FACULTY OF LAW
Lund University

Rebecka Krönmark

Limits of Mutual Recognition in Criminal Matters

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Christoffer Wong

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Contents

Summary

At Tampere in 1999, the principle of *mutual recognition* was declared the cornerstone of criminal law cooperation within the European Union. The idea was that a Member State shall recognise a judicial decision in criminal matters taken by a judicial authority in another Member State as if the decision had been taken by one of its own judicial authorities. The argument put forward was that mutual recognition would allow for enhanced criminal law cooperation while allowing the Member States to keep their own criminal law systems. The concept of mutual recognition was borrowed from the context of the *Internal Market* where it facilitates the free movement of goods and services. A product validly put on the market in one Member States shall be allowed to circulate freely in the entire EU, regardless of different national regulatory standards. Since the individual is freed from having to comply with double regulatory standards, one could argue that mutual recognition in the Internal Market provides for *liberalisation*. Furthermore, in the Internal Market, mutual recognition is accompanied with *harmonisation*, i.e. the Union legislator provides for a minimum level of regulatory standards where the Member States are hindered from applying their own. Mutual recognition in the context of the Internal Market can thus be justified with reference to its liberalising qualities and its complementary harmonisation. This is not the case for mutual recognition in criminal matters; the principle extends the States' power over the individual and there is little harmonisation of both substantive and procedural criminal law provisions. Instead, the main justification of mutual recognition in criminal matters has been *mutual trust*. The Member States should be ready to recognise each others' judicial decisions in criminal matters since they trust each others' criminal law systems. The fact that all member States are signatories to the *ECHR* is one of the reasons why mutual trust should exist. However, even if all the Member States were to respect the ECHR, it might still not be enough to justify mutual recognition. The reason being that mutual recognition applies at all stages of the criminal proceeding and thus mixes different criminal justice systems in unforeseen combinations. The fragmentation of national criminal systems works poorly alongside the *holistic approach of the ECtHR*, i.e. the Court always looks at the proceeding as a whole to decide whether it amounts to a fair trial. Although two different criminal law systems separately provide for a fair trial, the two in combination might not. In my opinion, harmonisation of criminal procedure is necessary in order to ensure that the individual is subjected to a fair trial when applying mutual recognition.

Sammanfattning

Ömsesidigt erkännande utsågs till hörnstenen i det straffrättsliga samarbetet inom the europeiska unionen i Tammerfors (Tampere) 1999. Tanken är att en medlemsstat ska erkänna ett juridiskt beslut fattat av en behörig instans i en annan medlemsstat som om beslutet var fattat av en av statens egna behöriga instanser. Det huvudsakliga argumentet för ömsesidigt erkännande var att det skulle medföra ett intensifierat straffrättsligt samarbete samtidigt som medlemsstaterna skulle tillåtas att behålla sina respektive straffrättssystem. Begreppet ömsesidigt erkännande lånades från den *gemensamma marknaden* där det främjar den fria rörligheten av produkter och tjänster. En produkt som lagenligt satts på marknaden i en medlemsstat ska tillåtas att cirkulera fritt inom hela EU oberoende av skiftande nationella regelverk. Man kan argumentera för att tillämpning av ömsesidigt erkännande på den gemensamma marknaden bidrar till *liberalisering* eftersom individen är befriad från att behöva uppfylla dubbla regelverk. Vidare åtföljs ömsesidigt erkännanden av *harmonisering* inom ramen för den gemensamma marknaden; den europeiska lagstiftaren garanterar en miniminivå på regelverket då medlemsstaterna är förhindrade att tillämpa sina nationella regler. Man kan således hävda att ömsesidigt erkännande inom ramen för den gemensamma marknaden är rättfärdigat såtillvida att principen bidrar till liberaliserande effekter för individen samt att principen kompletteras av harmonisering av regelverket. Detta är inte fallet vad det gäller ömsesidigt erkännande inom det straffrättsliga samarbetet. I detta sammanhang medför ömsesidigt erkännande att staten stärker sin position gentemot individen och dessutom existerar inte mycket harmonisering av vare sig materiella eller processuella straffrättsliga regler. Istället har ömsesidigt erkännande främst rättfärdigats med hänvisning till *ömsesidigt förtroende*. Det vill säga att medlemsstaterna är beredda att erkänna varandras straffrättsliga beslut eftersom de litar på varandras straffrättssystem. Att alla medlemsstater är anslutna till Europakonventionen är ett av huvudskälen till att ömsesidigt förtroende borde existera. Det är dock inte nödvändigtvis så att Europakonventionen är tillräcklig för att rättfärdiga ömsesidigt erkännande även om alla medlemsstater respekterar den. Det beror på att ömsesidigt erkännande är tillämpbart under hela processen och därför blandar olika straffrättsliga system i en oförutsebar kombination. Ömsesidigt erkännande bidrar till en fragmentering av nationell straffrättsprocess vilken fungerar dåligt i kombination med den *helhetssyn Europadomstolen* anlägger för att avgöra om en process motsvarar kraven på en rättvis rättegång, domstolen tittar alltid på alla omständigheterna under hela processen. Detta medför att två olika processuella system var för sig kan garantera en rättvis rättegång medan det inte är säkert att så är faller då systemen kombineras. Personligen anser jag att ömsesidigt erkännande av straffrättsliga beslut kräver harmonisering av processrätten för att kunna rättfärdigas.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
EAW	European Arrest Warrant
EEW	European Evidence Warrant
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FWD	Framework Decision
TFEU	Treaty of the Functioning of the European Union

1 Introduction

1.1 Background

At the European Council meeting in Tampere 1999, which took place at head of Government level, the principle of *mutual recognition* was set out as the cornerstone of judicial cooperation in criminal matters within the European Union. Mutual recognition entails the acceptance of national judicial decisions in criminal matters throughout the Union. With a minimum of formality and limited grounds for refusal, a judicial authority in the executing State shall recognise and execute a judicial decision by its counterpart in the issuing State.[1] When introducing the principle in the field of criminal law, mutual recognition was perceived as a way to intensify the cooperation without compromising the Member States' sovereignty; at least in theory, mutual recognition would enhance judicial cooperation without requiring alternation of national criminal law. The terror attacks of September 11 unified the Member States in their fight against terrorism and provided an opportunity to intensify criminal law cooperation by adopting instruments based on mutual recognition. To date ten instruments have been adopted covering all stages of the proceeding.[2]

The principle of mutual recognition originates from the context of the Internal Market. The basic idea is that a product validly put on the Market in one Member Sate, is allowed to circulate freely in the entire market of the EU regardless of differing national regulatory standards.[3] Transplanted into the area of criminal law, mutual recognition suggests that a judicial decision taken in one Member State takes effect as such in all other Member States without any further checks or controls. The basis for mutual recognition in criminal matters is mutual trust; Member States are ready to accept each other's judicial decisions since they trust each other's criminal law systems. However, when mutual recognition was introduced as a mean for criminal law cooperation, mutual trust was simply presupposed; there was never any profound discussion on why such trust should exist.

The transplantation of mutual recognition to the field of criminal law may be criticised from a number of different angles. From a constitutional point of view, mutual recognition is controversial since it provides free movement of judicial decisions and thus extends the State's criminal law competence beyond its territorial limits; mutual recognition provides for extraterritoriality. From the individual's point of view, this is problematic since the extension of the State's power beyond its traditional territorial limits strengthens the position of the State in relation to the individual.

[1] V. Mitsilegas (2009) p. 101.
[2] For further examination of the instruments of mutual recognition see part 3.3 of this essay.
[3] For an examination of mutual recognition in the context of the Internal Market see part 3.4 of this essay.

In order to strengthen the position of the individual, a proposal for a framework decision on certain procedural rights in criminal proceedings throughout the EU was launched in 2004.[4] The proposal has not yet been implemented and it is not certain that it ever will, in any case not in its presented form. One of the main arguments in opposition to the proposal was that all Member States are signatories to the ECHR and are thus obliged to respect the right to a fair trial set out therein. However, the right to a fair trial in the ECHR might work poorly alongside mutual recognition. The ECtHR applies a holistic view when deciding if a proceeding amounts to a fair trial; the Court looks at the *proceeding as a whole*. A procedural shortcoming at the beginning of the proceeding might be counterbalanced by measures at a later stage. This is problematic since mutual recognition provides for fragmentation of the national criminal law system; different parts of different criminal law systems might not be compatible in order to constitute a fair trial.

1.2 Aim and Limitations of the Essay

The aim of this essay is to examine whether procedural rules at Union level are a precondition for mutual recognition of judicial decisions in criminal matters. It is important to define the word *precondition* in order to identify the precise scope of the essay. The intention is to examine whether procedural rules are a precondition for mutual recognition from the individual's point of view, i.e. are procedural rules at Union level necessary to guarantee the suspect's or the accused person's right to a fair trial. The question is *not* whether procedural rules are necessary in order to make mutual recognition function properly in practice, although this is a related question. In order to answer the main question, the essay will first examine several sub-questions. To start with, in what way is mutual recognition justified in the context of the Internal Market; can mutual recognition of judicial decisions in criminal matters be justified in the same way? Second, how is the need for procedural rules of criminal procedure perceived at Union level and; to what extent do the instrument on mutual recognition provide protection of the procedural rights of the individual? Third, in what way does the ECHR protect the procedural rights of the individual; and is the ECHR protection compatible with the principle of mutual recognition?

The focus of this essay is mutual recognition in criminal matters in relation to *procedural rules*. The question of whether harmonisation of substantive criminal law is necessary to justify mutual recognition in criminal law cooperation is outside the scope of the essay. Hence, the question is not whether procedural rules at Union level are sufficient to justify mutual recognition, but whether they are necessary; it might be that harmonisation of both procedural and substantive criminal law is necessary to justify mutual recognition.

[4] This proposal will be discussed in 4.1.3 below.

1.3 Method and Material

The method used in order to answer the questions above is classical judicial method. Hence, different judicial sources of different weight are examined and analysed. The first part of the essay is of a more descriptive character and second part is of a more analysing character. The intention is to first present the material needed in order to answer the questions of the essay and then to analyse the findings. As for the material, since the European Union is the main topic of this essay, documents originating from the Union are used as an important source. The framework decisions on mutual recognition are binding legislation for the member States and thus a primary source that defines what is primary law. The essay will not deal with textual analysis of the framework decisions as it is not the purpose of the essay to interpret particular provisions. In addition, documents of a more political character, such as Commission communications, are also used. These documents are not legally binding but still important in order to show the opinions, arguments and objectives present within the Union. As illustrations to different phenomena, case law both from the ECJ and from the ECtHR is referred to. The case law is selected with help from literature. Since all Member States are signatories to the ECHR and since the human rights set out therein are recognised as fundamental rights by the Union, although the ECtHR is not a Union court its case law is still important. Some basic criminal law literature which mainly treats the European Union is used. In addition, articles mainly from legal journals are used in order to show views on mutual recognition both in the context of the Internal Market and in the criminal law cooperation.

1.4 Disposition

The first part of the essay will provide a short overview of criminal law cooperation and its development in the Union. This part aims to provide an explanation to why the principle of mutual recognition was introduced regarding criminal law matters.

The second part will describe the principle of mutual recognition both in the context of the Internal Market and criminal law cooperation. It will describe how the principle is justified in the economic context and then examine whether it can be justified in the same way in the area of criminal law. Two of the most important aspects of this part are whether the principle of mutual recognition provides for liberalisation or not and whether it is accompanied by harmonisation in the two different contexts.

In the third part of the essay, procedural safeguards are the focus. First, procedural safeguards within the framework decisions on mutual recognition are examined. Then, the need for, and existence of, procedural rules at Union level are described. Next, the Member States' obligations with regard to the ECHR are dealt with. Finally, the way ECtHR

decides whether a proceeding meets the requirement of a fair trial is explained and illustrated by case law.

