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“Fundamental rights versus fundamental freedoms: A change in the reasoning of the Court of Justice of the European Union?”

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Abstract

It has been well documented that the European Union (EU) began as an economic organization which now concerns itself with a variety of social issues, such as fundamental rights. This dissertation seeks to address a change in the Court of Justice of the European Union's (CJEU) reasoning from that of the fundamental freedoms and free movement so closely linked to the economic community to fundamental rights, which has growing importance within all international organisations, particularly in the area of Police and Judicial Cooperation in Criminal Matters (PJCC). The dissertation looks specifically to the rights of victims; the European Arrest Warrant; and, the rights of suspects. It is argued that there has been an increase in rulings in favour of fundamental rights from the Court, although not always dealt with adequately. It is also contended that fundamental freedoms are taking a lesser role, as illustrated by these PJCC rulings on wholly internal situations. However it is also argued that at times fundamental rights and freedoms are not always competing but in fact fundamental rights and freedoms are competing against the cornerstone of judicial cooperation; mutual trust.

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- *European Parliament v Council* Case C-540/03 [2006] ECR I-5769
- *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372
- *Gerardo Ruiz Zambrano v Office National de l'emploi (ONEm)* Case C-34/09 [2011] 2 CMLR 46
- *Gestoras Pro Amnistía and Others v Council of the European Union (Spain and United Kingdom, intervening at first instance)* Case C-354/04 P [2007] 2 CMLR 22
- *Greitling v High Authority* Cases 36, 37, 38 and 40/59 [1960] ECR 423
- *György Katz v István Roland Sós* Case C-404/07 [2008] ECR I-7607
- *Hoechst AG v Commission* Joined Cases 46/87 & 227/88 [1989] ECR 2859

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- *Leymann and Pustovarov* Case C-388/08 [2008] ECR I—8993
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- *Van Esbroeck* Case C-436/04 [2006] 3 CMLR 6
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- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States
- Commission Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM(2004) 328 final (28 April 2004)
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007
- Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings and Directive 2012/13/Eu of 22 May 2012 of the European Parliament and of the Council on the right to information in criminal proceedings
- Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate on arrest European Commission, 2011/0154 (COD)
- Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime COM(2011) 275/2

Scottish Legislation

- Double Jeopardy (Scotland) Act 2011

Other International Legislation

- 1963 Vienna Convention on Consular Relations
- Article 4, paragraph 1 of the Seventh Protocol to the European Convention of Human Rights and Fundamental Freedoms 1951
- International Covenant on Civil and Political Rights 1966

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature ____

Printed Name ____

Introduction

This dissertation aims to answer the following question:

> "Fundamental rights versus fundamental freedoms: A change in the reasoning of the Court of Justice of the European Union? A Critical Analysis of the Court of Justice of the European Union's Rulings in Police and Judicial Cooperation in Criminal Matters"

It has been decided to concentrate on the rulings of the Court of Justice of the European Union (CJEU) in the field of Police and Judicial Cooperation in Criminal Matters (PJCC). This focus has been chosen because of the fast paced development of EU law in this field, which is an important aspect of the Area of Freedom, Security and Justice (AFSJ) which has been established in the European Union (EU)[1]. Moreover, criminal matters, within the Member States, are inextricably linked to fundamental (human) rights. Thus using the Court's rulings in PJCC would appear to be the obvious area to examine in order to ascertain whether there has been a real and significant change in the reasoning of the CJEU towards more fundamental rights based arguments as opposed to fundamental freedoms based arguments.

It is submitted that this is a significant issue for a variety of reasons. Primarily, this would illustrate a further example of the development from what was initially the European Economic Community of six Member States with purely economic aims, to a European Union of twenty seven Member States (EU) which legislates in fields which are politically sensitive and fiercely protected by the Member States. Although the neofunctionalist theory of European integration has long been regarded as failing to account for the development of the EU[2], there is little doubt that the idea of spillover which resonates from that theory provides for some kind of explanation of the EU's role in the areas of PJCC and fundamental rights.

Secondly, in light of the fact that the EU now takes a much stronger position with regard to fundamental rights, exemplified by the introduction of the Charter of

[1] This thesis will refer to both the EU and the CJEU as opposed to the European Community (EC) and the European Court of Justice (ECJ) in line with the recent changes which were made in the Treaty of Lisbon. References to the EC Treaty will, however, remain.
[2] P. Craig and G. De Burca *'EU Law: Text, Cases and Materials'* (4th Ed, OUP) p2

Fundamental Rights of the European Union ('the Charter') as well as the Court looking to the European Court of Human Rights (ECtHR) for guidance on issues, it equates to the CJEU taking on a different type of role in these cases, and potentially more akin to the ECtHR in some instances.

Thirdly, a change of attitude from the CJEU resulting in a lesser emphasis on fundamental freedoms and requirements for a cross border element is a strong indication that the CJEU (and the EU) are prepared to act in respect of areas which would, once upon a time, have been outwith their competence. Thus "wholly internal situations" have now been considered by the CJEU, without any need for an EU citizen to cross an internal border of the EU. Therefore it is submitted that issues on fundamental rights can be of greater importance than merely facilitating movement of EU citizens within the EU.

Additionally, it is important to analyse to what extent this actually is the case; fundamental freedoms still play a key role in the EU and perhaps the emergence of fundamental rights language in the case law is merely incidental and with no significant effects or changes to the EU legal order. To evaluate whether the EU's competences can be seen as having broadened as a result of a greater emphasis on fundamental rights within the national legal orders of the EU Member States is of key importance. This also raises fundamental issues concerning the scope of powers transferred to the EU by the Member States[3] and the principle of subsidiarity.

Thus the question posed in this dissertation illuminates the ever evolving nature of the EU's legal order, its competences, and the CJEU's reasoning, particularly in the area of PJCC.

This dissertation will consist of four chapters and a conclusion. The first chapter will provide a background to the development of the role of the EU and more specifically of the CJEU in the area of PJCC as well as in the area of fundamental rights. This will provide the background and context in which the case law is set. It will also consider the rather unusual (and somewhat complex) transitional provisions which remain in

[3] Art. 5 TEU Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007

PJCC post-Lisbon Treaty[4], even now when the pillar structure has been abolished. It will also refer to the protocol negotiated by the UK and Polish Governments on the status of the Charter. This chapter aims to set out the basis for the case law which is examined in the following chapters and also emphasises the importance of this area of competence for the Member States.

This dissertation will then focus on the case law regarding distinct areas within PJCC.[5] Regardless of whether one walks into the criminal courts of the Sheriff Court in Glasgow or the CJEU on a criminal matter, the evidence, the witnesses and the accused are all part of the colourful weave of that case. As such, the cases which are considered in this dissertation, even with regard to the same framework decision, are all markedly different. However this does not negate the analysis which can arise from looking at the Court's reasoning in the various rulings.

The cases which are referred to, it is contended, fall into the category of 'hard cases' as described by Bengoetxea, as the cases often surround the issue of 'a conflict of norms' or 'antinomies'[6].

Therefore, the second chapter is based upon the case law on the Framework Decision on the Standing of Victims in Criminal Proceedings[7]. This will explain the aims and content of the Framework Decision and then provide a factual analysis of the (somewhat limited) case law on the Framework Decision. The chapter will then evaluate the use of fundamental rights as a method for reasoning within the cases and will evaluate to what extent the Court uses these fundamental rights in its interpretation and application of EU law. The chapter will then assess the lack of cross-border element in the case law and highlight the background to dealing with 'wholly internal situations' within the EU. This chapter will conclude that within this particular field there is evidence to suggest that fundamental rights have greater

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[4] Treaty of Lisbon *supra.* n.3

[5] There are, however, a number of areas within PJCC which will not be dealt with such as the European Evidence Warrant.

[6] R. Bengoetxea *'The Legal Reasoning of the European Court of Justice'* (1993, OUP) at p.168 Due to word constraints less emphasis is placed on the methodological and philosophical aspects of the CJEU's decisions than there might have been. See Bengoetxea for a full analysis.

[7] Framework Decision of 15 March 2001 on the Standing of the Victims in Criminal Proceedings, O.J. 2001, L 82/1.

importance than the fundamental freedoms, which is demonstrated in the cases where there is a lack of cross-border element. It will note the limitations which this area has as an indicator of the practice across the various, widely diverging, areas within PJCC. Furthermore, it will note how the situation of the standing of victims in criminal proceedings is distinct from the situation in respect of the European Arrest Warrant (EAW) where some form of cross-border element is present.

This then leads into chapter three which is case law which has arisen as a result of the Framework Decision on the EAW[8]. Similarly this chapter will examine the aims and the substance of the EAW itself. The chapter will then go on to examine the case law within this area. It will then be discussed to what extent the CJEU uses fundamental rights to make their rulings, and how great a weight the Court gives to such arguments within their reasoning. A key issue in this chapter is the fact that contrary to the standing of victims in criminal proceedings case law, there *must* be a cross-border element, but can interestingly refer to a national being requested to return to their home state or being requested to return to another EU Member State from their home state. The link between the EAW, the Convention Implementing the Schengen Agreement (CISA) and the *ne bis in idem* case law will thus be underlined. The *CISA* cases will be further analysed and it will be argued that in this instance although there may be a very clear cross-border element, however, fundamental rights as reasoning from the CJEU is still on the increase. This development is perhaps not to the detriment of the fundamental freedoms within EU law but rather raising the EU rights to a higher standard which should be expected of a Union of twenty seven democratic states who respect fundamental rights and freedoms, as stated in Article 6 of the Treaty on the European Union. The question thus arises as to how the Court can develop further. It will be proposed that as the Court has developed its use of fundamental rights (as well as looking to the ECtHR) within its reasoning then it can be foreseen that the Court will continue to do so within other areas of PJCC. It is also contended that in certain instances it is actually either competing fundamental rights which are the issue or in other circumstances mutual trust and recognition is pitted against fundamental rights and freedoms.

[8] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States

Therefore, the fourth chapter will look at the developing procedural guarantees for suspects and accused persons in criminal proceedings within the EU. The somewhat controversial development within this area of EU law will be discussed, particularly in light of the fact that it is often considered that legislative measures within PJCC have been more aimed towards the catching, prosecuting and punishment of criminals than any kind of protection of defendants throughout the process[9]. Thus this chapter will proceed to analyse how the Court may follow in line with the case law on the Framework Decision on the Standing of Victims. However it will be questioned as to whether there is a proper legal basis for this in the Treaty, even though it is suggested that following the Framework Decision on the Standing of Victims is preferable. The Court is still likely to be using fundamental rights based arguments and most likely using the Charter, the ECHR and the ECtHR's case law to reach a conclusion in its rulings. Thus this chapter will argue that the CJEU will be acting in a greater capacity as a 'guardian' of fundamental rights than of the fundamental freedoms.

This dissertation will conclude by suggesting that within the area of PJCC, the CJEU has become, and is more liable in the future to be, more interested in fundamental rights arguments than in the past. There are several points to be made in this regard. First it is argued that due to the nature of the issues which arise within PJCC it is only natural, if not blindingly obvious, that the Court would have to take on a stronger role with regard to fundamental rights. That being said however, there has been a general growth in the EU (and thus the CJEU's) competences which has led to the Court expanding its jurisdiction within this area. Moreover, the Court could have continued to follow the reasoning of the ECtHR, without having to truly further its own position regarding fundamental rights. But this has not been the case. The EU has made the Charter legally binding on all Member States[10] and the Court now makes reference to the Charter and can be seen to be taking fundamental rights seriously. It will be argued in the conclusion that the reality of the case law on the Framework Decision on the Standing of Victims in Criminal Proceedings necessarily means that the Court is often looking at situations which lack any kind of cross-border element. This

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[9] L. Van Puyenbroeck and G. Vermeulen *'Towards minimum procedural guarantees for the defence in criminal proceedings in the EU'* 2011 International and Comparative Law Quarterly (ICLQ) Vol. 60(4) pp.1017-1038 at p.1017

[10] With the exception of the UK and Poland who negotiated an opt-out; see Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom

therefore entails a lack of any real discussion of the fundamental freedoms which the Union citizens have. Moreover, it will be argued that at times, greater attention could be paid to fundamental rights arguments. However, from issues which arise from the Schengen *acquis* as well as the EAW case law, there is still a very strong cross-border element. Thus in turn there is a connection to the fundamental freedoms. However, it will also be contended that there are other pressures which the Court considers such as mutual rights and mutual recognition. It will be noted that this is not to suggest that fundamental rights arguments have no role in the Court's reasoning in such instances but rather these arguments fall alongside those of fundamental rights.

Thus it is suggested in this instance that there has been a change in the reasoning of the CJEU towards fundamental rights. However this is not to suggest that the Court is not taking its' role on fundamental freedoms any less seriously than it once would have, but merely to stress that the Court is looking at a wider range of issues, including human rights and mutual recognition, in instances that once upon a time it would not have concerned itself with, such as 'wholly internal situations'. It will also be argued that in light of the ever growing body of human rights case law, it is not only of the utmost importance for the Court as part of an international organisation to uphold fundamental rights, but it is necessary.

Chapter 1: The Development of Police and Judicial Cooperation in Criminal Matter, Fundamental Rights and the Court of Justice of the European Union

1.1 Introduction

This chapter's objective is to put the development in the Court's case law concerning Police and Judicial Cooperation in Criminal Matters (PJCC) and Fundamental Rights into an overall context. The later chapters explore the reasoning in the rulings and the potential changes in the Court's reasoning within these fields. This chapter will primarily show that, somewhat ironically, neither area was at the forefront of what was the European Economic Community's priorities or aims. However, they have become more important overall and eventually the Court of Justice of the European Union (CJEU) has been granted competence over new areas by the Lisbon Treaty.

1.2 Development of the CJEU's Competences in respect of Fundamental Rights[1]

1.2.1 Early Development of Fundamental Rights

As has been noted by Craig and De Búrca, "The original three European Community Treaties, signed in the 1950s, contained no provisions concerning the protection of human rights. More than fifty years since the first of the Communities was founded, this position has changed considerably."[2] It has been well documented that the original Treaties had no provisions relating to human rights as the EEC was originally an economic enterprise.[3] However, the issue of fundamental rights soon became an issue before the Court. Initially the Court appeared reluctant to allow litigation regarding rights recognised by national law, even when they were fundamental

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[1] In this text the term human rights and the term fundamental rights are used synonymously. It should be noted that Human Rights in the European Union is a huge topic within itself and that this chapter only provides the basis necessary upon which the rest of this thesis will follow. See for instance P. Alston *'The EU and Human Rights'* (OUP, 1999) and S. Peers and A. Ward *'The European Charter of Fundamental Rights'* (OUP, 2000)

[2] P. Craig and G. De Búrca *'EU Law: Text, Cases and Materials'* (OUP, 4th Ed) at p.379

[3] *ibid.*

rights[4]. In the *Stork* case[5], the Courts refused to countenance arguments that the institutions had violated some right protected in national laws. This was then followed by the *Stauder* case[6]. The facts of the case were that the Commission adopted a decision designed to reduce Community butter stocks by allowing butter to be sold at a lower price to people on welfare schemes. To get the better, a voucher had to be produced with your name on it in Germany and Holland, but this was not necessary in France or Italy. Stauder, a German national challenged the requirement saying that it violated his right to privacy. The national court made a preliminary reference to the CJEU. The Court indicated that the more liberal French and Italian methods should be adopted so as not to prejudice the fundamental human rights enshrined in the general principles of Community law, and should be protected by the Court. Thus if there were two options open to the national courts then it should choose the one which would protect fundamental rights. One commentator noted that, "Human rights still occupied no more than a second-order status of EC law"[7]. Although the *Stauder* case noted the importance of EC law and ideas of fundamental rights, these notions were not given an "organic status" which would allow them to be used for steering the actions of EU authorities or as a ground of judicial review.[8] Nonetheless, the importance of this case has been noted:

> "…it is unlikely that the Union would have reached this stage if the Court had not taken that small first step in *Stauder v Ulm*"[9]

There were subsequently more changes in the way in which the Court ruled on the issue of fundamental rights. This came as a result of judgments from both the German and Italian Constitutional Courts, where a belief was expressed that the provisions of their Constitutions, based upon fundamental human rights, were not being adequately protected by the EU, and as such their respective constitutions would reign supreme over EU law with regard to issues of fundamental rights[10]. Therefore one of the

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[4] Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37, 38 and 40/59 *Greitling v High Authority* [1960] ECR 423; Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215
[5] Case 1/58 [1959] ECR 17
[6] Case 29/69 [1969] ECR 419
[7] D. Chalmers and A. Tomkins *'European Union Public Law'* (Cambridge University Press, 2007) at p.296
[8] *ibid.*
[9] A. Arnull *'The European Union and its Court of Justice'* (OUP, 1999) at p.223
[10] *Solange I* BVerfGE 37, 271 2 BvL 52/71, 29 May 1974 (also known as *Internationale*

principal reasons "for the Court's declaration that fundamental rights formed part of the EU legal order was the challenge posed to the supremacy of EU law by Member State courts which felt that EU legislation was encroaching upon important rights protected under national law."[11] The Court dealt with this problem through interpretation and stated that "the protection of fundamental rights was indeed a general principle of European Community law."[12]

Thus the Court followed up the rulings in the *Stork* and *Stauder* cases with that of *Internationale Handelsgesellschaft*[13], in which there was an EU regulation which awarded Internationale Handesgesellschaft a licence to export maize on the condition that they put down a deposit which would be forfeited if the maize was not delivered on time. They failed to deliver the maize and challenged the forfeiture of the deposit before the German Administrative Court. It was alleged, that such forfeiture violated the German Constitutional provisions of freedom to trade and the requirement that all public action should be proportionate. The point was made in this ruling that, "Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect of the uniformity and efficacy of Community law."[14] The CJEU thus established that fundamental rights form an integral part of EU law, even although there had been no infringement of the rights claimed. These cases underline the beginning of a long journey on fundamental rights. It has been noted that, "In the absence of a catalogue of such [fundamental] rights in the Treaty, however, it was not at that stage clear which rights would be regarded by the Court as fundamental."[15] It has been evidenced that the Court used the formulation of 'general principles' of EU law as the way to equip the EU with fundamental rights. However, the Court then looked to other sources to provide direction. This could be found in looking to both the European Convention of Human Rights (ECHR), national constitutions and the Charter of Fundamental Rights of the European Union ('the Charter').

Handesgesellschaft, discussed further below)and *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372

[11] Craig and De Búrca *supra.* n.2 at p.383

[12] J. Coppel and A. O'Neill *"The European Court of Justice: Taking Rights Seriously?"*1992 Common Market Law Review (CMLR) Vol.29 pp.669-692 at p.671

[13] Case 11/70 [1970] ECR 1125

[14] *ibid.* at para. 3 of the Ruling

[15] A. Arnull *supra.* n.9 at p.204

1.2.2 Reliance on the ECHR and the Charter

For the first time, the Court looked specifically to international human rights instruments in the case of *Nold v Commission*[16]. The Court stated that rights protected in Member State constitutions and international human rights treaties were sources of fundamental rights in the EU. Thus this brought the ECHR into play, as well as, for instance, the International Covenant on Civil and Political Rights (ICCPR). In the *Rutili v Minister for the Interior* case[17], the ECHR was specifically mentioned by the CJEU and has since been referred to frequently in the Court's case law. An example is the case of *Hoechst AG v Commission*[18], concerning EU competition law which examined the investigation by the European Commission into anti-competitive practices. The Court looked at Article 8 of ECHR, but held that the right to privacy did not extend to private premises. The Court was criticised for its decision in this case by those who considered that the Court had dismissed the argument too quickly. They commented that the Court had also ignored the European Court of Human Rights (ECtHR) case law. Moreover it has been noted by commentators that the Court did not give the level of protection for human rights which would have been achieved at the national level.[19] Interestingly in a subsequent case in the ECtHR in *Niemiez v Germany*[20] it was held that business premises *were* included and the judgment relied on the CJEU case of *Roquette Frères SA v Commission*[21].

