

## Protection of Fundamental Rights in the ‘Globalised’ Criminal Justice and its Impact on the National Human Rights Policies in Europe

*“A world of persons which can not speak  
as they don’t have such a chance  
doesn’t need to be a world of silence”*

[J.B.G.]

### Abstract

This paper deals with a problem of ‘doing justice’ in the perspective of integration of the contemporary legal systems in the direction of global law through their gradual process of harmonizing. This matter is discussed in the light of emerging a ‘common area of justice’ within the European Union. The main attention is focused on the question of how to enhance respect for fundamental rights in an ‘integrated European system of criminal justice’. A further discussed issue is whether fundamental rights are protected in a ‘just’ manner in regard to all categories of persons which may be involved in the criminal proceedings, in accordance with the right to effective legal remedy and the right to a fair hearing.

### 1. Introduction

The legitimate protection of fundamental rights should be the guiding rule and new challenge for the contemporary national criminal justice systems, which are still entering into the New Millennium, natured by human rights’ based approach. This particular issue seems to have a significant meaning, especially in view of an ‘integrated European system of criminal justice’ *in statu nascendi*. It is worth to recall that for a long time, criminal justice was considered to be purely national, namely an expression of the sovereign power of the State. In a way, the contemporary systems of criminal justice still remain a matter for the domestic jurisdictions. Nevertheless, recently we have witnessed a gradual movement towards some harmonization or even unification of national criminal law and procedure into the more consistent system of legal norms. Actually, the growing up trends to standardized rules and principles of criminal substantive and procedural law are taking place, due to the common legal traditions and shared values in the region of Europe.

One may also add that, whether we like it or not, the European Union as a policy maker plays a great role in this harmonizing process, both at the global and regional levels. Since the European Union is currently co-operating effectively with the Council of Europe, OSCE and with several NGO’s. It is also supporting to much extent the international criminal justice, at the global (universal)

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level. Such a support concerns *inter alia* the works of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Court (ICC), based at the Hague. The European Union has high regard for the ICC, nominating it for the international community's Special Achievement Award in recognition of its role in promoting the law of nations, particularly humanitarian law and human rights. In consequence, signing and confirmation of the Rome Statute (the ICC Statute adopted at a diplomatic conference, in Rome on 17 July 1998 and it entered into force on 1 July 2002) are also the result of joint efforts taken up by all the member states of the European Union.<sup>1</sup>

What is more, the Humanitarian Aid department (ECHO, 1992) was established as a separate unit of the European Commission responsible for international humanitarian assistance in all over the world.<sup>2</sup> Also, one should not forget about such relevant decisions, as Council Decision 2003/335/JHA of 8 May 2003 on the investigation and prosecution of genocide, crimes against humanity and war crimes<sup>3</sup> or Council Decision 2002/494/JHA of 13 June 2002 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes<sup>4</sup>. Last but not least, is the establishment of the European Union Agency for Fundamental Rights (FRA - 2007, based in Vienna) which is involved in the setting-up of networks of organisations dealing with all kinds of fundamental rights aspects.<sup>5</sup> The next salient issue is a fact that the European Union has already expressed its engagement in the rights and dignity of persons with disabilities through signing the UN Convention.

## **2. The Place of Human Rights in the Integrated European Area of Criminal Justice**

Starting with the Universal Declaration dated from 1948 (Universal Declaration on Human Rights - UDHR), we may notice a tremendous development of fundamental (basic) rights protection in the all spheres of our life. This leading rule of respect for fundamental rights as it commonly adopted in the democratic countries, has been particularly strengthened by actions within the United Nations, Council of Europe and the European Union. All the undertaken efforts have strongly influenced the protection of fundamental rights of individuals, in the national legal systems as well as the respect for

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<sup>1</sup> Compare, for instance: Agreement between the International Criminal Court and the European Union on cooperation and assistance, O J L 115, 28.4.2006. European Parliament resolution on the Annual Report on Human Rights in the World 2004 and the EU's policy on the matter (2004/2151(INI)), O J C 45E, 23.2.2006.

<sup>2</sup> [http://ec.europa.eu/echo/index\\_en.htm](http://ec.europa.eu/echo/index_en.htm)

<sup>3</sup> O J L 118, 14.5.2003.

<sup>4</sup> O J L 167, 26.6.2002.