The last part of the essay provides an analysis on whether procedural rules at Union level are a precondition for mutual recognition in criminal matters. In other words, is harmonisation of procedural standards necessary in order to guarantee a fair trial when applying mutual recognition in criminal matters?

2 Development of Criminal Law Cooperation in the EU

2.1 Background

To understand why the principle of mutual recognition has become the cornerstone of judicial cooperation in criminal matters in the Union, it is important to have a picture of the history of European criminal law cooperation. Criminal law cooperation is a relatively new field in the Union; it became part of Union policy two decades ago but the cooperation has intensified remarkably during recent years. In the subsequent part of the essay, an overview of the judicial cooperation in criminal matters is given.

During the 1970s, several attempts were made to give the Union competence in the field of criminal law but all of them failed. The disagreement among the Member States was too large.[5] However, during the 1980s a number of factors led to criminal law cooperation at EU level.[6] One of the most important factors was the call for common action against *criminality of common concern* to the Member States. Another factor contributing to the need for criminal law cooperation was the development of the *Internal Market*. The abolition of internal borders and the achievement of free movement brought focus on issues such as immigration and crime.[7] In addition, the 1985 *Schengen Agreement* was initiated between some Member States and it led to the 1990 *Schengen Implementing Convention*, which inter alia included provisions on border control, judicial and police cooperation. Although the Schengen Agreement took place outside the EU framework, it was important since it shifted momentum towards closer integration within the EU.[8]

2.2 The Institutional Framework of Criminal Law within the Union

It was not until the adoption of the *Treaty on European Union* (Maastricht Treaty) in 1992, that criminal law cooperation became a field of cooperation at EU level.[9] The Treaty of Maastricht established the European Union by including new areas of cooperation to the European Community, i.e. the original mainly economic cooperation which established the Internal Market. The new cooperation was based on a pillar structure where the first pillar consisted of Community law. The second pillar regulated common defence and foreign policy and the third pillar concerned cooperation in the

[5] A. Klip (2009) p. 13.
[6] For more elaboration on these factors see part 5.1 of the essay.
[7] V. Mitsilegas (2009) pp. 5 ff.
[8] V. Mitsilegas (2009) p. 7.
[9] V. Mitsilega (2009) p. 10.

areas of justice and home affairs, which inter alia included immigration policy and criminal law cooperation. The different pillars were characterised by the way legislation was adopted, its binding effect and compliance monitoring.[10] It was only under the first pillar – regulating the establishment of the Internal Market – that Union action was characterised by supranational elements. Due to the sovereignty sensitivity of the areas covered by the second and third pillar – common defence and foreign policy and justice and home affairs – this cooperation took place within a more intergovernmental framework. This compromise allowed for EU action in the area of criminal law without depriving the Member States of their sovereignty in the field.[11] Indeed, criminal law cooperation became part of the Union through the Treaty of Maastricht but the provisions on EU action in the field were very weak. Furthermore, decision-making by the Council should, with few exceptions, be taken by unanimity.[12]

The compromise reached in the Treaty of Maastricht regarding criminal law in the third pillar proved hard to operate in practice. There was little legislation in the area and although some Joint Actions were adopted, their legal status was unclear. The shortcomings of the third pillar in the Treaty of Maastricht lead to structural changes through the *Treaty of Amsterdam*, adopted in 1997. Some of the areas under the third pillar - such as immigration, asylum, borders and civil law – became part of the Community policy, i.e. the supranational part of the EU.[13] The third pillar was renamed from the areas of justice and home affairs to the *area of freedom security and justice*.[14] Furthermore, through the Treaty of Amsterdam the *Schenegen Acquis* was integrated into the EU legal framework.[15]

The *Treaty of Nice*, adopted in 2001, did not bring about much change regarding criminal law cooperation within the Union; some limited amendments were done.[16]

With the adoption of the *Lisbon Treaty* in 2007, the pillar structure of the Union was abolished, which means that criminal law cooperation, within the limitations established by the Treaty, today takes place at a supranational level.[17] As a general rule, unanimity is no longer required in order to make decisions,[18] which makes it easier to get legislation adopted. However, it also limits the sovereignty of the States in the area of criminal law.[19]

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[10] A. Klip (2009) pp. 15 ff.
[11] V. Mitsilegas (2009) p. 9.
[12] V. Mitsilegas (2009) pp. 10 f.
[13] V. Mitsilegas (2009) pp. 11 f.
[14] A. Klip (2009) p. 18.
[15] S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (2004), pp. 5-36, at p. 8.
[16] Mitsilegas (2009) p. 13.
[17] Klip (2009) p. 14.
[18] As a general rule decisions are taken in accordance with *ordinary legislative* procedure, TFEU articles 82(1) & 294. However, there is a so called *emergency break*, which allows some Member States not to take part in enhanced cooperation, TEFU article 82(3).
[19] See part 5.2 of the essay.

2.3 *Corpus Juris* – An attempt to Harmonise Criminal Procedural Law?

Although the Union has acquired more criminal law influence during the last twenty years, yet further going attempts were made. In the middle of the 1990s, the Commission put together an expert group, which proposed a *Corpus Juris* to combat EU fraud.[20] Although there were no exact figures for the costs of fraud against the Community's financial interests, it was perceived as a large problem. Due to both legal and practical problems, EU fraud was hard to tackle. One important aspect was that the offence often comprised of transnational elements.[21] EU fraud was therefore seen as a Community interest, necessary to fight through criminal law harmonisation within the first pillar, i.e. the supranational level of the EU.[22] Without going into detail, *Corpus Juris* proposed to make the territory of all Member States into one judicial area with the purpose of investigating, prosecuting and punishing fraud against the EU budget.[23] *Corpus Juris* could thus be seen as a *mini criminal code*, including both definitions for some offences and provisions on criminal procedure.[24]

The proposal resulted in discussion throughout Europe. In the United Kingdom, in particular, the debate was vigorous and some perceived the *Corpus Juris* as an attack on their common law system.[25] The proposal proved too radical and *Corpus Juris* was never realised as such.[26] The Commission did not give up and launched a new proposal based on the *Corpus Juris* in 2001 on the protection of the Community's financial interests.[27] Still, that proposal did not manage to convince the Member States and it was not acted upon.[28] However, *Corpus Juris* is important in so far that it might have made the Member States more susceptible to the idea of mutual recognition as a way to avoid harmonisation of their national criminal law systems.

[20] V. Mitsilegas (2009) p. 67.
[21] J.R. Spencer, "The Corpus Juris Project and the Fight Against Budgetary Fraud" [1998] *The Cambridge Yearbook of European Legal Studies*, pp. 77-106, at p. 67.
[22] V. Mitsilegas (2009) p. 67.
[23] J.R. Spencer, "The Corpus Juris Project and the Fight Against Budgetary Fraud" [1998] *The Cambridge Yearbook of European Legal Studies*, pp. 77-106, at p. 84.
[24] V. Mitsilegas (2009) p. 67.
[25] J.R. Spencer, "Introduction" *European Criminal Procedures*, Cambridge University Press 2002, p 63.
[26] V. Mitsilegas (2009) p. 68.
[27] Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Community's financial interests, COM(2001) 272 final, OJ C 240, 28.8.2001, p. 125.
[28] V. Mitsilegas (2009) p. 68.

3 The Principle of Mutual Recognition

3.1 Introduction into the Criminal Law Cooperation

One must keep in mind the context in which the principle of mutual recognition was introduced as a means for criminal law cooperation in the Union: it was shortly after the bold proposal of *Corpus Juris* and it was during the United Kingdom's presidency in 1998. The introduction of the principle in the field of criminal law can be seen as a balancing act between the need to improve judicial cooperation in the area – the intergovernmental cooperation in the third pillar tended to be slow and cumbersome – and the need to calm Member States sceptical of further harmonisation of criminal law.[29] The principle of mutual recognition allowed, at least in theory, for enhanced judicial cooperation in criminal matters without trespassing the Member States' sovereignty in the area; the Member States did not need to change their criminal law systems in order to apply the principle. The safeguarding of national sovereignty as opposed to supranational harmonisation was one of the main arguments put forward in favour of the principle of mutual recognition, especially by the UK government.[30]

It was during the European Council Meeting in Tampere in 1999 that the European Council endorsed the principle of mutual recognition as "the *cornerstone* of judicial co-operation in [...] criminal matters within the Union" (emphasis added).[31] Not only should the principle be applicable to final decisions, but also to pre-trial orders. In addition, consideration should be given to fast track extradition procedure.[32]

The process of outlining the principle of mutual recognition continued with a Commission Communication in 2000.[33] The Commission pointed out that traditional judicial cooperation in criminal matters is based on the so-called *request-principle*,[34] i.e. one sovereign State requests another sovereign State and the latter decides whether to comply with the request or not. Since the request-system was perceived as both slow and cumbersome, borrowing the successful concept of mutual recognition from the Internal Market was advocated. It was explained that once a judge or other judicial authority has taken a certain decision in one Member State,

[29] V. Mitsilegas (2009) p. 116.
[30] S. Lavenex, "Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy", *Journal of European Public Policy* (2007), p. 762-779 at p. 766.
[31] Tampere Presidency Conclusion, 15-16 October 1999 no 33.
[32] Tampere Presidency Conclusion, 15-16 October 1999 no 35 & 36.
[33] Communication from the Commission to the Council and the European Parliament – Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final.
[34] Also called the *Cooperation principle*, see S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (2004), pp. 5-36, at p. 10.

that measure "would *automatically* be accepted in all other Member States, and have the same or at least similar effects" (emphasis added).[35] However tempting the transplantation of the principle from the creation of Internal Market to the criminal law sphere appeared, the Commission was aware that it might be "very tricky" looking into the details.[36]

Originally, the main priority for mutual recognition in criminal matters was freezing assets and evidence.[37] However, the terrorist attacks of September 11 2001 changed the focus to the need to surrender persons across borders and accordingly, the European Arrest Warrant was the first instrument to be adopted. The idea of EAW was not new but the speed with which it was adopted was undoubtedly a consequence of the terrorist attacks; the Union needed to show its ability to combat cross-border crime.[38]

3.2 Basic Function of Mutual Recognition in Criminal Law

The main objective of the principle of mutual recognition is to facilitate judicial cooperation in criminal matters in order to fight cross-border criminality.[39] Traditionally, judicial cooperation in the field of criminal law is based on the *request principle*.[40] The principle of mutual recognition is different from the request principle since it provides for a quasi-automatic request procedure with a minimum of formality.[41] The requested State is no longer allowed to refuse to cooperate on discretionary grounds but is restricted to refuse recognition in the cases provided for in the mutual recognition instruments.[42] Hence, "a decision taken by an authority in one State could be *accepted as such* in another State, even though a comparable authority may not even exist in that State, or could not take such a decision, or would have taken an entirely different decision in a comparable case."[43] The consequence of mutual recognition is that the requested State in principle loses some of it sovereignty with regard to the enforcement of criminal decisions on its territory.[44] To describe when a decision is having

[35] COM(2000) 495 final, p. 2.
[36] COM(2000) 495 final, p. 2.
[37] See Table by Order of Priority in Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, OJ C 12, 15.01.2001 pp. 10-22.
[38] S. Alagre & M. Leaf, "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant" 10 *European Law Journal* (2004/2), pp. 200-217, at pp. 201 f.
[39] S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (2004), pp. 5-36, at p. 5.
[40] See part 3.1 of the essay.
[41] V. Mitsilegas, "The Third Wave of Third Pillar Law: which Direction for EU Criminal Justice" *Queen Mary University of London, School of Law Legal Studies Research Paper* (2009/33), pp. 523-560, at p. 538.
[42] S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (2004), pp. 5-36, at p. 10.
[43] COM(2000) 495 final, p 4.
[44] S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (2004), pp. 5-36, at p. 10.

an effect outside the State in which it has been rendered, *extraterritoriality* is a term used.[45] Mutual recognition results in extraterritoriality since it requires States to recognise other States' norms, rules and standards on their own territory without reviewing them.[46] Hence, the principle of mutual recognition contributes to create a judicial space where judicial decisions in criminal matters no longer recognise jurisdictional territories.[47] This is interesting in relation to *Corpus Juris* since the aim of that initiative was to create a single judicial area. In principle, the same aim is sought with mutual recognition but with different means. Of course, *Corpus Juris* was restricted to EU fraud while mutual recognition concerns the entire criminal law cooperation.

