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Chapter 2: Regional Standards on Action against Transnational Organised Crime

2.1 Introduction

This Chapter analyses the development of regional standards relating to action against organised crime, with a particular focus on European Union Law. It begins with an analysis of core principles of approximation of national criminal laws and procedures and mutual recognition of judicial decision. It will be shown that the EU and its Member States have been instrumental in promoting these principles. The Chapter continues with the analysis of core obligations established by the relevant legal instruments which mirrors the discussions of the international standards in the previous Chapter. The important international obligations and standards are indeed implemented through European Union Law, thereby demonstrating a degree of synergy among the different levels of governance, although it becomes simultaneously evident that the measures adopted under the European Union Law are more advanced and progressive than those under the UNTOC. Finally, protection and promotion of human rights will be explored. While the EU and its Member States have made some progress in this area, the European Convention of Human Rights 1950 continues to play a significant role in this regard.

2.2 Core Principles

The first relevant principle is approximation of national criminal laws and procedures. While its importance was recognised in the 1990s, it was the Treaty on European Union as revised by the Treaty of Amsterdam which formally introduced this principle into under the

EU legal order.¹ It has also been recognised by the Treaty on the Functioning of the European Union (TFEU)² which has restructured the pre-existing treaty arrangements. For instance, Article 82(1) states that judicial co-operation in criminal matters shall include approximation of the laws and regulations of Member States in the following areas: a) mutual admissibility of evidence, b) the rights of individuals in criminal procedure, c) the rights of victims, d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision. Article 83 additionally provides for the establishment of minimum rules on the definitions and sanctions of serious offences with cross-border dimensions, such as trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

In terms of legal instruments, so-called framework decisions have been adopted under the TEU. Many of these are still relevant today until they are amended or repealed.

Although framework decisions are legally binding, they do not entail direct effect,³ meaning that they cannot be directly enforceable by national courts and tribunals of Member States.

Under the TFEU, directives are to be used to achieve approximation as stipulated in Articles 82(2) and 83(1). Article 288 provides that “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” Member States therefore have some flexibility in implementing approximation of national laws to combat transnational organised crime.

One noticeable difference between directives and framework decisions is that the former can

¹ Arts. 29 and 31 of the Treaty on European Union as revised by the Treaty of Amsterdam. On the historical development of this context within the EU legal order, see Anne Weyembergh, ‘The Functions of Approximation of Penal Legislation within the European Union’ (2005) 12 *Maastricht Journal of European and Comparative Law* 149; and Francesco Calderoni, *Organized Crime Legislation in the European Union* (Springer 2010).

² [2012] OJ C 326/47.

³ Art. 34.

entail direct effect. This is because Article 288 does not exclude this possibility unlike Article 34 of the TEU in relation to framework decisions. In addition, infringement proceedings before the European Court of Justice (ECJ) can now be instituted against Member States which fail to implement directives.⁴ The importance of these changes is that they will put additional pressures on Member States to take organised crime more seriously and strengthen their action compared to the old regime. However, Article 276 of the TFEU simultaneously states that the ECJ does not have jurisdiction to review the validity or proportionality of operations carried out by the police and other law enforcement services, and this unfortunately undermines the ability of the ECJ to provide independent oversight over some aspects of the action against transnational organised crime within the EU territories.

The second important principle is mutual recognition of judicial decisions in relation to criminal matters. This idea was first introduced by the UK during its Presidency in 1998 to promote judicial co-operation in this area throughout Member States.⁵ It was also recognised in the following year in the Tampere Conclusions, where the principle was regarded as the cornerstone of criminal judicial co-operation.⁶ In 2000 the European Commission consulted the matter with the Council and the European Parliament⁷ and launched an initiative to promote this principle in the following year.⁸ Finally, the Hague Programme, established to strengthen the Area of Freedom, Security, and Justice, reaffirmed the importance of this principle in preventing and suppressing serious crime.⁹ Therefore, mutual recognition was

⁴ Art. 258 of the TFEU.

⁵ Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277, 1278.

⁶ Tampere Presidency Conclusions, para. 33.

⁷ Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final.

⁸ Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, [2001] OJ C 12/10.

⁹ [2005] OJ C53/1.

clearly relevant under the TEU. Under the TFEU, mutual recognition is specifically mentioned in Article 82. The legal instruments are largely the same for mutual recognition under the TEU and the TFEU (i.e. framework decisions and directives).

The principles of approximation of national criminal laws/procedures and mutual recognition are closely interlinked. To begin with, the main factor which encouraged the EU and Member States to promote the mutual recognition principle was the divergence among national legal systems which undermined effective law enforcement co-operation.¹⁰ Undoubtedly, mutual recognition becomes easier if approximation of national criminal laws and processes is achieved to a greater degree. In this sense approximation can be regarded as a tool to promote mutual recognition.¹¹ However, the latter does not necessarily require the former. It has been noted in this regard that the aim of approximation is to eliminate differences, while these differences are recognised under mutual recognition.¹² The European Court of Justice also held that nothing in Title VI of the TEU has made the application of the principle of mutual recognition conditional upon harmonisation of criminal laws of Member States.¹³ For this reason, the principle of mutual recognition has been regarded as a good alternative to approximation of national laws and procedures as it does not require substantial alteration.¹⁴ Finally, it is evident that the EU and its Member States have been more willing to acknowledge explicitly the importance of two core principles in comparison with international law on transnational organised crime.

¹⁰ Mitsilegas, *supra* n 5, 1278.

¹¹ Massimo Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?' (2009) 15 *European Law Journal* 70, 77.

¹² *Ibid*, 74.