Once the CJEU accepted it had jurisdiction, the Court considered fundamental rights through a number of cases[22]. The *Wachauf* case was one of the 'milk quota' cases, and the judgment declared that the protection of fundamental rights was also binding on Member States when implementing EU rules, and in the *ERT* judgment, the Court expanded the point. Moreover in the *Cinéthèque* and *SPUC* cases, the Court noted that the EU could not determine cases which were outwith EU law. *ERT* also provided an example of allowing a Member State to derogate from EU law measures as a result

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[16] Case 4/73 [1974] ECR 491

[17] Case 36/75 [1975] ECR 1219

[18] Joined Cases 46/87 & 227/88 [1989]

[19] P. Craig and G. De Búrca *supra.* n.2 at p.393

[20] Series A, No.251 (1992) 16 EHRR 97

[21] Case C-94/00 [2002] ECR I-9011

[22] Cases 60-1/84 *Cinéthèque and others v Fédération nationale des cinémas français* [1985] ECR 2605; Case 5/88 *Wachauf v Federal Republic of Germany* [1989] ECR 2609; Case 260/89 *Elleniki Radiophonia Tileorasi (ERT) v Dimotiki Etairia Plirofissis and Sotirios Kouvelas* [1991] ECR I-2925; Case 159/90 *The Society for the Protection of Unborn Children (Ireland) Ltd v Stephen Grogan and others* [1991] ECR I-4685.

of fundamental rights. It was felt, notably, by commentators Coppell and O'Neill that the use of fundamental rights in some cases has been used by the Court to expand the competences of the EU into areas up until then reserved for national legislation. As such they believed that the Court has used fundamental rights instrumentally in order to accelerate legal integration.[23]

However, as well as using the ECHR and the national constitutions to provide guidance on fundamental rights, the Charter is now[24] a legally binding[25] source of rights within the EU. Article 6(1) TEU (as amended by Lisbon) states:

> "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights…which shall have the same legal value as the Treaties".

However, even before the Charter was considered a legally binding document on the Member States, it was referred to by Advocates General and then finally in rulings of the Court. The CJEU itself first referred to the Charter in a ruling regarding those rights contained within Chapter V, those on citizens' rights[26]. The Court finally mentioned the Charter in a case regarding the Family Reunification Directive[27]. It has been suggested that, "The seal of approval finally given by the Court to the Charter as a significant source of the general principles of EC law confirms that the Charter has definitely entered the constitutional practice of the EU…"[28] Thus the Charter now stands strong alongside other international instruments and national constitutions as a source of fundamental rights for developing the EU's legal order, and marks the development and significance of fundamental rights within the EU today.

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[23] J. Coppel and A. O'Neill *supra.* n.9 at p.691

[24] The Charter was not previously legally binding although it was set to be legally binding in the failed Constitutional Treaty; it was previously solemnly proclaimed by the Commission, Parliament, and Council and was politically approved by the Member State at the Nice European Council summit in December [2000] OJ C364/1

[25] This does not apply to the United Kingdom nor Poland who negotiated a protocol against making the Charter legally binding, see Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

[26] Case T-54/99 *max. mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313, para.48

[27] Case C-540/03 *European Parliament v Council* [2006] ECR I-5769

[28] P. Craig and G. De Búrca *supra.*n.2 at p.418

1.2.3 Position of Fundamental Rights within a Hierarchy of Norms

It has been proffered by Coppel and O'Neill that "fundamental rights are commonly regarded as being at the peak of the normative hierarchy of laws against which other rules of law are to be measured."[29] It is submitted that this contention is correct with regard to a Member State legal system and should now also apply to the *sui generis* EU legal system. However, in the case of EU law, fundamental rights were not always seen to be the most important norms:

> "Most authors are agreed that the hierarchical standing of these fundamental principles [human rights] ranks higher than derived Community law, and some even claim they rank higher than Community law."[30]

One commentator who has always put fundamental rights at the top of the hierarchy within the EU legal order is Dauses.[31] However, it has been argued that the CJEU is less than willing to put fundamental rights at the forefront of its legal reasoning and affords more weight to fundamental freedoms. It has been noted that, "…in the cases in which the Court has adopted fundamental rights discourse, it has been the general Community rule or the Community objective which has prevailed against claims as to the violation of fundamental rights."[32]

This point is expanded latterly by Coppel and O'Neill who make a very interesting assertion:

> "From the terms of the *Heylens* decision it appears that the four freedoms of workers, services, goods and capital enshrined in the Treaties can be translated into individuals' fundamental rights. It would seem, then, that there is no distinction and hence no hierarchical relationship being posited by the European Court between the basic human rights outlined, for example, in the European Convention of Human Rights and the free market rights arising out of the Treaties of the Community."[33]

In relation to this point, there is evidence to suggest that fundamental rights are receiving more than mere lip service. This is evinced by the now legally binding nature of the Charter and a higher frequency of fundamental rights discussions within

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[29] J. Coppel and A. O'Neill *supra*.n.9 at p.682

[30] J. Bengoetxea *'The Legal Reasoning of the European Court of Justice'* (1993, OUP) at p.77

[31] M.A.Dauses *'The Protection of Fundamental Rights in the Community Legal Order'* 1985 Vol.10European Law Review (ELRev) pp.398-419 at p.407

[32] J. Coppel and A. O'Neill *supra*.n.9 at p.682

[33] *ibid.* at p.690

the judgments and rulings of the Court. This, it is contended, is supplemented by the increase in areas of EU law which are more closely linked to the overt requirements of fundamental rights; such as that of Police and Judicial Cooperation in Criminal Matters (PJCC). Moreover, the view put forward by Coppel and O'Neill has been strenuously criticised by Weiler and Lockhart[34]. It is contended that although Coppel and O'Neill's analysis may be a rather sweeping generalization, however, it is argued that their analysis does have some weight and cannot simply be ignored.

1.3 Development of the CJEU within PJCC

1.3.1 Early Development of the Third Pillar

As has been explained by Peers, the cooperation within the field of Justice and Home Affairs (now known as Police and Judicial Cooperation in Criminal Matters[35]) which was "initially agreed informally, was formalized by the Maastricht Treaty on European Union (TEU), inserting it in the intergovernmental Title VI of that Treaty."[36]

This is not particularly surprising given the political sensitivity of these matters. Thus this field of activity was kept outside the more supranational based EC pillar and put outside the jurisdiction of the CJEU. Whilst PJCC was located in the third pillar of the Treaty of Maastricht "The EU's Court of Justice had no *mandatory* jurisdiction…"[37] However, it was stated in the TEU[38] that the Court could have jurisdiction to interpret or settle disputes concerning Conventions; this was the situation in which the Court had jurisdiction over Justice and Home Affairs.

This situation was changed by Article 23 of the Treaty of Amsterdam. Article 23 which alongside Declaration 10 of the Final Act of the Treaty of Amsterdam gives the Court jurisdiction to give preliminary rulings on Conventions (as was already provided for in Maastricht) but also, as laid out in Article 35(1) "on the validity and interpretation of framework decisions and decisions, on interpretation of Conventions

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[34] J.H.H.Weiler and N.J.S.Lockhart *"Taking rights seriously 'Seriously: The European Court and its fundamental rights jurisprudence"* 1995 CMLR Vol.32 pp.51-94, pp579-627
[35] As a result of Treaty amendment, when certain issues such as asylum and immigration moving to the EC Pillar
[36] S. Peers *'Human Rights and the Third Pillar'* in P. Alston *supra*.n.1 at p.167
[37] S. Peers *'EU Justice and Human Affairs Law'* (OUP, 2nd Ed) at p.17
[38] Ex Article K.3(2)(c) EU

established under this Title and on the validity and interpretation of measures implementing them." The Member States opted-in to the jurisdiction of the Court over PJCC in a variety of ways. Twelve of the fifteen Member States opted-in (France opted-in slightly later) to accepting the Court's jurisdiction over the third pillar matters[39]. The UK (notoriously awkward with regard to variable geometry within the EU), Ireland and Denmark negotiated opt-outs to the Court's jurisdiction. The Czech Republic and Hungary, two of the ten Member States who joined in 2004 have also opted in[40]. There were also arrangements regarding which national courts would have jurisdiction to request a preliminary ruling:

> "Of the fourteen Member States accepting the Court's jurisdiction, all except Spain and Hungary permit all national courts or tribunals to send questions. Nine Member States reserved the right to require their final courts to refer (the exceptions are Greece, Portugal, Finland, Sweden and Hungary)."[41]

An exception to the Court's jurisdiction was found in Article 35(5) which states that the Court of Justice cannot rule on issues of internal security nor on the maintenance of a Member State's law and order. Article 35(6) confers the power of direct judicial review. The Court's jurisdiction has been exercised on a number of occasions to rule on these matters.[42]

1.3.2 The Treaty of Lisbon (LT)

The LT brought in several changes and, more specifically, in relation to the CJEU and PJCC[43]. It has been commented that, "The changes made to the jurisdiction of the courts by the Treaty of Lisbon are more drastic. This is partially due to the abolition of the pillar structure of the Union, and partially motivated by concerns of legal protection."[44] Thus there has been action taken in the CJEU's favour by allowing the Court to continue to deliver rulings in cases regarding PJCC. As it has been put by

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[39] [1999] OJ C 120/24
[40] [2005] OJ L 327/19
[41] S. Peers *supra.* n.37 at p.41
[42] Some of which are subject to subsequent chapters of this thesis.
[43] Specific reference is made to the changes in EU criminal law in S.Peers *'EU criminal law and the Treaty of Lisbon'* 2008 ELRev Vol.33(4) pp.507-529
[44] F. de Witte *'The European Judiciary after Lisbon'* 2008 Maastricht Journal of International Comparative Law (MJ) Vol 15(1) pp.43-54 at p.45

one commentator, the LT "grants the Court almost unlimited jurisdiction."[45]

The changes have been noted as entailing "the application of the Court's normal jurisdiction to criminal and policing issues, with a five-year transition period as regards third pillar measures adopted before the entry into force of the new Treaty. On the other hand, for the United Kingdom, Ireland and Denmark, the effect of the various changes is limited because of their opt-outs concerning JHA law…"[46] Thus there are still somewhat complex (potentially more so now than ever) opt-outs in place for these three Member States.[47] An interesting point in relation to this is put forward by Peers:

> "The most striking aspect of the Court's ruling in Segi is the absence of any mention of the situation in Member States which have not opted in to the Court's preliminary rulings jurisdiction, and in particular the consequences of the situation as regards the legality of Third Pillar measures."[48]

It seems that such Member States are still bound by the rulings of the Court in the Third Pillar but rather unusually cannot make a preliminary reference to the Court.

With regard to the Court having 'normal' jurisdiction from 2014 (the date in which the transitional period will have elapsed), in PJCC issues, this is described as a 'welcomed' change unlike the specific provisions relating to three Member States.[49] Article 35 (referred to above) is therefore repealed and Article 267 on preliminary rulings applies to PJCC. There is however still an exception:

> "The exception is Article 276 TFEU which continues to preclude the ECJ from reviewing the validity or proportionality of operations carried out by the police or other law enforcement services of Member States or the exercise of responsibilities incumbent upon Member States with regards to the maintenance of law and order and the safeguarding of

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45 F. de Witte *supra.* n.44. at p.49

46 S.Peers *supra.* n.43 at p.508

47 For a comprehensive look at these provisions see M. Fletcher *'Schengen, the European Court of Justice and flexibility under the Lisbon Treaty: balancing the United Kingdom's "ins" and "outs"'* 2009 European Constitutional Law Review (EuConst. LR) Vol.5(1) pp.71-98

48 S.Peers *'Salvation outside the Church: Judicial Protection in the Third Pillar after the* Pupino *and* Segi *Rulings'* 2007 CMLR Vol.44 pp.883-929 at p.900

49 P. Craig *'The Treaty of Lisbon, process, architecture and substance'* 2008 ELRev Vol.33(2) pp.137-166 at p.143-144

> internal security."[50]

Thus the exception set out in Article 35(7) still prevails. Until 2014 the pre-Lisbon jurisdiction will apply.

1.4 Fundamental Rights and PJCC

It has been commented that, "As the Community assumes far greater administrative and legislative responsibility in relation to Justice and Home Affairs, the need to assure, at Community level, the rights of those affected by this new jurisdiction becomes more pressing."[51] It is quite clear that where criminal justice is concerned, it is of prime importance that those involved in the process have adequate protection. There are particular rights which are enshrined in the Charter which are likely to be of the utmost importance to those involved in criminal justice. These are the rights featured in Chapter VI entitled Justice. These rights "include[s] several of the so-called rights of the defence, such as the right to a fair trial, the presumption of innocence, the principle of legality and proportionality of penalties, and the familiar EC right to an effective remedy."[52]

1.4.1 Right to a fair trial

It has been commented that "Human rights measures do not generally have a direct impact upon substantive criminal law."[53] However with regard to such measures, the most important provisions are those of legality and non-retroactivity which is enshrined in Article 7 of the ECHR as well as in the Charter. It is explained that these rights are expanded in the Charter:

> "The EU's Charter of Rights contains the principles of legality and non-retroactivity of criminal liability, along with the principle of retroactive effect of more lenient penalties, and the principle that criminal penalties should be proportionate to the offence."[54]

However the majority of human rights issues arise in terms of procedural criminal

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[50] P. Craig *supra.* n.49 at p.143
[51] P. Alston and J.H.H. Weiler *"An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights'* P. Alston *supra.* n.1 at p.17
[52] Craig and De Búrca *supra*.n.2 at p.413
[53] S. Peers *supra*.n.37 at p.388
[54] *ibid.* at p.389; Art 49 of the Charter

law. These come in the form of Article 6 ECHR right to a fair trial. The rights enshrined in this article include the presumption of innocence (Article 6(2)) as well as minimum rights to be informed promptly of an accusation, to have time and facilities for a defence and to have access to a defence lawyer and an interpreter free of charge in Article 6(3). There has been a wide variety of case law on the right to a fair trial in ECtHR[55], and it is an issue of utmost importance for the CJEU to ensure protection of these rights within the EU.

1.4.2 The '*ne bis in idem*' principle

Rights coming from the *ne bis in idem* principle are also of prime importance in this area. This principle is obviously of great importance when considering the European Arrest Warrant (EAW) as well as regarding the Schengen Convention[56]. The principle ensures that people are not tried multiple times for the same crime in different states. It has been pointed out that, "It must be admitted that in one area, EU third-pillar measures have contributed to human rights protection that diminished it: the support for an international *non bis in idem* principle."[57] It was stated that this principle was "among the first third-pillar references reaching the Court of Justice. The Court will thus have an early opportunity to show that it 'takes rights seriously' in the third pillar."[58] This principle, which is dealt with in the ECHR[59] and ICCPR[60], is an important principle upon which the EU puts a strong weight, particularly in light of the Schengen Convention and more recently, the increase in criminal type proceedings in the CJEU.

1.4.3 *Segi*[61] and *Gestoras Pro Amnistía*[62]

The cases of *Segi* and *Gestoras Pro Amnistía* demonstrate the interaction between

[55] The relevant CJEU cases which look at the issue of the right to a fair trial are dealt with throughout this thesis; the Case C-105/03 *Pupino* [2005] ECR I-5285 being of particular interest.
[56] Issues dealt with in chapter 3 of this thesis
[57] S. Peers *'Human Rights and the Third Pillar'* in P. Alston *supra.*n.1 at p.185
[58] *ibid.*
[59] Article 4(1) of the Fourth Protocol to the ECHR
[60] Article 14
[61] Case C-355/04 P Segi and Others v Council of the European Union (Spain and United Kingdom, intervening at first instance) [2007] CMLR 23
[62] Case C-354/04 P Gestoras Pro Amnistía and Others v Council of the European Union (Spain and United Kingdom, intervening at first instance) [2007] 2 CMLR 22

fundamental rights and PJCC[63]. In these cases, the Basque organisations brought claims as a result of being included in a list of terrorist groups appended to a 'Common Position' on combating terrorism. The fundamental right which the organisations believed was at issue was that of the right to effective judicial protection. It was argued that they essentially had no way of challenging their inclusion on the list and as a result they had no right to effective judicial protection. The Court did, in the *Segi* judgment, refer to rights in the ECHR[64]. However, it was held, in both cases, that the contention that they did not have a right to effective judicial remedy was incorrect and both cases failed. The *Segi* case is described as being, "consistent with, on the one hand, the Treaty's broad tasks and objectives and, on the other hand, with the intentions of the Treaty drafters to limit the extent of integration within the third pillar."[65] As such, it appears that the *Segi* judgment allows the Court to broadly look at fundamental rights and develop issues regarding damages in the Third Pillar. It is submitted that this case may have had a different outcome had it taken place when the transitional provisions had passed and the third pillar falls within the ordinary jurisdiction of the Court.

Interestingly this case went to both the CJEU and the ECtHR[66]. Notably however, the ECtHR did not decide the case based upon the issue of jurisdiction; instead the ECtHR stated that the organisations did not fall within the meaning of 'victim' within the Convention.

1.5 Conclusion

It has been noted that, "JHA [Justice and Home Affairs] has thus moved from the outer fringes of European integration towards the centre, more than two decades since the start of Trevi."[67] It is suggested that this applies specifically to PJCC , the latter mutation of JHA, as well as to fundamental rights. This can be seen through the growth in their importance more generally as well as with regard to the Court.

[63] As well as the former second pillar of Common Foreign Security Policy (which still exists to some extent within the Lisbon Treaty)
[64] Case C-355/04 P at para.34 of the judgment
[65] S. Peers *supra*. n.48 at p.929
[66] App. Nos. 6422/02 and 9916/02, SEGI v The Fifteen Member States of the EU, admissibility decision of the ECtHR of 23 May 2002
[67] M. den Boer and W. Wallace '*Justice and Home Affairs. Integration through Incrementalism?*" in Wallace and Wallace "*Policy-Making in the European Union*" (4th Ed., OUP) at p.518

The development of the CJEU has been a gradual one and "the increasingly important contribution to the law of the AFSJ that is now being made by the European Court of Justice"[68] has already been noted. However, the difficulty of the CJEU playing a greater role within PJCC has been underlined by Peers:

> "National criminal and policing laws must always strike a familiar difficult balance. Established civil liberties principles require protection for the rights of suspects, but concern for public safety leads Member States to strive for effective investigations and prosecutions."[69]

Thus the pressures on national criminal justice systems become more complex when dealing with the cross-border crime which allegedly increases as a result of the fundamental free movement freedoms which arise as a result of EU membership, and thus it is key that fundamental rights are protected.

It is concluded that Coppel and O'Neill's contention that fundamental freedoms are given equal weight to fundamental rights and that the Court does not 'take rights seriously' is slightly outdated and partially exaggerated, as demonstrated by Weiler and Lockhart. However, it is agreed that the extent that fundamental *freedoms* are really what the EU has been about for such a long time and thus fundamental *rights* have only recently become a serious issue. Therefore, the subsequent chapters will focus on specific areas and contend that there has been a greater movement towards fundamental rights issues in the case law. Furthermore the changes to the jurisdiction of the Court brought about by the Treaty of Lisbon are to be welcomed to allow the Court to deliver preliminary rulings in this area of competence in the EU.