3.3 Instruments

3.3.1 Mutual Recognition at all Stages of the Proceeding

Since the introduction of the principle of mutual recognition in the field of criminal law cooperation in the Union, ten instruments based on the principle have been adopted.[48] The aim of the principle is that mutual recognition "must be sought at *all stages of criminal proceedings*, before, during or after conviction."[49] (emphasis added) The different framework decisions adopted reflect the idea that mutual recognition should be applicable at all stages of criminal proceedings. In the subsequent part of the essay, first the instruments are categorised with respect to what stage of the proceeding they apply to. Then, in order to illustrate how mutual recognition works, a detailed description of the EAW is given. Furthermore, the EEW is given some additional attention since obtaining and admissibility of evidence provides an example of the problem this essay is focusing on.

3.3.2 During the Entire Proceeding

Several of the framework decisions on mutual recognition apply during the entire proceeding. A *European arrest warrant* may be issued both for the purpose of conducting a criminal prosecution and for executing a custodial sentence or detention order, the framework decision is thus applicable at all

[45] V. Mitsilegas (2009) pp. 118 f.
[46] K. Nicolaidis & G. Shaffer, "Transnational Mutual Recognition Regimes: Governance without Global Government"68 *Law and Contemporary Problems* (2005), pp. 263-317, at p. 268.
[47] E. Guild, "Crime and EU's Constitutional Future in an Area of Freedom, Security and Justice" 10 *European Law Journal* (2004/2), pp. 218-234, at p. 226. For further analysis of *extraterritoriality* see part 5.2 of the essay.
[48] The framework decisions are listed and described in the subsequent part of the essay.
[49] Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, OJ C 12, 15.01.2001 pp. 10-22.
[49] COM(2000) 495 final, p. 11.

stages of the proceeding.[50] The purpose of the framework decision on *freezing property and evidence* is to regulate under what conditions a Member States shall recognise and execute, in its territory, freezing orders issued in another Member State in the framework of a criminal proceeding."[51] Hence, it is applicable during the entire proceeding. In the framework decision on *taking account of convictions in one Member State in a new criminal proceeding in a another Member State,* mutual recognition is applied at the pre-trial stage, at the trial stag and at the time of execution of the conviction in the new proceeding. [52] The framework decision does not aim at execution in one Member State of judicial decisions taken in another Member State, but rather at enabling the consequences of one conviction to be attached in the course of a new criminal proceeding.[53] The *European evidence warrant* is applicable during the whole proceeding; an EEW may be issued for evidence needed in a criminal proceeding already brought by, or to be brought before, a judicial authority. [54]

3.3.3 Pre-trial

One of the framework decisions is applicable only at the pre-trial stage. The framework decision on mutual recognition of *decisions on supervision measures instead of provisional detention* aims to enable a person subjected to criminal proceedings in a foreign Member State to be supervised by authorities of its home Member State of resident while awaiting trial. The objective is to ensure that non-residents are not kept in custody in cases where residents would not be.[55] The instrument is thus applicable to situations pre-trial, i.e. at the beginning of the proceeding.

3.3.4 Post-trial

A number of the framework decisions are applicable only at the post-trail stage. The purpose of the framework decision on *mutual recognition of*

[50] Article 1(1) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1-18.
[51] Article 1 & Preamble 2 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2005, pp. 45-55.
[52] Articles 2 & 3(2) Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220, 15.8.2008, pp. 32-34.
[53] Sixth recital FWD 2008/675/JHA.
[54] Article 5 Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350, 30.12.2008, pp. 72-92.
[55] Third and fifth recital Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294, 11.11.2009 pp. 20-40.

financial penalties is to facilitate enforcement of such penalties. The framework decision is applicable to final decisions regarding financial penalties, i.e. it is applicable at the end of the proceeding.[56] Thus a fine imposed by a court in one Member State will be enforced through the competent authorities in another Member State. The framework decision on *mutual recognition of confiscation orders* regulates when a Member State shall recognise and execute a confiscation order issued by a court competent in criminal matters. According to the instrument, a confiscation order is defined as a final penalty or measure imposed by a court following proceedings in relation to a criminal offence.[57] Hence, mutual recognition is applicable at the end of the proceedings. Regarding the framework decision on *mutual recognition of custodial sentences and measures involving depravation of liberty*, Member States are to recognise final decisions in criminal matters and to enforce their sentences; hence, it applies at the end of the proceedings. The purpose of the instrument is to facilitate the social rehabilitation of the sentenced person. [58] The framework decision on *mutual recognition of probation decisions is a complementary measure* to the above mentioned instrument since it applies to non-custodial sentences. This framework decision, as well as the one on depravation on liberty, aims to facilitate social rehabilitation of sentenced persons. This is done by applying mutual recognition to probation decisions and alternative sanctions contained in a criminal judgment. [59] Hence, the instrument applies after trial when the sentence is served. The framework decision on *procedural rights with regard to decisions rendered in absentia* sets the conditions under which recognition and execution of such a decision should not be refused. Hence, it regulates the situations when a judgment following a trial at which the accused was absent should not be recognised and executed; the framework decision is applicable at the end of a proceeding. The aim of the framework decision is to achieve consistency with regard to how the different instruments on mutual recognition deal with judgments rendered in absentia by amending the already existing *in absentia* provisions in the above mentioned framework decisions. [60] This framework decision is

[56] Articles 1, 5 & second recital Council Framework Decision 2005/214/JAI of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22.3.2005, pp. 16-30.

[57] Articles 1(1) & 2(c) Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, pp. 59-78.

[58] Articles 1(a) & 3(1) Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327, 5.12.2008, pp. 27-44.

[59] Articles 1 (1), 2(1) & third recital Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, 16.12.2008, pp. 102-122.

[60] Sixth recital Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, pp. 24-36. For *in absentia* provisions see also part 4.1.4 of the essay.

different from the other instruments in the sense that it is more of a procedural safeguard; it is related to the right to defence.[61]

3.3.5 The European Arrest Warrant

The preamble of the EAW states that the objective for the Union to become an Area of Freedom, Security and Justice leads to the replacement of traditional extradition between Member States with a system of surrender between judicial authorities. Traditional judicial cooperation between the Member States "should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions."[62] Hence, the principle of mutual recognition should provide free movement of judicial decisions and be applicable during the whole criminal proceeding. During the execution of an EAW, the role of the authorities must be limited to practical and administrative assistance.[63] The mechanism of the EAW, i.e. mutual recognition, is founded on a high level of confidence between the Member States.[64]

"The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."[65] Hence, the EWA is a *national* judicial decision that must be recognised and executed by the requested State.[66] For the list of offences for which the requirement of double criminality has been abolished, it is the law of the issuing State alone that decides whether a person should be surrendered.[67] In this case, it does not matter if the executing State has criminalised the act for which the person is surrendered. The procedure is formalised in so far as the Warrant takes the form of standardised certificate.[68] With the purpose of making the process as automated and fast as possible, certain time limits and restricted grounds for refusal of recognition are set out in the framework decision.[69] With a minimum of formality, a judicial authority in one Member State must give effect to a decision taken by a judicial authority in another Member State and thus surrender a suspected or convicted person, ideally without looking behind the issuing certificate.[70] It is the fact that a State will surrender a person without any further review of the grounds for extradition that will make mutual recognition work; if the warrant would be

[61] For more discussion about the connection between the right to defense and judgments rendered *in absentia* see part 4.1.2, *The Krombach case*, and 4.1.4 of the essay.
[62] Fifth recital FWD 2002/584/JHA.
[63] Ninth recital FWD 2002/584/JHA.
[64] Tenth recital FWD 2002/584/JHA.
[65] Article 1(1) FWD 2002/584/JHA.
[66] Mitsilegas (2009) pp. 120 f.
[67] Article 2 (2) FWD 2002/584/JHA.
[68] Article 8(1) FWD 2002/584/JHA.
[69] Articles 3, 4 & 17 FWD 2002/584/JHA.
[70] Mitsilegas (2009) p. 121.

reviewed with regard to its substance, a Member State would not recognise the other Member States decision as its own.[71]

3.3.6 The European Evidence Warrant

Although the first proposal on the European Evidence Warrant was presented in 2003 and political agreement reach in 2006, it was not adopted until December 2008.[72] When finally adopted, the EEW was of very limited scope; it is as a general rule only applicable to pieces of evidence that already exists.[73] The difficulties in reaching an agreement and the limited scope of the EEW illustrate the sensitivity regarding rules on evidence. The sensitivity is due to the fact that the Member States regulate the obtaining and admissibility of evidence very differently.[74] Less than a year after the adoption of the EEW, the Commission presented a Green Paper to examine the need for a more ambitious instrument on mutual recognition of evidence.[75] The aim is to examine whether all types of evidence should be included in the regime of mutual recognition.[76]

Since some criminal law systems condition the admissibility of evidence upon the way they are obtained, mutual recognition of evidence is a complicated area.[77] The EEW should only be issued for evidence that could be obtained according to the law of the issuing State. However, it is up to the issuing State to ensure that this condition is satisfied and it thus not a ground for non-recognition.[78] The fact that the requested measure is not regulated in the executing State is not a direct ground for refusal. Only if it is not possible to achieve the same result with other legal measures, is the executing State allowed to refuse the request.[79] In order to ensure the admissibility of the evidence obtained, the executing State is obliged to comply with the formalities and procedures indicated by the issuing State provided that they are not contrary to fundamental principles of law in the executing State.[80] This is a deviation from the strict application of mutual

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[71] For a discussion on how this quasi-automatic surrender corresponds to the Member States human rights obligations see part 4.1.5 of the essay, *The Mantello case*.
[72] R. Belfiore, "Movement of Evidence in the EU: The Present Scenario and Possible Future Developments" *European Journal of Crime, Criminal Law and Criminal Justice* (2009/17), pp.1-22, at pp. 3 f.
[73] Article 4 & seventh recital FWD 2008/978/JHA.
[74] S. Allegrezza, "Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility" *Zeitschrift für Internationale Strafrechtsdogmatik* (2010/9), pp. 569-579, at pp. 570 & 579.
[75] Green Paper on Obtaining Evidence in Criminal Matters from one member Sate to Another and securing its admissibility, COM(2009) 624 final, Brussels 11 November 2009.
[76] COM(2009) 624 final, p 5.
[77] S. Allegrezza, "Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility" *Zeitschrift für Internationale Strafrechtsdogmatik* (2010/9), pp. 569-579, at pp. 570 & 579.
[78] Article 7(b) & eleventh recital FWD 2009/978/JHA.
[79] Article 11(3) & 13(1)(c) FWD 2009/978/JHA, see also L. Bachmaier Winter, "European Investigation Order for Obtaining Evidence in Criminal Proceedings" *Zeitschrift für Internationale Strafrechtsdogmatik* (2010/9), pp. 580-589, p. 583.
[80] Article 12 FWD 2009/978/JHA.

recognition, which requires the issuing State to recognise the executing State's performance of the request according to its national rules. Hence, *locus regit actum* is abandoned in favour of *forum regit actum*.[81]

Mutual recognition is especially problematic for the countries that have strict rules on the admissibility of evidence. For example, in England has a sharp line is drawn between the investigative phase and trial stage of the proceeding; with few exceptions, investigative elements should not be used in trial. The coherence of such as system would suffer if evidence collected abroad, outside of trial were to be mutually recognised.[82]

3.4 Origin of the Principle of Mutual Recogntion – The Internal Market

3.4.1 Cassis de Dijon

As already explained, the principle of mutual recognition is a concept borrowed from the Internal Market and *Cassis de Dijon*[83] is the leading case in that context. The essence of the case is that products, which are put on the market lawfully in one Member State, shall, as a main rule, be allowed to circulate freely on the Internal Market. Hence, different regulatory levels in different Member States shall not hinder the free movement of products.