<sup>5</sup> Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, O J L 53, 22.2.2007.

human rights, in the international relations. *In principio*, a present legal basis for protection of fundamental rights has been mostly formulated in the UDHR, the International Covent on Civil and Political Rights (ICCPR, 1966), and regional system of the ECHR (1950). However, despite of all these valuable achievements in human rights law, it is sad to say that still in many cases the fundamental rights are routinely violated. Therefore, as ‘*citizens of Europe*’ we should express our solidarity for promoting human rights, both at the global and regional levels. This is one of the most important aspects on our path towards creating a genuine area of justice for global ‘civilised’ world, in which everyone may exercise his fundamental rights. These are especially, the right to human dignity, the right to freedom, the right to life or the equality before the law. In the UDHR it is directly proclaimed that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (art.1). Accordingly, the right to human dignity is taking the highest place in the hierarchy of fundamental rights, aspiring to a foundation stone for their further development.

The term of fundamental rights *per se* is commonly applied for the European legislation and the jurisprudence of the ECJ. Whereas, (basic) human rights is more reserved to the legal norms with regard to ‘the law of nations’ (*jus gentium*) established, at the global level. In the context of this paper ‘fundamental rights’ should be understood as ‘basic human rights’ for all the ‘citizens’ in the emerging area of European criminal justice, which should be founded on the democratic values of international community and humanisation of law. Such an approach would reflect then the current achievements in the human rights law and common consensus among the civilized nations.

More strictly speaking, the fundamental rights are non-transferable rights of individuals or civil rights which operate only in favour of the citizens. It is usually recognised that civil rights are connected with the positivist theory of law, while human rights find their roots in the *jus naturae*. In relation to the concept of fundamental rights within the European Union, the landmark in their further progress seems to be a full adoption of the Charter of Fundamental Rights of the European Union, 2000 (henceforth the Charter ) by all the Member States.<sup>6</sup> The Charter sets out the legal norms, which should constitute the ‘bill of rights’ guaranteed to all the ‘*citizens of Europe*’. Such an approach may have a very specific meaning for our living in the area of ‘Freedom, Security and Justice’ within the integrated Europe. Summing up, the Charter as a binding set of fundamental rights aspires to an effective system of strengthening position of individual in the criminal proceedings throughout the EU, too. Here, one should also stress a crucial role of the Lisbon Treaty which may become a *conditio sine qua non* for further strengthening the status of individuals, in the European area of criminal justice. Since this is just the Lisbon Treaty which opens up two direct legal pathways in obligation to

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<sup>6</sup> See generally A.M. Roddik Christensen, *Judicial Accommodation of Human Rights to the European Convention on Human Rights in the European Union*, DJØF Publishing 2007.

respect fundamental rights, these are respectively between the EU and its Charter and between the EU and the ECHR.<sup>7</sup>

Also, one should emphasize the importance of the functional relationship between fundamental rights and criminal law. Actually, it is said that fundamental rights “can function as *limits* to the punitive action, or as *safeguards* for the persons to whom a criminal law is applied, and as *grounds* giving rise to the exercise of punitive power, thereby constituting the *object* to be protected through criminal law”.<sup>8</sup> In fact, the ECJ through its wide jurisprudence has already accepted (basic) human rights as a fundamental principle confirming at the same time, its place in the very heart of the European Union policies. In addition, the Judge Allan Rosas maintains that protection and promotion of fundamental rights and human rights in and by the European Union can be roughly divided into two parts, namely the internal European Union situation, on the one hand, and the question of the European Union external relations with third countries, on the other.<sup>9</sup>

Further to the place of human rights in the European area of criminal justice, one should also realize that the definition of justice (or fairness) itself, in its legal sense and practice is quite complex and fragile matter. It seems to remain under strongly influence of the legal and culture heritage of the past decades. What else, the concept of justice is not only an academic topic, which might be discussed mostly on the grounds of theory of law or state. In truth, it is a vital concept that has also its significant meaning in our daily life, namely outside the academic debates. Generally, in the legal sense the term justice may be defined as a moral link that the law seeks to uphold in the protection of rights and punishment of wrongs. However, justice is not synonymous with law, because it is possible for a law to be called unjust, as well. The definitions of justice and criminal justice, in the legal, philosophical or social terms are natured by a visible process of its undergoing transition, due to the hierarchy of the adopted norms and values, in a certain community. In brief, one may conclude that the foundation stone of each legal system without any doubts should be justice. And, in the perspective of the emerging European area of criminal justice, it seems that this sphere may be build up only based on the common democratic rules and human values, where priority is given to the respect for fundamental rights of individuals.<sup>10</sup>

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<sup>7</sup> N.N. Shuibhne, *National Values, Fundamental Rights and EC Free Movement Law*, (2009) 34 E.L.Rev., p. 245.

