

# Rebalancing Fundamental Rights and Judicial Protection in Criminal Matters after Lisbon and Stockholm

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## Introduction

While EU measures related to criminal and security law have been adopted for the past twenty years, the legal framework of the Treaty of Lisbon and the political impetus behind the Stockholm Programme have given them a new direction. This chapter explores the basis of protection of fundamental rights enshrined in Title V, Chapter 4 of the TFEU entitled Judicial Cooperation in Criminal Matters, as well as the Stockholm Programme. This analysis is all more important in the light of the new legal status attributed to the EU Charter of Fundamental Rights (the Charter) and the EU's prospective accession to the European Convention on Human Rights (ECHR). We will, therefore, also discuss whether these reforms will soothe allegations that fundamental rights and, in particular, the procedural constitutional right to judicial protection are taken for granted in the AFSJ.<sup>1</sup> The Treaty of Lisbon has created a surplus of rights protection by inserting a provision in the Treaty which aims to expand the scope of fundamental rights protection in EU law. As such, Article 6(1) TEU provides that the Charter has the same legal value as the Treaties, raising it to primary law status, while Article 6(2) TEU not merely provides for the possibility of EU accession to the European ECHR, but expressly requires it.<sup>2</sup> In respect of the legal status of the Charter, references to it were increasing in frequency at the Court of Justice of the EU (CJEU) even prior to the entry into force of the Treaty of Lisbon. Its 'primary importance' in CJEU case law has been recognised by the Presidents of both the CJEU and European Court of Human Rights (ECtHR).<sup>3</sup> Notwithstanding the preparedness of the CJEU to

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<sup>1</sup> E Guild et al, 'Challenges and Prospects for the EU's Area of Freedom, Security and Justice' CEPS Working Document No. 313 / April 2009, p.2.

<sup>2</sup> Article 6(2) TEU provides that the EU "shall accede" to the Convention. The respective entries into force of Protocol No. 14 ECHR, and Article 6 TEU, Lisbon Treaty provided the required bases for EU accession to the ECHR.

<sup>3</sup> Joint Communication from Presidents Costa and Skouris, 27 January 2011, Available at <[www.echr.coe.int](http://www.echr.coe.int)>.

invoke the ECHR when interpreting EU law, the eventual accession of the EU to the ECHR will raise questions concerning the relationships between the CJEU and ECtHR, and the extent and ease of convergence in the area of fundamental rights protection. Both the legally binding status of the Charter and the constitutional power of the EU to seek accession to the ECHR will have a qualitative and quantitative effect upon EU criminal law with reference to the rights of defendants and victims.

More specifically in criminal matters, the Treaty of Lisbon has abolished the former intergovernmental third pillar and brought its criminal justice aspects within the scope of EU law proper. Hence, with the Treaty of Lisbon coming into force, the third pillar's new home became the Area of Freedom, Security and Justice (AFSJ), a vast legal area consisting of immigration and asylum policies, as well as civil cooperation matters. Most significantly, the 'communitarisation' of the third pillar brought by the Treaty of Lisbon encompasses a shift from unanimity to qualified majority voting and a changing of form of legal acts concerning criminal matters from conventions and framework decisions to the more robust directives. This is particularly important for the centralised enforcement of these provisions by the Commission, their invocability and decentralised enforcement by private individuals, and, ultimately, their justiciability before the Court of Justice of the European Union (CJEU) whose jurisdiction extends to all EU law including the AFSJ.

With reference to the Stockholm Programme, it can be argued that if the Treaty of Lisbon altered the legal infrastructure in the field of criminal law and security law, the Stockholm Programme provided the necessary political stimulus for the realisation of the criminal justice objectives of the AFSJ based on a common foundation of democratic principles, respect for human rights, and fundamental freedoms. Building on the priorities of the earlier Tampere and Hague multi-annual programmes, the Stockholm Programme set out the European Union's (EU) priorities for the AFSJ for the period 2010-2014.

This chapter focuses on whether the changes brought about by Lisbon and Stockholm indicate the strengthening or weakening of the protection of fundamental rights in this policy area. We place particular focus on effective judicial protection vis-à-vis common minimum standards of procedural rights in criminal proceedings. The chapter commences with an analysis of the implications of the Lisbon reforms, especially with reference to the binding status of the Charter and future accession of the EU to the ECHR. It then moves on to discuss Lisbon's fundamental rights protection and the

legislative opportunities it provides with reference to individual judicial protection. Last but not least, we provide a review of the position accorded to fundamental rights and judicial protection within the Stockholm Programme.

## 1. Implications of the Charter's Binding Status After Lisbon

Before the entry into force of the Treaty of Lisbon, the non-binding character of the Charter did not prevent Advocates-General (AG) and judges of the European Courts from making occasional references to the Charter. After Lisbon, the impact of the Charter on CJEU case law was immediate, with the CJEU engaging with the Charter on an increasingly systematic and comprehensive basis.<sup>4</sup> Judicial recourse to the Charter soon moved beyond using it as an interpretative tool, to using the Charter as a basis for judicial review to annul secondary legislation.<sup>5</sup> Thus, whilst Presidents Costa and Skouris have jointly referred to the Charter's primary importance as the 'reference text and the starting point'<sup>6</sup> for the CJEU's assessment of fundamental rights, CJEU case law indicates real engagement with the Charter and a preparedness to exploit its legally binding nature to the fullest extent.