The facts of the case were that Cassis de Dijon, a fruit liqueur with an alcohol content of between 15 and 20 %, was lawfully put on the market in France. The plaintiff in the main action wanted to import the liqueur to Germany. However, German law lay down a minimum requirement of an alcohol content of 25 % in order to market something as a fruit liqueur and thus prevented Cassis de Dijon to be marked as fruit liqueur in Germany.

First, the ECJ pointed out that since there are no common rules relating to production and marketing of alcohol, it is for the Member States to regulate these issues on their own territory. Furthermore, "obstacles to free movement within the Community resulting from disparities between national laws [...] may be recognized as being necessary in order to satisfy mandatory requirement relating" among other things to the protection of public health. Hence, Member States might be allowed to apply national requirements to products originating from other Member States if they are *necessary* to protect inter alia public health. The court found that the requirement for minimum alcohol content did not serve a public health

[81] S. Allegrezza, "Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility" *Zeitschrift für Internationale Strafrechtsdogmatik* (2010/9), pp. 569-579, at p. 578.
[82] S. Allegrezza, "Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility" *Zeitschrift für Internationale Strafrechtsdogmatik* (2010/9), pp. 569-579, at p. 579.
[83] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Judgment of 20 February 1979.

purpose. Thus, the free movement of goods should take precedence. To conclude, ECJ found that "there is no valid reason why, provided that they have been lawfully produced and marked in one of the Member States, alcoholic beverages should not be introduced into any other Member State."

3.4.2 Liberalisation

In the context of the Internal Market, the principle of mutual recognition essentially means that a person can bring with her advantageous standards of her home Member State into another Member State and thus does not have to comply fully with double standards.[84] Hence, the principle of mutual recognition is supposed to facilitate economic cross-border transactions between social actors in spite of varying regulatory standards; it is a measure that contributes to the process of *liberalisation*. In other words, the right of the individual taking part in trade and consumption is enhanced while the regulatory power of the Member States is reduced.[85] For example, if a beer brewed in the Netherlands meets the Dutch requirements for beer, it should be allowed on the German market although it might not meet the German requirements for beer.[86] Applying mutual recognition thus puts the Dutch beer brewery in a better position since it does not have to comply with German standards and reduces the scope of the German legislator. In addition, the consumer on the German market has a wider variety of beer to choose from. Hence, the producer and the consumer are less restricted by the State.

3.4.3 Harmonisation

In the context of the Internal Market, the principle of mutual recognition usually goes hand in hand with harmonisation. To impose mutual recognition duties on Member States is usually not permissible without some form of minimum harmonisation of standards, providing for a sufficient regulatory level with regards to security and public well-being. The more the Union, in order to establish the Internal Market, withdraws regulatory power from the Member States, depriving them from their ability to provide for security and public well-being themselves, the more the Union legislator must guarantee a sufficient level of protection at Union level. Although the establishment of the Internal Market is an aim of liberalisation, it comes with responsibilities and duties. The principle of mutual recognition in this context thus has two purposes: to facilitate the free movement of goods, services, people, capital and to provide for an

[84] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at p. 409.
[85] S. Lavenex, "Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy" *Journal of European Public Policy* (2007/14), pp. 762-779, at pp. 764 f.
[86] Case 178/84 *Commission v. Germany*, Judgment of 12 March 1987. (A. Klip (2009) p. 93)

adequate level of protection with regards public interests.[87] The pace of harmonisation after *Cassis de Dijon* has increased since the Member States seem to prefer to regulate a minimum standard of protection rather than to accept any, unspecified national standard.

3.4.4 Limitations

Although the principle of mutual recognition suggests that one Member State shall recognise rules and decisions of another Member State without further checks and controls, the principle is subjected to important *limitations*.[88] How far-reaching the limitations are, depend on whether mutual recognition is based on primary or secondary legislation.

In the case mutual recognition is based on primary legislation, as in *Cassis de Dijon*, it is directly applicable; an individual can invoke it referring directly to the Treaties and the Member States must justify deviations from it.[89] As ECJ pointed out in *Cassis de Dijon*, obstacles to free movement within the Union resulting from different regulatory standards must be accepted in so far as those rules may be recognised as necessary in order to satisfy a sufficient degree of protection of *public interests*.[90] Hence, refusal of mutual recognition may be justified under certain conditions. If the regulatory standards of one Member State are not sufficient to protect a public interest recognised by the Treaties, another Member States is not obliged to recognise those standards. For example, in the beer case mentioned above, the ECJ held that obstacles to the free movement of goods resulting from different regulatory standards in the Member States must be accepted if they are necessary in order to protect inter alia consumer protection.[91] Hence, consumer protection is a public interest which limits the application of mutual recognition.

Mutual recognition under primary law is not only limited with reference to the public interest but is also to a condition of *functional equivalence*. This means that the regulatory standards of the Member State of origin must ensure a comparable level of protection to the standards of the Member State of destination in order for the latter to be obliged to recognise them; if the difference in level of protection becomes too big, mutual recognition may be refused.[92]

In case mutual recognition is based on secondary legislation, the Union legislator may provide for *automatic recognition* without leaving

[87] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at pp. 413 f.
[88] S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (20049, pp 5-36, at p. 18.
[89] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at p. 410.
[90] Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Judgment of 20 February 1979, part 8.
[91] Case 178/84 *Commission v. Germany*, Judgment of 12 March 1987 § 28.
[92] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at p. 412.

any discretion for the Member States to refuse it under certain conditions. [93] However, as mentioned above, in the context of the Internal Market mutual recognition is linked to harmonisation and how conditional or automatic mutual recognition is, generally corresponds to the level of harmonisation; the more harmonisation the less Member State discretion for refusal and vice versa.[94] For example, in a case concerning recognition of higher-education diplomas, the ECJ held that it was the aim of the relevant directive to *avoid* automatic recognition of diplomas giving access to health professions in the absence of coordination of the provisions on the exercise of such professions. The host State is thus allowed to require an adaption period or aptitude test before recognising the diploma.[95] Hence, the lack of harmonisation of the exercise of health professions allows the Member States to have additional requirements before recognising those diplomas.

3.5 Mutual Recognition in Criminal Law

3.5.1 Liberalisation

As mentioned, the introduction of the principle of mutual recognition in the criminal law field was justified by reference to its successful contribution to the creation of the Internal Market. However, the way the principle works with regards to criminal law matters is quite different from how it works in the Internal Market context. While the principle of mutual recognition in the context of the Internal Market facilitates freedoms for the individual, in the field of criminal law cooperation it does the opposite; instead of contributing to liberalisation, the principle benefits the actors of the State.[96] In the AFSJ the principle is to achieve free movement of judicial decisions, i.e. State powers are to be freed from their territorial restrictions. Typically, applying the principle of mutual recognition in the AFSJ, individuals are to be subjected to disadvantageous or coercive measures of a foreign State and the principle thus threatens freedom.[97]

3.5.2 Harmonisation

Whereas in the context of the Internal Market the principle of mutual recognition is used as a complement to *harmonisation*, in the AFSJ the

[93] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at p. 414.
[94] S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (2004), pp. 5-36, at pp. 18 ff.
[95] Case C-39/07 *Commission v. Spain*, Judgment of 8 May 2008 § 39.
[96] S. Lavenex, "Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy" *Journal of European Public Policy* (2007/14), pp. 762-779, at p. 764.
[97] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at p. 409.

principle is often viewed as an *alternative* to harmonisation. [98] With regards to harmonisation of substantive criminal law, there are Union measures concerning the definition of some crimes. The offences associated with participating in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, corruption, fraud against the EU budget, money laundering, counterfeiting currency, computer-related crime, environmental crime, facilitation of unauthorised entry or residence, racism and xenophobia, drug trafficking and forgery of means of payment have all been defined in joint actions, framework decisions or conventions.[99] Hence, there exist some harmonisation with regards to the definitions of certain offences. However, the principle of mutual recognition applies to a very wide range of judicial decisions and for the most part there is no underlying harmonisation.[100] Harmonisation of substantive standards is mainly related to the abolition of double criminality for certain offences.

In addition to the lack of harmonisation of substantive criminal law, there is a lack of harmonisation of procedural criminal law, i.e. there are few common procedural standards at Union level. However, it can be argued that the fact that all Member States are signatories to the ECHR provides some form of procedural harmonisation.[101] Why the ECHR does not provide a sufficient level of procedural harmonisation will be discussed in part five of the essay.

An interesting case regarding the relation between mutual recognition and harmonisation is *Advocaten voor de Wereld.*[102] The reference for preliminary ruling concerned the validity of the EAW. A Belgian court asked, inter alia, whether the list of offences, for which the requirement of double criminality was abolished, was compatible with article 6 TEFU.[103] Advocaten voor de Wereld claimed that the abolition of double criminality infringed the principle of equality and non-discrimination and the principle of legality in criminal matters.[104] It was argued that the offences on the list were not accompanied by their legal definition but constituted very vaguely defined categories.[105] The ECJ started by stating that the Union is founded on the rule of law and the respect for fundamental rights as guaranteed by the ECHR. As a result, the Union acts should be reviewed with regards to the general principle of laws, which, commonly

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[98] The concept of harmonisation in the field of criminal law often refers only to substantive provisions, however sometimes it also includes procedural criminal law see M. Fichera, "The European Arrest Warrant and the Sovereign State: A Marriage in Convenience?" 15 *European Law Journal* (2009/1), pp. 70-97, at p. 74.

[99] S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (2004), pp. 5-36, at p. 29.

[100] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at p.419.

[101] S. Allegrezza, "Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility" *Zeitschrift für Internationale Strafrechtsdogmatik* (2010/9), pp. 569-579, at pp. 570 & 575.

[102] Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Judgment of 3 May 2007.

[103] *Advocaten voor de Wereld* § 16.

[104] *Advocaten voor de Wereld* § 44.

[105] *Advocaten voor de Wereld* § 48.

accepted, include the principle of equality and non-discrimination and the principle of legality in criminal law.[106] The ECJ found that the EAW did neither infringe the principle of legality nor the principle of equality and non-discrimination.[107] Furthermore, the Court noted "the fact that the lack of precision in the definition of the categories of offences in question risks giving rise to disparate implementation of the Framework Decision [...] suffice to point out that it is not the objective of the Framework Decision to harmonise substantive criminal law of the Member States and that *nothing* [...] *makes the application of the [EAW] conditional on harmonisation of the criminal laws of the Member States*."[108] (emphasis added) If one generalises this conclusion, the Court states that there is nothing which makes the application of mutual recognition conditional on harmonisation of the Member States criminal law systems.

3.5.3 Limitations

The principle of mutual recognition is not absolute and unlimited in the criminal law context; there are several grounds for refusal in the different instruments. However, none of them are explicitly linked to human rights, i.e. a human right defect in the judicial judgment to be recognised does not give the requested State the right to refuse recognition.[109] Furthermore, there is no general criterion for functional equivalency. The Commission has even stated that a decision taken in one State could be *accepted as such*, i.e. recognised, in another State, even though that State would have taken an entirely different decision in a comparable case.[110]

3.6 Mutual trust

3.6.1 The Concept of Mutual Trust

While the principle of mutual recognition in the context of the Internal Market is justified by accompanying harmonisation, in the field of criminal law cooperation it is based on the concept of *mutual trust*; since the Member States trust each other's criminal justice systems, they are ready to accept the outcome of them. In the Programme of measures to implement mutual recognition, it is stated that mutual recognition in criminal matters presupposes mutual trust and that such trust is based on the Member States' "shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.[111] Hence, given

[106] *Advocaten voor de Wereld* §§ 45 & 46.
[107] *Advocaten voor de Wereld* § 60.
[108] *Advocaten voor de Wereld* § 59.
[109] See part 4.1.4 of the essay.
[110] COM(2000) 495 final, p 4.
[111] Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, OJ C 12, 15.01.2001, pp. 10-22, at p. 10.

the shared fundamental values of the Member States, mutual trust is assumed to exist without any further empirical evidence.