<sup>8</sup> F. Palazzo, *European Charter of Fundamental Rights and Criminal Law*, in: M. Ch. Bassiouni, V. Militello, H. Satzger (eds.), *European cooperation in penal matters: issues and perspectives*, CEDAM 2008, pp. 3-30.

<sup>9</sup> A. Rosas, *International Human Rights Instruments in the case –law of the European Court of Justice*, in: *Law in the changing Europe*, Liber Amicorum Pranas Kūris, Mykolo Romerio Universitetas 2008, pp. 364-365.

<sup>10</sup> See H. Kelsen, *What is Justice? : Justice, laws and politics in the mirror of science: collected essays*, University of California Press, 1957. H. Kelsen, *Vom Wesen und Wert der Demokratie*, Scientia Verlag, 1981. J. Westphal (ed.), *Justice*, Hackett Publishing, 1996. Oxford Dictionary of Law, Seventh edition 2009, p. 310. One should mention, this was Hans Kelsen who noticed in his remarkable work *Vom Wesen und Wert der Demokratie/ On the Essence and Values of Democracy*

### 3. Towards the More Consistent System of Law in the Area of Freedom, Security and Justice

In the lately adopted initiatives within the European Union, it is often emphasized that the idea of developing an area of freedom, security and justice (henceforth AFSJ) having respect for ‘citizens of Europe’ should express common interests and solidarity among the European States. For example, the Preamble to the Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions reads, as follows: “The European Union has set itself the objective of developing an area of freedom, security and justice. This presupposes that there is an understanding of freedom, security and justice on the part of the Member States which is identical in its essential elements and based on the principles of freedom, democracy, respect for human rights and fundamental freedoms, as well as the rule of law”.<sup>11</sup>

So, the stressed question of respect for human rights becomes a real element of the present European Union strategy in the AFSJ. This leading idea of the European Union policy was officially proclaimed in the Presidency Conclusions, Tampere European Council (1999). And, then further enshrined in the Hague Programme (2004) and the Stockholm Programme (The Stockholm Programme – An open and secure Europe serving and protecting the citizens, 2009). Thus, one may truly expect that in the coming years “the challenge will be to ensure respect for fundamental rights and freedoms and integrity while guaranteeing security. It is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law and international protection rules are coherent and mutually reinforcing”.<sup>12</sup> Accordingly, it is declared also in the Stockholm Programme for the period 2010 -2014 that “The European Council reaffirms the priority it attaches to the development of an area of freedom, security and justice (JLS) responding to a central concern of the peoples of the States brought together in the Union”. In this sphere, there are also *explicite* references made to “an integrative approach” which should consolidate the protection, both of the crime victims’ rights and procedural safeguards of suspected or accused persons in criminal proceedings.<sup>13</sup>

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(1929) that democratic governance of law gives a better opportunity to achieve some legal guarantees to respect for justice as the constitutional system of democracy is based on the ideas of liberty and compromise.

<sup>11</sup> OJ L 337, 16.12.2008.

<sup>12</sup> Beatrice Ask, Minister of Justice, Sweden, eucrim issue 4/2009, pp. 117.

<sup>13</sup> Council of the European Union, Brussels, 2 December 2009, 17024/09, CO EUR-PREP 3, JAI 896, POLGEN 229. Also, worth quoting are words of Beatrice Ask, Ministry of Justice, Sweden that “ The priority for the coming years should be the interests and needs of citizens and other persons for whom the EU has responsibility”, eucrim issue 4/2009, p. 117.

Whilst it is obvious that respect for fundamental rights as derived from international norms (especially, from the ECHR system) is a guiding principle, which should be observed by all the European States, there is still scope for further strengthening the legal rights of the individual. The emergent European Union criminal law (both substantive and procedural) should protect the general interests and shared values of the community, as a whole. But, on the other hand, it also has to ensure respect for fundamental rights of individuals, as the *citizens of Europe*, protecting them from injury arising from the exercise of State power in the European Union context. Furthermore, it should facilitate the reparation of harm done to victims of such rights violations. However, there may be serious doubts as to the implementation of this paradigm in the framework of a supranational organisation, such as the European Union, having its own autonomous *sui generis* legal order. This situation will be changed by the enhancing of the judicial protection of fundamental rights, through the Lisbon Treaty, when the European Union joins the ECHR system. In this way, individuals as *citizens of Europe* will have direct access to the ECtHR, which may be the competent Court to decide their individual complaints against the EU institutions. This seems to be an important issue, in the event of any European Union legal act violating the fundamental rights of an individual.