After Lisbon, given the overlap in fundamental rights protection offered by the Charter and ECHR, a real test for adjudication is the degree of coherence between Charter and Convention rights where such rights correspond. Article 52(3) of the Charter provides that where rights protected by the Charter and Convention correspond, 'the meaning and scope of those rights shall be the same'.<sup>7</sup> The CJEU does appear to be engaging in the kind of 'parallel interpretation' of rights envisaged by the Charter in such cases, AG Opinions in particular placing detailed emphasis on systematic interpretation and cross-referencing between the guarantee of rights by the Charter and Convention. The Opinions of AG Cruz Villalón in *European Air Transport*<sup>8</sup> and of AG Sharpston in *Volker and Eijfert*<sup>9</sup> were early post-Lisbon examples illustrating this detailed engagement

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<sup>4</sup> See Joint Communication from Presidents Costa and Skouris, 27 January 2011, Available at <[www.echr.coe.int](http://www.echr.coe.int)>. The Joint Communication notes that the Charter was referred to in at least 30 judgments in the year following the Lisbon Treaty's entry into force.

<sup>5</sup> Joined Cases C-92/09 *Volker und Markus Schecke GbR* and C-93/09, *Hartmut Eijfert v Land Essen* [2010] ECR I-0000.

<sup>6</sup> Joint Communication from Presidents Costa and Skouris, 27 January 2011, para.1. Available at <[www.echr.coe.int](http://www.echr.coe.int)>.

<sup>7</sup> Joint Communication, para 1.

<sup>8</sup> Case C-120/10 *European Air Transport SA v Collège d'Environnement de la Région de Bruxelles-Capitale* (Opinion of AG Cruz Villalón, 17 February 2011).

<sup>9</sup> Joined Cases C-92/09, *Volker und Markus Schecke GbR* and C-93/09, *Hartmut Eijfert v Land Essen* [2010] ECR I-0000 (Opinion of AG Sharpston, 17 June 2010).

well, though references to the Convention were less detailed in the respective final CJEU judgments.

The impact of the Charter on the AFSJ in case law to date has been particularly striking in the *N.S.*<sup>10</sup> judgment (notwithstanding the argument that a similar result may well have been reached without recourse to the Charter). *N.S.* confirmed that EU law precludes the application of a conclusive presumption in relation to Member States' respect for fundamental rights, thus preventing the transfer of an asylum seeker to a Member State where he/she risks being subjected to inhuman or degrading treatment or punishment in violation of Article 4 of the Charter.<sup>11</sup> In clarifying the duties of Member States (including national courts) in respect of mutual recognition in the area of asylum, the CJEU was conscious that mutual confidence is deeply rooted in the 'raison d'être' of the Union, the AFSJ and the Common European Asylum System. The Court's interpretation of Article 4 of the Charter demonstrates that the CJEU is mindful of the "major operational problems" that can arise in a Member State, and of the overriding need to ensure asylum seekers' rights are not prejudiced by significant flaws in procedure or conditions, where there are substantial grounds to believe they exist.<sup>12</sup>

The 'spillover' effect of *N.S.* on the field of EU criminal justice is particularly evident in CJEU case law relating to the Framework Decision on the European Arrest Warrant (EAW).<sup>13</sup> A trend of recent cases on the execution of EAW requests suggests that the approach of the CJEU is not as predictable as one might expect, and raise questions as to the interpretative approach where Convention and Charter rights correspond. The conceptual problems inherent in Article 52(3) Charter's requirement to interpret corresponding Charter and Convention rights 'the same', noted by Beal and Hickman, may account for this apparent imbalance to some extent.<sup>14</sup> For example, in *Melloni*<sup>15</sup> both AG Bot and the Court's final judgment adopted both a strict approach to refusals to execute (finding that an executing authority cannot make execution of an EAW conditional on the availability of judicial review of the issuing authority's decision) and to compatibility of the Framework Decision to the Charter (with scant references to

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<sup>10</sup> Joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M.E. et al v Refugee Applications Commission and Minister of Justice, Equality and Law Reform*, judgment of 21 December 2011.

<sup>11</sup> Note also *M.S.S. v Belgium and Greece*, ECtHR, judgment of 21 January 2011.

<sup>12</sup> *N.S.* para 81.

<sup>13</sup> Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1.

<sup>14</sup> K Beal and T Hickman, 'Beano no more: The EU Charter of Rights After Lisbon' (2011) JR 113, 117-9.

<sup>15</sup> Case C-399/11 *Melloni*, Opinion of AG Bot, 2 October 2012.

the Convention). This contrasts with the Opinions in *Radu*<sup>16</sup> and (in a non-EAW context) *Fransson*<sup>17</sup> in which the level of protection on the facts appeared to be variously regarded by the CJEU as stronger in the Charter (*Radu*) and the Convention (*Fransson*). In a highly restrictive approach to fundamental rights, the recent judgment in *Radu*<sup>18</sup> illustrated a marked divergence from the Opinion of AG Sharpston, in ruling that a violation of fundamental rights in the issuing Member State (failure to hear the requested person) cannot *per se* justify non-execution of an EAW by a Member State under Articles 3 or 4 of the Framework Decision.<sup>19</sup> It is at least arguable that *Radu* may hint at a perhaps unwelcome ‘sectoral’ approach in fundamental rights protection in the AFSJ. In the context of the EAW, for example, *Radu* favours an unequivocal approach to mutual recognition, taking a strictly textual approach to the duty to execute at the expense of wider fundamental rights considerations which arguably underpin the Framework Decision itself.<sup>20</sup> By contrast, *N.S.* expressly indicated that the presumption that Member States respect their fundamental rights obligations under the Charter and Convention in the field of asylum is not “conclusive”.<sup>21</sup> While it is very early days for the case law in these areas, it is notable that in these early, landmark cases this fundamental presumption seems to be regarded differently by the CJEU across AFSJ fields.