¹³ Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECR I-3633, para. 59.

¹⁴ Mitsilegas, *supra*, 1280.

2.3 EU Action against Transnational Organised Crime

2.3.1 Prohibition of Organised Crime and Criminal Jurisdictions

Having explored two key principles under EU Law, it is now useful to analyse how they are reflected and implemented in relation to transnational organised crime. In relation to prohibition of organised crime, an important instrument is the Framework Decision on the Fight against Organised Crime¹⁵ adopted in 2008. Under Article 1, the Framework Decision defines ‘criminal organisation’ as:

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

‘structured association’ means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.

While this definition is largely in line with the one under the UNTOC, one noticeable difference is the number of individuals (i.e. two persons as opposed to three) needed to form a criminal organisation. The offences relating to participation in a criminal organisation also mirror those under the UNTOC¹⁶ and the Framework Decision allows a degree of flexibility for Member States to choose between the conspiracy or participation models.

In relation to substantive crimes, there are other instruments which emphasise the obligation to prohibit.¹⁷ An important point to note, however, is that there is currently no

¹⁵ Framework Decision 2008/841/JHA, [2008] OJ L 300/42.

¹⁶ Arts. 2 and 3.

¹⁷ See for instance, Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union, [1997] OJ C 195/2; Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, [2003] OJ 192/54; Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, [2004] OJ L 335/8; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, [2011] OJ L 101/1; 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335/1; and

clear legal basis obliging Member States to prohibit and punish fiscal or excise fraud such as tobacco smuggling or fuel laundering. In relation to tobacco products, it is important to mention that the EU has adopted two Directives in the past.¹⁸ In addition, it has concluded several agreements with major tobacco companies such as Philip Morris International, Japan Tobacco, British American Tobacco and Imperial Tobacco.¹⁹ However, the first Directive did not contain any criminal law provisions, and given that tobacco smuggling continues to exist within the EU territories, its effectiveness in suppressing this crime can be called into question. Similarly, while it is not yet possible to measure the effectiveness of the newest Directive, the same argument can be applied. As to agreements with tobacco companies, they will be penalised if they do not put enough effort to tackle tobacco smuggling.²⁰ While encouraging co-operation from these corporations is a reasonable step to be taken, the current arrangements can be interpreted as shifting the responsibility of crime prevention to private entities. It has also been argued that these agreements have not been entirely effective in reducing the crime.²¹ There is therefore scope for improvement in relation to these crimes which are becoming serious as noted previously.

Unlike the UNTOC, the EU instruments on substantive crimes goes further to provide for punishments to be implemented by Member States. The participation offences under the

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance), [2015] OJ L 141/73.

¹⁸ Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, [2001] OJ L194/26; and Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on approximation of laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products repealing Directive 2001/37/EC, [2014] OJ L 127/1.

¹⁹ The European Anti-Fraud Office at <http://ec.europa.eu/anti_fraud/investigations/eu-revenue/cigarette_smuggling_en.htm>.

²⁰ European Parliament, *Workshop on Cigarette Smuggling* (January 2014), 39.

²¹ *Ibid*, 40.

Framework Decision on Organised Crime, for instance, are to attract the imprisonment of at least 2-5 years.²² It also obliges States to designate the involvement of organised criminal groups as an aggravating factor in sentencing. This is important as the involvement of these groups naturally make their operations more dangerous and difficult to detect, and a heavier penalty might be justified for these reasons. The Framework Decision on Drug Trafficking similarly provides for imprisonment of at least 1-3 years for drug offences. Article 4 additionally lists aggravating circumstances with heavier penalties (maximum of at least 5-10 years imprisonment), which include production/trafficking of large quantities of drugs or involvement of organised criminal groups. Moreover, human trafficking is to incur the maximum imprisonment of at least 5 years' (or 10 years' under aggravating circumstances).²³ It is evident that these instruments are designed to encourage States to find common grounds by establishing minimum thresholds for punishment, and provide clearer guidance compared to the UNTOC by promoting approximation of substantive criminal law among Member States.

In terms of criminal jurisdiction, the rules stipulated in the EU instruments largely reflect the international standards as represented by the UNTOC. Under the Framework Decision on Organised Crime, the territorial principle is recognised as a mandatory ground for establishing jurisdiction.²⁴ The same provision also mentions the nationality principle (for both natural and legal persons), but this is regarded as an optional ground, allowing Member States not to prosecute their own nationals. This is in line with the practice of some States explained elsewhere. Interestingly, however, the Directives on Human Trafficking and Child Sexual Exploitation make the nationality principle mandatory. This is particularly useful in prosecuting and punishing nationals and habitual residents of the EU Member States

²² Art. 3.

²³ Art. 4.

²⁴ Art. 7.

who commit these crimes abroad.²⁵ Aside from the territorial and nationality principles, the passive personality and universality principle (i.e. presence of perpetrators without territorial or nationality connections, and *aut dedere aut judicare*) are provided for.²⁶

2.3.2 Special Investigative Techniques

There is no single comprehensive instrument governing the use of special investigative techniques under EU Law. However, Member States are encouraged to use them one way or another. The EU Human Trafficking Directive states in this regard that ‘Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases are available.’²⁷ This can be interpreted as including measures such as surveillance and interception of communications. These are also mentioned in the context of cross-border co-operation. The Convention on Mutual Legal Assistance in Criminal Matters between the EU Member States 2000²⁸ encourages measures such as controlled delivery (Article 12), covert investigations (Article 14), and interception of communication (Title III). The Schengen *Acquis*,²⁹ which incorporated the Schengen Agreement 1985 and the Convention 1990 into the EU legal framework, also touches upon cross-border surveillance and hot pursuits.³⁰ More recently in 2014, the Commission and the European Parliament adopted the Directive on European Investigation Order.³¹ This builds upon the previous instruments, most notably the

²⁵ Proposal for a Directive of the European Parliament and of the Council on Combating Sexual Abuse, Sexual Exploitation of Children and Child Pornography, COM (2010) 94 final; and Proposal for a Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting Victims, COM (2010) 95 final.