A further key question in the creating a common AFSJ is whether fundamental rights in the context of transnational (European) criminal proceedings are protected in a ‘*fair*’ manner, especially in the light of an integrative approach towards criminal law and procedure. As it is well-known, such an integrative approach has already led to merger of the three pillars’ structure into one ‘uniform’ legal order under the Lisbon Treaty, which entered into force on the 1 of December 2009.<sup>14</sup>

From the perspectives of the emerging a more consistent system of law in the AFSJ we have witnessed the widely spreading transnational criminal proceedings, this means: a legal process in “cross-border situations”, within the common legal area in criminal matters of the European Union. The jurisprudence of the ECJ evidently shows that nowadays many European criminal proceedings have such a very specific ‘trans-boundary dimension’. This is no longer limited to the traditional forms of inter-state co-operation. Because the actions may be just taken, with the help of team members of competent judicial authorities of different States on the territory of Europe, without internal borders, introducing special measures of legal assistance in criminal matters and the principle of mutual recognition. Moreover the latter is based upon the need for mutual trust between national criminal justice systems.<sup>15</sup> The arising problem is however that mutual trust in majority cases is not given.<sup>16</sup>

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<sup>14</sup> E. Baker, Ch. Harding, *From past imperfect to future perfect? A longitudinal study of the Third Pillar*, (2009) E.L. Rev., Issue 1, pp.25-54. E. Herlin-Karnell, *Waiting for Lisbon...Constitutional Reflections on the Embryonic General Part of EU Criminal Law*, (2009), Volume 17, N° 3, Eur. J. Crime Cr. L. Cr. J., pp. 227 -242.

<sup>15</sup> A. Klip, *European Criminal Law, Ius Communitatis II*, Intersentia 2009.

<sup>16</sup> But for the Nordic legal space, see A. Strandbakken, *The Nordic Answer to the European Arrest Warrant: The Nordic Arrest Warrant*, eurcrim 3-4/2007, pp. 138-140.

For this reason, a certain degree of harmonized legislation is and will still be needed to consolidate mutual trust. This issue is particularly important in the field of some procedural guarantees (legal rights) under the ECHR and the Charter.<sup>17</sup>

One may also admit that in the transnational criminal proceedings are mostly noticeable the three categories of possible obstacles, namely: principle of State sovereignty (its violation, for example may induce some problems concerning the admissibility of evidence gathered), some diversity of legislation under national legal orders (these are differences in procedural law governing criminal trials), and finally two trial models which may be applied within the European Union (the accusatorial (adversarial) and the inquisitorial trials).<sup>18</sup>

*Ergo*: such a conflict of legal norms may bear some doubts about the “justice process” or “just result”, and also which state should be then held responsible for fundamental rights violations. Here, A Smeulers is correctly arguing that states “in order to guarantee an equivalent protection of human rights, should fully accept the consequences of such close cooperation and thus accept full liability for violations even if that means that states accept liability in cases in which they had no direct and active participation in the human rights violation”.<sup>19</sup> This remark gives rise to the next question of “just result”, namely with a view to the minimum procedural safeguards of the suspects or defendants<sup>20</sup> and to the standing of victims in the transnational criminal proceedings.<sup>21</sup>

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<sup>17</sup> L. Salazar, *Introduction*, in: M. Ch. Bassiouni, V. Militello, H. Satzger, (eds.), *op cit.*, p. XIII.

<sup>18</sup> See generally Peter J.P. Tak, *Bottlenecks in International Police and Judicial Cooperation in the EU*, (2000), 8 Eur. J. Crime Cr. L. Cr. J., pp. 343-360. S. Gless, *Mutual Recognition, Judicial inquires, due process and Fundamental Rights*, in: J.A.E. Vervaele (ed.), *European Evidence Warrant. Transnational Judicial Inquires in the EU*, Intersentia 2005, pp. 121-129. S. Gless puts a very important question, namely whether it be possible to construct a European law of evidence or are the various rules of procedure to diverse. She discuss the triangle which combines the principle of mutual recognition, the EEW and ‘due process’. In this landscape, she argues that a ‘due proces’ still remains something of a no ‘mans’ land. A. Smeulers, *The position of the individual in international criminal cooperation*, in: J.A.E. Vervaele, *ibid.*, pp. 79-102. N. Keijzer, *The European Arrest Warrant Framework Decision between Past and Future*, in: E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen 2006, pp.13-73.