This trend not only demonstrates the spillover effect of *N.S.* on criminal law cases—i.e. that ‘mutual recognition’ does not extend to Member States’ compatibility with human rights guarantees. It also reveals the stark contrast in AG approaches when it comes to balancing the sources of fundamental rights at its disposal and to clarifying the Charter’s impact, and—in the light of *Radu*—a diverging approach between AGs and the CJEU which may have sectoral consequences within the AFSJ. The CJEU has opportunities to address these imbalances and inject coherency in future cases. Its approach(es) may have an important effect for the interpretation of rights in the AFSJ context more generally.

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<sup>16</sup> Case C-396/11 *Radu*, Opinion of AG Sharpston, 18 October 2012.

<sup>17</sup> Case C-617/10 *Åkerberg Fransson*, Opinion of AG Cruz Villalón, 12 June 2012.

<sup>18</sup> Case C-396/11 *Radu*, CJEU, judgment of 29 January 2013.

<sup>19</sup> Council Framework Decision 2002/584/JHA of 13 January 2002, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

<sup>20</sup> See for example, detailed arguments advanced by AG Sharpston in *Radu* suggesting that a narrow approach excluding fundamental rights considerations from the decision on executing an EAW is not supported by either the wording of the Framework Decision on the EAW or relevant case law.

<sup>21</sup> *N.S.* para 105.

## 2. EU Accession to the ECHR After Lisbon

Further efforts to enhance the protection of fundamental rights will be realised with the EU's accession to the ECHR. Although the Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights (Draft Accession Agreement) were tabled on 30 June 2011,<sup>22</sup> negotiations are continuing. Despite Article 6(2) TEU's requirement that the EU 'shall accede' to the Convention, the drafting process has raised complex questions which remain on the table for negotiators, and the scale of agreements needed could yet delay the process for some time. Currently, the Council of Europe Steering Committee for Human Rights (CDDH) has been in negotiations with the EU in the so-called 'ad-hoc' group since June 2012 with a view to concluding a final Agreement.<sup>23</sup> On accession, the EU will become the 48th High Contracting Party (HCP) to the Convention, and the first non-state signatory.

Subjecting the EU to the external scrutiny of the ECtHR in respect of rights guaranteed under the Convention will place the EU on the same footing as the other HCPs in terms of external review of compliance with the ECHR. This exposure of the EU to external scrutiny is where accession will make its mark, rather than necessarily causing material changes in the level of fundamental rights protection at national or EU levels.<sup>24</sup> It is therefore the political and symbolic value of EU accession which tends to be welcomed, with views on the substantive impact of accession rather more circumspect<sup>25</sup> (and views expressed in some European Parliament debates openly hostile).<sup>26</sup> It is clearly possible, however, that accession may impact on the detail with which the Convention is explicitly applied by the CJEU in relation to relevant Charter rights.

The Draft Accession Agreement envisages the creation of two main mechanisms to accommodate EU accession and the future closer, engagement between the ECtHR

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<sup>22</sup> Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights, 16 CDDH-UE (2011).

<sup>23</sup> Negotiations requested by the Committee of Ministers were scheduled for June 2012-January 2013; (CM/Del/Dec (2011) 1126/4.1, COM (2011) 149, 13 June 2012.

<sup>24</sup> T Lock, 'End of an epic? The Draft Agreement on the EU's Accession to the Convention' (2012) 31 *Yearbook of European Law* 162.

<sup>25</sup> FG Jacobs, 'The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice — The Impact of European Union Accession to the European Convention on Human Rights', in I Pernice, J Kokott and C Saunders (eds) *The Future of the European Judicial System in a Comparative Perspective* (Baden-Baden: Nomos Verlag, 2006), p.291. In contrast, note Leskinen's arguments in respect of the potential impact accession may have on the regulation of defences in competition proceedings: C Leskinen, 'An evaluation of rights of the defense during Antitrust Inspections in the light of the case law of the ECtHR: would the accession of the European Union to the ECHR bring about a significant change?', Working Paper IE Law School, No 10-04, 29 April 2010.

<sup>26</sup> Note for example, European Parliament—EU accession to the ECHR (debate), 19 April 2012.

and the CJEU.<sup>27</sup> First, the introduction of a co-respondent mechanism to govern how and to whom complaints will be addressed. Second, prior involvement of the CJEU would allow it to make a pronouncement on the compatibility of EU legal acts with ECHR rights, in the event that such an issue reaches the ECtHR before the CJEU has had an opportunity to adjudicate on the point in question. It has been mooted that the current drafting process for Protocol 16 ECHR on extending the ECtHR's advisory jurisdiction to include 'advisory opinions' might be used or somehow adapted for the prior involvement mechanism. When the Draft Accession Agreement was tabled for adoption by CDDH in October 2011<sup>28</sup> a number of delegations raised objections and/or reserved their views on aspects of the Draft Accession Agreement. While both mechanisms have been extensively critiqued in the literature, the draft provisions regulating them may yet be subject to change.