²⁶ Similar provisions are included in the Framework Decision on Drug Trafficking (Art. 8).

²⁷ Art. 9(4).

²⁸ [2000] OJ C 197/1.

²⁹ Protocol 19 to the TFEU.

³⁰ Arts. 40 and 41.

³¹ [2014] OJ L 130/1.

Framework Decision on the European Evidence Warrant.³² Under this regime, investigation measures such as covert investigation (Article 29) and interception of communications (Chapter V) can be requested and implemented among Member States. In summary, it is apparent that the EU legal frameworks actively encourage Member States to utilise special investigative techniques for serious cross-border crimes, including organised crime.

2.3.3 Confiscation of Criminal Proceeds

Several instruments have been implemented in relation to confiscation of criminal proceeds. Under the TEU, there were 4 framework decisions on this.³³ Among others, a lack of a common approach to confiscation, conflicting legal traditions, and a lack of training on the part of law enforcement authorities have been raised as key reasons for the ineffectiveness of these instruments, and consequently the need for a new instrument was highlighted by the European Commission.³⁴ This has also been acknowledged in the Stockholm Programme, designed to enhance the Area of Freedom, Security and Justice within the EU, which called for more efficient system of asset recovery.³⁵ In response, the Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union³⁶ was finally adopted under the TFEU.

The key features of this Directive can be identified in comparison with the previous instruments. To begin with, the application of this Directive is limited to serious crimes,

³² [2008] OJ L 350/72.

³³ Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, [2001] OJ L 182/1; Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, [2003] OJ L 196/45; Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, [2005] OJ L 68/49; and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, [2006] OJ L 328/59.

³⁴ Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crimes in the European Union, COM (2012) 85 final, 7.

³⁵ [2010] OJ C 115/1.

³⁶ [2014] OJ L 127/39.

unlike previous instruments which cover crimes which attract imprisonment of 1 year. Article 3 in this regard provides a non-exhaustive list of crimes including drug trafficking, human trafficking, counterfeiting, terrorism, corruption and participation in organised criminal groups. This Directive also allows both conviction and non-conviction based confiscation of proceeds.³⁷ While Article 4(2) stipulates a suspect being ill or having absconded as examples of cases where non-conviction based confiscation can be instituted, this list is not exhaustive as the term ‘at least’ suggests. Having said this, whether the Directive will actually encourage Member States to allow expansive non-conviction based confiscation is open to question as many of them have already opposed to such a measure,³⁸ although it is widely practiced in the United Kingdom and the Republic of Ireland as will be explored later in this book. In addition, the rights of the defendants are also specifically recognised under the Directive,³⁹ and therefore additional safeguards are to be implemented by Member States. Another important aspect of this Directive is the use of confiscated proceeds. Article 10(3) encourages Member States to use the confiscated proceeds for public interest and social purposes. In addition to enhancing the capability of law enforcement agencies in combating transnational crime, these proceeds can be used to protect and compensate victims of organised crime, particularly human trafficking and slavery/forced labour where the physical and mental well-being are greatly affected. It has also been suggested that these proceeds should be used to assist civil society organisations in educating the general public and conducting important activities for prevention of crime.⁴⁰ The EU Directive therefore goes further than the UNTOC.

³⁷ Art. 4.

³⁸ See Michele Simonato, ‘Directive 2014/42/EU and Non-Conviction Based Confiscation: A Step Forward on Asset Recovery?’ (2015) 6 *New Journal of European Criminal Law* 213.

³⁹ Art. 8.

⁴⁰ Stefano Montaldo, ‘Directive 2014/42/EU and Social Reuse of Confiscated Assets in the EU: Advancing a Culture of Legality’ (2015) 6 *New Journal of European Criminal Law* 195, 200.

2.3.4 International Co-operation

The EU and its Member States have been instrumental in facilitating international co-operation against transnational organised crime. In relation to treaties, there are a few important ones. The first is the aforementioned the Convention on Mutual Legal Assistance in Criminal Matters between the EU Member States. Requests for mutual assistance are to be made directly by judicial authorities of Member States (Article 6), although spontaneous information exchange relating to criminal offences can be conducted without formal requests as long as that is permitted in their domestic legal frameworks (Article 7). Here, the promotion of mutual recognition is clear and the Convention aims to facilitate smoother co-operation on the ground. In relation to specific measures, the Convention also provides for mutual assistance in the temporary transfer of those in custody (Article 9), hearing of testimonies by video/telephone conferences (Articles 10 and 11), controlled delivery (Article 12), covert investigations (Article 14), and interception of communication (Title III).

The second treaty regime is Schengen *Acquis*.⁴¹ The relevant part is Title III on Police and Security. In addition to facilitating co-operation through judicial authorities, the Schengen *Acquis* allows direct police co-operation when permitted by domestic legal frameworks of the EU Member States (Article 39). Of particular relevance in relation to organised crime is a possibility of cross-border surveillance under Article 40. Normally this is done with the express permission of the concerned Member States, but the same provision also allows surveillance of up to 5 hours without permission in urgent cases. The offences for which such cross-border surveillance is permitted include human and drug trafficking. Article 41 additionally provides for ‘hot pursuit.’ Mutual legal assistance measures are also listed in Part 2.