<sup>19</sup> A. Smeulers, *The position of the individual in international criminal cooperation*, in: J.A.E. Vervaele, *op.cit.*, pp.79-102.

<sup>20</sup> M. Jimeno-Bulnes, *The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union*, in: E. Guild, F.Geyer, *Security versus Justice*, CEPS 2008, pp. 171-202. M. Jimeno-Bulnes, *The EU Roadmap for Strengthening Procedural Rights of Suspects or Accused Persons in Criminal Proceedings*, eucrim issue 4/2009, p. 157-161.

<sup>21</sup> See point 32 of the Presidency Conclusions, Tampere European Council, October 1999. Framework Decision on the standing of victims in criminal proceedings with a view to harmonizing basic rights for victims of crime within the EU, OJ L 82, 22.3.2001. Council Directive 2004/80/EC relating to compensation to crime victims and 2006/337/EC: Commission Decision of 19 April 2006 establishing standard forms for the transmission of applications and decisions pursuant to Council Directive 2004/80/EC relating to compensation to crime victims, OJ L 261, 6.8.2004 and OJ L 125, 12.05.2006, respectively. Initiative for a Directive of the European Parliament and of the Council on the European Protection Order, Brussels, 9.3.2010, Brussels, 11 March 2010, 7388/10, COPEN 61, CODEC 193.

The question of “just result” seems now to be of a primary importance, because in the new coming Millennium there is a real demand for ‘doing justice’, in its broad sense of wording. Such a human based approach seems also to be adequate to the recent legislative initiatives within the European Union. For instance, the objectives of the Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention are, as following:

“(a) to ensure the due course of justice and, in particular, that the person concerned will be available to stand trial;

(b) to promote, where appropriate, the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place;

(c) to improve the protection of victims and of the general public “ (article 2).

Also, it is proclaimed that the FWD 2009/829/JHA “is without prejudice to the exercise of the responsibilities incumbent upon Member States with regard to the protection of victims, the general public and the safeguarding of internal security, in accordance with Article 33 of the Treaty on European Union” (article 3).<sup>22</sup> One may underline that the above mention FWD 2009/829/JHA refers directly to the respect for fundamental rights and principles recognised, in particular, by Article 6 of the TUE and consequently reflected by the Charter. Also, its provisions “should not prevent any Member States from applying its constitutional rules relating to entitlement to due process [...]”.<sup>23</sup>

In my view, the general tendency towards the more consistent system of law in the AFSJ based on human rights approach is efficiently corresponding to the current trend of international legal system, at the global level which is oriented towards “a structuring process for a universal human society” (global community), and the protection of common values and goods accompanied by objective safeguards mechanisms and procedures.<sup>24</sup>

#### **4. A Question of Due Process in the European Fundamental Rights Area**

On principle, the international and internationalized criminal proceedings are taking very seriously the standards of a due process for respecting human rights values. At the global level, international (criminal) courts and tribunals have raised *de facto* a platform between differing legal systems, with a view to creating common rules of international (or transnational) criminal

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<sup>22</sup> OJ L 294, 11.11.2009.

<sup>23</sup> Similarly, see for instance Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008.

<sup>24</sup> G. Ziccardi Capaldo, *The Pillars of Global Law*, ASHGATE 2008, pp.301-303.

proceedings<sup>25</sup>. With regard to the ‘globalisation’ process this is G. Ziccardi Capaldo who truly notices that the evolution of the classical international legal system has produced a corpus of rules autonomous enough from inter-state law to be called “Global Law”. In this meaning she distinguishes *inter alia* Global Judicial System and Global Legal System – Legal System for a Universal Human Society. She has identified the four main pillars as the foundations of the Global Legal System, these are: (1) verticality of decision –making processes; (2) legality and safeguarding of common values and goods; (3) integration between legal systems and processes; (4) development of forms of collective guarantees.<sup>26</sup>