[68] E. Baker *"The European Union's "Area of Freedom, Security and (Criminal) Justice" ten years on"* 2009 Criminal Law Review (Crim LR) Vol.12 pp.833-850 at p.834
[69] S. Peers *'Human Rights and the Third Pillar'* in P. Alston *supra*.n.1 at p.186

Chapter 2: The Court of Justice of the European Union and Victims' Rights

2.1 Introduction

This chapter aims to assess whether the Court of Justice of the European Union (CJEU)[1] is taking a greater role in examining fundamental rights issues as opposed to fundamental freedoms issues within the case law which exists upon the Framework Decision on the Standing of the Victims in Criminal Proceedings[2].

In order to assess this, the author will primarily explain the context in which the Framework Decision was adopted. Then an analyses of the cases based upon this Framework Decision will proceed. It will then be argued that some of the cases do have strong fundamental rights themes to them, however what is more striking is the lack of cross-border element and as such the willingness of the Court to judge in such areas may mean that fundamental freedoms necessarily has a lesser role in victims' rights issues and thus in the overall area of Police and Judicial Cooperation in Criminal Matters (PJCC).

2.2 Framework Decision on the Standing of the Victims in Criminal Proceedings

The Commission adopted a Communication[3], and noted that within it there were situations where an EU citizen is the victim of a crime in another EU Member State and thus it is imperative that the victim has access to justice. This led to the scrutiny of national procedures relating to victims in the Member States and was part of the Action Plan on the optimal way of achieving an area of freedom, security and justice (AFSJ). There was a strong emphasis on being a victim of crime in another Member State, and issues such as linguistic requirements featured[4] in the build-up to the

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[1] The Treaty of Lisbon renamed the European Court of Justice (ECJ) the Court of Justice of the European Union as stated in Article 19 TEU. The case law however will refer to the ECJ. The term Court will also refer to the ECJ/CJEU and will be used to mean this unless otherwise stated.

[2] Framework Decision of 15 March 2001, O.J. 2001, L 82/1.

[3] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee of 14 July 1999 - Crime victims in the European Union - Reflexions on standards and action [COM(1999) 349 FINAL]

[4] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee of 14 July 1999 - Crime victims in the European Union - Reflexions on standards and action [COM(1999) 349 FINAL]

adoption of the Framework Decision. It was decided at the European Council meeting in Tampere in October 1999 that minimum standards should be created to protect the victims of crime.

Such a move by the Commission to contend with the rights of victims fell in line with moves by other international organisations[5]. It should be noted that the European Convention of Human Rights and Fundamental Freedoms 1950 (ECHR) does not specifically deal with victims' rights but instead enshrines the right to a fair trial of the defendant in Article 6[6]. Moreover, the Charter of Fundamental Rights of the European Union ('the Charter'), under Chapter VI entitled 'Justice' does not mention the rights afforded to victims[7]. However the idea of victims' rights is linked to the idea of dignity which is mentioned within the Framework Decision which states "The rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity…"[8] and dignity is also enshrined in Article 1 of the Charter.

Therefore, the Framework Decision was based on fundamental rights issues as well as cross-border issues arising from persons becoming victims of crime in a Member State other than their own. There are 19 Articles within the Framework Decision and include Articles on respect and recognition (Article 2); right to receive information (Article 4); penal mediation in the course of criminal proceedings (Article 10); and, victims resident in another Member State (Article 11). Interestingly the Commission has presented a proposal for a new directive in this field[9], and so the legislative journey regarding victims' rights continues.

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[5] The UN has the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; and, the 2006 Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[6] ECHR Article 6

[7] This chapter relates to an effective remedy and a fair trial (Article 47); Presumption of innocence and right of defence (Article 48); Principles of legality and proportionality of criminal offences and penalties (Article 49): and, Right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50).

[8] In Preamble to the Framework Decision, recital 8

[9] A Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime COM(2011) 275/2

2.3 Case Analyses

It is important to look at the cases which the Court has ruled based upon the Framework Decision. The cases which are considered concern young children as the victims of crime; the definition of a victim as a natural or legal person; victims as a private prosecutor; and, victims of domestic abuse. These cases will show the import of fundamental rights in these cases, with a much smaller emphasis on fundamental freedoms.

2.3.1 Young Children as Victims of Crime

The case of *Criminal Proceedings against Pupino*[10] is one which has attracted a great deal of academic comment as a result of its constitutional importance as to the legal effect of framework decisions which were adopted under what was previously the third pillar[11]. It has been the case that "Since the *Pupino* judgment, national courts of the Member States have the duty to interpret their legislation in conformity with instruments under the Third Pillar of the European Union."[12] and so granting indirect effect to matters pertinent to the Third Pillar[13].

The preliminary reference in this case came from Italy from the *Tribunale di Firenze*. The case concerned Signora Pupino, who was a nursery school teacher to children under the age of five. She was accused of, in several instances, a "misuse of disciplinary procedures" through a variety of actions including hitting the children regularly, preventing them from going to the toilet, threatening them and also closing their mouths with plasters. In light of these facts, the prosecutor asked that the judge who was in charge of the initial inquiries to take the statements from the children, who were both witnesses and victims, under a special procedure so as to protect their dignity and in order to avoid the children feeling distressed. The judge was also asked to note that there was the possibility of a "process of psychological repression".

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[10] Case C-105/03 [2005] ECR I-5285

[11] M. Fletcher *'Extending "indirect effect" to the third pillar: the significance of Pupino?'* 2005 ELRev Vol.30(6) pp.862-877; Case Comment *'ECJ affirms binding nature of JHA framework decisions'* 2005 EU Focus Vol.169 pp.9-10; N. Padfield & Katja Sugman *'The Spread of EU Criminal Law'* 2006 Arch. News Vol. 7 pp.5-9; E. Spaventa *'Opening Pandora's box: some reflections on the constitutional effects of the decision in Pupino'* 2007 EuConst LR Vol.3(1) pp.5-24; R. Loof *'Temporal aspects of the duty of consistent interpretation in the first and third pillars'* 2007 ELRev Vol.32(6) pp.888-895; V. Hatzopoulos *'With or without you…judging politically in the field of Area of Freedom, Security and Justice'* 2008 ELRev Vol.33(1), pp.44-65

[12] T. Margery *'Case C-404/07,* György Katz v István Roland Sós*, Ruling of the Court (Third Chamber) of 9 October 2008, not yet reported'* 2009 CMLR Vol.46 pp.1697-1708 at p.1697

[13] M. Fletcher *supra.*n.11 at p.862

However, the special provisions which are in place in the Italian Code of Criminal Procedure Article 392(1a) referred only to those under the age of sixteen who have been subjected to some form of sexual offence or offence with a sexual background, which was not the situation with Ms Pupino and her pupils. Thus the defence opposed this application. The Italian Court also believed that the application should be rejected. However, in light of Article 2(2) of the Framework Decision which states that, "Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances" and Article 8(4) which states "Each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles.", the Italian court made a preliminary reference to establish whether it was possible to interpret Italian law in the light of the Framework Decision.

In the CJEU's ruling, the Court followed the Opinion of Advocate General Kokott and ruled that Articles 2, 3 and 8(4) of the Framework Directive must give national courts the power to authorise young children who claim to be the victims of crime, to give their evidence in special procedures. The CJEU also ruled that national courts have to take into consideration the whole of national law and interpret them in light of the Framework Decision.

There is a strong emphasis from both the Advocate General and the Court on issues of a fundamental rights/human rights nature in this case, a point referred to by one commentator:

> "In coming to this judgment, the European Court of Justice based much of its position on Judgments of the European Court of Human Rights."[14]

Thus the Advocate General mentions the principle of legal certainty which is explicitly provided for in Article 7 of the ECHR, Article 15 of the International

[14] M. Hall *'The relationship between victims and prosecutors: defending victims' rights?'* 2010 Criminal Law Review Vol.1 pp.31-45 at p.37

Covenant on Civil and Political Rights (ICCPR) *and* Article 49(1) of the Charter. However, with regard to this point the Advocate General argues that this case does not cover substantive law and as such the important principle is that of a fair trial[15]. The Advocate General returns to this point and states that the defendant's right to a fair trial, enshrined both in Article 6 of the ECHR and Article 47 of the Charter, must be respected[16]. She states that, "Under that provision, the defendant in criminal proceedings is entitled *inter alia* to a public hearing and to have the main witnesses heard and questioned at the hearing, with a view to adversarial argument. At the same time, the defendant must have the opportunity to question and challenge witnesses."[17] Thus, in line with the ECtHR's case law, she points out that the rights of the witnesses, who are victims, have to be balanced with that of the defendant. The Advocate General opined that in a case where there are particularly vulnerable children as witnesses then special procedures for taking evidence should apply. Thus the Advocate General is balancing the respective norms.

The Court also made reference to fundamental rights and ECHR Article 6[18], and ruled that the Italian Court would have to allow the young children to have special procedures as long as Ms Pupino's right to a fair trial was not encroached upon[19].

The need for the Court to consider the right to a fair trial in this instance is clear, particularly in light of the fact that the Italian provision makes no mention of special procedures in the circumstances in this case. However, the Court's reasoning has generally been applauded,

> "…the Court is also likely to, and should, adopt a wide reading of harmonising legislation that sets out minimum standards of individuals' rights. To a certain extent, we saw this in *Pupino* in relation to the rights of victims."[20]

The fact that the CJEU chose to use fundamental rights was initially considered

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[15] Case C-105/03 at paras 41-42 of the Opinion
[16] *ibid* at para 66
[17] *ibid.*at para 66
[18] Case C-105/03 paras 58-60 of the Ruling
[19] *ibid.*at para 61
[20] A. Hinarejos *'Integration in criminal matters and the role of the Court of Justice'* 2011 European Law Review Vol.36(3), pp.420-430 at p.428

surprising[21], and in light of the Court's reasoning being based upon fundamental rights and ECHR it has been stated that, "The EU, it said, must respect fundamental rights as guaranteed by the ECHR. So when construing Framework Decisions, and trying to interpret national laws to take account of them, courts must always bear in mind the ultimate need to respect the requirements of the ECHR - and in particular the right to a fair trial under Article 6."[22]

The Advocate General also makes reference to the fact that the witnesses/victims in this case are children and as such can be particularly vulnerable in line with the arguments from the Commission and the referring Italian Court[23]. She notes that children are provided for specifically in the Charter in Article 24 as well as in a range of other international instruments. Furthermore the Advocate General points out that, "Accordingly, Art.24 of the Charter of Fundamental Rights of the European Union guarantees the right of children to such protection and care as is necessary for their well-being. In all actions relating to children taken by public authorities the child's best interests must be a primary consideration."[24]

It is interesting to note that in this case the Advocate General stated that the Framework Decision did not define who would or should be classified as a 'vulnerable' victim, as there are a number of ways in which a person can be construed to be vulnerable[25]. With this in mind however, the Commission proposed a new directive on victims' rights[26] restating the right to protection of vulnerable victims[27] *as well as* a specific separate right to protection of child victims[28]. This underlines the importance of the fundamental rights of the child as well as the lasting impact of the *Pupino* ruling. It has been pointed out by one commentator that now practitioners

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[21] J.R.Spencer *'Child witnesses and the European Union'* 2005 Cambridge Law Journal Vol.64(3) pp.569-572 at p.569

[22] *ibid.* at p.572

[23] Case C-105/03 at para 53 of the Opinion

[24] *ibid.* at para 57

[25] Case C-105/03 at paras 54-55 of the Opinion

[26] Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime - COM(2011) 275/2 (Brussels)

[27] *ibid.* in Article 21. The wording of this Article has been criticised; see *Joint Response of the Criminal Bar Association and Justice to the Consultation on European Directive on Victims Rights* July 2011

[28] *ibid.* in Article 22

would have to find a way for smaller children to provide their evidence in advance of the trial[29]. Moreover, the question may be whether the Court would have been so willing to extend indirect effect to the Third Pillar had the case not concerned the particular class of victim that is children. This model of reasoning is one which Bengoetxea has suggested:

> "It may well be that if a proposed interpretation leads to consequences which are negatively evaluated by the interpreter, a different, more 'suitable' interpretation will be adopted…"[30]

It is submitted that this is what the Court and the Advocate General did in this instance; it foreseen an undesirable situation where the most vulnerable in society would not be adequately protected when in the position of being a victim of crime. As such it must be remembered that "the ECJ can be considered a social agent; its decisions are socially relevant."[31] It has been elucidated by one commentator:

> "Where the European Union has recognised the existence of rights for suspected perpetrators or victims of criminal activity it is therefore crucial that these rights are enforceable."[32]

Thus this shows the *importance* that the Court has given to these rights and therefore created indirect effect of a part of the Treaty which was purely intergovernmental in nature. As such, this case was the pioneer in terms of firstly, demonstrating the indirect effect of Framework Decisions on the national legal orders and secondly, it was the first case on this specific Framework Decision on the standing of victims in criminal proceedings. It is clear from the *lack* of attention which the Court gave to fact that this was a 'wholly internal situation' that that had no effect on the Court's capacity to rule on this area.

Definition of Victims as Natural or Legal Persons

There are two cases centred on similar issues and thus will be discussed together[33].

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[29] J.R.Spencer *supra*.n.22 at p.571

[30] J.Bengoetxea *'Legal Reasoning of the European Court of Justice'* 1993 OUP at p.96 Bengoetxea looks in depth at a number of factors which affect a Court's reasoning. For more see p.115

[31] *ibid.* at p.98

[32] M. Fletcher *supra*.n.11 at p.875

[33] Criminal Proceeding against *Giovanni Dell'Orto* Case C-467/05 [2007] ECR I-5557; and Criminal

Firstly in the case of Criminal Proceedings against *Dell'Orto*, the preliminary reference came from the Tribunale di Milano, and surrounded the interpretation of the definition of victim as provided for in Article 1 of the Framework Decision as well as the Council Directive 2004/80 relating to compensation to crime victims[34]. There was some discussion of issues relating to whether the proceedings were admissible as a result of the reference being based on Article 234 EC as opposed to Article 35(1) EU, but the preliminary reference was found to be admissible[35]. Another issue of the temporal application of the law was discussed, but due to the procedural nature of the rule, it was decided to be in force for the purpose of the case[36]. Mr. Dell'Orto was found to have embezzled money from companies through receiving payment for fictional consultancy activities provided to offshore companies. Dell'Orto had given himself the amount of 1,064,069.78 euros which belonged to the company Saipem and was placed under sequestration of the Italian Court. After the final judgment, eventually Saipem obtained an order for the return of this money which was subsequently set aside. The Italian Courts questioned whether they were able to return this money to Saipem and felt this was based on a purely procedural point. Thus the Italian Court asked whether the Articles of the Framework Decision could apply to legal persons as well as natural persons and as such whether it could apply to legal persons for the purposes of the Directive relating to compensation to crime victims in the case.

The ECJ firmly ruled in this case that:

> "It follows from the wording of this provision that the Framework Decision applies only to natural persons who have suffered harm directly caused by conduct which infringes the criminal law of a Member States.
>
> To interpret the Framework Decision to mean that it would also apply to "legal" persons…would contradict the very letter

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Proceedings against *Emil Eredics* and *Mária Vassné Sápi* Case C-205/09

[34] [2004] O.J. L261/15

[35] This was an issue which was discussed at length by the Advocate General in parts A and B of the Opinion. It is contended that the arguments were, at times, somewhat convoluted so as to allow the Court to hear this case. It was noted by the AG that "…references concerning Union law - under Art.35 EU - are in principle requests within the meaning of Art.234 EC. The admissibility of a request cannot depend on the extent to which the national court refers expressly to those provisions." The Court ruling also looked at the question of admissibility and held the reference to be admissible.

[36] Case C-467/05 at paras. 48 and 49 of the Ruling

> of Art.1(a) of the Framework Decision.[37]"

Thus the Court was quite clear on its position in this regard. The issue of the definition of a 'victim' arose again in a subsequent case.

In the *Eredics and Sápi* case, Mr Eredics was the principal of a nursery school and Ms Sápi was the director of a hotel, both in Hungary. They entered into a framework contract for funding for a forest paths project which Mr Eredics was leading. Vá Ti kht, the Hungarian public utility company, supervised the project and settled the accounts. It became apparent that funding which was received as a result of invoices and log books drawn up were in fact fraudulent. As such, there were charges of adversely affecting the financial interests of the European Communities (EC) by allegedly having defrauded the Hungarian public utility company responsible for rural and urban development. Eredics admitted the facts against him and asked for mediation. Vá Ti kht agreed in its capacity as victim for mediation. The proceedings were thus stayed for mediation. However, the prosecutor appealed saying that the facts of the case did not lend itself to mediation under Hungarian law. Moreover it was argued that Eredics did not admit the facts during the investigation and also that Vá Ti kht was not in fact the real victim, but the EC (as it was at that time) was. Thus the case was referred onto the CJEU.

This case followed on from *Dell'Orto* and the Court referred to it in its ruling. When analysing this case, the ECJ ruled that a 'victim' for the purposes of the Framework Decision does not extend to legal persons for mediation in criminal proceedings[38]. It is noted that the framework decision specifically refers to 'natural persons' in its definition in Article 1 and thus the Court cannot call into question the decision which the Court made in *Dell'Orto*[39]. It was noted that,

> "The fact that some Member States provide for penal mediation where the victim is a legal person does not call into question that conclusion, the ECJ now held. Since the Framework Decision does not undertake a complete harmonisation of the field in question, a decision that its provisions are also applicable where the victim is a legal

[37] Case C-467/05 at p.796 of the Ruling
[38] *ibid.* at para. 31
[39] *ibid.* at para.28

> person is one that Member States are neither prevented by the Framework Decision nor obliged to take."[40]

The CJEU also ruled that Article 10 of the Framework Decision does not require Member States to make recourse to mediation for all substantive components. Member States can decide themselves and thus in this instance the Hungarian legislature did not go beyond its discretion[41].

Although it is important to note the fundamental rights aspects which have arisen in the case law, it is essential not to overstate the fundamental rights argument in these cases. Here are two examples which have arisen which have *no* fundamental rights reasoning whatsoever, and come largely down to a clear definition of the term 'victim' as well as the admissibility of the preliminary reference. Thus these cases would suggest that although there may be times in which fundamental rights are the driving force in a ruling, there are instances where they play no role at all.

On the other hand, there is still a lack of cross-border elements in these cases. Although there were some off-shore issues in the *Dell'Orto* case, the case was still about Italian nationals and an Italian Company, with the Italian Court forwarding the preliminary reference to the CJEU. Likewise with the *Eredics and Sápi* case, the defendants were both Hungarian and so was the public utility company who had overseen the accounts. It may be argued that as the victim could be seen as the EU then there was a cross-border element, but in reality, it is submitted that the EU was merely the overall administrator of the funding and the overall criminal acts were being undertaken within Hungary. Thus again, there is a lack of cross-border element suggesting that fundamental freedoms relating to movement has not needed to exist for the Court to intervene.

Victims as a Private Prosecutor

The circumstances which led to the case of *György Katz v István Roland Sós*[42] being brought before the CJEU are quite distinct. In this case, the question boiled down to

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[40] Case Comment *'Member States free to choose offences subject to mediation'* EU Focus 2010 pp.31 - 32 at p.31-32

[41] Case C-205/09 at para 38 of the Ruling

[42] Case C404/07 [2008] ECR I-7607

whether the Framework Decision requires that victims of crime must be able to be heard as witnesses in criminal proceedings in which they fulfil the role of prosecutor, in this case through the medium of the victim being a substitute private prosecutor.

