committed an offence you have the following rights:

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| <ul style="list-style-type: none"><li>A. To be informed of what offence you are suspected</li><li>B. <u>Not</u> to answer the police's questions or to give any statements to the police</li><li>C. To assistance of a lawyer</li><li>D. To an interpreter and translation of documents, if you do not understand the language</li><li>E. To notify somebody of your deprivation of liberty</li><li>F. To inform your embassy if you are a foreigner</li><li>G. To know for how long you can be detained</li><li>H. To see a doctor if you feel ill or need medicine</li></ul> |
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<sup>331</sup> Vermeulen & Puyenbroeck, *supra* note 325, at 49-50.

You can find more details of these rights inside

A. Information on the suspicion

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

B. Right to remain silent

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

C. Help of a lawyer

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

D. Help of an interpreter

- If you do not speak or understand the language, the police will arrange for an interpreter.
- The interpreter is independent from the police and will not reveal any information you give him without your consent.
- You can also ask for an interpreter to help you to talk to your lawyer.
- The help of an interpreter is free of charge.
- You have the right to receive a translation of any order or decision concerning your detention.
- You have the right to have documents of the investigation translated that are important for a request for release (see under G).

E. Telling somebody that you are detained

- Tell the police if you want someone, for example a family member or your employer, to be told that you are detained.

F. For foreigners: how to contact your embassy

- If you are a foreigner, you can tell the police to inform your embassy or consular authority that you are detained and where you are being held.
- The police must help you if you want to talk to officials of your embassy or consular authority.
- You have the right to write to your embassy or consular authority. If you do not know the address the police must help you.
- The embassy or consular authority can help you with finding a lawyer.

G. How long can you be deprived of your liberty?

- You have the right to ask a judge for your release at any time. Your lawyer can advise you on how to proceed.
- You or your lawyer can ask to see the parts of the case-file relating to the suspicion and detention or be informed about their content in detail.
- If you are not released, you must be brought before a judge within \_\_ hours after you have been deprived of your liberty.
- The judge must then hear you and can decide whether you

are to be released or to be kept in custody.

- You have the right to receive (a translation) of the judge's decision if he decides that you will remain in custody.

#### H. Medical care

- If you feel ill or need medicine, ask the police to see a doctor.
- You have the right to be examined by a doctor in private.
- You can ask for a male or a female doctor.