Taking into consideration, the phenomenon of ‘globalized’ criminal justice, one may assume that within international criminal proceedings some procedural values have been gradually developed which in consequence have attained the status of procedural *jus cogens* norms. They were mostly established on the basis of human rights law as well as the jurisprudence of the international and internationalized criminal courts. Such values represent overarching fundamentals which are determinative for the establishment and further development of international criminal proceedings. Here, the first and foremost principle is *presumptio innocentiae (in dubio pro reo)*. The next fundamental principles of international procedural criminal law, are as follows: a) the principle that the accused should be informed of charges; b) the principle that the lawfulness of the arrest is open to challenge; c) the principle of fair and impartial proceedings without undue delay; d) the principle of equality of arms, including equal access to documents and witnesses as well as having adequate facilities and time to prepare the defence; e) the principle that examination of witness should be conducted on an equal footing; f) the principle that the international criminal trial should be conducted in the presence of the accused.<sup>27</sup>

The similar tendency towards some clarification with regard to the due process standards (fair trial), is also observed, at the regional level within the framework of the European Union. Here, one should especially mention a Proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings.<sup>28</sup> This proposal aims to set common minimum standards as regards the right to interpretation and translation in criminal proceedings throughout the European Union. Its scope has to constitute the first step in a series of measures set out in the Procedural Rights Roadmap, adopted in Council on 30 November 2009. The Roadmap indicates the following measures as the next steps for strengthening procedural rights of suspected or accused

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<sup>25</sup> See C. Buisman, B. Gumpert, M. Hallers, *Trial and Error – How Effective is Legal Representation in International Criminal Proceedings?*, in: I.C.L.R. , Volume 5, Issue 1, (2005), pp. 1-82. G.-J.A. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer 2005.

<sup>26</sup> G. Ziccardi Capaldo, *op.cit.*, pp. xii-xvi (Preface).

<sup>27</sup> G.-J.A. Knoops, *op.cit.*, p. 23.

<sup>28</sup> Brussels, 9.03.2010, COM (2010) 82 final.

persons in criminal proceedings: A: Translation and Interpretation; B: Information on Rights and Information about the Charges; C: Legal Advice and Legal Aid; D: Communication with Relatives, Employers and Consular Authorities; E: Special Safeguards for Suspected or Accused Persons who are Vulnerable; F: A Green Paper on Pre-Trial Detention.<sup>29</sup>

In the perspective of an ‘integrated European system of criminal justice’ the arising question of a due process has very special meaning, because of its possible ‘trans-boundary’ dimension. In other words, the harmonized level of procedural safeguards becomes an essential aspect of criminal procedure, in all legal systems of the Member States. Accordingly, as it is presupposed in the Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention : “In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident”.

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This again may induce some reflexions on due process, this means with a view to the standing of victims in the criminal proceedings. In general, a current policy concerning crime victims’ rights in the contemporary criminal justice systems is natured by an approach towards four main directions: (1) the prevention of victimization (including ‘double victimization’); (2) the assistance to victims of crime; (3) the standing of victims in criminal proceedings; (4) the compensation for damages. Here the term ‘victims’ means the injured persons (natural persons) standing in the criminal proceedings.<sup>31</sup> These four directions have been reflected, both in the international (European) and national policies. On the basis of some comparative study one may assert that the emerging European criminal justice seems to tend consequently towards strengthening crime victims’ position, at the all stages of criminal law process.

One may correctly admit that a big step on the track to strengthen the victims’ rights in national legal systems should be the Charter of Fundamental Rights of the European Union. Since its art.47 - Right to an effective remedy and to a fair trial (Chapter VI on ‘Justice’) declares *expressis*

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<sup>29</sup> The Procedural Rights Roadmap, adopted in Council on 30 November 2009, OJ 295, 4. 12. 2009. M. Jimeno-Bulnes, *The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union*, in: E. Guild, F.Geyer, *Security versus Justice*, CEPS 2008, pp. 171-202. M. Jimeno-Bulnes, *The EU Roadmap...*, *op. cit.*, pp. 157-161.

<sup>30</sup> OJ L 294/20, 11. 11.2009.

<sup>31</sup> I. Waller, (2003), *Crime Victims: Doing Justice to their Support and Protection*. Helsinki: HEUNI. [www.heuni.fi/uploads/3ggu6heyubd3.pdf](http://www.heuni.fi/uploads/3ggu6heyubd3.pdf) .B. Fellegi, (2005), *Meeting the Challenges of Implementing Restorative Justice in Central and Eastern Europe*, Final Report of the AGIS project of the European Forum for Restorative Justice, Leuven. <http://www.fellegi.hu/publications.html> <http://www.euforumrj.org/readingroom/FinalAGIS2publication.pdf>