Mutual trust is merited in spite of both substantive and procedural differences. With regards to substantive differences, the abolition of double criminality in EAW is an outflow of the principle of mutual recognition; Member States recognise the political choice to criminalise certain acts in other Member States regardless of whether they have corresponding offences.[112] However, the issues concerning mutual recognition of substantive provisions are outside the scope of this essay. With regards to procedural differences, the fact that a Member State with generous individual guarantees has to recognise decisions taken in a State with a less liberal procedure is a consequence of mutual recognition.[113]

3.6.2 Mutual Trust in Reality?

In theory, mutual trust is a very appealing concept since it allows for mutual recognition, which requires a minimum of change at a national level, while still allowing for far reaching cooperation at an international level. However, in practice, the concept is problematic; the question is if a sufficient degree of mutual trust even exists. The implementation of the EAW showed that it might have been slightly optimistic to presuppose mutual trust; debates arose in several Member States on the subject of deficiencies in procedural safeguards in other Member States. As a result of the lack of mutual trust, many Member States failed to implement the EAW in time.[114] Mutual trust is an issue, not only when Union legislation is implemented but also when the implemented national legislation is applied. Hence, the application of mutual recognition implies that the executing State finds the requesting State's criminal justice system trustworthy.[115]

Although mutual trust is a convenient concept it does not necessarily reflect the reality, i.e. to some extent the Member States have reasons not to trust each other. There are still some Member States with criminal justice systems that, especially during the investigative phase, put suspected persons at grave risk. Areas of particular concern are the lack of sufficient legal advice, legal representation, interpretation and oppressive police practices both with regards to suspects and witnesses.[116]

Since mutual trust lacks legal significance it is hard to pin point the grounds on which it is based among the Member States.[117] One

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[112] A. Weyembergh, "Approximation of Criminal Law, the Constitutional Treaty and the Hague Programme" *Common Market Law Review* (2005/42), pp. 1567-1597, at p. 1576.
[113] A. Weyembergh, "Approximation of Criminal Law, the Constitutional Treaty and the Hague Programme" *Common Market Law Review* (2005/42), pp. 1567-1597, at p. 1576.
[114] S. Aleger, "Mutual Trust – Lifting the Mask" *Mutual Trust in the European Criminal Area* (2005), pp. 41-45, at pp. 41 f.
[115] E. Pitto, "Mutual Trust and Enlargement" *Mutual Trust in the European Criminal Area* (2005), pp. 47-68, at p. 49.
[116] J.R. Spencer, "Fair Trials and the European Arrest Warrant" [2010] *Cambridge Law Journal*, pp. 225-228, at p. 227.
[117] E. Pitto, "Mutual Trust and Enlargement" *Mutual Trust in the European Criminal Area* (2005), pp. 47-68, at p. 52.

assumption underlying the application of mutual recognition is that all Member States meet the standards of human rights in the ECHR.[118] Hence, mutual trust is based on the procedural safeguards provided by the ECHR and therefore supports mutual recognition. However, the question is whether the ECHR is sufficient in order to justify mutual recognition in criminal matters.

[118] S. Alagre & M. Leaf, " Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant" 10 *European Law Journal* (2004/2), pp. 200-217, at p. 201.

4 Procedural Safeguard

4.1 The Union

4.1.1 Non-discrimination

Also outside the EU criminal law cooperation, individual rights in connection with criminal proceeding have been recognised; for quite some time, the ECJ has acknowledged that EU citizens have certain procedural rights in criminal proceedings in the context of the *Internal Market*. If incriminated while exercising their freedoms, EU nationals are to be subjected to treatment equal to that of nationals, unless there are justifiable reasons for unequal treatment.[119] Hence, the procedural rights in this context stem from the non-discrimination principle: equal treatment based on nationality should be guaranteed. The ECJ has established that the principle applies to criminal proceedings that have sufficient connection to Internal Market rights.[120] However, since the focus of this essay is to what extent the treatment in *different* criminal justice systems when applying mutual recognition are compatible in order to provide a fair trial and not to what extent individuals are treated equaly in the *same* criminal justice system, procedural safeguards guaranteed by the non-discrimination principle fall outside its scope

4.1.2 The Krombach case

Although the *Krombach case* [121] is concerned with a civil claim connected to a criminal judgment, it shows that the ECJ is willing to accept human right defects with regards to procedural safeguards as a ground to refuse recognition of a *civil judgement*.[122] Following the death of a French girl in Germany, the German national Mr Krombach was subjected to a preliminary investigation in Germany, which was discontinued but later reopened in France. Since Mr Krombach chose not to appear in person during the trial, the French court applied a provision to prevent a defence counsel from appearing on behalf of him and reached its decision without hearing neither him nor his defence counsel. In the judgments, Mr Krombach was sentenced to 15 years in prison and to pay compensation to the dead girl's father. The father sought enforcement of the civil judgment, i.e. the compensation, in Germany. This lead a German court to ask the ECJ whether, in relation to the *public policy* clause in the Brussels

[119] See for example Case 137/84 *Mustasch*, Judgment of 11 July 1985 and Case C-29/95 *Pastoors*, Judgment of 23 January 1997.
[120] S. Peers, "Criminal Suspects' Rights and EU Law" 5 *ERA Forum* (2004/4), PP. 520-532, at p. 520.
[121] Case C-7/98 *Dieter Krombach v André Bamberski*, Judgment of 28 March 2000.
[122] The entire case, including the criminal proceedings, was also tried by the ECtHR see *Krombach v France*, Judgment of 13 February 2001.

Convention,[123] a court of the State where enforcement is sought can take into account that the court of the State where the decision was taken, refused to allow the defendant to have his defence represented unless he appeared in person.

First, the ECJ reminded that, according to the Brussels Convention, Member States are not allowed to review foreign civil judgments with regard to their substance. Furthermore, a discrepancy between the rule actually applied and the rule that would have been applied in the State where enforcement is sought, is not a ground for refusal. However, refusal of recognition is allowed, with reference to public policy, if a foreign civil judgment would vary to an unacceptable degree compared to the legal order of the State where enforcement is sought inasmuch as to infringe *fundamental principles*. In order not to review the judgment in substance, the infringement has to constitute a *manifest breach* of a rule of law essential in the enforcing State or of a right recognised as being fundamental within that legal order.

The ECJ moved on to the specific question of the case: *the right to be defended*. It stated that the right to defence forms a prominent part of a *fair trial* and is one of the fundamental rights derived from the constitutional traditions common to the Member States. The ECJ held that under the ECtHR case law the refusal to hear the defence of an absent accused person constitutes a manifest breach of fundamental rights. In addition, although the Brussels Convention is intended to simplify the formalities governing the reciprocal (mutual) recognition and enforcement of judgments, it is not acceptable to do so by undermining the right to a fair hearing. The public policy ground for refusal of recognition is only acceptable in exceptional cases where the defendant has not been sufficiently protected against manifest breaches of his right to defend himself before a court as recognised by the ECHR. The ECJ reached the conclusion that the court of the State where enforcement is sought may, in relation to the public policy clause, take account of the fact that the court in the State where the decision was made refused to allow the person to have his defence presented unless he was present.

4.1.3 Recognising the Need for Procedural Safeguards at Union Level

In the *Krombach case*, the ECJ recognised that manifest breaches of the right to a fair trial as set out in the ECHR might amount to a ground to refuse recognition of a civil judgment. However, for quite some time specific procedural safeguards at Union level with regard to criminal proceedings have been considered.

Already at Tampere, when introducing the principle of mutual recognition in criminal law cooperation, the Council recognised that enhanced mutual recognition should be accompanied by the necessary

[123] See Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

approximation[124] of legislation to facilitate cooperation and *judicial protection of individual rights*. Furthermore, that work should be launched on the aspects of procedural law for which *common minimum standards* were considered necessary to facilitate mutual recognition.[125] In the subsequent Programme of measures to implement the principle of mutual recognition, the Council and the Commission identified a number of parameters, which would determine the effectiveness of mutual recognition. Two of these were "mechanisms for safeguarding the rights of [...] suspects" and "the definition of minimum common standards necessary to facilitate application of mutual recognition".[126] In a Communication on mutual recognition, the Commission stated that not only must it be ensured that the treatment of suspects and the rights of the defence do not suffer from the implementation of mutual recognition in criminal matters, but that procedural safeguards would be improved through the process. Although, the ECHR would remain the *cornerstone* for any thoughts in the area, some aspects of procedural law would have to be spelled out in more detail. The Commission interpreted the call for common minimum standards in Tampere as acknowledging, "that mutual recognition cannot entirely replace approximation of law, but that the two should go hand in hand."[127]

In order to realise the Union's aspirations to protect individual rights in criminal proceedings, a Green Paper on Procedural safeguards was presented in 2003.[128] It was desirable to have certain common minimum standards throughout the Union in order for judicial authorities of the Member States to have confidence in each others' judicial systems.[129] Since all the Member States already are signatories to the ECHR, the mechanism for achieving mutual trust was already in place according to the Commission. The next step was to develop tools for enhancing visibility and efficiency for the standards at Union level in order to ensure that the rights were not *theoretical and illusory* but *practical and effective.*

In response to the Green Paper, a Proposal for a framework decision on Procedural Rights was presented in 2004.[130] The aim of the Proposal was to offer, "an *equivalent level of protection* to suspects and defendants throughout the European Union" (emphasis added) and thus "facilitate the application of the principle of mutual recognition."[131] The intention was not to duplicate the ECHR, but to promote a consistent standard of compliance among the Member States.[132] The Proposal highlighted some of the procedural rights perceived as basic, many of which

[124] *Approximation* is another term to describe harmonization see A. Klip (2009) p. 31.
[125] Tampere Presidency Conclusion, 15-16 October 1999 no 33, 37.
[126] Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, OJ C 12, 15.1.2001, pp.10-22, at pp. 11 f.
[127] Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final, Brussels 26 July 2000, p 16.
[128] Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, Brussels 19 February 2003.
[129] COM(2003) 75 final p 4.
[130] Proposal for a Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union, COM(2004) 328 final, Brussels 28 of April 2004.
[131] COM(2004) 328 final, seventh recital.
[132] COM(2004) 328 final, ninth recital.

already exist in the criminal justice systems of the Member States.[133] So far, the Member States had complied with their fair trial obligations, deriving from the ECHR, on a national level, which had led to discrepancies in the levels of safeguards in the Member States. The Commission stated that research and "case law of the ECtHR, show that the ECHR is implemented to very differing standards in the Union and that there are many violations of the ECHR. Those divergences prejudice a common protection of procedural rights within the Union, jeopardize mutual trust and affect the smooth operation of the mutual recognition principle."[134] At the first stage, common minimums standards were proposed in the areas of: access to legal advice, both before the trial and at trial; access to free interpretation and translation; ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention; the right to communicate, inter alia, with consular authorities in the case of foreign suspects; and notifying suspected persons of their rights ("Letter of Rights"). These rights were considered particularly important in the context of mutual recognition since they have a transnational element.[135] The Proposal was only intended as a first step in achieving common minimum standards; more measures were envisaged during the following five years.[136]

However, the proposal was never adopted. Neither was the much lighter counter proposal that was set out several years later. The main reason for the failure of the initiative was the hard opposition from some of the Member States, namely UK, the Czech Republic, Ireland, Malta and Slovakia. They considered that that the protection of procedural rights provided by the ECHR was sufficient, i.e. there was no need for action at Union level.[137] It is not surprising that the UK opposed the Proposal, considering their opposition of the *Corpus Juris* and the fact that they launched mutual recognition as an alternative to harmonisation.