The future contours of rights-based case law are often hard to predict, and speculating on developments or legal challenges arising as a result of EU accession remains premature without the final text of the Agreement. The value of accession in reinforcing the centrality of fundamental rights protection in the EU legal order, and on a practical level, subjecting the EU to external scrutiny should not be underestimated. The relationships between the ECtHR and CJEU may be tested, and emerging case law closely scrutinised in cases involving overlaps between core Charter and Convention rights, with draft legislation coming under renewed scrutiny for compatibility with the Charter and ECHR. Commissioner Reding's statement that EU accession will increase the perception of the ECtHR as 'the European capital of fundamental rights protection'<sup>29</sup> does not diminish the duties of all courts to robustly adjudicate in defence of fundamental rights protection. The agreed legal instruments for EU accession have been long-anticipated; it is to be hoped that political will accelerates the route to accession rather than create fresh obstacles or further delays.

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<sup>27</sup> On the functioning of the proposed 'internal review' mechanism providing for the prior involvement of the CJEU in specific cases where the ECtHR exercises its power of 'external review', see further: S Douglas-Scott, 'The European Union and Human Rights After Lisbon', (2011) 11 (4) *Human Rights Law Review* 645; J-P Jacqué, 'The Accession of the European Union to the European Convention of Human Rights and Fundamental Freedoms' (2011) 48 (4) *CML Rev* 995; T Lock 'Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order', (2011) 48(4) *CML Rev* 1025; N O'Meara, "'A More Secure Europe of Rights?'" The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12 *German Law Journal* 1813.

<sup>28</sup> Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention of Human Rights, CDDH (2011) 009.

<sup>29</sup> Proceedings High Level Conference on the Future of the European Court of Human Rights, Council of Europe 2010, 26; see further M. Kuijer, 'The Accession of the European Union to the ECHR: A Gift for the ECHR's 60<sup>th</sup> Anniversary or an Unwelcome Intruder at the Party?' (2011) 3 *Amsterdam Law Forum* 17, p.31

### 3. Fundamental Rights Protection in Criminal Matters in Lisbon

Fundamental rights concerns with regard to judicial cooperation relate predominantly to adopted acts on mutual legal assistance, extradition, execution of sentences and the rights of the accused and the victim. In line with the principle of mutual recognition, the AFSJ presumption is that all Member States have a sufficient system of criminal procedure in place which contains a satisfactory level of fundamental rights protection. The idea is that the establishment of equal standards of fundamental rights protection across the EU will ultimately enhance mutual trust between Member States. The only explicit rule with reference to the protection of fundamental rights in AFSJ matters is the generic Article 6 TEU which reinforces the centrality of fundamental rights protection in EU law. In this context a reference is made to a three-layered fundamental rights shield: the Charter of Fundamental Rights (now legally binding), the ECHR (and the EU's prospective accession to it) and the constitutional traditions common to the Member States (now as relevant as ever in light of Article 4 (2) TEU). The latter together with the ECHR constitute the general principles of EU law protected by the CJEU.<sup>30</sup> These enjoy primary law status.

Despite the thorough commitment expressed in the TEU, fundamental rights protection with regard to EU criminal matters has traditionally enjoyed an ambivalent status, partly because penal law lay outside the scope of the former third pillar. Equally, before the Lisbon Treaty, individual judicial protection was never at the core of EU judicial cooperation in criminal matters. Three areas are worth highlighting with reference to the pre-Lisbon jurisdiction of the CJEU.

- i) the preliminary reference procedure was subject to the former Article 35 TEU limitations where Member States had to make a declaration as to whether they accept the CJEU's jurisdiction;
- ii) the third pillar instruments listed in former Article 34 TEU (framework decisions and conventions) had no direct effect; and
- iii) private individuals could not resort to an action for annulment to

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<sup>30</sup> For a detailed study of the general principles of EU law see T. Tridimas, *The General Principles of EU Law* (2nd ed. Oxford University Press, 2006).



challenge effectively, for instance, the legality of a framework decision.

This could only be done by the Commission or the Member States.<sup>31</sup>

The light-touch involvement of EU law in this area was due largely to the divergence of criminal justice systems in the Member States, especially in relation to rules of criminal procedure.

The above sentiment is partly manifest to this day. For instance, the UK Government recently stressed that it ‘will approach forthcoming legislation in the area of criminal justice on a case-by-case basis, with a view to maximising our country’s security, protecting Britain’s civil liberties and preserving the integrity of our criminal justice systems.’<sup>32</sup> Indeed, crime definitions and the rights enjoyed by suspects and victims still vary considerably between Member States. As such, the establishment of a European ‘area’ of security and justice is a relatively slow process. Until the EU reaches a stage of convergence in criminal justice matters, individuals are bound to be subjected to the requirements inherent in different penal regimes. Such requirements not only differ between Member States with regard to what type of conduct is criminal and punishable but also, and perhaps most significantly, with reference to substantive rights and procedural safeguards applicable in every case. For instance, there is a significant variation in the method and timing of the right of access to a lawyer in criminal proceedings across the EU. This is a single example, but perhaps sufficient to reveal the general fallacy of the AFSJ presumption of equivalence of criminal justice systems across the continent. The EU needs, therefore, a system of criminal law which is not merely based on a blind, or sometimes superficial, presumption of equivalence between Member States. The proliferation of EU criminal legislation and case law requires a system which is based on rigid checks, balances and periodic assessments. Only when due process, a principle rooted at the heart of all advanced legal systems, is guaranteed, mutual recognition will be capable of strengthening mutual trust among the judiciaries of the Member States.