In this case Mr Katz had brought a substitute private prosecution against Mr Sós, who Mr Katz accused of defrauding him and thus as a result caused him serious harm. As a result of the fact that it was Mr Katz himself who was defrauded, he applied to be a witness in the case. However, this application was reject on the grounds that as public prosecutors may not act as witnesses in a case, thus neither should a substitute private prosecutor. The referring Hungarian Court asked, in paragraph 11 of the Court's ruling:

> "Must Articles 2 and 3 of Council Framework Decision 2001/220...be interpreted as meaning that the national court must be guaranteed the possibility of hearing the victim as a witness also in criminal proceedings which have been instituted by him as a substitute private prosecutor?"

It should be noted that in the Framework Decision Article 2 provides that victims should have a real and appropriate role in criminal proceedings and Article 3 states that Member States shall safeguard the possibility of victims being allowed to provide their evidence in court and be heard. A number of issues were discussed in the Court, including the fact that there was nothing within the Framework Decision to suggest that victims who bring a substitute private prosecution should *not* be protected in their criminal proceedings[43] and that in fact it is in such circumstances where a victim is bringing a prosecution that victims deserve special protection[44]. The Court discussed fundamental rights provisions[45]. However, the Court then ruled that in proceedings where the victim is also acting as a substitute for the prosecutor then they "must have the possibility of contributing evidence in the proceedings by giving testimony. Such victims need not, however, be afforded the status of witnesses if the applicable national law governing criminal procedure nevertheless grants them the possibility of being heard before the court and that testimony constitutes admissible evidence."[46]

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[43] Case C-404/07 at para.38 of the Ruling
[44] *ibid*. at para.39
[45] Discussed further below
[46] Case C-404/07 at para.47 of the Ruling

This particular case provides an interesting juxtaposition of rights of victims as witnesses and the right to a fair trial. Comment on this case provides for a valuable summary of the Court's overall judgment and highlights the complexity of the issue:

> "The ECJ therefore concluded that the Framework Decision while requiring Member States, first, to ensure that victims enjoyed a high level of protection and had a real and appropriate role in their legal system and, second, to recognise victims' rights and legitimate interests and ensure they could be heard and supply evidence, left to the national authorities a wide margin of discretion with regard to the specific means by which they implemented those objectives. However, it also held …that the victim was to be able to give testimony in the course of criminal proceedings which could be taken into account as evidence."[47]

The Court noted the rather awkward position which prevailed: on the one hand allowing the victims to be witnesses in cases where they are also the prosecutor could lead to a conflict of interest[48]; on the other hand, the victim's evidence could also be essential in proving the case against the accused.[49] Advocate General Kokott alluded to this fact, it being noted that, "Indeed, where the public prosecutor refused to carry on prosecution, the victim has to supply all the evidence on his/her own - his/her testimony being one of the most important - in order to prove the charge. However, the Advocate General did not accept the contention of Mr Katz that this would amount to a breach of his right to a fair trial. The protection against unfair trial as enshrined in Article 6 ECHR in criminal cases remains mainly in favour of the defendant."[50] Thus the right to a fair trial is an interesting line of argument for the Court to follow in any case regarding the Framework Decision on the standing of victims in criminal proceedings because it is most likely that whatever rights that victim does have, and no matter how strongly the Court attempts to safeguard them, there is always the chance that their rights can be lessened to ensure the overall fairness of the trial as required by Article 6 ECHR. In this regard one commentator has contended that, "In the fight against crime, public prosecutors must uphold

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[47] Case Comment *'Victim acting as prosecutor must be able to give evidence'* 2008 EU Focus Vol.243 pp.12-13 at p.13
[48] Case C-404/07 at para.44 of the Ruling
[49] *ibid* at para.32
[50] T. Margery *supra.* at n.13 at p.1701

fundamental human rights and, therefore, always try to find the right balance between the prosecution of these rights and the public interest."[51] Therefore, the problems inherent in this type of case are clear from the outset.

Not only was the victim's role an odd one, it led to the important issue of the recognition of fundamental rights, similar to that in the *Pupino* case above. The Court stated that "It should, in addition, be emphasised that giving effect to the position of victims bringing prosecutions should not entail any kind of diminution of the rights of the defence…The rights of defence, therefore, constitute a fundamental right forming part of the general principles of law whose observance the Court ensures" The Court then went on to refer to ECHR Article 6, right to a fair trial and Articles 47 and 48 of the Charter, and say that the Framework Decision had to be read in light of these provisions. Particular mention was made in the ruling of the defence's right to examine or to have examined witnesses against him, a point which the Advocate General also made. The CJEU also noted that it was for the national court to ensure that the position of the defence was not prejudiced in light of allowing the victim/witness/substitute private prosecutor from providing testimony[52].

The importance of the equality of arms is stressed in this ruling[53]. Although it is important in these types of cases for the Framework Decision to protect a particular type of victim, nevertheless, the rights of the defence, which are enshrined elsewhere, are not to be prejudiced as a consequence.

An analysis of this case provides an illuminating illustration of the interaction between the CJEU and the ECtHR:

> "…the ECJ, on the one hand, respects the diversity of national legal systems, but, on the other hand confirms that human rights protection as enshrined in the ECHR and interpreted by the Court of Strasbourg requires unity. The judgment confirms that, far from operating in isolation from each other, the Court in Luxembourg operates in line with the Court in Strasbourg."

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[51] T. Margery *supra.* at n.13 at p.1707

[52] Case C-404/07 at para.45-46 of the Ruling

[53] *ibid.* at para.45

[54]

This, it is submitted, makes it difficult to argue that the Court is *not* taking a broader approach when dealing with fundamental rights and a more restricted approach in respect of fundamental freedoms. This entire case was based within Hungary and again no cross-border element is visible.

Victims of Domestic Violence

This case concerned *Criminal Proceedings against Gueye (X intervening) and Salmerón Sánchez (Y intervening)*[55] in respect of domestic violence. The position of victims of domestic violence is particularly sensitive as the victims are particularly vulnerable. Interestingly a consultation paper has been published in the UK and aimed to "*prevent* domestic violence occurring or recurring; to increase *support* for victims; and to ensure improved legal *protection and justice* for domestic violence victims."[56] The consultation paper was published prior to implementation of the Framework Decision and underlines problems which victims of domestic abuse face.

The preliminary reference in the *Gueye and Sanchez* cases were referred from the *Audiencia Provincial de Tarragona* in Spain. The central issue was whether the Framework Decision prevented reliance on the Spanish national law which created a mandatory penalty where the perpetrator of the crime had to stop any kind of contact with the victim, regardless of whether the victim would like to have further contact with the perpetrator. This was as a result of Articles 57(2) and 48(2) of the Spanish Criminal Code which provided that an additional penalty be imposed upon the offender which prevents the offender from contacting the victim. This is supposed to provide protection to the victim according to the referring court[57]. Additionally, a breach of this injunction resulted in the crime of contempt of court as stated in Art.468(2) of the Spanish Criminal Code.

[54] T. Margery *supra.*n.13 at p.1708
[55] Joined Cases C-483/09 & C-1/10
[56] Home Office, *Safety and Justice: The Government's Proposals on Domestic Violence* (Home Office, London, 2003) as cited in L. Ellison *"Responding to victim withdrawal in domestic violence prosecutions"* 2003 Criminal Law Review November pp.760-772 at p.760
[57] Joined Cases C-483/09 & C-1/10 *ibid.* at para.7 of the Opinion

In this case Mr Gueye and Mr Salmerón Sánchez, were both held separately in contempt of court after, primarily being found guilty of domestic violence towards their partners and then breaching the ancillary order to stay away from the victims within a very short period of time in both instances. Mr Gueye was prohibited from being within 1000 metres of his victim and Mr Salmerón Sánchez within 500 metres of his victim for periods of 17 and 16 months respectively.[58] Such a penalty was imposed on both the offenders regardless of the views of the victims, who *wanted* to resume contact with the offenders.

The Court noted in this case that even though the victim's interests are to be taken into consideration, an injunction can still be imposed contrary to their wishes[59]. The CJEU also noted that such a penalty against the offender "is not only to protect the interests of the victim as he or she perceives them but also other more general interests of society."[60] It was thus ruled in this case that such an injunction against the perpetrator was not precluded by the Framework Decision where the victim disagrees with the penalty[61].

On an issue which arose in the *Eredics and Sápi* cases regarding mediation, the Court also ruled that crimes within the family could be excluded from the possibility of mediation[62]. This emphasises the idea that the Member States have a large measure of discretion in how they implement Framework Decisions.

This case is a particularly interesting one, and the Court's ruling and the Opinion of Advocate General Kokott is equally so. The Advocate General notes that the Charter has to be given due consideration[63]. The specific provision of Article 7 of the Charter, which provides for the respect for private and family life, was put forward as an argument by the Commission. The Commission submitted that due to the fact there was no discretion in the Spanish law in respect of the measures to be taken, then the

[58] Joined Cases C-483/09 & C-1/10 at para.19 of the Ruling
[59] *ibid.* at para.56
[60] *ibid.* at para.61
[61] *ibid.* at para.70
[62] *ibid.* at para.76
[63] Joined Cases C-483/09 & C-1/10 at para.76 of the Opinion

victim's private and family life would be disrupted.

However, it was stated by the Advocate General that in this instance the Framework Decision did not affect the suitability of the penalties which are to be imposed. The Advocate General went further and stated that the Court which had jurisdiction on the matter of whether an injunction to keep the victim away from the perpetrator was in line with fundamental rights was either the national court or the ECtHR. This is an interesting position that the Advocate General decided to take. This may be with regard to the specific questions which were raised in the preliminary ruling; that is to say that perhaps if the question was formulated in a different way then it would have had due regard to issues of private and family life. On the other hand, it was perhaps a very deliberate move to steer clear of issues which may be seen to constitute issues over which the ECtHR has jurisdiction over and to avoid having to comment on the Charter's binding status.

With regard to the Court's ruling, it did not arrive at the same conclusion. The Court stated that, "The provisions of the Framework Decision must be interpreted in such a way that fundamental rights, including in particular the right to respect for family and private life, as stated in art.7 of the Charter of Fundamental Rights of the European Union, are respected."[64] Thus it was noted that the victim had a right to be heard and consideration should be taken of their opinion[65]. However, in stating that, the Court explained that it did *not* in turn mean that the victim had rights in terms of the penalties to be imposed. It is submitted that this is the correct ruling; to provide the victim with the right to be able to suggest some kind of imposition of a penalty is an unusual one. Obviously this case alludes to the situation where the victims would have opted for a lesser (if not no) penalty on the perpetrator of the crime. But what of the situation where a person has suffered at the hands of another and feels they deserve a life in prison? In such a case it would hardly seem fair that the view of the victim has any kind of binding effect. Such an opinion may be taken into consideration but should not replace the role of the judge. This point is reaffirmed by one commentator who notes:

[64] Joined Cases C-483/09 & C-1/10 at para.55 of the Ruling
[65] Joined Cases C-483/09 & C-1/10 at paras.57-59

> "The measures and the associated case law and statutory instruments make it clear that victims should not expect to dictate prosecution decisions or, in all circumstances, have their wishes adhered to during the criminal process…A good example of this reality lies in the particular problems faced by the criminal justice system when approaching cases of domestic violence."[66]

Thus the comment provides some clarity on this issue within the Framework Decision.

Furthermore, it has been observed that:

> "Nevertheless, there will inevitably be cases, albeit a minority, where, *inter alia*, the severity of harm inflicted and the likelihood of recurrence render it in the public interest to prosecute a perpetrator of domestic violence regardless of the alleged victim's non-co-operation.[67]"

This is perhaps the converse, i.e., where the situation is that regardless of the fact the victims *wants* to be reunited with the partner, it is perhaps both in the victim's interest and in the public interest, to keep the victim away from their partner regardless of their wishes. The Court's position in the case is specific to the case that of a victim of domestic violence. It can often be difficult to discern whether pressure has been exerted upon the victim and CJEU's decision not to preclude this legislation, particularly in a Member State struggling with the issue of domestic abuse, is perhaps understandable.

It cannot be ignored however that there will be effects on the victims' family life, and the Court, although mentioning the Charter and its provision, fails to make any meaningful comment in the context of the case. The victims wished one outcome but faced with a very different one. To the benefit of those said victims - perhaps, but to decide what is best for these victims is not the role of the CJEU.

This is another case which deals only with Spanish litigants, Spanish legislation and has been a reference from a Spanish Court. There is no cross-border element in this case.

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[66] M. Hall *supra.*n.15 at p.40
[67] L. Ellison *supra.* n.57 at p.762

2.4 Fundamental Rights Reasoning of the CJEU

Notably victims' rights are not rights which are protected by the ECHR but the defendant's right to a fair trial is one which is protected by the Convention. Nonetheless, the CJEU has now chosen to look at issues of fundamental rights as enshrined in the Charter and human rights as enshrined in the ECHR, particularly in relation to the right to a fair trial. However, it is contended that there is still some criticism to be leveled at the CJEU in this regard. At times within the rulings it seems more like the CJEU is merely paying lip service to fundamental rights, particularly in the *Gueye and Sánchez* cases. The issue of the victim's right to a private and family life was largely ignored.

Moreover, these issues are often mentioned near the end of the ruling, as though an afterthought. This must be seen as surprisingly in light of the issues which are being handled, and particularly due to the strong connection with State sovereignty that these issues raise. It is submitted that this is as a result of fundamental rights falling within the category of general principles of law[68], which is why, at times, there fails to be a proper analysis of such issues.

However, Courts and Advocates General have begun to pave the way by increasingly considering these issues, and it must not be forgotten that the binding effect of the Charter is still relatively new in the overall development of the EU's legal order. Many basic points regarding the ECtHR have been explained, including the fact that, "The court [European Court of Human Rights] has consistently made it clear that the relevant consideration is whether the proceedings *taken as a whole* were fair."[69] It is submitted that the Court made slightly stronger opinions felt with regard to the provisions regarding the right to a fair trial.

Although the Zambrano case[70] relates to citizenship, some points which Advocate General Sharpston made with regard to fundamental rights provide interesting

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[68] G.Conway *'Levels of Generality in the Legal Reasoning of the European Court of Justice'* 2008 European Law Journal (ELJ) Vol.14(6) pp.787-805 at p.793 Other issues such as legal certainty and proportionality are also referred to.

[69] L. Ellison *supra.* n.57 at p.771

[70] Case C-34/09 *Gerardo Ruiz Zambrano v Office National de l'emploi (ONEm)* [2011] 2 CMLR 46

reflection. She noted that, "The rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect citizens of the EU *even if such competence has not yet been exercised*."[71] Thus the fact that fundamental rights arguments are being furthered in relation to the area of freedom, security and justice, a field of shared competence between the EU and the Member States, is no great surprise, particularly bearing in mind the content of such cases.

Moreover, the position of fundamental rights in these cases should not be over stated. Perhaps as a growing field in law, the few case studies undertaken in this chapter are more examples of questions over definitions as opposed to fundamental rights. Thus new cases on the Framework Decision (or any future directive based upon this provision) should be closely monitored to determine whether any further pattern emerges.

2.5 Lack of Cross-border Element

One of the comments that have been made in relation to this Framework Decision was:

> "…the Decision focuses on cross-border victims, that is, persons who fall victim to crime in a country other than their country of residence. In fact, tourists and travellers in other member states have a higher risk of becoming victims of crime than the residents of that country…"[72]

While perhaps it can be argued that this is one of the aims of the Framework Decision, that is, to protect those victims of crime from abroad (and thus pertaining to the idea of free movement), it is difficult to see evidence of this restriction in the case law so far. As yet not a single case which has been referred to the Court has centred on the issue of one Member State's national being a victim of crime in another Member State. While it could be argued that this merely means that the Framework

[71] Case C-34/09 at para.163 of the Opinion

[72] S. Kuhn *'Falling victim to inadequate laws'* 2005 European Lawyer Vol.46 pp.31-32

Decision has been implemented correctly and is achieving all its intended outcomes, it is contended that this would be a rather naïve and simplistic position to take. The fact remains that CJEU has had opportunities to answer questions from Member States where a wholly internal situation has been at issue. Notably however, the Commission reported[73] that implementation of the Framework Decision as a whole has been unsatisfactory. Perhaps, as a result, the CJEU recognises the need to provide adequate protection to nationals of a Member State where they are not being adequately protected as a result of a lack of (or poorer quality) piece of national legislation supposedly implementing the Framework Decision.

The reason for having a rule regarding the requirement of cross-border movement is explained by one commentator:

> "The current 'internal situation rule' does not exist just for the sake of it. The rule reflects constitutional values that the Court must respect and also protect…it serves as the borderline demarcating the EU's jurisdiction *vis-à-vis* national jurisdictions and expresses the 'federal' notion that there are matters that the EU, in principle, should not get involved in. Hence crossing that borderline is by definition a politically sensitive and a constitutionally troublesome thing to so. Caution is warranted."[74]

It is not contended that the Court is opposed to such rulings in this particular field; rather it is submitted that the lack of cross-border element in the case law discussed above strengthens and supports the proposition that the Court is not relying in its reasoning on the fundamental freedoms which have existed in the EU since its inception but on the protection of fundamental rights which in fact means the Court

[73] Commission Report on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)

[74] A. Pieter van der Mei *'The Outer Limits of the Prohibition of discrimination on grounds of Nationality: A Look Through the Lens of Union Citizenship'* 2011 MJ pp.62-85 Vol.18 at p.78

has widened its competences.

This can be seen from the development and reasoning regarding 'purely internal situations'. Initially the Court was reluctant to rule on wholly internal situations. The *Saunders* case[75] is an example of this. This was the first case to apply the 'wholly internal situation' rule since it concerned a woman from Northern Ireland who was working in England and convicted of theft. The English courts decreed that she had to remain in Northern Ireland for a period of three years, which, she argued was incompatible with her right to free movement as guaranteed by EU law. The CJEU however, would not rule on this as it concerned a wholly internal situation. It has been pointed out that "When the *Saunders* case was decided, the idea of the common market having anything to do with a Member State's exercise of its power in the field of criminal law with reference to its own nationals would no doubt have been shocking"[76]. However, today the EU does have competences in the AFSJ.

It might be worthwhile mentioning at this juncture that perhaps the Court's most recent reasoning was in response to a perceived heightened level of cross-border crime as a result of the removal of the internal borders between Member States. Again this initial reasoning has a cross-border emphasis which the Court does not seem to take into account.

In light, however, of the surprising situation of 'reverse discrimination' which can occur, it is understandable why the Court would wish to avoid this in light of cases

[75] Case 178/78 [1979] ECR 1129

[76] S. O'Leary *'The past, present and future of the purely internal rule in EU law'* 2009 Irish Jurist Vol.44, pp.13-46 at p.33

involving fundamental rights of citizens. This phenomenon is described here:

> "Reverse discrimination has remained a problem for the EU since the 1970s. Arising across all fundamental freedoms, it is a direct corollary of EU law's non-application in 'wholly internal' situations. Such discrimination is premised not on discrimination against nationals, but rather, on discrimination against individuals who have not made use of free movement rights. The result is that Member State national, as a rule, may be treated less favourably than foreign nationals."[77]

Thus if we take the Pupino example, would the children had to have come from another Member State and exercised their free movement rights, then suffered the abuse at the hands of the teacher, before a preliminary reference could be made to the CJEU? It is clear that this would have left an unimaginable and highly unsatisfactory situation.

Thus, although the background to the AFSJ and this specific Framework Decision had cross-border origins, the issues which are raised in these cases are ones upon which the Court is asked to consider. It is submitted that this is most likely because there is a greater emphasis on fundamental rights in this area. The Framework Decision has certain specific articles based upon the cross-border element but otherwise there is no suggestion that the Court cannot look to wholly internal situations. Equally though, it is not clear that there is a legal base in the Treaties which permits the Court ruling in such areas. It does however present an interesting example of the changed role that the CJEU perceives it has in this field of law.