During the Swedish presidency in 2009, the need for a set of procedural safeguards at Union level was once again on the table; a Roadmap[138] set out to foster the right to a fair trial in criminal proceedings across the Union was presented and later, a Resolution on the same subject was adopted.[139] In the Resolution, once again it was pointed out that the ECHR is the common basis for procedural safeguards in the Union.[140] Yet, there is room for further action at EU level in order to ensure full implementation of, and respect for, the ECHR and, where appropriate, to ensure consistent application of existing standards and even to raise them.[141]

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[133] COM(2004) 328 final, eleventh recital.
[134] COM(2004) 328 final, twenty-second recital.
[135] COM(2004) 328 final, twenty-fourth recital.
[136] COM(2004) 328 final, twenty-fifth recital.
[137] M. Jimeno-Bulnes, "Towards Common Standards on Rights of Suspects and Accused Persons in Criminal Proceedings in the EU?" *Liberty and Security and Security and Europe/Center for European Policy Studies* (2010), pp. 1-20, at p. 4.
[138] Presidency of the Council of the EU, Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings, Brussels 1of July 2009.
[139] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 4.12.2009 , pp 1-3.
[140] First recital Resolution on procedural rights.
[141] Second recital Resolution on procedural rights.

The proposed action concerns measures of: translation and interpretation;[142] information of rights and information about the charges; legal advice and legal aid; communication with relatives, employers and consular authorities; special safeguards for suspected and accused persons who are vulnerable and; a green paper on pre-trial detention.[143] The list is thus quite similar to the one presented in the Proposal on procedural safeguards in 2004.

The Council Conclusion of the Swedish presidency included the so-called *Stockholm Programme*, which sets out the priorities in the AFSJ in the years 2010-2014.[144] The challenge foreseen "is to ensure respect for fundamental rights and freedoms [...] while guaranteeing security" because "it is of paramount importance that law enforcement measures and measures to safeguard individual rights [...] are coherent and mutually reinforcing."[145] "The [AFSJ] must above all be a single area in which fundamental rights are protected", the "rights set out in the [ECHR] are core values" which "must be preserved beyond national borders."[146]In order to realise the Stockholm Programme, an Action Plan[147] was adopted in April this year (2010). The Action Plan states that "the European judicial area [...] [is] built on the cornerstone principle of mutual recognition", which "can only function effectively on the basis of mutual trust" and "mutual trust requires minimum standards."[148] Hence, according to the Commission minimum standards, for example common procedural safeguards,[149] are necessary in order to achieve mutual trust.

The new strategy at EU level is to proceed separately with procedural rights, starting with regulation of the procedural rights where agreement already exists between the Member States.[150] The aim is that this *step by step* approach should result in a comprehensive package of procedural rights over the next few years.[151] The first procedural rights to be dealt with were *the right to translation and interpretation*.[152] They were adopted in the form of a directive 8 of October this year (2010). The next step foreseen is to adopt a directive on the *right to information* in criminal proceedings. [153]

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[142] The Resolution is prior to the adoption of the Directive on the Translation and Interpretation, see not 153.
[143] Annex Resolution on procedural rights.
[144] Conclusion of the European Council 10-11 December 2009, (EUCO 6/09) Brussels 11 of December 2009.
[145] Stockholm programme point 26.
[146] Stockholm programme point 27.
[147] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, Delivering an Area of Freedom, Security and Justice for Europe's Citizens, Action Plan implementing the Stockholm Programme, COM(2010) 171 final, Brussels 20 April 2010.
[148] Action Plan, point 4 p 4.
[149] Action Plan, point 8 p 8.
[150] M. Jimeno-Bulnes, "Towards Common Standards on Rights of Suspects and Accused Persons in Criminal Proceedings in the EU?" *Liberty and Security and Security and Europe/Center for European Policy Studies* (2010), pp. 1-20, at p. 4.
[151] Proposal for a Directive of the European Parliament and of the Council on the Right to Information in Criminal Proceedings, COM(2010) 392 final, 20.7.2010, p. 2.
[152] Proposal for a Council Framework Decision on the Right to Interpretation and Translation in Criminal Proceedings, COM(2009) 338 final, 8.7.2009, p.
[153] COM(2010) 392 final, p. 2.

4.1.4 Procedural Safeguards in the Framework Decisions on Mutual Recognition

To some extent, provisions in the framework decisions on mutual recognition compensate for the lack of procedural safeguards at a general Union level. To begin with, all the framework decisions contain an Article stating that they shall not change the obligation to respect fundamental rights and fundamental legal principles.[154] However, none of the framework decisions contain a general and explicit ground for refusal of recognition in case of human rights issues in the issuing State. For example, suspicion that an individual may be denied a fair trial in the issuing State does not constitute a ground for refusal of his or her surrender according to the EAW. Although the instruments do not contain a general fair trial ground for refusal, most of them have provisions on the principle of *ne bis in idem* and decisions rendered *in absentia*.[155] The aim of the *ne bis in idem* principle as understood by the ECtHR is "to prohibit the repetition of criminal proceedings that have been concluded by a final decision."[156] Hence, the individual is to be protected from being tried more than once for the same offence. The reasons for why proceedings *in absentia* are undesirable are several. Participation of the defendant, or his or her counsel,[157] is necessary for the purpose of the defence. In addition, it enables the Court to get an impression of the defendant and to hear his or her statement. Furthermore, it gives the defendant the chance to control the fairness of the proceedings in person.[158] Hence, procedural safeguards with regards to judgments rendered *in absentia* and with regards to the *ne bis in idem* principle are to some extent provided in the framework decisions themselves.

However, the inconsistency in how the various framework decisions handled decisions rendered *in absentia* was perceived as a potential threat to the judicial cooperation.[159] In order to cure the inconsistency, a framework decision amending the old framework decisions' *in absentia* provisions was adopted. Thereby improving the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial was adopted.[160]

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[154] Art 1(3) FWD 2002/584/JHA; Art 1 FWD 2003/577/JHA; Art 3 FWD 2005/214/JHA; Art 1(2) FWD 2006/783/JHA; Art 1(2) FWD 2008/675/JHA; Art 3(4) FWD 2008/909/JHA; Art 1(4) FWD 2008/947/JHA; Art 1(3) FWD 2008/978/JHA; Art 1(2) FWD 2009/299/JHA and; Art 5 FWD 2009/829/JHA.
[155] Art 3(2), 5(1) FWD 2002/584/JHA; Art 7(1)(c) FWD 2003/577/JHA; Art 7(2)(g) FWD 2005/214/JHA; Art 8(2)(a), 8(2)(e) FWD 2006/783/JHA; Art 9(1)(c), 9(1)(i) FWD 2008/909/JHA; Art 11(1)(c), 11(1)(h) FWD 2008/947/JHA; Art 13(1)(a) FWD 2008/978/JHA and; Art 15(1)(c) FWD 2009/829/JHA.
[156] See for example *Gradinger v Austria*, Judgment of 23 October 1995 § 53.
[157] See *Krombach* above.
[158] S. Trechsel (2005) p. 253.
[159] Recital 2 FWD 20059/299/JHA.
[160] FWD 20059/299/JHA.

In addition to the provisions on *ne bis in idem* and *in absentia*, there are human rights provisions with regards to torture and degrading and inhuman treatment. Although it is not mentioned as a ground for refusal, the preamble of the EAW states that "no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment."[161]

4.1.5 Opinion of Advocate General in the Mantello case

The *Mantello case* is the first reference for a preliminary ruling that concerns the *ne bis in idem* ground for non recognition in the EAW. At the time of writing (October 2010), the ECJ has not delivered a judgment but there is an opinion of Advocate general Bot.[162] Although it is not legally binding and it is not sure whether the ECJ will rule in accordance with it, the opinion is still interesting. The issue of the case is whether the executing German judicial authorities are allowed to refuse surrender to the issuing Italian authorities with the argument that Mr Mantello already has been tried for the same acts in Italy. Hence, the *ne bis in idem* objection refers to a conviction in the issuing State. The Advocate general first points out that it is not for the executing judicial authority to *ex officio* examine whether the issuing State, or other State, has delivered a judgment concerning the same acts as the EAW.[163] It is only "if the executing judicial authority is *informed* that the requested person has been finally judged [...] in respect of the same acts" (emphasis added) that it shall refuse execution.[164] If this is the case or if the executing authority has information which indicates that the requested person has been tried on the same acts and when asking the issuing State does not get a satisfactory answer, the executing State shall apply the ground for non recognition.[165] Because, in the same way as Union acts might be reviewed in the light of the fundamental rights - including the right to a fair trial in the ECHR – the Member States' measures implementing Union acts shall be in accordance with fundamental rights. The executing authority must thus respect this obligation when applying the EAW, as explicitly stated in the framework decision, i.e. the *ne bis in idem* ground for non recognition.[166]

[161] Thirteenth recital FWD 2002/584/JHA
[162] Case C-261/09 *Mantello*, Opinion of Advocate general Yves Bot of 7 September 2010.
[163] *Mantello* § 82.
[164] Article 3(2) FWD 2002/583 JHA.
[165] *Mantello* § 95.
[166] *Mantello* § 88.

4.2 The ECHR

4.2.1 The Soering case

All Member States are signatories the ECHR and thus obliged to respect the right to a fair trial as guaranteed by Article 6. This might be problematic with respect to mutual recognition since the instruments, as mentioned above, do not contain a general fair trial ground for refusal. This is probably due to the logic that mutual trust enables the executing Member State to accept that the trial has been fair. The *Soering case*[167] is important since it states that a State can have responsibility for human rights issues *outside* its own territory. The case concerned a German national, Mr Soering, charged of murder in the USA. Mr Soering was detained in prison in the UK pending extradition to the USA. If extradited to the USA, Mr Soering was likely to be sentenced to death and as a consequence, would have to spend time on death row. Mr Soerings claimed that spending time on the death row would amount to a breach of article 3 ECHR - the prohibition of torture and inhuman or degrading treatment – since he would be exposed to the so-called *death row phenomena*. Hence, it was not the death penalty as such that was the human rights issue but the time awaiting the execution of the sentence. The ECtHR was faced with question "whether Article 3 can be applicable when the adverse consequences of extradition are, or may be, suffered *outside the jurisdiction* of the extraditing State as a result of treatment or punishment administered in the receiving State."[168] (emphasis added) The ECtHR started by making clear that Article 1 ECHR[169] do n*ot* justify a "general principle to the effect that [...] a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him [or her] in the country of destination are in full accordance with each of the safeguards in the Convention."[170] However, the ECtHR continued, a Contracting Party cannot be absolved "from responsibility under Article 3 for all and any foreseeable consequences of extradition outside their jurisdiction."[171] The provisions of the ECHR must be interpreted and applied in a manner to make their safeguards practical and effective. Furthermore, the ECtHR pointed out that Article 3 is an *absolute prohibition*, which enshrines one of the fundamental values of a democratic society. The Court reached the conclusion that "the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the

[167] *Soering v the United Kingdom*, Judgment 7 July 1989.
[168] *Soering* §85.
[169] **Obligation to respect human rights -** The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.
[170] *Soering* § 86.
[171] *Soering* § 86.

requesting State."[172] The ECtHR is careful to mention that Article 3 is an absolute prohibition. However, "the Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive [...] risks suffering a flagrant denial of a fair trial in the requesting country."[173]

4.2.2 The Drozd and Janousek case

In *Drozd and Janousek case*,[174] the ECtHR considered whether France was responsible under Article 5 ECHR – the right to liberty and security - for enforcing a criminal sentence taken after a questionable procedure in Andorra. The Court found that "as the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with *all the requirements* of Article 6 of the Convention. [...] The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a *flagrant denial of justice*."[175] (emphasis added). According to the Court, no violation of Article 5 had been established. Hence, it had not been shown that France was obliged to refuse cooperation in enforcing the sentence in the particular case.