⁴¹ Protocol 19 to the TFEU.

In addition, there is a treaty aimed to facilitate customs co-operation, which are relevant for crimes such as fiscal/excise fraud. The Convention on Mutual Assistance and Co-operation between Customs Administrations 1997 (Naples II),⁴² adopted under the TEU, builds upon the previous Convention on Mutual Assistance between Customs Administrations 1967. The main aim of this Convention is to facilitate co-operation for the purpose of preventing, detecting, prosecuting and punishing infringements of EU and national customs provisions.⁴³ Key measures stipulated under this instrument include sharing of information (Article 10), cross-border surveillance (Article 21), hot pursuit (Article 20), controlled delivery (Article 22), overt investigation (Article 23), and JITs (Article 24). These measures therefore are similar to the EU Mutual Assistance in Criminal Matters Convention as well as Schengen *Acquis*. In any event, it is apparent that that important international standards as represented in the UNTOC are reflected in these treaties.

There are other legal instruments designed to facilitate smoother international co-operation. A prominent example is the European Arrest Warrant (EAW).⁴⁴ This is the very first measure adopted to promote the mutual recognition principle and has simplified the extradition procedures among Member States, enabling them to bring criminals to justice sooner rather than later. The EAW regime therefore is a good example of an expedite procedure envisaged by Article 16 of the UNTOC. Among others, participation in a criminal organisation, trafficking of human beings, drug and weapons, corruption, and money laundering, have been included in the list of offences under which double criminality is relaxed,⁴⁵ thereby allowing Member States to facilitate faster surrender of suspects and defendants. Since its adoption, EAWs have been relied upon by Member States regularly.

⁴² [1998] OJ C 24/1.

⁴³ Art. 1.

⁴⁴ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [2002] OJ L 190/1.

⁴⁵ Art. 2.

Between 2005 and 2013, a total of 99,841 EAWs have been issued, with the number steadily increasing since the adoption.⁴⁶ The average surrender time for those who have consented to extradition was around 15 days, while it has taken approximately 48 days for those who have not.⁴⁷ These clearly demonstrate that the EAW regime has been recognised by the EU Member States as an important tool to enhance smoother administration of justice. The European Court of Justice has also been upholding the importance of respecting mutual recognition in executing EAWs.⁴⁸

Another important arrangement is the establishment of Joint Investigation Teams (JITs)⁴⁹ as envisaged by Article 19 of the UNTOC. It follows from the aforementioned EU Convention on Mutual Assistance in Criminal Matters, but the 9/11 attack in the United States and some delay in ratification of the Convention prompted the EU to adopt a separate framework decision.⁵⁰ These JITs aim to facilitate more proactive cross-border investigations into serious crimes, including organised crime, by seeking a degree of harmonisation on rules governing its operation among Member States.⁵¹ They are to be set up for specific aims and for limited periods only⁵² and can be participated not only by national police officers, but also by prosecutors and judges, as well as the EU institutions such as Europol and Eurojust.⁵³ The available statistical information reveals that JITs has

⁴⁶ European Parliament, *At Glance: European Arrest Warrant* (European Parliament 2014), 1. It is important to remember that not all of these relate to organised crime as EAWs are used for other serious offences such as theft, grievous bodily harm and murder.

⁴⁷ European Commission, *Report on the Implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, SEC (2011) 430 final, 3.

⁴⁸ See for instance, *Radu*, C-396/11 [2013]; and *Melloni*, C-399/11 [2013]

⁴⁹ [2002] OJ L 162/1.

⁵⁰ Ludo Block, 'Combating Organised Crime in Europe: Practicalities of Police Cooperation' (2008) 2 *Policing: A Journal of Policy and Practice* 74, 79. This Framework Decision will cease to exist as soon as the Convention on Mutual Legal Assistance is ratified by all Member States.

⁵¹ Tom Schalken and Maarten Pronk, 'On Joint Investigation Teams, Europol and Supervision of and Their Joint Actions' (2002) 10 *European Journal of Crime, Criminal Law and Criminal Justice* 78.

⁵² Art. 1.

⁵³ Art. 1(12). See also Art. 30 of the TEU and Art. 88 of the TFEU; Council Act Drawing Up a Protocol Amending the Convention on the Establishment of a European Police Office (Europol Convention) and the Protocol on the Privileges and Immunities of Europol, the Member of Its Organs, the Deputy Directors and

increasingly been facilitated by Member States and EU institutions. According to Eurojust, there were 122 JITs in 2014, with 45 for crime such as participation in organised criminal groups, money laundering as well as human and drug trafficking being formed during that year.⁵⁴ This may be compared with 10 new JITs being set up in 2009⁵⁵ and 30 in 2011.⁵⁶

Moreover, the European Investigation Orders (EIOs) are also designed to facilitate mutual assistance in criminal matters more effectively. To begin with, the Directive on EIOs was adopted as the scope of the pre-existing instruments, most notably the Framework Decision on the European Evidence Warrant (EEW)⁵⁷ is limited. To explain this further, the Framework Decision is limited to evidence which already existed and was available in the forms of objects, data and documents. This means, among others, that the EEWs cannot be issued for interviewing suspects/witnesses as well as obtaining evidence in real time (e.g. through the use of special investigative techniques such as interception of communications).⁵⁸ The Directive aims to ameliorate some of the shortcomings in the European Evidence Warrant. To begin with, the relevant authority in one Member State can issue an order authorising specific investigation measures to be facilitated in another Member States for the purpose of obtaining evidence. With an exception of gathering of evidence within the framework of JITs,⁵⁹ investigation measures under EIOs may include, but are not limited to, temporary transfer of suspects (Articles 22 and 23) and the use of telephone or video links (Articles 24 and 25) in addition to special investigative techniques mentioned above. The

Employees of Europol, [2002] OJ C 312/1; and Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, [2002] OJ L 61/1.