The above argument demonstrates that the issue of fundamental rights protection in the AFSJ turns on the more complex question of how national differences in criminal law can be reconciled and ultimately resolved. Typical questions include, for instance, whether all Member States shall share an agreed list of cross-border crimes as

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<sup>31</sup> See Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

<sup>32</sup> Daily Hansard - Written Ministerial Statements, The Lord Chancellor and Secretary of State for Justice (Mr Kenneth Clarke), 5 Sep 2011: Column 12WS.

well as establish a number of essential aspects of criminal procedure. Chapter 4 of the TFEU entitled Judicial Cooperation in Criminal Matters purports to answer this question in the positive. Lisbon, therefore, presents a system based on mutual legal assistance which also leaves open the possibility for the EU to legislate on criminal and procedural law. Article 82(1) TFEU stresses that judicial cooperation in criminal matters shall be based on the principle of mutual recognition and shall include the approximation of national laws. It further provides for institutional support through the adoption of measures which have as their objective the facilitation of jurisdictional conflicts and recognition of judgments in all cases.

Article 82(2) TFEU, on the other hand, elaborates further by providing for the enactment of minimum harmonisation directives in order to enable mutual recognition of judgments in criminal matters with a cross border dimension. Such legislation, including procedural rights and the rights of victims, can be directly effective provided that it satisfies the relevant *Van Gend en Loos* criteria.<sup>33</sup> Still, however, one should not forget that paragraph 3 of both Article 82 TFEU (and to the same extent Article 83 TFEU) provides for an emergency brake which aims to make the idea of EU criminal law more palatable to Member States.<sup>34</sup>

#### 4. Judicial Protection in Criminal Matters After Lisbon

With reference to effective judicial protection, it is by now well-established that the protection of the rights of the individual in criminal proceedings is a fundamental value of EU law and essential in order to maintain mutual recognition between Member States' practices and public confidence in the EU. It was not until the Lisbon Treaty that the preliminary reference procedure was expedited under Article 267 TFEU 'in a case pending before a court or tribunal of a Member State with regard to a person in custody'. Hence, it can be argued that Lisbon assisted in the adaptation of the preliminary reference procedure to address the needs of the AFSJ. Of course, such adaptation of preliminary rulings is bound to be excluded under Article 276 TFEU from reviewing 'the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent

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<sup>33</sup> This is a lot more straightforward compared to the *Pupino* duty of consistent interpretation. See E Herlin Karnell, 'In the wake of *Pupino: Advocaten voor de Wereld and Dell'Orto*' (2007) 8 *German Law Journal* 1147.

<sup>34</sup> See A Hinarejos, JR Spencer and S Peers, 'Opting out of EU Criminal law : What is actually involved?' (CELS, September 2012)  
Available at: <[www.cels.law.cam.ac.uk/Media/working\\_papers/Optout%20text%20final.pdf](http://www.cels.law.cam.ac.uk/Media/working_papers/Optout%20text%20final.pdf)>

upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’.

Since a person’s rights in respect of a criminal charge, trial, and sentence are strictly confined within the national boundaries of Member States, the mutual recognition threshold has to depend on a high level of trust between judicial authorities. What is more, procedural rules need respond to equivalent guarantees in relation to an individual’s liberty. This is a rather thorny task, especially since the adoption and implementation of minimum standards of procedural rights across the Member States was never a precondition to the adoption of EU criminal legislation under the former third pillar. For instance, the Framework Decision on the EAW does not foresee for Member States’ refusal to surrender a suspect on grounds of concerns about human rights breaches.<sup>35</sup> There is a host of other issues in need of attention. These include suspects’ entitlement to legal representation during surrender, pre-trial detention length and conditions, as well as proportionality checks regarding extradition requests for minor offences.<sup>36</sup>

To that end, the EU has aspired to establish common minimum standards of procedural rights in criminal proceedings, to ensure that the basic rights of suspects and accused persons are sufficiently protected. In 2004, the Commission proposed a draft Framework Decision on rights for criminal suspects that covered five basic rights. The proposal was met by dissent from six Member States (UK, Ireland, Malta, Cyprus, Czech Republic and Slovakia). It was generally accepted that such a proposal contravened the principle of subsidiarity (also perhaps national identity under Article 4 (2) TEU)<sup>37</sup> and compromised the rights already guaranteed by the ECHR.<sup>38</sup> It was not until 2009 that the Council agreed on a general approach to procedural rights of suspected or accused persons in criminal proceedings.<sup>39</sup> In this fashion, a proposal under Article 82(2) TFEU for a directive on the right of access to a lawyer in criminal proceedings and on the right

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<sup>35</sup> See further, Case C-396/11 *Radu*, CJEU, judgment of 29 January 2013; discussed at section 1, above.

<sup>36</sup> M Fichera, ‘The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?’ (2009) 15 *European Law Journal* 70; J Komárek, ‘European Constitutionalism and the European Arrest Warrant: in Search of the Limits of ‘Contrapunctual Principles’” (2007) 44 *CML Rev* 16; T Konstadinides, ‘The Europeanization of extradition: how many light years away to mutual confidence?’ in C Eckes and T Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: a European Public Order* (Cambridge, Cambridge University Press, 2011).