It appears that there is a *Soering effect* to Article 6 ECHR, applicable not only to extradition but also to enforcement of foreign custodial sentences. However, the *Soering* effect only seems to apply with regard to Article 6 ECHR when there is *flagrant denial of justice*; the principle does not require *full application* of Article 6 in the other States.[176]

4.2.3 Fair trial – the Proceeding as a Whole

The right to a fair trial is a *procedural guarantee*, designed to guarantee procedural justice rather than result-oriented justice.[177] Repeatedly, the ECtHR has stressed that it is *not a Court of forth instance*; it is not its task to examine if the national law has been correctly applied or if the facts have been correctly established.[178] Article 6 ECHR, first sets out a general right to a fair trial then presents specific rights as minimum rights. Hence, within the rather vague right to a fair trial, there are a number of more concrete guarantees. At least in theory, if any of the specific rights have not been respected, the proceeding cannot be considered as fair. Nonetheless, the opposite conclusion cannot be drawn; although the specific guarantees have been respected, the trial might have been unfair. This is the case since other

[172] *Soering* § 91.
[173] *Soering* § 113.
[174] *Drozd and Janousek v France*, Judgment 26 of June 1992.
[175] *Drozd and Janousek v France* Paragraph 110.
[176] S. Peers (2006) p. 438.
[177] S. Trechsel (2005) p. 83.
[178] See for example *Anderson v United Kingdom*, Decision of 5 October 1999.

aspects can influence the fairness of the proceedings. [179] However, in some of the ECtHR's case law, although some of the minimum guarantees have not been respected, the proceedings as a whole added up to a fair trial.[180] Probably, this is the result of the Court's reluctance to give a precise meaning to the specific rights of the defence in Article 6(3).[181]

When deciding whether a trial has been fair, the ECtHR takes a holistic approach, i.e. the Court looks at all circumstances to decide if the right has been respected.[182] For example, in a case where the conviction was partly based on unlawfully obtained evidence the Court stated that, "it is not for the Court to substitute its view for that of the national courts which are primarily competent to determine the admissibility of evidence. It must nevertheless satisfy that *the proceedings as a whole* were fair."[183] (emphasis added) The Court's holistic approach has been criticised, inter alia claiming that it is contrary to the meaning of Article 6. However, the ECtHR's reluctance to in particular deal with problems related to the admissibility of evidence is explainable; not only is it a very difficult area in criminal procedure, but furthermore, it is treated very differently in different legal systems.[184] Below, some relevant case law will used as an illustration to the ECtHR's holistic approach.

4.2.4 Admissibility of Evidence - Case Law

How the ECtHR deals with questions of the admissibility of evidence is interesting in relation to mutual recognition of evidence in the EEW. As pointed out above, when deciding if a trail has been fair, the Court looks at the proceedings as a whole; it is hard to say that one particular feature of a proceeding is unfair per se. Below two cases will be described in order to illustrate the manner in which the ECtHR handles the question of admissibility of evidence. The cases are chosen from references in literature.[185]

In the *Schenk case,*[186] the issue was a tape-recording made by Mr Pauty of a call between him and Mr Schenk. The recording was used as evidence when Mr Schenk was convicted for attempted incitement to murder. Allegedly, the tape supported that Mr Schenk had hired Mr Pauty to kill his former wife. Mr Schenk complained to the ECtHR and claimed that *making* of the recording and *using* it as evidence contravened Article 6 ECHR.[187] The Swiss Government did not dispute that the recording was obtained unlawfully. The Swiss courts had already recognised this but still admitted the recording as evidence.[188] The ECtHR started with stating that

[179] S. Trechsel (2005) p. 86.
[180] See for example *Asch v Austria*, Judgment of 26 April 1991, §§ 25-31.
[181] S. Trechsel (2005) p. 87.
[182] S. Trechsel (2005) p. 86.
[183] *Miailhe v France (no 2)*, Judgment of 26 September 1996, § 43.
[184] S. Trechsel (2005) pp. 87 f.
[185] See S. Trechsel (2005).
[186] *Schenk v Switzerland*, Judgment of 12 July 1988.
[187] *Schenk* § 39.
[188] *Schenk* §§ 43, 44.

Article 6 ECHR does not lay down rules on the admissibility of evidence as such, which is therefore primarily for national law to regulate. Therefore, the Court cannot exclude as a matter of principle that unlawfully obtained evidence of the present kind may be admissible. It only has to ascertain if Mr Schenk's trial as a whole was fair.[189] First of all, not all the rights of the defence were disregarded. Mr Schenk was not unaware that the recording was unlawful and he took the opportunity to challenge its authenticity and to oppose its use. The fact that these attempts were unsuccessful makes no difference. Furthermore, Mr Schenk sought and obtained an investigation of Mr Pauty.[190] The Court also attached weight to the fact that the recording was not the sole evidence on which the conviction was based. The Swiss Criminal Court allowed the cassette as evidence since it would have been sufficient to hear Mr Pauty as witness regarding its content; declaring it inadmissible would have made no difference. Furthermore, the Swiss Court heard several other witnesses, both called by the Court's own motion and at the request of the defence. Hence, the Court's conviction was founded *partly* on the recording of the telephone call but also on *other evidence*.[191] This made the ECtHR reach the conclusion that "the use of the disputed recording as evidence did not deprive the applicant of a fair trial and therefore did not contravene Article 6 para. 1."[192] However, there were dissenting opinions regarding the ECtHR addressing the unlawfulness of the evidence. Three out of the seventeen judges thought that if a Court relies on evidence that has been obtained unlawfully, a trial cannot be fair within the meaning of the ECHR. The fact that the evidence was only partly relied on did not alter the conclusion. Hence, the dissenting judges found that there had been a violation of the right to a fair trial in Article 6 ECHR.[193] The dissenting judges thus wanted to see a per se prohibition of unlawfully obtained evidence in the courts; allowing unlawfully obtained evidence would always amount to a breach of the right to a fair trial.

In the *Khan case*,[194] the applicant was convicted on evidence obtained during the investigation against *another* person; Mr Khan was recorded on tape while visiting a friend under investigation for dealing with heroin. First, the ECtHR found that the surveillance carried out by the police constituted a violation of Article 8 ECHR – the right to respect for private and family life.[195] The applicant also claimed a breach of Article 6(1) ECHR since the only evidence used against him was obtained in breach of Article 8 ECHR and thus not compatible with a fair hearing requirement.[196] The Court pointed out that "it is not [its] role to determine, as a matter of principle, whether particular types of evidence [...] may be admissible [...]. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair."[197]

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[189] *Schenk* § 46.
[190] *Schenk* § 47.
[191] *Schenk* § 48.
[192] *Schenk* § 49.
[193] *Schenk* Joint dissenting opinion of Judges Pettiti, De Meyer and Carrillo Salcedo.
[194] *Khan v United Kingdom*, Judgment of 12 May 2000.
[195] *Khan* § 28.
[196] *Khan* § 29.
[197] *Khan* § 34.

The Court distinguished the case from the *Schenk case* by noting that the recording at issue was not *unlawful* in the sense that it was contrary to domestic criminal law; it was not *in accordance with the law* as required by Article 8(2) ECHR since there was no statutory authority for the interference. Hence, although the recording was in accordance with national Guidelines, the lack of real rules, i.e. law, made the interference not in accordance with the law. Furthermore, Mr Khan made the admission on the tape voluntarily; there was no entrapment.[198] Next, the ECtHR noted that the recording was the *only* evidence. However, since the tape recording was acknowledged as very strong evidence, and there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker.[199] Finally, the Court notes that, as in *Schenk*, the applicant had full opportunity to challenge the authenticity and use of the recording of which he used the latter. The ECtHR added that it was clear that if the national Courts would have believed that the admission of the evidence would have amounted to substantive unfairness, they would have had discretion to exclude it. Therefore, the Court found that the use of the secretly taped material did not conflict with the requirements of Article 6 (1) the ECHR.[200] Also in this case, there was a dissenting opinion. One judge could not accept that a trial can be found fair "if a person's guilt for any offence is established through evidence obtained in breaches of human rights guaranteed by [ECHR]."[201]

These two cases illustrate how unwilling the ECtHR is to interfere with how national criminal justice systems' deal with the admissibility of evidence; although the only evidence of a conviction has been obtained through human rights breaches a trial can be considered as fair.

[198] *Khan* § 36.
[199] *Khan* § 37.
[200] *Khan* §§ 38-40.
[201] *Khan* Partly concurring, partly dissenting opinion of judge Louaides.

5 Analysis

5.1 Introduction

The area of criminal law is a relatively new field of cooperation in the Union; it was integrated in the EU during the 1990s. There were several factors which contributed to make criminal law a policy area of the Union. One of these factors was the call for common action against *criminality of common concern* to the Member States such as terrorism, drug trafficking and organised crime. Another factor giving rise to the need for criminal law cooperation was the development of the *Internal Market*. EU measures implemented to create the Internal Market for goods and services sometimes had criminal law implication, so called spill over effect. Furthermore, the abolition of internal borders and achievement of free movement brought focus on issues such as immigration and crime; there was a need to counterbalance the freedoms.[202] In addition, the 1985 *Schengen Agreement* was initiated between some Member States outside the institutional framework of EU, in the field of criminal law cooperation.[203] It led to the 1990 *Schengen Implementing Convention*, which inter alia included provisions on border control, judicial and police cooperation. Although the Schengen Agreement took place outside the EU framework, it was important as it resulted in a momentum towards closer integration within the EU.[204] Today, the *Schengen acquis* is partly integrated into Union law.[205] The *fall of the Berlin wall* was another event that stimulated integration in criminal matters in the EU. Western Europe was concerned that the collapse of the Soviet bloc and the resulting political instability and lack of stable legal frameworks in Eastern Europe, would lead to exportation of criminality from East to West. The threat of Eastern criminality thus needed common action. Finally, the *end of the Cold War* expanded the focus of global security threats from purely military threats to include securisation of border phenomena. Security threats in this context have shifted in nature from drug trafficking in the 80s to organised crime in the 90s to terrorism in the 2000s. This securisation of crime has to a large extent justified EU action in the criminal law field. Focus has been placed on the cross-border character of the threats in order to justify a common approach.[206]

One of the main reasons for why criminal law became a Union policy area relatively late is that it is a sensitive area closely linked to the sovereignty of the State. The difficulties inherent in criminal law cooperation were apparent at the beginning of the cooperation; negotiations were slow and cumbersome and not much happened. However, the Union acquired more and more influence and after a while bold attempts were made in order to intensify the cooperation: the idea of the *Corpus Juris* was

[202] V. Mitsilegas (2009) pp. 5 ff.
[203] A. Klip (2009) p. 15.
[204] V. Mitsilegas (2009) p. 7.
[205] A. Klip (2009) p. 15.
[206] V. Mitsilegas (2009) pp. 5 ff.

presented. The *Corpus Juris* could be explained as a mini criminal code on EU fraud. Hence, the project could be seen as an attempt to harmonise or even unify the Member States' criminal laws on fraud against the Union budget. The idea proved too radical; some Member States opposed the idea of harmonisation of criminal law, especially the UK. Instead a new way to intensify the cooperation was launched: the principle of mutual recognition. One of the main arguments was that mutual recognition would allow enhanced cooperation while still leaving national criminal law intact, i.e. without harmonisation. September 11 provided an opportunity to adopt legislation based on mutual recognition and to date, ten framework decisions have been adopted. However, mutual recognition in the field of criminal law has been heavily criticised on several points.