2.6 Conclusion

It was once commented that "The ECJ is driven by the same concern to uphold the protection of fundamental rights in the context of the Area of Freedom, Security and Justice as far as police and judicial cooperation in criminal matters is concerned."[78] It is argued that, the Court has largely the 'same concern to uphold the protection of fundamental rights' within the more discrete ambit of the Framework Decision on the Standing of Victims in Criminal Proceedings within PJCC. The fundamental and

[77] R. Morris *'Case C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), Ruling of the Court (Grand Chamber) of 8 March 2011, not yet reported'* 2011 MJ Vol.18 pp.179-189 at pp.185-186

[78] K. Lenaerts *"The Contribution of the European Court of Justice to the area of freedom, security and justice"* 2010 ICLQ Vol.59(2) pp.255-301 at p.298

human rights arguments which have been put forward by the Court have been analysed above. It is contended that there has been a shift towards resolving the issues raised in the case law by focusing on the Charter and the ECHR. However that being said, it is concluded that the Court could continue to go further, en route to being seen as taking fundamental rights more seriously.

On the other hand, the lack of cross-border element, which has to be seen to relate to the lack of economic elements within the facts of the cases, has been totally absent. Interestingly, the Court has dealt in 'wholly internal situations' and has rendered much of the original language and reasoning on fundamental freedoms redundant *in this area*. Thus there is a much lesser emphasis on the fundamental freedoms and it is difficult to find any reference to citizenship, free movement or the like within the rulings on the standing of victims in criminal proceedings.

Thus to conclude, it would seem that there has been a greater emphasis placed on fundamental rights which could be seen as conversely proportionate to the level of emphasis placed upon the fundamental freedoms. Whether this is the situation which is evident throughout the field of PJCC remains to be seen. The next chapter will focus on whether the same is evident in the case law on the European Arrest Warrant.

Chapter 3 - The Court of Justice of the European Union and the European Arrest Warrant

3.1 Introduction

This chapter's aim is to assess the position the Court of Justice of the European Union (CJEU) has taken with regard to the European Arrest Warrant (EAW)[1], fundamental rights and fundamental freedoms.

This will be undertaken, primarily, by providing an explanation of the EAW and will then analyse the case law which has arisen in this somewhat controversial field of European Union (EU) law. The strength of fundamental rights arguments will be underlined. However, the very essence of the EAW is the requirement of movement which will provide a noteworthy contrast to the case law on the framework decision on victims' rights. A parallel will also be drawn with some select Schengen cases which provide illustrative examples of perhaps not competing fundamental rights and freedoms, but in fact competing fundamental rights alone.

3.2 Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States

The Council Framework Decision on the EAW was considered to be one of the steps "to maintain and develop the Union as an area of freedom, security and justice."[2] The question therefore remains, what actually is the EAW? The EAW was the EU successor to various extradition Treaties amongst the Member States which were based on public international law. In a case where a person is not in the State where that person is awaiting a criminal trial, and an extradition Treaty was in place with the State the person is in, then the State in which the person was present would extradite that person to the issuing State. This would equally be the case for a person after they have been sentenced and have to undertake that sentence. Thus the EU created the EAW to simplify the former extradition process which had come to be known as somewhat "ineffective."[3] It has been noted that:

> "Responding to the shortcomings in current practice, the

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[1] Council Framework Decision 2002/584 (JHA) on the European arrest warrant and the surrender procedures between Member States, hereinafter referred t o as EAW or the European Arrest Warrant

[2] Article 2 TEU

[3] S.Alegre and M.Leaf *'European Arrest Warrant: A solution ahead of its time?'* A Justice Publication 2003 at p.8

> EAW is intended to introduce faster and simpler surrender procedures, primarily through reliance on the principle of mutual recognition and through ensuring the process takes place exclusively between the judicial rather than the political authorities of EU member states, while continuing to safeguard human rights…"[4]

In the development of the EAW Framework Decision, many amendments were put forward to the original proposal by the Commission and the European Parliament which evinced that "the members of these organs were preoccupied with the protection of human rights and safeguarding fundamental freedoms in the new mechanism."[5] It is thus clear that at the very essence of the EAW is free movement. Equally, however, the importance of human rights protection is of prime importance, especially in terms of the right to a fair trial.

Interestingly, the EAW was the "first European instrument to implement the principle of mutual recognition. It is based on mutual trust and understanding of each other's legal systems and enforcement mechanisms."[6] However, the extent to which Member States actually have mutual trust in each other's legal systems is debatable[7], as is the use of a principle which has its roots in the establishment of a free internal market[8]. Moreover, an important point has been made namely the idea that the Member States should blindly trust that other Member States are adhering to fundamental rights just because they are signatories to the European Convention of Human Rights (ECHR) is somewhat surprising in light of the fact that the Member States are often brought to task before the European Court of Human Rights (ECtHR) specifically *for* human rights abuses[9]. It is in light of such issues that the EAW is particularly controversial and has led to references to the CJEU.

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[4] S.Alegre and M.Leaf *supra.* n.3 at p.9

[5] M.Plachta and W. van Allegoric '*The Framework Decision on the European Arrest Warrant and Surrender Procedures Between Member States of the European Union'* in R. Blextoon and W. van Allegoric *'Handbook on the European Arrest Warrant'* 2005 TMC Asser Press distributed by Cambridge University Press at p.35

[6] A. Vitorino in R. Blextoon and W. van Allegoric *ibid.* at p.1

[7] In fact it has been suggested that it actually creates 'mistrust': "it can provoke in the analyst a certain mistrust towards the legal orders of the other States…" M. de Hoyos Sancho *Harmonization of Criminal Proceedings, Mutual Recognition and Essential Safeguards'* in de Hoyos Sancho, M (Ed) *'Criminal proceedings in the European Union: essential safeguards'* (Lex Nova, 2008) at p.44

[8] K.Ambos *'Mutual recognition* versus *procedural guarantees?'* in de Hoyos Sancho, M (Ed) *ibid.* at p.30 It is noted that rather than the free movement of goods being at stake, it is in fact personal freedom of EU citizens.

[9] Examples are provided for in M. de Hoyos Sancho *supra.* at n.7 at p.75-76

3.3 Case Analyses

The EAW has been problematic for the Member States with the result that many national cases were appealed to the national Constitutional Courts to rule on the constitutionality of the Framework Decision[10]. Problems with the new Framework Decision involved the abolition of the exception to extradite a Member State's own nationals and the removal of the double criminality requirement, *i.e.* the removal (in most cases) for the offence to be a crime in both the issuing and executing States. These are some of the issues which concern the following case law which has came before the CJEU.

Validity of the EAW

This case of *Advocaten Voor De Wereld VZW v Leden Van De Ministerraad*[11] arose from the Belgian Constitutional Court after other Constitutional Courts had avoided making a preliminary reference to the CJEU. The case was based upon the validity of the Framework Decision on the EAW. Advocate General Ruiz Jarabo Colomer pointed out that the questions being asked by the *Arbitragehof* comprised of one procedural issue and one substantive issue.[12] The questions being referred by the Belgian Constitutional Court were firstly whether a Framework Decision was the appropriate form of implementation under Article 34(2)(b) TEU rather than a convention in light of the fact that Framework decisions ought only to be adopted "for the purpose of approximation of the laws and regulations of the Member States". Secondly it was asked whether Article 2(2) of the Framework Decision, regarding the abolition of the requirement of double criminality regarding certain offences, was compatible with Article 6(2) TEU and specifically compatible with the principle of legality of criminal proceedings as well as the principles of equality and non-discrimination.

The length of the Court's actual ruling has been criticised for its surprising brevity: only sixty two paragraphs in total with twenty dedicated to the procedural issue and a

[10] See *Bundesverfassungsgericht* (German Constitutional Court), Decision of 18 July 2005 (2 BvR 2236/04); *Trybunal Konstytucyjny* (Polish Constitutional Court), Ruling of 27 April 2005, No. P1/05; Ruling of the Czech Constitutional Court of 3 May 2006, PI US 66/04; Supreme Court of Cyprus. Ruling of 7 November 2005, App No 294/2005; *Minister for Justice & Law Reform v Robert Aaron Anderson* [2006] IEHC 95 and *Office of the King's Prosecutor v Cando Armas* [2005] UKHL 67.

[11] Case C-303/05 [2007] 3 CMLR 1

[12] *ibid.* at para.3 of the Opinion

mere eighteen to the substantive issue[13]. The Court decided that a framework decision was the appropriate form of implementation of the EAW as opposed to a convention and that the Framework Decision was compatible with Article 6(2) and the principles of legality, equality and non-discrimination.

In terms of the procedural issue, the Court considered the argument that the Framework Decision should in fact have been made through the use of a convention instead. It was argued that if a measure is implemented through a convention on extradition, then only another convention can validly introduce further derogatations[14]. However this idea concerning the *actus contrarius* doctrine was rejected by both the Advocate General[15] and the Court. The Court stated that to come to any other conclusion would "risk depriving if its essential effectiveness the Council's recognised power to adopt framework decisions in fields previously governed by international conventions."[16] As such the Council could use whatever means it felt was most suitable for the EAW, and while that could have been in the form of a convention, there was no reason why it could not be a framework decision.

On the other hand, when it came to the substantive question, the Court provided some intriguing responses. The plaintiffs put forward the argument firstly based on the fact that Article 2(2) of the Framework Decision, which removed the requirement for double criminality in thirty two non-defined offences, did not adhere to the principle of legal certainty. It was suggested that the lack of precise legal definitions meant that it did not satisfy the conditions of precision, clarity and predictability which requires a person to know whether what they have done constitutes an offence at the time of the act.[17] However, the Court did not agree with such a position. The Court concluded that although the legality of criminal offences is of great importance and is common to the constitutional traditions of the Member States and enshrined in international instruments, it was down to the issuing States' definition of the offence. The harmonisation of criminal offences was not one of the aims of the EAW or of the

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[13] F.Geyer *'European arrest warrant: Court of Justice of the European Communities: Ruling of 3rd May 2007, case C-303/05, Advocaten voor de Wereld VZW v Leden van de Ministerraad Case Comment'* 2008 Eu. Const. LR Vol.4(1) pp.149-161 at p.153
[14] Case C-303/05 at paras 11,25 and 26 of the Ruling
[15] Case C-303/05 at paras.38-68 of the Opinion
[16] Case C-303/05 at para.42 of the Ruling
[17] *ibid.* at para.48

Police and Judicial Cooperation in Criminal Matters (PJCC).[18]

Turning to the issue of equality and non-discrimination regarding double criminality that the plaintiffs put forward, it was contended that for offences which are not covered by Article 2(2) then the double criminality rule will apply and as such there is a difference in treatment which is not objectively justified.[19] These principles, which the Court explains, mean that "comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."[20] An issue which the Court looked to in order to assist with their reasoning was that of mutual trust and recognition. Thus the decision that the Court reached was that regardless of whether it was a comparable situation between a person who had committed an offence specified in Article 2(2) or not, it would be objectively justified that they were treated differently[21].

This case has been scrutinised as a result of the significance which it carries in the (former) Third Pillar and also due to the case being the first one on matters relating to the EAW. The case has even been described as "seminal" by Lenaerts[22].

As far as the substantive issues in the case are concerned, the Court when examining the issue of legality, on the basis of competition law and the principle of legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*) as this principle is one of the (commonly referred to) general legal principles underlying the constitutional traditions common to the Member States and was enshrined in various international treaties.[23] As such it was for the Member States to enforce legality as the EAW is seen to be an essentially procedural prosecution and not criminal prosecution, an issue with which commentators have major issues[24]. It is contended that the Court often makes reference to certain principles, for instance, those enshrined in Article 6 of the ECHR and now those enshrined in the Charter. However, the Court makes sweeping statements without an in-depth analysis of the effects that such principles

[18] *ibid.* at paras.48-54
[19] *ibid.* at para.55
[20] *ibid.* at para.56
[21] *ibid.* at para.57-58
[22] K.Lenaerts *"The contribution of the European Court of Justice to the area of freedom, security and justice'* 2010 ICLQ Vol.59(2) pp.255-301 at p.298
[23] Case 303/05 at paras 48-54 of the Ruling
[24] F.Geyer *supra.* n.13 at p.159

have on the case at hand. This, it is argued, is the situation in *Advocaten voor de Wereld*; mention is made to these principles which are actually at the heart of the arguments and yet quite a brief examination ensues[25].

This theme is continued in reference to the issues of equality and non-discrimination. This part of the ruling has been particularly criticised[26]. Criticisms levelled at this part of the ruling are based on the fact that no particular in depth analysis was given on the issue of whether there was a comparable situation between those offences which do and do not require double criminality. Moreover, it was suggested that the issue was in fact one of proportionality as opposed to that of using the seriousness of the offence as an objective justification[27]. Thus it seems that the Court used brevity somewhat as an avoidance technique to prevent further scrutiny which may have led to an unsatisfactory answer. As put by one commentator, "It should be borne in mind that arguing that disparities in the application of Article 2(2) of the Framework Decision breach the principle of equality attacks the very principle behind this EU measure, ie, that of mutual recognition"[28] There has also been suggestion that there certainly are inequalities which could exist as a result of using Member State definitions. These national definitions could lead to two different people committing the same crime and fleeing to different countries with the result being a difference of treatment[29].

Moreover, the wider significance of this judgment has been noted as well:

> "If the Court had declared the very first legal instrument incorporating the principle of mutual recognition as incompatible with fundamental rights, it would have sent a devastating signal to proponents of further EU judicial co-operation based on this principle, but the Court rejected the plaintiff's challenge and upheld the Framework Decision."[30]

Thus, the ruling made by the Court in this case, and its relative brevity, was perhaps attributable to a fear of what would result for the area of freedom, security and justice

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[25] This point was also made in reference to Chapter 2; see p.42
[26] F.Geyer *supra* n.13 at p.160-161
[27] *ibid.*
[28] A.Hinarejos *'Recent human rights developments in the EU courts: the Charter of Fundamental Rights, the European arrest warrant and terror lists'* 2007 HRLRev Vol7(4) pp.793-811 at p.799
[29] A.Hinarejos *supra*.n.28 The example used by the author is a particularly useful and interesting one which evidences the potentially bizarre consequence of mutual recognition instead of harmonisation of national criminal laws
[30] F.Geyer *supra.* n.13 at p.151

(AFSJ) had their landmark instrument been struck down. The lack of detail on certain points in the Court's ruling could likely be part of a strategy to expedite the preliminary reference quickly. It has been pointed out though, that this may have left some unsatisfactory gaps from the Court.[31]

It is submitted that the EAW provides a particularly interesting example of the interests which are being balanced between fundamental rights and fundamental freedoms, and *Advocaten voor de Wereld* is a useful illustrative example for this point. On the one hand, the AFSJ is based on the fact that citizens can move freely between Member States and the consequences can be twofold. Firstly there is a higher chance of cross-border crime as a result of fewer barriers between borders, and secondly, there is a requirement therefore to ensure a high level of safety and protection to those within the EU. Understandably then, this would involve a streamlined process within the 'trusting' EU Member States to bring criminals to justice within it, and thus the tool of the EAW is being used to do so. However, even though our fundamental rights and freedoms are being protected by being able to live in a 'safe space', the question is whether *competing* fundamental rights are being paid adequate attention. Illustrated in this case, we see an unsatisfactory analysis of the principles of legal certainty, equality and non-discrimination, while on the other hand seeing further deference to what was at that time, the non-binding legal document of the Charter. Therefore this case is demonstrative of the issues which the Court has to attempt to balance: on the one hand, the fundamental rights of people to move freely and safely around the Union without the fear of criminal activity whilst on the other hand providing adequate and equal protection to those who may or may not have done wrong - all in the midst of principles of 'mutual trust' and 'mutual recognition' which supposedly exists within the Member States. Meanwhile in practice a certain element of reluctance amongst the Member States to adhere to such principles can make this difficult. As the Advocate General put it:

> "while the protection of fundamental rights is an essential part of the Community Pillar, it is equally indispensable in the context of the third pillar, which, owing to the nature of its subject-matter, is capable of affecting the very heart of individual freedom, the foundation of the other freedoms."[32]

[31] F.Geyer *supra.* n.13 at p.161
[32] Case 303/05 at para.79 of the Opinion

This is something that must not be forgotten; without freedom in general, a person cannot benefit from any of the freedoms bestowed on to them by the EU's legal order.

Interestingly, it has also been suggested that this case could be a benchmark for how the Courts is likely to deal with the United Kingdom and Polish opt-outs from the binding effect of the Charter. The reason for this observation is the ruling demonstrates when the Charter is not legally binding[33]. However, it is contended that if this were to be the case it may actually result in a somewhat unusual outcome in that there would be little practical difference between those Member States who have signed up to the legally binding Charter and those who have not. If this were to be the case then it may suggest that if the United Kingdom and Poland did not object tothe ruling then their opt-out was a mere political façade more than a genuine distaste for fundamental rights protection stemming from the EU's legal order.

3.3.2 The Definition of "Resident" and "Staying"

The case of *Re Execution of European Arrest Warrant Issued Against Kozlowski*[34] sought to discern what the scope of the terms "resident" and "staying" contained in Article 4(6) of the Framework Decision on the EAW. Article 4(6) states:

> "Grounds for optional non-execution of the European arrest warrant
> The executing judicial authority may refuse to execute the European arrest warrant:
> …
> (6) if the European arrest warrant has been issued for the purposes of execution or a custodial sentence or detention order, where the requested person is staying in, or is a national or resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law."

The case concerned Kozlowski who had been sentenced to five months imprisonment in Poland. The sentence had become final but was never executed. He was latterly in prison in Stuttgart in Germany. The Polish issued an EAW for Kozlowski to the German executing authority to request them to surrender Kozlowski for the purpose of carrying out the five month sentence. As such the German executing authority

[33] F.Geyer *supra.* n.13 at p.159
[34] Case C-66/08 17 July 2008 [2008] 3 CMLR 26

asked the German court to authorise the EAW, but first the German court made the preliminary reference on the meaning of the terms “staying” and “resident”.

It was ruled that the words “staying” and “resident” were to be given autonomous and uniform interpretations as they “concern autonomous concepts of Union law”[35]. When looking at theses concepts, the Court ruled that “the terms “resident” and “staying” cover, respectively, the situations in which the person who is the subject of a European arrest warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence.”[36] Thus the Court goes on to note that certain objective factors should be looked at to decide whether a person is “staying” in the Member State, such as “the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State.”[37] In line with these issues, Kozlowski was not considered to be “staying” in Germany, in light of the weak family and economic factors and as such Article 4(6) did not apply.

The fact that the definition of “staying” and “resident” were to be given autonomous and uniform interpretations of EU law is unsurprising; over the years the EU has felt the need for EU definitions so as to avoid the fragmentation of EU law through Member State courts creating their own definitions[38]. This is further explained by one commentator in that, “Should it be left completely up to the Member States to give shape to the terms ‘staying’ and ‘resident’, which are part of an optional ground for refusal, that ground for refusal could have divergent meanings in the different Member States. This would impede the effectiveness of the surrender system.”[39]

It has been contended that the Court’s view on the national courts’ interpretation of these concepts is that they ought not be too broad. It is argued, this means “an

[35] Case C-66/08 at para.43 of the Ruling
[36] *ibid.* at para.46
[37] *ibid.* at para.48
[38] For instance the definition of a ‘Court’ or ‘Tribunal’ for the purposes of the Preliminary Reference Procedure laid out in article 267 TFEU
[39] M.J.Borgers *‘Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters’* 2010 European Journal of Crime, Criminal Law and Criminal Justice Vol.18 pp.99 - 114 at p.104

interpretation that leads to refusal of surrender sooner than it would have resulted on the basis of a uniform and autonomous interpretation."[40] It is perhaps odd that the Court recognises any broader or narrower definition and not just the broader definition which may lower mutual recognition between the States.