*verbis* that “Everyone whose rights and freedoms guaranteed by the law of Union are violated has the right to effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone should have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.<sup>32</sup> These provisions, in majority confirm the idea of a ‘due process’ for the parties standing in any judicial proceedings. Since, the first paragraph of the art. 47 of the Charter, is actually based on the art.13 of the ECHR. While the second paragraph of the art. 47 of the Charter is compatible with the article 6 (1) of the ECHR, which to some extent requires that the defendant’s rights to ‘a fair trial’ be balanced with the rights of victims. With regard to the third paragraph of the art.47 of the Charter, it is recognized that in accordance with the jurisprudence of ECtHR, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy.<sup>33</sup>

In my opinion, the right to effective legal remedies for ‘*citizens of Europe*’ should be recognized as a key element in the creating a ‘common area of European justice’. Consequently, the Cicero’s maxima, in its original formulation *ubi remedium, ibi ius* (Where there is a remedy, there is a right) should once again aspire to a principal rule in the contemporary legal systems aiming at ‘just result’. The present judicial practice illustrates that a lack of effective legal remedy which by its nature is closely linked with the right to hearing, may lead to serious mistreatments of the individuals, especially persons with intellectual disabilities and persons with mental problems. They should be treated in any case, as so called vulnerable persons. Since it is very easy to cross a sensitive border of what is ‘good or fair’, particularly in the events of their involuntary placement and involuntary treatment. Here, one should realize that these categories of individuals may often concern, both victims of crime (e.g. victims of sexual violence or trafficking in human beings) and defendants. Furthermore, their mistreatment through deprivation of their fundamental rights in the most drastic way, might be in some circumstances recognized even in the terms of deprivation of their liberty with the tortures. Therefore, the recently launched project within works of the European Union Fundamental Rights Agency which aims to better understand how the fundamental rights of persons with mental health problems and persons with intellectual disabilities are safeguarded in the European countries and where violations rights occur is highly appreciated. In particular, the notice should be focused on the incorporation of the UN Convention on the Rights of Persons with Disabilities (CPRD, 2006) into national legislation. Looking to the protection of fundamental rights in the context of these

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<sup>32</sup> O J C 303, 14.12.2007. Council Decision of 12 February 2007 establishing for the period 2007 to 2013, as part of the General Programme on Fundamental Rights and Justice, the Specific Programme ‘Criminal Justice’, O J L 58, 24.2.2007.

<sup>33</sup> ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11. <http://europa.eu/en/treaties/index.htm>

forgotten persons is very important matter, from the legal point of view. Since these persons can not claim for their legal rights themselves. In fact, they do not have such a chance. Thus, in the created European fundamental rights area for ‘*citizens of Europe*’, there should be also a certain place guaranteed for such persons which can not speak themselves, in order to avoid their possible ‘secondary victimization’ or ‘overdoing crime’ once again.<sup>34</sup>

Generally speaking, in relation to the victims’ of crime the European Union member states are obliged to guarantee to them, such rights as : the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and to be understood, the right to have access to legal advice and to have legal costs refunded, the right to be protected at the various stages of procedure, the right to compensation the possibility of setting disputes through mediation, the possibility for victims resident in another member states to participate properly in the criminal proceedings<sup>35</sup>. However, as the judicial practice shows still in many of the European States the regulations concerning the rights of victims are not properly implemented into the national legislation. As a result, the victims of crime can not often enjoy all the legal rights which should be guaranteed for them under the rules of criminal procedure. At the same time, such a state the case may bear some well-reasoning concerns about weaker position of victims of crime in compare to the status of suspects or the accused persons.

With regard to the standing of victims in the transnational criminal proceedings, at the European Union level one should make special references to the Council Directive 2004/80/EC relating to compensation to crime victims,<sup>36</sup> 2006/337/EC: Commission Decision of 19 April 2006 establishing standard forms for the transmission of applications and decisions pursuant to Council Directive 2004/80/EC relating to compensation to crime victims,<sup>37</sup> the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration,

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<sup>34</sup> See *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* by Manfred Nowak, United Nations A/HRC/13/39/Add.1, General Assembly Distr.: General, 25 February 2010, English/French/Spanish only, Human Rights Council, Thirteenth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development., Summary of information, including individual cases, transmitted to Governments and replies received\* . Professor Manfred Nowak presented also the idea of *A World Court of Human Rights*.

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-39.pdf>.