<sup>37</sup> See to that effect T. Konstadinides ‘Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement’ (2011) 13 *Cambridge Yearbook of European Legal Studies* 195.

<sup>38</sup> See J Smyth, ‘Irish lead resistance to draft EU law on suspects rights’, *The Irish Times*, 2007. Available at <[www.ecba.org/extdocserv/projects/ps/Irish\\_lead\\_resistance\\_to\\_draft\\_EU\\_law\\_on\\_suspects.pdf](http://www.ecba.org/extdocserv/projects/ps/Irish_lead_resistance_to_draft_EU_law_on_suspects.pdf)>

<sup>39</sup> Council of the EU, ‘Procedural Rights in Criminal Proceedings’, 23 October 2009, 14828/09 (Presse 305).

to communicate upon arrest was put forward in order to set out minimum rules between the Member States. This proposal is in line with the rights guaranteed under the ECHR and the Charter.<sup>40</sup> Most importantly, the proposal emphasizes that the rights provided for in this directive should also apply, *mutatis mutandis*, to proceedings for the execution of a European Arrest Warrant in the executing state and, in some cases, also in the issuing state. This is a welcome development and seems to remedy the current regime under which defence lawyers in either country cannot coordinate or jointly evaluate the evidence available throughout judicial proceedings. Yet, the UK decided to opt out (at least for the time being) because it was felt that certain provisions in the Commission's proposal go beyond the requirements of the ECHR and would, therefore, have an adverse impact on the UK's ability to investigate and prosecute offences.<sup>41</sup> Hence, the final wording of the Directive's recital 33 will depend on the position of the UK and Ireland taken in accordance with the provisions of Protocol 21 of the TFEU.

Together with the strengthening of procedural rights of suspects or accused persons in criminal proceedings, there is also an urge to strengthen victims' rights with regard to information; access to victim support services; right to be heard; and protection during criminal proceedings. The EU has already acted in the past on the rights of victims in criminal proceedings through Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings and through Directive 2004/80/EC relating to compensation to crime victims. The recent proposal for a directive on establishing minimum standards on the rights, support and protection to victims of crime is indicative of Lisbon's new approach under Article 82(2) TFEU to establishing common minimum rules. The objective is to build mutual trust through approximation of national substantive rules on victims' rights as part of a range of EU policies relating to cross-border crime.<sup>42</sup> Hence, the proposal for a Directive on victims' rights builds on existing legislation on human trafficking;<sup>43</sup> sexual abuse, exploitation of children and child pornography<sup>44</sup> and counter-terrorism.<sup>45</sup> The directive further complements the European Protection Order, endorsed by the European Parliament in December 2011, which

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<sup>40</sup> Article 6 (right to a fair trial) and 8 (respect for private and family life) ECHR and Articles 6 (right to liberty and security); 47 (effective remedy and fair trial) and 48 (presumption of innocence and the right of defence) of the EU Charter.

<sup>41</sup> Hansard, Commons Debates, Written Ministerial Statements, 11 October 2011: Column 17WS.

<sup>42</sup> COM/2011/0275 final.

<sup>43</sup> Directive 2011/36/EU.

<sup>44</sup> Directive under negotiation to repeal Framework Decision 2004/68/JHA.

<sup>45</sup> Framework Decision 2008/919/JHA.

provides protection of victims of violence when they move within the EU.<sup>46</sup>

## 5. Fundamental Rights and Judicial Protection in Criminal Matters

The Stockholm Programme builds on previous political agendas in outlining the EU's priorities for criminal justice measures and co-operation in a programme that expressly puts the citizen at its core. Agreed simultaneously with the entry into force of the Lisbon Treaty, the Stockholm Programme could take advantage of the constitutional and institutional reforms provided by Lisbon; the 'communitarisation' of the former third pillar and its consequences (transfer to ordinary legislative procedure, relaxation of voting thresholds) increased the scope for a more vigorous pursuit of Stockholm's legislative agenda.<sup>47</sup> Moreover, an Action Plan implementing the Stockholm Programme contains a timetable for the adoption of all AFSJ measures up to 2014.<sup>48</sup>

These multiannual programmes shaping the development of the AFSJ have, in the past, faced criticism on a number of fronts. For example, on the basis of the democratic deficit, with all priorities agreed in the European Council; though agreement of the Stockholm Programme was more transparent than in previous initiatives.<sup>49</sup> The security-oriented Hague Programme, agreed in the shadow of 9/11 and the 2004 Madrid bombings, was strongly criticized for failing to strike the right balance between demands for security co-operation and underlying ethical and legal standards for fundamental rights protection. As Guild observes, the vocabulary relating to 'striking a balance' between security concerns and fundamental rights considerations so prominent in the Hague Programme is notably absent from Stockholm.<sup>50</sup> It will take concrete actions rather than a change of vocabulary to convince critics that this balance is struck in favour of fundamental rights protection—particularly as much of Stockholm clearly builds on pre-existing priorities and legislation, which without exception, have implications for liberty and/or security considerations.

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<sup>46</sup> European Parliament, 'Parliament endorses European Protection Order for crime victims', 13 December 2011, Available at: <[www.europarl.europa.eu/news](http://www.europarl.europa.eu/news)>.