The Urgent Procedure

There are two cases which were dealt with under this procedure. The case of *Santesteban Goicoechea*[41] concerned the situation where extradition was requested by the Spanish government before and after January 1, 2004. The first request was denied by a French court because the ground for the offences for which extradition was requested was statutorily time barred in France. The second time this was requested by the Spanish Government, in March 2004, it was held that the request had to be dealt with under the Extradition Convention which was in place before the EAW. The defendant was actually serving a sentence in France, and either way extradition could not take place until after that sentence had been served. Another request was then made by the Spanish authorities on his release from French prison. Santesteban asked the Court to decide on whether it would be contrary to the general principles of law within the EU, especially those of legal certainty, legality and non-retroactivity of the more severe criminal law, to apply the 1996 Convention to him in respect of acts which the French Court declared to be statutorily barred under French law. However, it was ruled in the case that this issue was not one for the CJEU to make a preliminary ruling on; that was the remit of the national courts.

Other issues included the temporal aspects of the conventions and EAW.

In the case of *Leymann and Pustovarov*[42], the preliminary reference was made on the issue of the interpretation on Articles 27(2) to (4) of the Framework Decision on the EAW[43]. The reference was made by a Finnish court where criminal proceedings against the defendants for a serious narcotics offence were taking place after an EAW

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[40] M.J.Borgers *supra.* n.39 at pp.107-108
[41] Case C-296/08 PPU [2008] 3 CMLR 40
[42] Case C-388/08 [2008] ECR I-8993
[43] Article27 of the Framework Decision on the EAW relates to 'Possible prosecution for other offences'

was issued.[44] Both of the defendants in the case had been surrendered on the basis of importing, with the intention to sell, of amphetamines[45]. However, they were subsequently being prosecuted for the offence of importing of hashish with the intention to sell. Thus the questions referred to the Court were "what the decisive criteria are which would enable it [the referring court] to determine whether the person surrendered is being prosecuted for an 'offence other' than that for which he was surrendered within the meaning of article 27(2) of the Framework Decision, making it necessary to apply the consent procedure laid down in article 27(3)(g) and 27(4)?"[46]

The Court ruled that it depends upon the constituent elements of the offence, subject to the legal description given by the issuing State, and whether there is a sufficient correlation between the information given in the arrest warrant and that contained in the later procedural document. As such, a change in the type of narcotics is not enough to constitute an 'offence other' than that for which the person was surrendered within the meaning of article 27(2) of the Framework Decision of the EAW[47].

The *Santesteban* case was dealt with under the 'urgent procedure', as a result of the defendant being detained in custody. As a result, the position set forth by the Advocate General in the case is under strict time constraints[48], as is the Court. As a result, some of the detail that the Advocate General usually delves into may be lost to the overall detriment of EU law. Although the need for a speedy resolution of preliminary references is of the greatest importance when a person's liberty is being deprived, this should not be to the detriment to the overall coherence of EU law.

It is somewhat unfortunate that the Court could not have delved into the matter set forth by the defendant Santesteban. It has been contended that in certain instances the Court uses sweeping statements with regard to the 'general principles of Union law', and the particular issues raised by the defendant were quite noteworthy and may have

[44] Case C-388/08 PPU at para.2 of the Ruling
[45] *ibid* at para.19 and 21
[46] Case C-388/08 PPU at para.41 of the Ruling
[47] *ibid* at para.76
[48] As explained by AG Sharpston in '*The Workload of the Court of Justice of the European Union – European Union Committee – Appendix 5: Written Evidence of Advocate General Sharpston'* at http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/12816.htm accessed on 22nd August 2012

provided a strong, reasoned argument of the Court on the matter. The case does not, however, provide any other further enlightenment on issues of either fundamental rights or fundamental freedoms.

On the other hand, the *Leymann and Pustovarov* case concerned some particularly notable issues and makes some very valid points. It was pointed out that the speciality rule which is laid down in Article 27(2) is "linked to the sovereignty of the executing Member State and confers on the person requested the right not to be prosecuted, sentenced or otherwise deprived of liberty except for which he or she was surrendered."[49] This is an important point and a person should not be handed over for the purpose of an EAW for one crime in order to then find themselves being accused of others. In light of this point however, another equally important point arises:

> "To require the consent of the executing Member State for every modification of the description of the offence would go beyond what is implied by the speciality rule and interfere with the objective of speeding up and simplifying judicial cooperation of the kind referred to in the Framework Decision between the Member States."[50]

This is a perfectly reasonable suggestion. It would be disproportionate to stop proceedings against someone as a result of minor changes to the offence. In this particular case it is clear that regardless of whether the drugs were amphetamines or hashish, a serious drug offence was still being committed. Moreover, to stop charges as a result of what would essentially be a minor procedural issue would make a mockery of the AFSJ.

As already noted, this case is another which was undertaken using the urgent procedure as a result of the fact that Mr Pustovarov was "in custody serving a sentence of imprisonment for various offences"[51]. Again, similar to the issues which were suggested regarding *Santesteban* in this regard, fundamental rights protection should not be compromised in order for decisions to be made more quickly.

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[49] Case C-388/08 PPU at para.44 of the Ruling
[50] *ibid* at para.56
[51] *ibid* at para.39

Optional Grounds for Non-Execution

The case of *Criminal Proceedings Against Wolzenburg*[52] concerned, in part, one of the optional grounds for non-execution of an EAW. The defendant Wolzenburg was given a suspended custodial sentence for numerous offences in 2003. He then moved to the Netherlands in 2005. However after he had moved to the Netherlands, a German court revoked the suspended sentence as he had infringed the conditions of that suspended sentence. Wolzenberg was then arrested in the Netherlands subsequent to a German arrest warrant being sent out for him. He sought to resist surrender by relying on Article 4(6) of the Framework Decision on the EAW. The optional grounds for non-execution were that the requested person must either be staying in, a national of or a resident of the executing Member State. However, the defendant had difficulty claiming he was a resident as a result of the conditions laid down in the Netherlands which required him to have a residence permit of indefinite duration.

As such a preliminary ruling was requested on a number of issues. The Court ruled on the length of time a person must be resident in a Member State so as to allow them to fall within the scope of Article 4(6). On this point the Court stated that time on its own is not a conclusive factor but one of many which should be taken into consideration by the executing authority[53]. It was also queried whether additional requirements such as administrative requirements could preclude the use of Article 4(6). This too was not agreed by the Court, which stated that the time requirement was sufficient[54]. Questions were also raised in respect of Article 12 on non-discrimination.

The case of *Proceedings concerning IB*[55] related to whether an EAW fell within Article 4(6) of the Framework Decision, or whether it fell under Article 5(3) of the Framework Decision. The case concerned a Romanian national who was convicted in Romania for certain criminal offences, and received a sentence of four years imprisonment to be served under supervised release. This sentence was upheld on appeal, however, this ruling was made *in absentia* and the defendant had not been informed of the ruling. The Supreme Court of Romania had held that the sentence

[52] Case C-123/08 [2010] 1 CMLR 33
[53] Case C-123/08 at paras.75-76 of the Court's Ruling
[54] *ibid* in the Order at para.2
[55] Case C-306/09 21 October 2010 [2011] 1 WLR 2227

should be undertaken in custody. The defendant then fled to Belgium, not having served any part of the sentence and settled there. Consequently an EAW was sent out for the defendant. An issue rose in the process of execution of the EAW. This question was whether the warrant was to be considered a warrant which had been issued for the purposes of execution of a custodial sentence, within the meaning of Article 4(6) of the Framework Decision or, since the defendant was entitled to a retrial under Romanian law as he had been sentenced *in absentia,* as a warrant which had been issued for the purpose of prosecution, within the meaning of Article 5(3). On top of that, the issue was whether, depending on this being a warrant for the execution of a sentence or for a prosecution, that person could be returned to the executing state under Article 5(1) to serve any sentence passed against him following a retrial in the issuing state.

It was ruled by the Court that, the person could be returned to the executing Member State where a person had been sentenced *in absentia* to execute their sentence, that person being a national or resident of the executing state. The Court stated that:

> "Given that the situation of a person who was sentenced in absentia and to whom it is still open to apply for a retrial is comparable to that of a person who is the subject of a European arrest warrant for the purposes of prosecution, there is no objective reason precluding an executing judicial authority which has applied article 5(1) of Framework Decision 2002/584 from applying the condition contained in article 5(3) of that Framework Decision."[56]

This case highlights the situation between the prior EC Treaty and the EU Treaty, and the different aims to which they intended to meet. What is contended is that in this particular case, the EC Treaty articles are given higher importance and a connection between the two Treaties is found in order to allow the EC Treaty articles to apply. As such the Court stated that:

> "The Member States cannot, in the context of the implementation of a framework decision, infringe Community law, in particular the provisions of the EC Treaty relating to freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States."[57]

Thus had Mr.Wolzenberg been surrendered under an EAW and sent back to Germany,

[56] Case C-306/09 at para.57 of the Ruling
[57] Case C-123/08 at para.45 of the Ruling

his home State, this would have perhaps been a better outcome for the objectives of the AFSJ but would have intruded upon those most basic fundamental freedoms set out in the former EC Treaty.

Another important matter brought up in this case is that there should be some margin of appreciation with regard to the optional grounds of non-execution, even in light of mutual recognition. The point being that, "by limiting the situations in which the executing judicial authority may refuse to execute a European arrest warrant, such legislation only facilitates the surrender of requested persons, in accordance with the principle of mutual recognition…"[58] Thus, mutual recognition means that in reality there are fewer instances where execution will not take place, and in light of the relatively small number of instances in which non-execution could apply, there should be a margin of appreciation. This is understandable, particularly in light of the fact that fundamental freedoms may be being removed as a result of execution.

Again in this case, there is the idea of reintegration into society. It has been noted by the Court that there should be some kind of real bond which connects the requested person with the society he or she wants to be in after any sentence has been imposed[59]. It is argued by one commentator that the Kozlowski ruling puts a greater weight on this issue than the subsequent case of Wolzenburg:

> "It is clear at any rate that the ECJ established a certain order of rank in these judgments: the importance of reintegration into society is not so compelling that it can block surrender, and is thus not an importance which, as it were, is higher in rank than the principle of mutual recognition."[60]

Thus mutual recognition continues to be of prime importance within this particular field of PJCC.

The case of *IB* is one of the more recent cases in the CJEU. It deals with the noteworthy issue of *in absentia* hearings. In terms of such a trial, convictions which are made *in absentia* are considered to be "fundamentally unfair"[61]. This therefore

[58] Case C-123/08 at para.59
[59] *ibid* at para.66
[60] M.J.Borgers *supra*.n.39 at p.110
[61] D. Krapac *'Verdicts* in absentia*'* in R.Blextoon and W.van Bllegooij *supra*.n.5 at p.119

often provides grounds, in traditional extradition law, not to execute the extradition.[62] Thus this case concerns the fairness of proceedings which have been undertaken outwith the presence of the accused, not through the accused's own fault, as well as the issue of where he would serve any sentence set at a retrial.

One point made by the Court in reference to the issue of returning to the executing state is that of *reintegration* into society of the offender[63]. The person has the right, after the sentence has been undertaken, to be in a place where there is the highest possible chance of a successful reintegration into society. The Court puts a great deal of emphasis on this point. Thus the defendant's freedom of movement is not impeded as a result of any possible sentence, custodial or otherwise.

An interesting contention is made by Advocate General Cruz Villalón in this case:

> "Although mutual recognition is an instrument for strengthening the area of freedom, security and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area."[64]

This suggests that perhaps the competing interests are not, in certain cases, fundamental rights versus fundamental freedoms, but actually *mutual recognition* versus fundamental rights *and* freedoms *combined*.

3.4 The European Arrest Warrant, Schengen and *'Ne Bis In Idem'* Case Analyses

What is '*ne bis in idem*'?

The principle of *ne bis in idem* states that a person should not be prosecuted more than once for the same offence or offences. Although in the context of this chapter, the principle has a cross-border element, it applies equally within domestic legal orders[65].

[62] D. Krapac *supra.* n.61 at p.119
[63] Case C-306/09 at para.52 of the Ruling
[64] Case C-306/09 at para.43 of the Opinion
[65] H. van der Wilt *'The European Arrest Warrant and the principle* ne bis in idem' in R.Blextoon and W.van Ballegoij *supra.*n.5 at p.99. Interestingly there have been reforms made to the Scottish rules on *ne bis in idem,* otherwise commonly known as 'double jeopardy', in the form of the Double Jeopardy (Scotland) Act 2011

This principle can be construed to be a fundamental right and is referred to in the ECHR[66].

The necessity for the rule has been explained by one commentator:

> "Apart from being extremely unjust to the person concerned, a second prosecution erodes legal certainty and thus public confidence in the legal authority of the state…"[67]

Thus it is clear why the rule of *ne bis in idem* exists. It becomes even more important in the cross-border, multi-jurisdictional instances which the EU lends itself to. It is of prime importance that once someone has been prosecuted in one State, then they should not fear prosecution again and again, in different jurisdictions, as a result of utilizing free movement rights. Interestingly, however, it has been noted that "its [the *ne bis in idem* principle] international ramifications are less self-evident."[68] That being said however, there have been international instruments which have codified the principle to a certain extent. This can be seen in the Convention Implementing the Schengen Agreement (CISA) [69], in Articles 54 to 58 and in the Charter at Article 50[70]

Thus the CISA was the first EU-related instrument to handle the issue of cross-border *ne bis in idem*, as this agreement related to the gradual abolition of checks at their common borders. Thus there have been a number of cases relating to different issues, some of which will be analysed below to demonstrate the issues which have or may be likely to cause difficulties when enforcing the EAW.

Development through Schengen Case Law

It has been said that "The set of judgments on *ne bis in idem* is simply the start of the important role of the ECJ in the area of European criminal justice."[71] An important case on *ne bis in idem* was the case of *R v Gözütok and Brügge*[72]. This case concerned the issue of further proceedings being barred after out of court settlements had been

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[66] See Article 4, paragraph 1 of the Seventh Protocol to the ECHR
[67] H. van der Wilt *supra.*n.65 at p.99
[68] *ibid.*at p.100
[69] Convention Implementing the Schengen Agreement, Schengen 19 June 1990
[70] "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."
[71] J.A.E Vervaele '*Fundamental rights in the European Space for Freedom, Security and Justice: The Praetorian* ne bis in idem *principle of the Court of Justice'* in de Hoyos Sancho, M (Ed) *supra.* n.7 at p.99
[72] Joined Cases C-187/01 and C-385/01 [2003] 2 CMLR 2

made in each instance. The main issue turned on whether or not CISA Article 13 would apply in the instances where the proceedings were barred as a result of the prosecution being discontinued, and also in the instance where there had not been any judicial involvement. The Court's ruling on these points dealt with a point of interpretation in a sense; on the matter of what amounted to a case being "finally disposed of".

The Court held that *ne bis in idem* does apply in the disposal of a case, through means such as a fine etc, without the involvement of a court.[73] The Court pointed out that the aims of the Treaty were the "maintaining and developing the Union as an area of freedom, security and justice in which the free movement of persons is assured"[74] Thus the overall importance of freedom of movement is elucidated in the Court's ruling[75], as is the importance of the protection against being put in 'double jeopardy'. However the Court seems to protect this fundamental right *in light of the fact* it could negatively impact on the fundamental freedom of free movement rights[76]. This is particularly interesting in light of the fact that "The ECJ did not directly discuss the words to be found prior to "finally disposed of" in Article 54 – "whose trial""[77].

Another interesting point which the Court makes is that, "…if Art.54 of CISA were to apply only to decisions discontinuing prosecutions which are taken by a Court or take the form of a judicial decision, the consequence would be that the *ne bis in idem* principle laid down in that provision (and, thus, the freedom of movement which the latter seeks to facilitate) would be of benefit only to the defendants who were guilty of offences which - on account of their seriousness or the penalties attaching to them - preclude use of a simplified method of disposing of certain criminal cases by a procedure whereby further prosecution is barred, such as the procedures at issue in the main action."[78] This is a noteworthy point, showing that unintended consequences can result without proper care and attention to the facts at hand.

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[73] Joined Cases C-187/01 and C-385/01 at para.48 of the Ruling
[74] *ibid.* at para.36 of the Ruling
[75] H. van der Wilt *ibid.* at p110
[76] *ibid.* at para.38 of the Ruling
[77] G.Conway *'Judicial interpretation and the Third Pillar'* 2005 European Journal of Crime, Criminal Law and Criminal Justice, Vol.13(2) pp.255-283 at p.279
[78] Joined Cases C-187/01 and C-385/01 at para.40 of the Ruling

With regard to this case, one commentator has made a particularly notable point, in that "the ECJ makes an explicit connection with the free movement of persons. If persons want to exercise this right effectively, they must be able to trust that decisions on the final barring of prosecution will be respected by other Member States."[79] Furthermore, this 'landmark' case provides settled case law that for any EAW cases, an out of court settlement will mean the executing Member State will be able to apply *ne bis in idem* and not grant an EAW[80].

A very interesting case is that of *Criminal Proceedings against Gasparini*[81], particularly in light of the differing opinions of Advocate General Sharpston from the Court itself. The case concerned olive oil which was being imported from outside the EU, from Turkey and Tunisia, and through the port of Setúbal in Portugal. The defendants had created a system of falsifying the documents which made it appear as though the olive oil came from Switzerland. Two of the defendants had been acquitted in Portugal of offences as a result of the offences being statutorily time barred. A Spanish Court (the Audiencia Provincial de Málaga) thus requested a preliminary ruling from the CJEU on a number of issues, one of which "is the finding by the courts of one Member State that prosecution of an offence is time-barred binding on the courts of the other Member States?"[82] This is a particularly interesting question in light of the fact that time bar is essentially a procedural matter, not a substantive criminal law. The overall finding of the Court was that the principle of *ne bis in idem* enshrined in CISA Article 54 would be applicable in light of where a defendant had been acquitted as a result of the proceedings being time barred in another Member State[83].