[http://www.fra.europa.eu/fraWebsite/research/projects/proj\\_disability\\_en.htm](http://www.fra.europa.eu/fraWebsite/research/projects/proj_disability_en.htm)

<http://www.un.org/disabilities/default.asp?id=1540>

<sup>35</sup> See Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, with a view to harmonizing basic rights for victims of crime within the European Union, O J L 82, 22.3.2001.

<sup>36</sup> O J L 261, 6. 08.2004.

<sup>37</sup> O J L 125, 12. 05.2006.

who cooperate with the competent authorities<sup>38</sup> and the Initiative for a Directive of the European Parliament and of the Council on the European Protection Order<sup>39</sup>. This undertaken victim' rights approach in the current European Union policy has been also reflected in the jurisprudence of the ECJ.<sup>40</sup>

Summing up, the 'due process' international standards are clearly observed in the current trends to the humanization of law, at the European Union level. Such an approach is really corresponding to the ideas of 'freedom and equality in dignity and rights'. Nevertheless, one may claim that it is still necessary to take some further actions to strengthen the legal rights of individuals in the European fundamental rights area. It seems that this might be achieved through encouraging the competent authorities to review their national legislation (or to adopt the new regulations) in the perspective of the harmonizing national legal systems, so that to improve the existing *status quo*.

## 5. Conclusions

On the basis of some comparative studies, one may conclude that a set of procedural legal norms concerning protection of fundamental rights developed in the 'globalised' criminal justice have increased impact on the national human rights policies, as well. More strictly speaking, the gradual development of international protection of fundamental rights has considerably enhanced the implementation of legal norms respecting a due process, into the national criminal justice systems. Nevertheless, still there is a strong need to adjust the national legal systems to the current concept of a due process, in the meaning of international standards which have been increasingly developed by the jurisprudence of international (criminal) courts. In this context, one should pay a special attention on the vulnerable individuals. They may be victims of crime, including also the persons with mental health problems and persons with intellectual disabilities. Such persons should have access to justice in accordance with the right to equality before law, too. Specifically, under the norms of international human rights law everyone deserves due process in compliance with the established international minimum standards. Since a current concept of due process as it is often declared, is factually aiming at a 'justice approach'. In other words, the fundamental rights should be protected in a 'fair manner'

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<sup>38</sup> OJ L 261, 6. 08.2004.

<sup>39</sup> Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Spain, the Republic of Estonia, the French Republic, the Republic of Hungary, the Italian Republic, the Republic of Poland, the Republic of Portugal, Romania, the Republic of Finland and the Kingdom of Sweden for a Directive of the European Parliament and of the Council on the European Protection Order, Brussels, 28 May 2010, Interinstitutional File: 2010/0802 (COD), COPEN 127, CODEC 498. European Protection Order, Briefing and suggested amendments, February 2010, <http://www.justice.org.uk/images/pdfs/European%20Protection%20Order%20briefing.pdf>

<sup>40</sup> E.g. Case C-105/03 *Maria Pupino*.

respecting all the categories of persons which may be involved in the criminal proceedings. Here, as follows the Latin maxim *audi alteram partem*, the central place should be given to the right to effective remedy and the right to hearing which actually constitute the essential aspects of due process concept.<sup>41</sup>

So, in view of the recent developments in the creating a genuine area of European criminal justice the minimum rules should be built “step by step” to establish some common standards, having its roots in the legal culture and shared human values of the European States. Its potential advantage should be a set of procedural norms in the form of more consistent system of law respecting, both the rights of suspects or defendants and victims of crime in the Europe without internal borders. Only then, in my view, one may legitimately speak about the emerging common AFSJ within ‘an integrated European system of criminal justice’. Specifically that its mechanism has to operate in a ‘fair’ manner, that means with full respect for fundamental rights of all the ‘*citizens of Europe*’.

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<sup>41</sup> M.S. Groenhuijsen A.Pemberton, *The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?*, Eur. J. Cr. L. Cr. J. (2009) 17, pp. 43-59. Project: *Victims in Europe*, Implementation of the EU FD on the standing of victims in the criminal proceedings in the Member States of the European Union, 2009, [www.wave-network.org/start.asp?b=7](http://www.wave-network.org/start.asp?b=7). Trechsel with the assistance of Sarah J. Summers, *Human Rights in Criminal Proceedings*, Oxford University Press, pp. 36-42. V. Tochilovsky, *Jurisprudence of International Criminal Courts and the European Court of Human Rights, Procedure and Evidence*, M. Nijhoff Publishers 2008. D. Shelton, *Remedies in International Human Rights Law*, Second edition Oxford 2006.