<sup>47</sup> C Murphy, 'The European Evidence Warrant: Mutual Recognition and Mutual (Dis)trust?' in C Eckes and T Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: a European Public Order* (Cambridge, Cambridge University Press, 2011), p.22.

<sup>48</sup> See Annex to the Commission Communication, 'Delivering an area of freedom, security and justice for Europe's citizens: Action Plan Implementing the Stockholm Programme' COM (2010) 171 final, 20 April 2010.

<sup>49</sup> V Mitsilegas, 'General Report: The Area of Freedom, Security and Justice from Amsterdam to Lisbon. Challenges of Implementation, Constitutionality and Fundamental Rights', FIDE 2012, p.77. Available at <[www.fide2012.eu/index.php?doc\\_id=90](http://www.fide2012.eu/index.php?doc_id=90)>.

<sup>50</sup> Guild et al, 'Challenges and Prospects for the EU's Area of Freedom, Security and Justice', p.4.

The Stockholm Programme sought to place the citizen at the heart of AFSJ initiatives, the language infusing the text emphasizing citizenship and fundamental rights, with aims to overcome existing areas of fragmentation.<sup>51</sup> The tenor of the Programme also has an external dimension, focusing on access to and the role of the EU in the globalised world. The Programme's policy priorities are grouped under five main areas. The first of these, 'A Europe of Rights' focuses primarily on measures to protect the vulnerable (including children, victims of crime), criminal procedural rights, and rights relating to privacy and democratic participation). The second, 'A Europe of Law and Justice', focuses on the core AFSJ areas of mutual recognition in criminal and civil justice, and methods of developing and enhancing mutual trust. 'Europe's Security Strategy' is the focus of the third area, with priorities in relation to effectively exercising security priorities on one hand, and a range of priorities against serious and organized crime on the other. A fourth area focuses on 'A Europe of Solidarity' in relation to asylum and migration, with a final category of priorities relating to external dimensions. Throughout, achieving the Stockholm priorities is envisaged with a combination of legislative proposals and dissemination of best practice.

Specifically in relation to judicial protection vis-à-vis procedural rights, the Stockholm Programme refers to the Roadmap for strengthening procedural rights of suspected accused persons in criminal proceedings, with a view to ultimately affording greater protection to the individual in the AFSJ.<sup>52</sup> The Roadmap may have sought to counter criticism that too much emphasis had been placed on prosecution-oriented procedure in the AFSJ due to its long-term overriding objective of driving forward mutual recognition, which some viewed as ultimately being at the expense of defence rights. On this front, the Hague Programme had failed to deliver on promised reforms.<sup>53</sup> In the light of the Charter's changing legal status and imminent EU accession to the ECHR, the time was ripe for the Stockholm agenda to deliver a re-balanced approach to procedural rights in criminal justice.

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<sup>51</sup> The European Civil Liberties Network (ELCN) campaigned against the Stockholm Programme on the basis that it endangered "the human rights situation in Europe and beyond"; 'Oppose the Stockholm Programme, Statement by the European Civil Liberties Network on the new five-year plan for Justice and Home Affairs, April 2009. Available at <[www.ecln.org](http://www.ecln.org)>.

<sup>52</sup> Stockholm Programme, at s.2.5. See, Presidency of the Council of the EU, Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, Brussels, 1 July 2009, document No. 11457/09; Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295, 4 December 2009.

<sup>53</sup> 'Justice, Freedom and Security in Europe Since 2005: An Evaluation of the Hague Programme and Action Plan', COM (2009) 263 final, 10 June 2009, p.14.

The Hague Programme's failure to deliver on the proposed Council Framework Decision on certain procedural rights in criminal proceedings,<sup>54</sup> or on watered-down versions of the proposals, has led to the Stockholm Programme taking an incremental, sectoral approach to procedural rights.<sup>55</sup> This has been criticized in some quarters for the continued apparent lack of political commitment evident for setting minimum standards for fair trial rights and for failing to tackle the inherent structural shortcomings in relation to Article 6 ECHR; the results of which remained all too evident in the case law before the ECtHR.<sup>56</sup> Jimeno-Bulnes' suggestion that the continued block on the Framework Decision proposals by various Member States on the basis that Articles 5 and 6 ECHR sufficiently guarantee procedural rights, makes this criticism all the more ironic.<sup>57</sup>

The Roadmap's approach focuses on translation and interpretation; rights and information about charges; legal aid and provision of legal advice; the right to communication with relatives, employers and consular authorities; and safeguards for vulnerable suspects or accused persons; and pre-trial detention, with scope left by the Council to address other procedural rights. It is still too early to definitively conclude whether Stockholm will live up to expectations in providing concrete changes in to secure defence rights. Yet at the mid-way stage, a range of legislative proposals, communications and Green Papers have been tabled.<sup>58</sup> Whether this incremental approach will have a greater chance of securing political agreement, and result in a genuinely coherent approach to securing procedural rights post-Stockholm remains to be seen.

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<sup>54</sup> COM (2004) 328 final, 28 April 2004.

<sup>55</sup> While the overall Roadmap has a sectoral approach, limited horizontal changes have been agreed, for example in the area of judgments *in absentia*. Council Framework Decision 2009/299/JHA of 12 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA and 2008/947/JHA.

<sup>56</sup> Judge Dean Spielmann, 'Justice in the EU – From the Citizens' Perspective', ECBA Conference 2009, 22 July 2009.