⁵⁴ Eurojust, *Annual Report 2014*, 21.

⁵⁵ Eurojust, *Annual Report 2009*, 34.

⁵⁶ Eurojust *Annual Report 2011*, 11.

⁵⁷ [2008] OJ L 350/72. Another important instrument is the Framework Decision on execution of orders freezing property or evidence.

⁵⁸ European Commission, *Green Paper on Obtaining Evidence in Criminal Matters from One Member State to Another and Securing Its Admissibility*, COM (2009) 624 final, 4. It should also be noted that the EEW was implemented in only 2 States (Denmark and Finland), making this instrument ineffective.

⁵⁹ Art. 3.

Directive also incorporates some safeguards against misuse, such as the tests of necessity and proportionality.⁶⁰ Member States are also to respect the rights of suspects/defendants. All in all, many of the international standards on international co-operation are reflected at the EU level.

2.4 Protection of Human Rights of Victims and Perpetrators of Organised Crime

Compared to the past, the EU and its Member States have made some progress in relation to protection and promotion of human rights. To begin with, the Charter of Fundamental Rights of the European Union⁶¹ is now legally binding on all Member States by virtue of the entry into force of the Lisbon Treaty in 2009. The Charter is applicable when the EU institutions or Member States are implementing EU law.⁶² The relevant rights include prohibition on torture, inhuman or degrading treatment (Article 4), the right to liberty and security (Article 6), and the right to a fair trial (Article 47), presumption of innocence (Article 48), legality and proportionality of criminal offences and punishments (Article 49), and the *ne bis in idem* principle (Article 50). While these are mostly relevant to the perpetrators, Article 47 additionally provides for access to remedy for those whose rights have been violated, and it seems reasonable to assume that it applies, at least, to the victims of transnational organised crime with human rights dimensions, such as human trafficking and exploitation.

Aside from the Charter, Article 82(2) of the TFEU specifically authorises the Council and the European Parliament to establish minimum rules on the rights of individuals in criminal proceedings as well as victims of crime. This is an important change as protection

⁶⁰ Art. 6.

⁶¹[2010] OJ 83/389.

⁶² Art. 51 of the Charter.

of their rights was not sufficiently provided for under the previous regime. In relation to protection of victims, there were two key instruments under the TEU: the Framework Decision on the Standing of Victims in Criminal Proceedings⁶³ and the Directive on Compensation for Crime Victims.⁶⁴ It has, however, been acknowledged that implementation of these instruments at the national level was far from satisfactory,⁶⁵ and the need for a new instrument under the TFEU was expressed.⁶⁶ In response, the European Parliament and the Council adopted the Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime in 2012.⁶⁷ This Directive represents an improvement as protection and assistance are to be provided outside of criminal proceedings. To begin with, Article 1 makes it clear that the ‘Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.’ This is significant as many victims of organised crime are non-EU nationals. Measures stipulated under the Directive include, but are not limited to, provision of relevant information, interpretation/translation, access to confidential support services free of charge, legal aid, protection of privacy, and compensation. It is also noteworthy that it obliges Member States to pay particular attention to vulnerabilities surrounding the victims of organised crime.⁶⁸ This instrument is further supplemented by subject specific instruments such as the Directives on Human Trafficking and Child Sexual Exploitation which contain provisions on protection of victims of these crimes.

⁶³ [2001] OJ L 82/1.

⁶⁴ [2004] OJ L 265/15.

⁶⁵ European Commission, *Report Pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings*, COM (2009) 166 final; Portuguese Association for Victim Support, *Victims in Europe: Implementation of the EU Framework Decision on the Standing of Victims in Criminal Proceedings in the Member States of the European Union* (2009); Proposal for a Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, COM (2011) 275 final, 2; and the Stockholm Programme, *supra* n 35.

⁶⁶ Resolution of the Council on a Roadmap for Strengthening the Rights and Protection of Victims, in particular in Criminal Proceedings, [2011] OJ C 187/1.

⁶⁷ [2012] OJ L 315/58.

⁶⁸ Art. 22(3).

In relation to the rights of defendants, a similar development can be recognised. It was not possible to adopt an instrument on this due to oppositions expressed by some Member States such as the United Kingdom, Republic of Ireland and the Czech Republic.⁶⁹ In recognition of the need to strengthen their rights during criminal proceedings, the Council published a roadmap for enhancing procedural rights during criminal proceedings in 2009, which mentioned the following priority areas: translation and interpretation, information on rights/charges, legal advice/aid, communication with relatives, employers and consular authorities, special safeguards for vulnerable individuals, and pre-trial detention.⁷⁰ Some of these measures have been formalised under the TFEU. The relevant instruments are the Directives on the Right to Interpretation and Translation during Criminal Proceedings,⁷¹ on the Right to Information during Criminal Proceedings,⁷² and on the Right to Access to a Lawyer in Criminal and EAW Proceedings and to Communicate with a Third Persons and Consular Authorities.⁷³ Proposals in relation to presumption of innocence,⁷⁴ legal aid,⁷⁵ and safeguards for children suspected of crime,⁷⁶ are currently being considered and negotiated. Finally, the rights of defendants are further strengthened by the European Convention on Human Rights 1950, to which all EU Member States are Parties and the EU recently acceded. Many of the human rights principles mentioned earlier are indeed developed by the European Court of Human Rights, and therefore the Council of Europe System provides an additional

⁶⁹ Ed Cape and Jacqueline Hodgson, 'The Right to Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice' (2014) 5 *New Journal of European Criminal Law* 450, 451.