The Court came to this conclusion based on the fact that to rule otherwise would be in opposition to the objectives set out by CISA (i.e. to avoid people being prosecuted more than once based upon the same set of facts), as well as the principle of mutual trust.[84] This may be the answer that one would have anticipated that the Court would give, however it is in quite stark contrast to what the Advocate General posited in her

[79] M.J.Borgers *supra.* at n.39. p.167
[80] H.van der Wilt *supra.* n.65 at p.110-111
[81] Case C-467/04 [2007] 1 CMLR 12
[82] Case C-467/04 at para.20 of the Ruling
[83] *ibid.* at para.33
[84] *ibid.* at paras.28, 30

Opinion. It is contended that her arguments merit serious consideration. The arguments suggested by the Advocate General were based on the idea that the *ne bis in idem* principle should apply depending on whether the facts of the case have been proven before being finally disposed of[85]. The Opinion of the Advocate General was that the 'substance based approach' proffered by certain Member States in their pleadings was the correct option. Thus where the material facts in a case had not been proven, then *ne bis in idem* would not apply. In support of the Opinion, a number of cases were cited[86], including some EU competition case law on the imposition of sanctions[87]. The Advocate General noted a general lack of consistency amongst the CJEU case law on matters regarding *ne bis in idem*[88]. What is contended is that the Advocate General puts a great deal of emphasis on providing a *balance* "between free movement of persons and the requirements of combating crime and providing a high level of safety within 'an area of freedom, security and justice'."[89] The Advocate General continues:

> "…the substance-based approach seems to me to strike a more appropriate balance between the two desirable objectives of promoting free movement of persons, on the one hand, and ensuring that free movement rights are exercised within an area of "freedom, security and justice" characterised by a high level of safety, in which crime is effectively controlled, on the other hand…neither article 2 nor article 29 EU gives priority to free movement of persons over the prevention and combating of crime and the attainment of a high level of safety."[90]

It is submitted that there is great worth in this argument. As opposed to standing in the way of prosecutions which have been barred for a procedural reason with no attention to the material facts of the case, these could take place so as to increase the likelihood of a safer European Union. In a sense, to allow a person not to be prosecuted as a result of a time bar, that person on the one hand may evade a punishment they deserve

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[85] Case C-467/04 at para.120 of the Opinion
[86] These included *R v Gözütok and Brügge ibid; Miraglia* Case C-469/03 [2005] ECR I-2009; and *Van Esbroeck* Case C-436/04 [2006] 3 CMLR 6
[87] *Limburgse Vinyl Maatschappij v Commission* C 238, 244, 245, 247, 250-252 & 254/99 P [2002] ECR I-8375; and *aAalborg Portland v Commission* C 204, 205, 211, 213, 217 & 219/00 P [2004] ECR I-123 (Cement)
[88] Case C-467/04 at para.63 of the Opinion
[89] *ibid.;* title to section beginning para.82
[90] *ibid.* at para.97

for a crime they have committed, putting the safety of others at risk but also they are eradicated of the chance to clear their name on the true merits of the case. While it is noted that further difficulties could arise from this substance-based model (for instance what are the material facts; if one issue is not dealt with before the case is finally disposed of, can another Member State then still take proceedings?), the essence of what the Advocate General is saying should not be lost. From her viewpoint, if a 'hierarchy of norms' as such were to exist, there is nothing to say that fundamental free movement rights would be at the top of such a hierarchy. In contrast, it seems that the norms which would be of greatest value to the Advocate General would in fact be those of free movement within a *safe* area. As such the fundamental right which the *ne bis in idem* principle provides would only be of prime importance in certain circumstances.

It is understandable why the Court did reject this view; in reality *ne bis in idem* is a strong safeguard which should only be dispensed with at very specific times which are provided for in legal instruments. Thus it is contended that the Court puts the fundamental rights of those *exercising* their fundamental freedoms at the height of their importance. This suggests that perhaps, in the case of CISA and the EAW at least, the fundamental rights are not actually competing against each other.

However, criticism has been levelled at both the Advocate General *and* the Court in this case for failing to differentiate between *nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (nobody ought to be punished twice for the same offence. It was noted that:

> "It is surprising that neither the AG nor the Court had studied whether the *ne bis is idem* of Article 54 of the CISA also includes the *ne bis in idem vexari*. They have limited themselves to dealing with the time-barred aspect of the criminal action in the context of a judgment considered *idem factum*…it is a mistaken path to follow."[91]

Interestingly, both these cases make a point of noting the lack of any requirement of

[91] J.A.E Varvaele *supra.*at n.71 at p.98

harmonisation in the field of Police and Judicial Cooperation in Criminal Matters (PJCC)[92].

The European Arrest Warrant and '*ne bis is idem*'

It has been noted that, "The CISA case law represents a significant contribution of the ECJ to the Area of Freedom, Security and Justice, especially as far as the principle of *non bis in idem* embodied in article 54 of the CISA is concerned."[93] It can be asserted that the Schengen *acquis* has provided illustrative examples of issues which arise in relation to *ne bis in idem*, with just a few of the rulings being discussed above[94].

In terms of the Framework Decision on the EAW, Article 3 on the 'Ground for mandatory non-execution of the European arrest warrant' states that:

> "The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:
> …
> (2) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State"

As such, the issues which are liable to come before the Court (or have regarding *ne bis in idem* in other areas) are the definitions of 'finally judged' and 'same acts'. An example of this is in the case below.

The case of *Criminal Proceedings against Mantello*[95] is a case which involves the EAW and *ne bis in idem* specifically. This case concerns the issue of what constitutes the 'same acts.' Mantello was sentenced to a term of imprisonment for unlawful possession of cocaine in November 2005 in Italy. In November 2008 a national arrest warrant was sent out in relation to Mantello and 76 other co-accused based on allegations that between January 2004 and November 2005 they played a major role

[92] Joined Cases C-187/01 and Case C-385/01 at para.32; Case C-467/04 at para.29
[93] K.Lenaerts *'The Contribution of the European Court of Justice to the area of freedom, security and justice'* 2010 ICLQ Vol.59(2) pp.255-301 at p.300
[94] Due to the length of this piece, the whole Schen *acquis* will not be analysed
[95] Case C-261/09 [2011] 2 CMLR 5

in a large criminal organisation who were trafficking cocaine in Italy and Germany and were supplying to third parties. Seeing this arrest warrant on the Schengen Information System (SIS), the German authorities arrested Mantello in December 2008. It was declared by the Italian Court that the prior conviction of November 2005 did not preclude the criminal proceeding referred to in the EAW and thus they were not subject to *ne bis in idem*. However, the referring court (*Oberlandsgericht Stuttgart*, Germany) queried whether it might oppose the execution on the warrant based on the fact that the Italian investigating authorities had sufficient evidence at the time of the investigation in 2004, with which to charge Mantello for the offences in the EAW, but had not submitted that evidence for consideration at the trial. Thus the question put to the Court was to interpret the term 'same acts' in Article 3(2) (which amounts to *ne bis in idem* in the legislation) of the Framework Decision on the EAW in the circumstances of the case.

It was ruled in this case by the Court that the concept of 'same acts' as provided for in Article 3(2) constitutes an autonomous concept of EU law[96]. The Court went on in its ruling to say:

> "…the issuing judicial authority…expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issues by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in article 3(2) of the Framework Decision."[97]

The Court looked at a number of issues when making this ruling. Again, the importance of mutual trust and recognition, as well as the objectives of the Framework Decision on the EAW were alluded to[98]. The rulings on what 'same acts'' constituted in the context of CISA were also looked to by the Court. The Court noted that in that context, 'same acts' could be defined as "referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked

[96] Case C-261/09 *ibid.* at para.51 of the Ruling. For a discussion on the concepts of autonomous interpretation within EU law see M.J.Borgers *supra.* n.39.
[97] Case C-261/09 at para.51 of the Ruling
[98] *ibid.* at para.35-37

together, irrespective of the legal classification given to them or the legal interest protected."[99] The Court thus decided that the issue of interpretation actually related more to the idea of 'finally judged' than 'same acts'. Notably though, it is for the Member States laws to decide where an issue has been 'finally judged'.[100] As a result of the Italian laws, the case had not been finally judged and thus there was no reason for the German court to apply the mandatory reason for non-execution.

Perhaps it is surprising that the Court decided not to give the definition of 'finally judged' an autonomous interpretation within the EU, in light of so many EU interpretations for uniformity; perhaps what is more surprising is that given the facts of the case, substantially similar criminal acts were allowed to be prosecuted twice. It is submitted that this may have been the case given the nature of the second offence - a criminal organisation with a large number of people involved. It is contended that there may have been a feeling that not to allow for the prosecution in 2008 would have been to the detriment to the whole AFSJ - and as a result, the fundamental right of the accused safeguarded by *ne bis in idem* have been ignored somewhat.

It is probable that other such cases may arise on this matter, particularly given the aforementioned proponents of the Framework Decision on the EAW.

3.5 Contrast to Framework Decision on Victims' Rights

In the aforementioned case of *Gözütok and Brügge*, a noteworthy matter was put forward by the Belgian government, who argued that settlements in criminal proceedings are likely to "prejudice the rights of the victim"[101].However, in this case the Court argued that the objective of the *ne bis in idem* principle is only to preclude a State from prosecuting a person who has already had their case finally disposed of[102]. Thus the priority in this instance appears to be that of the fundamental rights of the accused who has used their fundamental freedoms, as opposed to the rights of the victim. That being said however, the Court does note that *ne bis in idem* does not prevent the victim from bringing a civil action against the accused.[103] Although this

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[99] Case C-261/09 at para.39
[100] *ibid.* at para.46
[101] Joined Cases C-187/01 and C-385/01 at para.47 of the Ruling
[102] Joined Cases C-187/01 and C-385/01 at para.47 of the Ruling
[103] *ibid.*

may seem like an inadequate alternative for the victim, there is at least some avenue for restitution as a result of the damage caused.

The natural requirement for cross-border element in EAW is one which is not inherent in victims' rights. Another important issue has been underlined by one commentator regarding *Gözütok and Brügge,* that the suggestion from this case is that the protection of *ne bis in idem* is confined to those who are "entitled to free movement."[104]

Ultimately however, both areas within Police and Judicial Cooperation in Criminal Matters have given rise to CJEU rulings of constitutional importance and have provided some illustrative examples of how the Court will likely develop its fundamental rights and freedoms arguments in the future.

3.6 Conclusion

There is a strong emphasis in the Framework Decision itself, *and* in its case law, on fundamental rights. For instance, paragraph 12 of the Preamble makes reference to respect for fundamental rights and to the Charter. The cases concern important fundamental rights principles such as double criminality, *ne bis in idem*, and *in absentia* trials. These are all issues which are at the heart of the idea of the right to a fair trial, as enshrined in both the Charter and the ECHR. This does not mean however, that one should underestimate the importance of free movement rights in this case law. In fact it is the very essence of the whole idea of the European Arrest Warrant that people have the right to move freely within the EU territory in an AFSJ.

However, this chapter has shown that although in certain instances fundamental rights and fundamental freedoms are competing interests, there are often other competing issues which need due attention from the Court. In certain instances there have been diverging fundamental rights which have to be balanced; at others, fundamental rights and freedoms have competed together against the forces of mutual trust and recognition which is based at the very heart of the EAW. Contrasting *Kozlowski* and *Wolzenberg* highlights the differences which can result from assigning different

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[104] H. van der Wilt *supra.* n.65 at p110

weights to each respective issue. Issues, such as *ne bis in idem* and double criminality, make this area of the Court's competence one which has a particularly high amount of diverging issues to consider.

It is also clear that although both the EAW and the Framework Decision on Victims' Rights are both part of the PJCC, the fundamental freedoms which are involved in each case can be extremely different. The next chapter will go on to examine how the recent developments on suspects' rights may have diverging issues which could potentially fall in line with the Framework Decision on Victims' Rights. However, this area is intrinsically linked with the EAW and therefore it provides an opportunity to discuss the competing fundamental rights and fundamental freedoms which are arising in this field of EU law.

Chapter 4: Suspects Rights in the European Union

4.1 Introduction

This chapter aims to look at the future of judicial decision making in the field of Police and Judicial Cooperation in Criminal Matters (PJCC) through a discussion of suspects rights and thus on the recent proposed Directive on the Right of Access to a Lawyer in Criminal Proceedings[1], as well as the Directives already enacted in this field[2]. Although as yet there have not been rulings delivered in the area of suspects and accused persons rights, it is submitted that by looking to the rulings on the Framework Decisions on the European Arrest Warrant (EAW)[3] and Victims Rights[4], the issue of whether fundamental rights or fundamental freedoms would be the higher norm can be speculated upon.

The chapter will note that there are important additional safeguards being provided for in this area. There are however, different safeguards which are provided for in the EAW, all of which realistically provide for an increase in the fundamental (procedural human) rights protection in this field, which the Court would no doubt draw upon. On the other hand, by contrasting the proposed Directive to the Framework Decision on Access to a Lawyer, it provides a contrast which suggests that the fundamental freedom of free movement will have to be in place before any such fundamental right can be invoked in the Courts.

4.2 Suspects and Accused Persons Rights

This area of law has been one of growth, particularly in the international arena. This stems from the overall Article 6 right to a fair trial as enshrined in the European Convention of Human Rights (ECHR). Cases have come before the European Court

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[1] 'Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate on arrest' European Commission, 2011/0154 (COD)

[2] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings and Directive 2012/13/Eu of 22 May 2012 of the European Parliament and of the Council on the right to information in criminal proceedings

[3] Council Framework Decision 2002/584 (JHA) on the European arrest warrant and the surrender procedures between Member States, hereinafter referred t o as EAW or the European Arrest Warrant

[4] Framework Decision on the Standing of the Victim in Criminal Proceedings of 15 March 2001, O.J. 2001, L 82/1.

of Human Rights (ECtHR) on the issue of access to a lawyer during criminal proceedings[5], as well as before national courts[6]. It was pointed out by one commentator in light of these decisions that, "It is well known that Scotland…has also been called upon recently to modify its historic practice to enable immediate access to lawyers in the police station."[7] Thus the focus on this area has been heightened as a result of cases which affect areas of national sensitivity and national sovereignty.

As such, "A draft Directive was issued in June 2011 aiming to entrench in EU law the principles established in the recent ECtHR jurisprudence."[8] This was alongside the EU Council formally adopting the Directive on the 'letter of rights' on 26 April 2010. It was noted that "This Directive [that on the 'letter of rights'] - the second in a series of measures under the 'procedural rights Roadmap' [the first being the Directive on interpretation and translation] adopted by the EU in late 2009 - aims to ensure stronger protection of fair trials across Europe."[9]

These three measures were taken after a somewhat contentious journey. Firstly, it was seen that the area of freedom, security and justice (AFSJ) was legislating mainly in the 'security' field:

> "The idea of introducing a set of common (minimum) rules, guaranteeing the rights of defence at a EU-wide level, has not been accorded the same attention as the introduction of instruments aimed at improving the effectiveness of crime-fighting."[10]

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[5] See, for instance, *Salduz v Turkey* (2008) 49 EHRR 421; *Dayanan v Turkey* 2009 ECHR 7377/03 (13 October 2009 ; *Brusco v France* (Application No 1466/07) (unreported) given 14 October 2010, ECtHR

[6] See, for instance, *Cadder v HM Advocate* [2010] UKSC 43 This Ruling was particularly interesting in light of the argument by the Lord Advocate that there were sufficient safeguards in the Scottish system as a whole, as a result of the principle of corroboration. However, the Court did not agree with this argument and held for the change in Scottish practice. See paras 27, 50, 92 and 102

[7] A.Dorange and S.Field *'Reforming defence rights in French police custody: a coming together in Europe?'* 2012 International Journal of Evidence and Proof Vol.16(2) pp.153-174 at p.171. Interestingly the UK has considered opting-out of this Directive, the effects of which on British citizens was criticised, see *'EU directive opt-out could hit Britons arrested abroad'* Guardian 7 September 2010; *'MPs reject directive on right to lawyer in criminal proceedings'* Solicitors Journal 2011 Vol.155(35) p.3

[8] A.Dorange and S.Field *supra.* n.7 at p.174

[9] http://www.fairtrials.net/press/article/european-council-enacts-law-to-protect-fair-trial-rights accessed on 4 July 2012

[10] G.Vermuelen and L.van Puyenbroeck *'Approximation and mutual recognition of procedural*

As such there was a lacuna in legislation which was geared either to 'freedom' or 'justice'. In response to this, a Commission Green Paper on the protection of rights of the suspect or defendant during the proceedings[11] has been published which led to a proposed Framework Decision on Certain Procedural Rights in Criminal proceedings ('PFWD')[12]. This was an ambitious proposal which dealt with the right to legal assistance and representation; the right to interpretation and/or translation; special protection for vulnerable groups; and, consular assistance. Much criticism was levelled at this proposal.[13] However, "Although the Hague Programme called for the adoption of this proposal by the end of 2005, agreement on the substance appeared difficult to reach and several Member States had legal and political objections to an EU measure on this issue."[14] It has been pointed out that the "dividing line was the question of whether the Union was competent to legislate in purely domestic proceedings (at least 21 Member States share[d] this view or whether the legislation should be devoted solely to cross-border cases."[15] Nonetheless, the PFWD provided a basis which has subsequently been used in this field even after its abandonment in 2007.

The Council of the European Union latterly made a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[16]. It has been stated that the Roadmap "set out its vision to foster the right to a fair trial in criminal proceedings across the EU."[17] The Roadmap itself intended to deal with six different measures (measures which are not dissimilar to those which were discussed in the PFWD):

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safeguards of suspects and defendants in criminal proceedings throughout the European Union' in *'EU and International Crime Control. Topical Issues'* Governance of Security Research Paper Series Vol.4 2010 Muklu Publishers Eds Cools *et al.* at p.44

[11] COM (2003) 75, 19 Feb 2003

[12] Commission Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM(2004) 328 final (28 April 2004)

[13] See C. Arangüena Fanego *'Procedural Guarantees if Suspects and Defendants'* in de Hoyos Sancho, M (Ed) *'Criminal proceedings in the European Union: essential safeguards'* (Lex Nova, 2008)

[14] S.Peers *'Justice and Home Affairs Law'* 2nd Ed. OUP at p.454

[15] Press Release on the 2807th Session of the Council on the 12th and 13th June, 2007[1026/07-Press 125] as cited in Ambos, K *'Mutual recognition* versus *procedural guarantees'* in de Hoyos Sancho, M (Ed) *supra*. n.12 at p.35 fn.46

[16] Resolution of the Council of 30 November 2009 (2009/C 295/01)

[17] M.Jimeno-Bulnes *'Towards Common Standards on Rights of Suspected and Accused Persons in Criminal Proceedings in the EU'* CEPS 'Liberty and Security in Europe' February 2010 at p.1

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

As has already been referred to, directives on translation and interpretation as well as on rights and charges have already become law. The proposed Directive on Access to a Lawyer is currently in the process of being negotiated, and the exact form it will take remains to be seen. The notable difference between the PFWD and the measures referred to is that these measures have been broken down into more discrete areas in which to legislate. Nonetheless, issues which the Court may face based upon these Directives raise interesting questions; at times a contrast can be drawn between the PFWD and the current Directives in place. The PFWD was established in a different legal context in that this was before the Treaty of Lisbon (and even the failed Constitutional Treaty) was in force. As such the legal basis upon which the PFWD was to be enacted under and which the Directives have been enacted under are different[18].

The Roadmap became part of the Stockholm programme which set out the legislative aims in this field for 2010 to 2014.[19]

4.3 Suspects Rights, ECHR and the Charter of Fundamental Rights ('the Charter')

As has already been mentioned, the area of protection of suspects' rights is largely based upon the ECHR Article 6 right to a fair trial and the case law thereof. However,

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[18] Notably there was some controversy over the use of Article 31(1) TEU as the legal basis for the PFWD; for further reading, see R.Lööf *'Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU'* 2006 ELJ Vol.12(3) pp.421-430 Perhaps had the legislative basis not changed, a challenge on the validity of this PFWD would have came about. Now the legislative basis is Article 82 and 83 TFEU.

[19] *The Stockholm Programme - An open and secure Europe serving and protecting citizens,* Council of the European Union, 5731/10 (3 March 2010)

there has been some argument that as a result of the safeguards provided for in the ECHR and other international instruments[20] that protection by the EU in this field was unnecessary. As such why would the Court of Justice of the European Union (CJEU) require to resolve issues in this field of fundamental rights at all when there is the ECtHR? There are many arguments as to why the CJEU should play a role in the protection of fundamental rights.