<sup>57</sup> M Jimeno-Bulnes, 'Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU?' CEPS Policy Paper, February 2010, p.4. Available at <[http://aei.pitt.edu/15104/1/Jimeno-Bulnes\\_on\\_rights\\_of\\_suspects.pdf](http://aei.pitt.edu/15104/1/Jimeno-Bulnes_on_rights_of_suspects.pdf)>.

<sup>58</sup> Note, for example: Proposal for a Directive of the European Parliament and of the Council on the Right to Interpretation and Translation in criminal proceedings, COM (2010) 82, 9 March 2010; Proposal for a Directive of the European Parliament and Council on the right to information in criminal proceedings, COM (2010) 392, 20 July 2010; Communication 'Strengthening victims rights in the EU', COM (2011) 274/275/276, 18 May 2011; 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, 8 June 2011; Green Paper 'Strengthening mutual trust in the European Judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention', COM (2011) 327, 14 June 2011.

## 6. Conclusion

Both Lisbon and Stockholm appear to be catalysts for change with reference to Judicial Cooperation in Criminal Matters. On the one hand, the Treaty of Lisbon has influenced the legal geography and legislative culture in this area, whilst on the other, the Stockholm Programme has reaffirmed the priority the EU attaches to the protection of citizens and the fight against serious crime. Indeed in the post-Lisbon and Stockholm EU, justice and security are both legally and politically in the epicentre of EU policy making on cross border policing and judicial cooperation in criminal matters. Yet, the AFSJ remains a diamond in the rough. Not only this area is characterised by numerous opt-outs<sup>59</sup> but also, according to the Treaty's Transitional Protocol, the criminal aspects of the AFSJ will only be fully effective in December 2014.<sup>60</sup> In respect of the UK's position in relation to the AFSJ, the clock is ticking for its decision on whether to exercise a mass opt-out from approximately 130 pre-Lisbon measures on police and criminal justice.<sup>61</sup> The options available to the Government in terms of opting out *en masse* by the 31 May 2014 deadline provided by Protocol 36 Lisbon Treaty, and opting back into certain measures are currently under consideration by the Government. Action taken to opt back into police and criminal justice measures would naturally be subject to future negotiations at EU level.

Although the reforms provided or promised through Lisbon and Stockholm have not yet been fully realised, we are witnessing a rebalancing of fundamental rights and judicial protection which individuals derive from EU law. These legal and policy priorities, and the means of attaining them, have changed. Although this appears to be a positive development, there is a risk that it may mask certain constitutional dangers vis-à-vis national competence to preserve the authenticity and integrity of national criminal justice systems and the potential overlap of a 'Europeanised' inventory of procedural rights with the rights long guaranteed by the ECHR. In this regard, a significant risk relates to the challenge faced by the CJEU in consistently interpreting the different sources of rights now available under EU law and the contribution of these sources to the enhancement of judicial protection in criminal matters. The fact that most of the

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<sup>59</sup> See A Hinarejos, JR Spencer, S Peers, 'Opting Out of EU Criminal Law: What is Actually Involved?' (September 1, 2012) University of Cambridge Faculty of Law Research Paper No. 25/2012.

<sup>60</sup> See E Herlin-Karnell, 'What Principles Drive (or Should Drive) European Criminal Law?' (2010) 11 *German Law Journal* 1115.

<sup>61</sup> Protocol 36, Treaty of Lisbon. The House of Lords EU Select Committee, Sub-Committee E (Justice and Institutions) is currently managing an inquiry into the options available and the implications of a block opt-out in 2014.



changes discussed in this chapter are either tentative or forthcoming may render some of the conclusions drawn speculative but nonetheless instrumental to EU's rights' discourse.<sup>62</sup>

Notwithstanding the fact that many of these developments are in flux, it is clear that EU criminal policies in relation to the AFSJ are among those most affected by Lisbon. Two main streams of EU law scholarship are emerging in this context. A first (and overriding) category of scholarship focuses on tracing the impacts of institutional, procedural and substantive changes that have already occurred or are about to take place—scholarship which focuses on EU legislation which aims at producing a unified, simplified and therefore efficient common framework where more justice and security are guaranteed.<sup>63</sup> To a lesser extent, there are studies which emphasize the AFSJ's potential as a single area in which fundamental rights are respected and protected;<sup>64</sup> an emerging area in which fundamental rights adjudication is still relatively nascent (and arguably inconsistent), and in which the fundamental rights discourse has, as yet, made a limited impact. Although this chapter has claimed to do the latter, both streams of legal literature reflect the main concerns of the EU vis-à-vis the AFSJ: To become a credible justice and security actor while guaranteeing the effective protection and promotion of fundamental rights.

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<sup>62</sup> See E Spaventa, 'Federalisation versus Centralisation: tensions in fundamental rights discourse in the EU' in M Dougan and S Currie, *50 Years of the European Treaties: Looking Back and Thinking Forward* (Oxford, Hart Publishing, 2009) 343-364.

<sup>63</sup> See C Eckes and T Konstadinides (eds.) *Crime within the Area of Freedom Security and Justice: A European Public Order* (Cambridge, Cambridge University Press, 2011).

<sup>64</sup> S Douglas-Scott, 'The rule of law in the European Union – putting the security into the 'area of freedom, security and justice' (2004) 29 *EL Rev* 219.