⁷⁰ [2009] OJ C 295/1.

⁷¹ [2010] OJ L 280/1.

⁷² [2012] OJ L 142/1.

⁷³ [2013] OJ L 294/1.

⁷⁴ Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM (2013) 821 final.

⁷⁵ Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM (2013) 824 final.

⁷⁶ Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822 final.

layer of human rights protection. The detailed analysis of relevant human rights norms principles will be provided throughout this book.

2.5 Critical Appraisal of the EU Action against Transnational Organised Crime

There is no doubt that the EU and its Member States have been more proactive in implementing measures against transnational organised crime individually and collectively compared to other regions of the world, and that the two core principles, approximation of national criminal laws and procedures and mutual recognition of judicial decisions, have gradually found their place in the Area of Freedom, Security and Justice. Further, the relevant instruments relating to action against organised crime amply reflects the obligations imposed by the UNTOC. Nevertheless, a closer look at actual implementation of a variety of EU legal instruments simultaneously reveals a number of issues, shortcomings and concerns. To begin with, approximation of national laws and criminal procedures has not been consistently realised. For instance, the definitions of ‘criminal organisation’ or ‘criminal group’ vary among Member States. There is no mention of a ‘structured group’ under the Austrian,⁷⁷ German,⁷⁸ Hungarian⁷⁹ and Slovenian⁸⁰ legislation, while the Estonian⁸¹ and Spanish⁸² Criminal Codes speak of a ‘permanent organisation.’ The benefit element is not mentioned in most statutes, and the Danish and Swedish legislation do not contain a definition of a criminal group or organisation in line with the Framework Decision or the Organised

⁷⁷ Austrian Criminal Code, s. 278

⁷⁸ German Criminal Code as amended in 2009, s. 129.

⁷⁹ Hungarian Criminal Code 2012, s. 459.

⁸⁰ Slovenian Criminal Code 2006, art. 294.

⁸¹ Estonian Criminal Code as amended in 2013, s. 255.

⁸² Spanish Criminal Code, art. 570 bis.

Crime Convention.⁸³ In terms of offences relating to criminal organisations, mere membership (or belonging) is criminalised in Estonia⁸⁴ and Greece,⁸⁵ while leading or forming a criminal organisation are punished additionally in Bulgaria,⁸⁶ Germany,⁸⁷ Romania⁸⁸ and Slovenia.⁸⁹ These discrepancies do not necessarily demonstrate that Member States have been reluctant to abide by the relevant European standards. Nevertheless, they certainly highlight the point expressed elsewhere that criminal offences are defined according to Member States' social, political, legal cultural underpinnings.

In relation to the punishments stipulated in various instruments, an important question to be asked is whether the minimum rules stipulated in the relevant instruments reflect the serious nature of various forms of organised crime. In other words, are punishments proportionate to the offences committed? Drug offences are not regarded as seriously in Europe in comparison to other regions such as Asia where many States still impose the capital punishment. Consequently 1-3 years imprisonment stipulated in the Framework Decision on Drug Trafficking may be regarded as reasonable by the EU Member States. However, an argument may be made that other crimes such as human trafficking and exploitation should attract heavier penalties as these are widely regarded as gross violations of human rights. While States impose heavier penalties in practice,⁹⁰ the Directive on Human Trafficking could have set a higher threshold than 5 years' imprisonment. The same argument can be raised for child sex offences.⁹¹ A related question is whether these

⁸³ European Commission, *Study on Paving the Way for Future Policy Initiatives in the Field of Fight against Organised Crime: The Effectiveness of Specific Criminal Law Measures Targeting Organised Crime* (February 2015), 31, 42 and 43.

⁸⁴ *Supra* n 81, s. 255.

⁸⁵ Greek Criminal Code, art. 187.

⁸⁶ Bulgarian Criminal Code, art. 321.

⁸⁷ *Supra* n 78, s. 129.

⁸⁸ Romanian Criminal Code, s. 367.

⁸⁹ *Supra* n 80, art. 294.

⁹⁰ See Chapter 3 on the legislative frameworks on substantive crimes in the United Kingdom (including Northern Ireland) and the Republic of Ireland.

⁹¹ Under the Directive on Child Exploitation, coercing a child, who has reached the age of sexual consent, into prostitution attract only 5 years' imprisonment.

punishments are sufficient to deter perpetrators from committing organised crime in future. The national courts do not normally impose maximum penalties particularly when perpetrators are first time offenders or minor players. Other factors such as mitigating circumstances and co-operation with law enforcement authorities can also affect sentencing. Even with the imposition of custodial sentences, prisoners are often released early with parole arrangements. Given the amount of profits criminals can make, spending some time in prison may not serve as an effective deterrence in the end.

The State practice on punishment also reveals a great degree of divergence. Money laundering in Finland attracts the maximum of 2 years' imprisonment,⁹² whereas the same offence carries up to 5 years' and 18 years' imprisonment in Croatia⁹³ and Malta⁹⁴ respectively. The punishment for drug trafficking is imprisonment for 10 years in France,⁹⁵ 2-8 years in Hungary,⁹⁶ and 3-6 years in Spain.⁹⁷ Further, under the Estonian Criminal Code, human trafficking is punished with imprisonment for between 1-7 years,⁹⁸ and the same offence carries 4-10 years in Slovakia.⁹⁹ What these examples show is that the minimum rules/thresholds for substantive organised crime offences as envisaged by the TEU and the TFEU have not necessarily been accepted by Member States, and that approximation of substantive criminal laws has been difficult to achieve. The principle of State sovereignty therefore remains strong in this area.