It has been noted that, "The failure of this initiative [the PFWD] was mainly due to the hard opposition expressed by certain EU Member States' delegations…which considered that the protection of procedural rights was already laid down in Arts.5 and 6 of the ECHR and that this protection should be considered to be sufficient."[21] However, it has been argued that the standards set out by the ECHR are an absolute minimum which relates to countries which are not part of the EU (such as Turkey). Thus "EU cooperation is at a far more advanced stage than that within the members of the Council of Europe."[22]

Furthermore, the number of applications to the ECtHR is exceptionally high and grows annually, making it difficult for citizens to realistically get to the Court and often signatories to the ECHR do not always amend their legislation to reflect the changes which have been determined the by the ECtHR judgments.[23] Another interesting point made was that the ECHR does not provide rules of evidence and therefore "It often remains difficult to conclude from the ECHR's decisions whether or to what extent the use of illegally or unfairly obtained evidence constitutes a violation."[24]

Interestingly, in the preamble to the Council Resolution on the Roadmap, it alludes to the problems with compliance with the ECHR more "subtly":

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[20] For instance with regard to consular assistance there is the 1963 Vienna Convention on Consular Relations. With regard to right to legal assistance see also Art 14(3)(b) and (d) of the International Covenant on Civil and Political Rights (ICCPR)

[21] M.Jimeno-Bulnes *supra.* n.17 at p.4

[22] S.Douglas-Scott *'Chapter 1 - Fundamental rights in EU justice and home affairs'* in M.Martin (Ed) *'Crime, rights and the EU future of police and judicial cooperation'* (Justice, 2008) at p.22

[23] G.Vermuelen and L.van Puyenbroeck *supra.* n.10 at p.49

[24] *ibid.* at p.50

> "the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other's criminal justice systems and to strengthen trust. At the same time, there is room for further action on the part of the European Union to ensure full implementation and respect of Convention standards, and where appropriate, to ensure consistent application of the applicable standards and to raise existing standards."[25]

This is further emphasised in the Directive on Interpretation and Translation which makes a similar point[26]. This underlines the fact that the EU has an awareness that often there are violations of the rights provided for by the ECHR and thus the EU should provide a set of rights which build upon the standards and cases which the ECtHR has judged upon.

Nevertheless, then, although the EU has considered that the ECHR does not provide *adequate* protection in the field of defendants rights, the ECHR still provides the foundations for this field of competence. The EU has decided to supplement its only primary piece of legislation - the Charter in which Article 47 deals with the 'right to an effective remedy and a fair trial' and Article 48 relates to the 'presumption of innocence and right of defence' - with secondary legislation on the matter. The Directives which have so far become law make explicit reference to both the ECHR and the Charter[27].

Thus the field of suspects and accused persons rights is based, at the most basic level, on fundamental human rights. This is exemplified by the fact that the area is based upon Article 6 of the ECHR and Articles 47 and 47 of the Charter. Interestingly Articles 5 (the right to liberty and security) and 6 of the ECHR are the most commonly cited in applications to the ECtHR[28]. Thus it is more than likely that the CJEU would have to put fundamental rights at the height of importance if a case were to be referred on this area.

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[25] L.van Puyenbroeck and G.Vermeulen *"Towards minimum procedural guarantees for the defence in criminal proceedings in the EU"* 2011 ICLQ Vol.60(4) pp.1017-1038 at p.1018

[26] See point 6 of the preamble to the Directive on interpretation and translation: "Although all Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States"

[27] *ibid.* at point 6 of the Preamble on the Directive on Interpretation and Translation; see point 5 of the Preamble of the Directive on the Right to Information in Criminal Proceedings

[28] L.van Puyenbroeck and G.Vermeulen *supra.* n.25 at p.1018

4.4 Suspects and Accused Persons Rights and the EAW

In the case of the EAW where the person is awaiting a trial, they are thus a suspect or accused person. There are however, certain special rights within the field of EAW; some of these are built in to the Framework Decision (FWD) on the EAW themselves and some are within the new Directives on suspects and accused persons rights. It has been pointed out that "The European Arrest Warrant is sometimes seen purely as a tool for efficient prosecution, and there are fears that it may have the effect of lowering respect for the fundamental rights of suspects and defendants. In some ways however, it may well enhance defendants' rights."[29] As such, there have been some interesting safeguards provided only in respect of the EAW.

Primarily, there have been some safeguards for suspects or accused persons built into the EAW since its implementation. These include the speciality rule,[30] time limits for surrender[31] and the *ne bis in idem* principle[32]. In Article 12 of the Framework Decision on the EAW, it refers to "a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State". Thus rights to an interpreter and a lawyer were already provided to those being requested under an EAW, although the form which this took was actually a *lesser* form than had originally being planned on:

> "Although the provision for legal advice and the services of an interpreter has been reduced by this reference to the national law of the executing Member State, this still fulfils the requirements of the ECHR."[33]

These provisions on the EAW are now supplemented elsewhere. For instance, with regard to the Directive on Interpretation and Translation, this is a right to

[29] C.Morgan *'The European Arrest Warrant and Defendants' Rights: An Overview'* in (Eds) Judge Rob Blextoon and Wouter van Ballegoij *'Handbook on the European Arrest Warrant'* TMC Asser Press 2005 at p.195

[30] Referred to in the previous chapter

[31] See Article 23 of Council Framework Decision 2002/584 (JHA) on the European arrest warrant and the surrender procedures between Member States, hereinafter referred t o as EAW or the European Arrest Warrant

[32] Referred to in the previous chapter

[33] C.Morgan *supra.* n.29. at p.205

interpretation in criminal proceedings and proceedings for the execution of an EAW[34].

Looking to the Directive on the right to information in proceedings, "This law ensures that anyone arrested or subject to a European Arrest Warrant in any EU Member State is given a *Letter of Rights* listing their basic rights during criminal proceedings…Currently the right to a Letter of Rights is only available in around one third of Member States."[35] The EAW is explicitly referred to in point 39 of the preamble to this Directive:

> "The right to written information about rights on arrest provided for in this Directive should also apply, *mutatis mutandis*, to persons arrested for the purpose of the execution of a European Arrest Warrant…"

A specific model Letter of Rights is provided for in Annex II to this Directive and provides information on slightly different issues to the 'traditional' Letter of Rights. These are:

- A - Information about the European Arrest Warrant;
- B - Assistance of a Lawyer;
- C - Interpretation and Translation;
- D - Possibility to consent; and
- E - Hearing[36]

In the proposed Directive on Access to a Lawyer, the EAW is also referred to. However, for those involved in proceedings pursuant to an EAW, their rights are "more limited and less specific, as the merits of the case will then be discussed in the Member State which issued the EAW, where the full rights of access of Articles 3-4 shall apply to the suspected or accused person"[37]. From the proposal, it appears that

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[34] Article 1(1) of the Directive on the Right to Interpretation and Translation

[35] Europa Press Releases - 'EU-wide right to information at arrest is now law' Brussels, 7 June 2012 accessed 05/07/2012

[36] This is in contrast to the Indicative model Letter of Rights in Annex I which looks at A - assistance of a lawyer/entitlement to legal aid; B - information about the accusation; C - interpretation and translation; D - right to remain silent; E - access to documents; F - informing someone else about your arrest or detention/informing your consulate or embassy: G - urgent medical assistance.

[37] N.Joncheray and L.Manageress *'The Proposal for a Directive on the right of access to a lawyer in criminal proceedings - A further step towards a European ius commune in criminal law or* All Quiet on the Western Front*?'* 2011 Maastricht Journal of International and Comparative Law Vol.18(3) pp.403-

access to a lawyer is restricted to the initial stages of criminal proceedings[38] which is understandable to an extent as the person subject of the EAW will receive assistance from a lawyer during the case when in the issuing state.

It is clear why a person subject to an EAW is in a particularly vulnerable position and thus requires these safeguards additionally to those which are set out in the Framework Decision on the EAW itself. In a situation where "effective judicial cooperation in criminal proceedings according to the mutual recognition doctrine is partly dependant on a commonly accepted level of trust between the competent national authorities, which in turn requires the presence of a common set of minimum procedural guarantees for the defence."[39], and thus in reality there are no further checks on the practices in Member States as well as the fact that the EAW is essentially a faster version of extradition, people must know what they are facing.

This comes in the form of the use of a language that will be understood, information as to their rights and, one would hope, to the access of a lawyer. This is necessary for the protection of EU citizens in EAW proceedings for it must be remembered that in certain instances this person is still only an accused to suspected person and is *not* a convicted criminal. Thus these issues of fundamental rights which take place meanwhile someone is using their fundamental freedom of free movement are ones which the Court may well have to call upon.

4.5 Suspects and Accused Persons Rights and Victims Rights: A Comparison

In a sense, the rights of victims in criminal proceedings and the rights of suspects and accused persons are somewhat juxtaposed. Nonetheless an interesting parallel can be drawn between the two issues. One of the most important features which has arisen from the CJEU case law on the Framework Decision on Victims Rights is that there was often *no* cross-border element in the cases, meaning a wholly internal situation which was void of any kind of fundamental freedom, i.e. there was no exercise of the free movement right of a citizen. The question then arises as to whether this is the

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410 at p.406

[38] Article 8 of the Proposal on the Directive for Access to a Lawyer in Criminal Proceedings

[39] L.van Puyenbroeck and G.Vermeulen *supra.* n.25 at p.1020-1021

case for the new legislation on suspects and accused persons rights.

One can assume that when it comes to the Directive on Interpretation and Translation there is almost necessarily going to be a cross-border element; if a suspect were to be in their own State it is unlikely that they will need an interpreter. However in the instances of the Directive on Information for Suspects and the proposed Directive on Access to a Lawyer, the situation is not likely to be so straightforward.

Primarily, with regard to the Directive on Information for Suspects, there is nothing to suggest that there is a requirement for there to be a cross-border element. Although the proposed Directive on Right to Access a Lawyer has not yet become law and as such there is still time for there to be changes to the proposed legislative measures as it stands, similarly there is little to suggest that there would be a requirement for a cross-border in that instance. It has been stated that, "Should the proposal be adopted as such, the Directive will apply to all criminal proceedings, regardless of the presence of any cross-border element."[40] This contention is made based upon the fact that there is no reference to a cross-border element to the criminal procedure. As such the proposed Directive will apply to a wholly internal situation and thus not only EU law but its interpretation would be exclusively within the competence of the CJEU. It has been suggested that this does stretch the EU's competence in that what is taking place in reality is harmonisation[41]. There is also a suggestion that not to allow purely internal situations to come within the scope of the proposed Directive would be to the detriment of situations which may become later a cross-border one.[42]

It has been pointed out that one of the main issues that the PFWD encountered was that it permitted wholly internal cases to come within its scope:

> "Probably the main dividing line was the question whether the EU was competent to legislate on purely domestic proceedings or whether the legislation should be devoted only to cross-border cases."[43]

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[40] N.Joncheray and L.Manageress *supra.* n.37 at p.407
[41] *ibid.* at p.407
[42] *ibid.* at p.407, p.409
[43] G.Vermuelen and L.van Puyenbroeck *supra.* n.10 at p.48

There has been a different view posited on the effects of these instruments in that, "whereas the Roadmap was originally intended to guarantee a minimum level of procedural protection throughout the EU in all criminal cases (cross-border as well as national); its application is limited to cross-border cases."[44] This contention that the Roadmap was based upon cross-border cases is based upon point 3 of the preamble of the Roadmap:

> "…the removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have, as an inevitable consequence, led to an increase in the number of people becoming involved in criminal proceedings in a Member State other than that of their residence. In those situations, the procedural rights of the suspected or accused persons are particularly important in order to safeguard the right to a fair trial."

Thus from this perspective EU citizens who have *exercised* their right of *free movement* ought to have their *fundamental rights* safeguarded. If this different view is used to understand the Directive and the Proposed Directive regarding the need for a cross-border element, it must be asked why this would be the case. There is the argument which was put forward to prevent *any* initiatives in the field of suspects rights; that there is adequate protection provided by other international instruments. This is not, however, mirrored to the same degree in the case of the Framework Decision on Victims Rights. However it is submitted that such a view is unsatisfactory in light of the analysis of the proposed Directive. Furthermore, if this were the case, why bother legislating on this issue *at all* at EU level if it were seen to be efficiently dealt with at national and international level?

Another view is that this issue impacts on national sovereignty and the protection of national interests, and as such the issues of victims' rights are somewhat less controversial. One commentator noted these problems in relation to the PFWD but they are still relevant here:

> "Some Member States are concerned that a measure of this sort [the PFWD], which seeks to impose constraints on their domestic criminal justice systems, would infringe the subsidiarity principle by laying down rules governing the

[44] L.van Puyenbroeck and G.Vermeulen *supra.* n.25 at p.1037

> organisation of something that remains a matter of sovereignty."[45]

Thus it is likely that Member States would wish there to be a requirement for a cross-border element so as to avoid wholly internal situations coming within the competence of the CJEU. Interestingly, it has been contended by some commentators that the requirement for a cross-border is a good idea:

> "Although this may seem to some a drawback, it is not. This approach offers an opportunity to introduce minimum EU standards in areas where such an exercise is needed, for instance in the field of cross-border traffic of evidence…"[46]

Although it would be preferable that fundamental rights should be allowed to take precedence even when fundamental freedoms have not been exercised in the case of rights of suspects[47], it is contended that there is no legal basis for this. Article 82(2) and Article 83 TEU *both* make reference to PJCC matters which have a *cross-border dimension*. Thus it is submitted that although following the line of rulings on the rights of victims would be preferable, the Court does not appear to have a legal base to rule on wholly internal matters as the legislation relates to a cross-border dimension. It is not the role of the Court to make legislation and, it is argued, Treaty amendment would be required before the Court could deal with such matters. This would be, it is submitted, the optimal situation.

4.6 Conclusion

Of course one cannot definitively surmise what the Court's case law may be in the future. However, the tools are there to provide some kind of suggestion as to how the Court may well rule on new issues, such as suspects and accused persons' rights, in light of prior rulings. As has been pointed out by many commentators, the issue in this instance is not so much adopting directives in these areas but actually making changes in practice:

> "It is rather easy to formulate rights of citizens, rights of suspects, etc. But then the mentality of police officers, of other

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[45] C.Morgan *supra.* n.29 at p.203

[46] L.van Puyenbroeck and G.Vermeulen *supra.* n.25 at p.1037

[47] Especially in light of the fact that this has been the way that the recent CJEU case law has developed with regard to the standing of victims in criminal proceedings.

> officials of criminal procedure, to create open-mindedness, and an inclination to improve the practices, well that's the big challenge…"[48]

Thus Member States may be brought before the CJEU for infringements of the directives (once the time limits for implementation have expired). This would in turn mean that there had been an infringement of a fundamental right. However it is not yet clear whether there would have to be a cross-border element, thus involving a fundamental freedom, for the Court to be involved.

Essentially, the rights provided for by the new Directives and the proposed Directive provide an interesting opportunity for the Court to rule in a developing area of law. It is reasonable to ask whether there must be fundamental freedoms enacted in order to ensure fundamental rights are protected. Meanwhile the Directive on Interpretation and Translation may provide an example which lends itself to a cross-border element. This is not the case with the Directive on the Right to Information in Criminal Proceedings and the proposed Directive on the Right of Access to a Lawyer. It is contended that the Court should await a more clear legal base to allow them to follow the case law on the Framework Decision on the Standing of Victims in Criminal Proceedings and permit cases which concern wholly internal situations.

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[48] Quote from Theo de Roos, a Dutch appeal court judge and law professor on Spotlight on Suspects Rights on euronews - http://prod-euronews,euronews.net/2012/06/11/spotlinght-on-suspects-rights/ accessed on 08/07/12

Conclusion

The aim of this thesis was to address the question of:

> "Fundamental rights versus fundamental freedoms: A change in the reasoning of the Court of Justice of the European Union? A Critical Analysis of the Court of Justice of the European Union's Rulings in Police and Judicial Cooperation in Criminal Matters"

The thesis has undertaken to do this by examining some of the diverse areas within the field of Police and Judicial Cooperation in Criminal Matters (PJCC). These selected areas were: standing of victims in criminal proceedings, the European arrest warrant; and, the rights of suspects and accused persons in criminal proceedings.

Firstly, however, the thesis explained the development of fundamental rights and PJCC generally before analysing the development of the Court's own competence within this field. It was concluded that there has been a widespread move to include human rights arguments by the parties involved in the cases. It is suggested the contention put forward by Coppel and O'Neill however, that fundamental rights arguments were not being given the proper respect by the Court and were being 'trumped' as it were by arguments which pertained to the fundamental freedoms is somewhat exaggerated and outdated, as suggested by Weiler and Lockhart. Moreover, it was argued that the changes to the jurisdiction of the Court, particularly those which are due to take place after the transitional period ends in 2014 in the area of PJCC are to be welcomed to allow the Court to consider issues of fundamental rights, as well as fundamental freedoms.

The subsequent chapter dealt with the Framework Decision on the Standing of Victims in Criminal Proceedings. This chapter investigated the detail of the Framework Decision and the cases and rulings which have been delivered to date. This chapter concluded that as a result of the lack of a requirement for a cross-border element, there is much less emphasis on fundamental freedoms. In other words free movement is still relevant, but there is a stronger emphasis on fundamental rights. The

prior importance of the cross-border element to the Court was highlighted by a discussion of case law on ‘wholly internal’ situations. It was also concluded that at times the Court does not give fundamental rights a thorough enough examination and can be somewhat flippant in their treatment of the issues. However, it was pointed out that the somewhat limited case law on this Directive should not be over emphasised.

The next chapter was that which considered the Framework Decision on the European arrest warrant (EAW). This chapter concluded that at the very heart of the EAW is the idea of crossing a border, which results in an accusation or a conviction at a later stage. It was contended in this case that although fundamental freedoms are important to the EAW, fundamental rights are of great significance as a result of issues such as double criminality, *in absentia* trials and *ne bis in idem*, which has been of particular import with regard to the Convention Implementing the Schengen Agreement (CISA). It was concluded in this instance that fundamental rights and freedoms are, at times, actually pitted against mutual trust and recognition as opposed to against each other.

The final chapter is concerned with the Roadmap on procedural rights for suspects and accused persons and the respective directives which have been adopted. As yet there has not been any case law in this area but using the analysis of the Directives and the prior case law from the previous chapters, suggestions were put forward as to how the Court may decide these issues. It is concluded that there is a major opportunity for the Court to put fundamental rights at the top of any hierarchy of norms and allow cases which are based upon ‘wholly internal’ situations.

To conclude, it was once said that:

> “Those who would give up Essential Liberty to purchase a little Temporary Safety, deserve neither Liberty nor Safety”[1]

This is something which the law-makers in the EU should be wary of. It is particularly interesting in the context of the often criticised EAW which was considered a knee jerk reaction to events on September 11, 2001[2]. Long criticised for creating legislation in the field of PJCC which was centred upon prosecution, there was, and still is, a

[1] Benjamin Franklin as cited in http://www.quotationspage.com/quote/1381.html

[2] Although notably the piece of legislation had already been in the pipeline, this undoubtedly speeded up the process of finalising the Framework Decision

need to adopt legislative measures which counter-balances this in order to protect freedom at its most basic level. Thus, the Court has the important role of protecting those fundamental rights which are, perhaps, more obviously essential in terms of criminal law as opposed to more economically based fields of EU law. Given this is an area which Member States consider the EU is impinging national sovereignty, it is paramount the Court, as well as the other EU institutions, consider these matters appropriately. In turn then, it is perhaps not surprising that fundamental freedoms are taking a lesser role in some cases resulting in the elimination of the cross-border requirement. On the contrary though, perhaps because of the area's importance to Member States, it perhaps *is* surprising that the Court has decided to delve into matters which are considered to be 'wholly internal' situations. Thus it is concluded that fundamental rights are taking a higher precedence in the field of PJCC to fundamental freedoms. However at times the Court's rulings on fundamental rights has still been lacking. Moreover, it is contended that it is not simply fundamental rights and freedoms which are competing but sometimes fundamental rights compete with each other. Sometimes it is competing fundamental rights and the freedoms combined which compete with the 'cornerstone' of the Area of Freedom, Security and Justice, that is, mutual recognition and trust. The PJCC has provided for a particularly interesting study with regard to fundamental rights and freedoms, and is set to continue to be with new legislative measures to protect the suspects and accused persons in criminal proceedings.

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