It has also not been easy to implement the principle of mutual recognition on the ground. In relation to EAWs, for instance, of 99,841 EAWs issued between 2005 and 2013,

⁹² Finnish Criminal Code as amended, ch. 32, s. 6.

⁹³ Criminal Code as amended in 2003, art. 279.

⁹⁴ Prevention of Money Laundering Act 1994, s. 3.

⁹⁵ French Penal Code, art. 222-36.

⁹⁶ *Supra* n 79, s. 176.

⁹⁷ *Supra* n 82, art. 368.

⁹⁸ *Supra*, n 81, s. 133.

⁹⁹ Slovakian Criminal Code, s. 179.

26,120 resulted in actual surrender of suspects or defendants.¹⁰⁰ The majority of them therefore have not been enforced by Member States. It has also been pointed out that, while the Member States must recognise EAWs issued by others, a decision not to execute an EAW is not always respected as EAWs themselves can continue to be valid.¹⁰¹ In addition, the proportionality has been raised as an ongoing problem with the EAWs because some States are known to issue them even for very minor offences,¹⁰² such as possession of small quantities of narcotics,¹⁰³ while others do not.

Aside from difficulty in facilitating two principles, the scope of some instruments raises concerns. The EIO regime is the case in point. Its scope is very wide as it can be issued and executed for ‘any investigative measure,’¹⁰⁴ and it has been rightly argued that this can undermine the principle of legality.¹⁰⁵ Although validation of EIOs by a ‘judicial authority’ can ensure impartial oversight, it has been pointed out that a public prosecutor can additionally be regarded as a judicial authority.¹⁰⁶ The same argument has also been raised in relation to the definition of an ‘executing authority’ which may not require judicial scrutiny or intervention.¹⁰⁷ Further, it has been pointed out that, due to a lack of consistent standards, a wide margin of appreciation is given to a judicial authority in determining the necessity and proportionality of investigative measures to be conducted.¹⁰⁸ Finally, the execution of the

¹⁰⁰ European Parliament, *supra* n 46, 1.

¹⁰¹ Fair Trial International, *The European Arrest Warrant Seven Years On – The Case for Reform* (Fair Trial International 2011), 6-7.

¹⁰² European Parliament, *Report with Recommendations to the Commission on the Review of the European Arrest Warrant*, A7-0039/2014, 13.

¹⁰³ Dan Helenius, ‘Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?’ (2014) 5 *New Journal of European Criminal Law* 349, 361.

¹⁰⁴ Art. 2.

¹⁰⁵ Annalisa Mangiaracina, ‘A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order’ (2014) 10 *Utrecht Law Review* 113, 120.

¹⁰⁶ Ines Armada, ‘The European Investigation Order and the Lack of European Standards for Gathering Evidence: Is a Fundamental Rights-Based Refusal the Solution?’ (2015) 6 *New Journal of European Criminal Law* 8, 12.

¹⁰⁷ *Ibid*, 13.

¹⁰⁸ *Ibid*, 15.

EIOs can be refused on various grounds, including national security, classified information relating to intelligence activities, and human rights grounds (Article 11), and this opens up the possibility that the mutual recognition principle is not respected in the same way as other instruments such as EAWs.

In terms of State practice, the implementation of various obligations established under relevant instruments has not been consistent in some areas. For instance, while the available evidence suggests that the Member States are increasingly relying on JITs to conduct investigations against organised crime as noted earlier, a number of important issues have been highlighted. Some Member States avoid participation by referring to the grounds for refusal such as sovereignty and internal security.¹⁰⁹ The double legal basis (both the Framework Decision on JITs and the Convention on Mutual Legal Assistance) also created some confusion among the law enforcement and judicial authorities in implementing relevant obligations. To illustrate this with an example, the United Kingdom incorporated the Framework Decision into its domestic law, while the Netherlands uses the Convention as a legal basis for JITs.¹¹⁰ Because of this, the United Kingdom was regarded as an ineligible partner in JITs in the past.¹¹¹ In addition, the diverse criminal procedures among Member States, including the rules relating to disclosure of evidence and retention of personal data, as well as the reluctance on the part of the law enforcement authorities to share sensitive intelligence, were said to have made it difficult to set up JITs.¹¹² These suggest that mutual trust has not been developed by frontline law enforcement agencies.

¹⁰⁹ European Commission, *supra* n 83, 326.

¹¹⁰ *Ibid.*, 332.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, 333-334. See also Toine Spapens, 'Joint Investigation Teams in the European Union: Article 13 JITs and the Alternatives' (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 239.

Finally, protection and promotion of human rights of victims and perpetrators of transnational organised crime should be carefully assessed. In relation to victim protection, some uncertainty remains for victims of organised crime who are non-EU nationals. Although the principle of non-discrimination stipulated in Article 1 of the Directive on Victims of Crime is to be welcomed, if Member States decide to repatriate or return foreign victims by enforcing immigration laws and regulations, support and assistance stipulated in the Directive become meaningless to them. A clear example of this is access to compensation. It is extremely difficult to seek compensation once non-EU victims are returned to their States of origin but both the Directives on Victims of Crime and on Compensation are silent as to how non-EU victims can receive appropriate compensation. These instruments should have created additional obligations to allow these victims to stay in Member States while receiving relevant assistance and support. This lack of clear obligations can be interpreted as shifting the burden of victimisation to their States of origin. This is not fair particularly when victimisation occur within the EU territories.

As to the rights of perpetrators of transnational organised crime, various issues have also been highlighted. For instance, the European Parliament has expressed its concern over the lack of fundamental rights safeguarded within the Framework Decision on EAWs.¹¹³ In particular, human rights protection has not been included as part of the mandatory refusal to execute EAWs under Article 3, leaving Member States with a wide margin of appreciation.¹¹⁴ It has also been noted that the absence of minimum standards relating to judicial oversight over EAWs has led to inconsistent State practice with regard to protection of fundamental rights,¹¹⁵ in areas such as pre-trial detention and access to legal representation during

¹¹³ European Parliament, *supra* n 46, 4; and European Commission, *supra* n 47, 7.

¹¹⁴ In *Radu*, *supra* n 48, the European Court of Justice ruled (para. 39) that the judicial authorities are not required to refuse to execute EAWs even when fundamental rights have been reached.

¹¹⁵ European Parliament, *supra* n 46, 5.

surrender proceedings.¹¹⁶ Ironically, protection of human rights has been said to create a degree of tension as the domestic courts may be forced to examine the human rights situations of other Member States in deciding whether to refuse surrender.¹¹⁷ Despite these concerns, the European Court of Justice has ruled that the principle of mutual recognition can take precedence over protection of human rights,¹¹⁸ and its decisions have rightly been criticised.¹¹⁹

Similarly, there are several issues with the Directive on Access to a Lawyer. According to Article 2, the Directive is applied from the time when the suspects or accused persons are informed by the competent authorities that they are suspected or accused of having committed a criminal offence. Article 3 further provides that suspects or accused persons shall have access to a lawyer before they are questioned by the police, another law enforcement or judicial authority. These suggest that the Directive is applicable to the criminal investigation stage. However, it has been pointed out that it does not guarantee the presence of a lawyer during the police interrogations.¹²⁰ Indeed, the wording of Article 3(3)(b), ‘in accordance with the procedures under national law’ gives a margin of appreciation on Member States to decide how the lawyer’s participation is to be secured during questioning.¹²¹ It has also been argued that the wording of Article 2 can be manipulated by the competent authorities to delay access to a lawyer by not informing the suspects or accused persons promptly.¹²² Further, when investigations take place in another

¹¹⁶ European Commission, *supra* n 47, 6.

¹¹⁷ On this, see Luisa Marin, ‘The European Arrest Warrant and Domestic Legal Orders: Tension between Mutual Recognition and Fundamental Rights: The Italian Case’ (2008) 15 *Maastricht Journal of European and Comparative Law* 473.

¹¹⁸ See the cases of *Radu* and *Mellani*, *supra* n 48.

¹¹⁹ Ermioni Xanthopoulou, ‘The Quest for Proportionality for the European Arrest Warrant: Fundamental Rights Protection in a Mutual Recognition Environment’ (2015) 6 *New Journal of European Criminal Law* 32.

¹²⁰ Cape and Hodgson, *supra* n 69, 467.

¹²¹ Lorena B Winter, ‘The EU Directive on the Right to Access to a Lawyer: A Critical Assessment’ in Stefano Ruggieri (ed.), *Human Rights in European Criminal Law: New Developments in EU Legislation and Case Law After the Lisbon Treaty* (Springer 2015), 121.

¹²² *Ibid*, 118.

Member State, the right of access to a lawyer in those investigations is not always guaranteed.¹²³ This also applies to EAWs proceedings as access to a lawyer is relevant only in executing, and not issuing, States.¹²⁴ These loopholes mean that the current EU instruments do not sufficiently protect the rights of suspects and accused persons, and must be supplemented by the ECHR.¹²⁵ In summary, implementation of the European standards on relating to action against organised crime, including promotion and protection of human rights, has not always been an easy task.

2.6 Conclusion

This Chapter explored the core regional standards as represented by European Union Law. It is apparent that the EU and its Member States have been instrumental in promoting and implementing individual and collective responses to transnational organised crime. Similar institutional and legal developments cannot be seen in other regions of the world such as Asia, Africa, the Americas and the Middle East. Compared to the UNTOC, approximation (harmonisation) and mutual recognition principles have clearly been recognised and implemented more proactively by the EU Member States. However, the examination of State practice simultaneously reveals that national implementation is not always consistent, as the relevant instruments allow a wide margin of appreciation on Member States. In addition,

¹²³ *Ibid*, 128.

¹²⁴ The Directive provides only for the obligation to inform the suspects the possibility of appointing a lawyer in issuing States but actual appointment is not guaranteed.

¹²⁵ See for instance, *Salduz v Turkey* (2008), App no 36391/02, in which the European Court of Human Rights held that access to a lawyer should be provided as from the first interrogation of a suspect by the police (para. 55). In addition, in *Cadder v Her Majesty's Advocate* [2010] UKSC 43, the UK Supreme Court held that Article 6 was breached if the prosecution relies on evidence of the accused's interview by police when a solicitor was not present. Finally, in *Stojkovic v France and Belgium*, App no 25303/08, the European Court held that France was in breach of Article 6, because the applicant, who was wanted by the French authorities for his involvement in robbery there, did not have access to a lawyer in Belgium where he was detained and interviewed, despite the fact that the letter rogatory designated him as a 'legally assisted witness' which entitled him the access to a lawyer.

there is much to be done in terms of protecting and promoting the human rights of victims and perpetrators of organised crime. The role of human rights law therefore is important within the EU territories also.