5.2 Extraterritoriality

A first critical comment about mutual recognition is that it provides for extraterritoriality. Weber[207] defines the State as a territory where a political administration "successfully upholds the claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order."[208] Hence, the State is defined as a territory where a political administration has monopoly over the legitimate use of force (in order to enforce its ruling). The monopoly of force has two implications: the state has the right to use force, but also the duty to prevent others from using force on its territory.[209] The criminal law system is an outflow of the State's monopoly of force; through criminalisation, the State both acts to prevent the illegitimate use of force and through enforcement of the legislation, the State itself uses coercive force.

In the commonly accepted definition of the State, the monopoly of force is restricted to the territory of the State. Traditionally judicial cooperation in criminal matters is based on the request principle. One sovereign State makes a request to another sovereign State, the latter then decides whether to cooperate or not.[210] This kind of cooperation leaves the State's monopoly of force intact since it decides whether to act upon the request or not. However, replacing the traditional intergovernmental criminal law cooperation with the principle of mutual recognition has resulted in a paradigm shift. The decision to accept a request from another State is shifted from a political level to a judicial level and refusal is no longer possible on political grounds.[211] When applying mutual recognition,

[207] His definition is used since it is the most referred to in modern literature, see E. Guild, "Crime and EU's Constitutional Future in an Area of Freedom, Security and Justice" 10 *European Law Journal* (2004/2), pp. 218-234, at p. 220.
[208] M. Weber (1978) p. 54.
[209] E. Guild, "Crime and EU's Constitutional Future in an Area of Freedom, Security and Justice" 10 *European Law Journal* (2004/2), pp. 218-234, at p. 220.
[210] S. Peers, "Mutual Recognition and Criminal Law in the European Union: has the Council got it Wrong?" 41 *Common Market Law Review* (2004), pp. 5-36, at p. 10.
[211] H.G. Nilsson, "Ömsesidigt erkännade" (Mutual recognition), Svensk Juristtidning (2005) pp. 887-899, at pp. 889 f.

the Member States' right to use coercive measures is extended to the entire AFSJ and correspondingly the monopoly of force is lost.

The adoption of the Lisbon Treaty has made mutual recognition even more problematic with regards to the sovereignty of the State. Before, Union action in the field of criminal law required unanimity among the Member States; the Member States agreed to give up some of their competence when voting in favour of mutual recognition instruments. Now, with the Lisbon Treaty Union action in the area of criminal law no longer requires unanimity. As a result, mutual recognition instruments might be adopted although some Member States are not in favour of them.[212] In this manner the sovereignty implications of mutual recognition are even more problematic. This is very interesting since one of the arguments in favour of mutual recognition was that it would allow the Member States to keep their national legislation and thus not threaten the sovereignty of the State. Mutual recognition might, at least in theory, allow the Member States to keep their criminal law systems but at the same time, it obliges the States to accept the effects of other States criminal law systems on their territory, which is an intrusion in the sovereignty of the State.

5.3 The Internal Market

As shown above, mutual recognition in the Internal Market and in the judicial criminal law cooperation are hardly comparable concepts. On the one hand, both in the Internal Market and the AFSJ, mutual recognition provides free movement of something, namely products and services and judicial decisions. On the other hand, since the object of free movement is fundamentally different, introducing mutual recognition of judicial decisions in criminal matters cannot be justified by sole reference to the Internal Market. There are two main differences. One, mutual recognition facilitates freedoms in the context of the Internal Market. The individual is freed from having to comply with several regulatory standards. The States' power in relation to the individual is thus restricted. Since mutual recognition facilitates freedoms in the context of the Internal Market, it may be argued that it is not the principle itself that needs justification but limitations to the principle.[213] Hence, the liberalising effect that mutual recognition brings about in the European economic cooperation is a justification for its application. In the AFSJ, the situation is the opposite: the State's criminal law competence is extended beyond its national borders, i.e. the State's power is increased in relation to the individual.[214] If the principle of mutual recognition in the context of the Internal Market can be justified with reference to its liberalising qualities, in the area of criminal law

[212] However, in some cases the above mentioned *emergency break* allow Member States not to take part in enhanced cooperation.
[213] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at p. 410.
[214] It might be interesting to note that in the Internal Market it is the individual who raises the right to mutual recognition, while the individual will be unlikely to claim mutual recognition to something disadvantageous, i.e. in relation to criminal matters.

cooperation the limitation of freedoms that the principle brings about needs to be justified.[215]

Second, in the Internal Market mutual recognition is accompanied by harmonisation; when mutual recognition prevents the State from protecting the public interest through national legislation, the European legislator steps in to provide a (sufficient) minimum level of protection. For example as in the case of diplomas for health professions, when the Union has not provided any harmonisation, the Member States retain their right to impose extra requirements before recognising diplomas issued in other Member States. One could argue that mutual recognition in the context of the Internal Market is justified in so far as a minimum level of protection of the public interest is safeguarded through minimum harmonisation, for example through rules related to the safety of products. Both from an ethical view, i.e. it will avoid a regulatory race to the bottom[216] and from a Member State view; it is easier to accept another Member State's regulatory standards if they are set at a certain minimum level. So far, this is not the case regarding mutual recognition in the AFSJ. There is little harmonisation both with regards to substantive and criminal provisions. Although there have been attempts to provide procedural safeguards, i.e. minimum harmonisation of criminal procedure, harmonisation does not seem to be perceived as a precondition to mutual recognition in criminal matters. For example in the *Advocaten voor de Wereld*, the ECJ said that there is nothing which suggests that the application of the EAW is conditional on harmonisation of national criminal law. However, in Union documents it has been recognised that mutual recognition should not replace harmonisation but that the two should go hand in hand. The only thing that seems clear is that there is no common and coherent view of what the relationship between harmonisation and mutual recognition is or should be.

Although free movement is the objective of mutual recognition both in the Internal Market and in the AFSJ, the desired result of the free movement is not the same. In the Internal Market, free movement of products and services is meant to increase the number of products and services on the Market which will improve the competition and thus benefit the consumer. Hence, both the producer and consumer should benefit from mutual recognition on the Internal Market. This is not the case for mutual recognition of criminal matters; it is not an objective to increase the number of judicial decisions in criminal matters. The idea is not that mutual recognition will stimulate more judicial decision which will compete and leave the judicial consumer in a better position. However, one could argue that mutual recognition in criminal matters benefits the collective of individuals since it hopefully provides for more effective and efficient law enforcement and thus contributes to a less crime exposed Europe.

[215] M. Möstl, "Preconditions and Limits of Mutual Recognition" 47 *Common Market Law Review* (2010), pp. 405-436, at pp. 408 ff.
[216] S. Lavenex, "Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy" *Journal of European Public Policy* (2007/14), pp. 762-779, at p. 765.

5.4 Mutual Trust and Procedural Safeguards

Mutual recognition is said to rest upon mutual trust. In my opinion, mutual recognition cannot be justified with reference to mutual trust. One must distinguish between what makes mutual recognition function in practice and what justifies the application of mutual recognition. Mutual trust in itself might make mutual recognition work without providing a justification for it. If the Member States trust each others' criminal justice systems they will probably be ready to recognise each others' judicial decisions. However, it is not necessary to base the trust on facts in order for mutual recognition to function; it is the trust itself that is important and not the actual truth. One could distinguish between trust based on facts and blind trust, i.e. *faith*. It is the faith that the Member States have in each others' criminal justice systems which make mutual recognition work. For example, it is not necessary that a issuing State actually respects human rights for a executing State to execute an EAW; it is enough that the executing State *believes* that the issuing State respects human rights in order for mutual recognition to function. Therefore, mutual trust can only be used as a concept that enables mutual recognition to work in practice; mutual trust cannot justify the application of the principle of mutual recognition from the individual's point of view. As will be discussed later, even if trust is based on facts it might not be sufficient in order to justify mutual recognition.

It is interesting to examine the way in which the concept of trust has been used. When introducing mutual recognition of judicial decisions in criminal matters, mutual trust was presupposed and used almost as an absolute concept. The trust was based on common values and traditions of the Member States, which was sufficient to introduce mutual recognition in criminal matters. The trust was not supported by empirical evidence or even argued about; the trust was simply there. Then in order to promote procedural safeguards, mutual trust was also used as a justification; procedural safeguards were perceived as necessary in order to strengthen mutual trust. In this case mutual trust was used as a relative concept since strengthened trust implies that there can be different levels of trust. In this case the Union seemed to want a more tangible ground for the trust to rest upon, such as procedural safeguards. Common traditions and values were no longer sufficient. It seems like a reversed order of argumentation to first base mutual recognition on an absolute notion of mutual trust and then justify common procedural safeguards with reference to the need to strengthen mutual trust and thus turning the concept into a relative one; one might expect the foundation of the trust to be in place before the trust can be the base of mutual recognition. Of course trust is not constant, but it is hard to imagine that there initially is enough trust to introduce mutual recognition and just a few years later the lack of trust needs procedural safeguards at Union level. If trust is such a transient phenomena, one could argue that it is not sufficient to build mutual recognition on.

Presupposed mutual trust was thus sufficient in order to introduce mutual recognition in criminal matters. However, the Union's

point of view of the relationship between mutual recognition of judicial decisions in criminal matters and harmonisation of national standards is very unclear. On the one hand, mutual recognition would allow the Member States to keep their national legal systems, i.e. mutual recognition would mainly be an alternative to harmonisation. On the other hand, the fact that harmonisation might be necessary in addition to mutual recognition was recognised already in Tampere. When the Commission launched a proposal for procedural safeguards in criminal matters throughout the Union in 2004, the desired result of the initiative was to highlight the degree of *harmonisation of procedural safeguards* that would enhance mutual trust in practice and thus support mutual recognition.[217] In the Green paper subsequent to the proposal, the Commission recognised the fact that human rights are translated into national procedural law in different ways in the Member States does not in itself amount to violations of ECHR. However, divergent practices might hinder mutual trust and confidence and thus weaken the base for mutual recognition.[218] Hence, the ECHR was not considered sufficient in relation to the mutual trust needed to support mutual recognition. As discussed above, to use mutual trust both to promote mutual recognition and to promote harmonisation of procedural rules seems contradictory. Compared to the Internal Market, in that context mutual recognition has to a large extent been accompanied with harmonisation and thus been a factor to stimulated harmonisation. One could argue that mutual recognition in criminal matters was introduced as a mean to achieve harmonisation since harmonisation would be necessary in order for mutual recognition to function. Although, the ECJ in the *Advocaten voor de Wereld* clearly stated that harmonisation was not a precondition for mutual recognition in the EAW, it might be that harmonisation is a necessary consequence of mutual recognition.

The attempt in 2004 to strengthen the position of the individual through procedural safeguards failed. Despite the Commission's view that the ECHR needed to be complemented by Union measures, one of the main arguments against the proposal was the Member States' accession to the ECHR. The right to a fair trial was already guaranteed since all member States are signatories to the ECHR. Although, the attempt to introduce procedural safeguards in criminal proceedings in 2004 failed, a new attempt was made during the Swedish presidency in 2009, the so called Stockholm programme. The justification for introducing procedural safeguards at Union level was twofold. On the one hand, there was a *practical argument*: the removal of internal borders have resulted in increasing number of people involved in criminal proceedings in Member States other than their own and they need to be guaranteed rights such as translation and interpretation.[219] On the other hand, there was a *conceptual argument*: mutual recognition presupposes mutual trust, which is enhanced by Union standards for the protection on procedural rights to complement the ECHR.[220] Hence, procedural safeguards are necessary in order to

[217] COM(2003) 75 final p 9.
[218] COM(2003) 75 final p 9.
[219] Fourth recital Resolution on procedural rights.
[220] Eight recital Resolution on procedural rights.

strengthen mutual trust and to strengthen the position of the individual. With regards to the rights of the individual, the Union focused on rights such as the right to translation and the right to legal counsel. These are rights that enable the individual to enjoy the procedural rights of the legal system that he or she is confronted with at the moment. It is not rights which make the different legal system fit better together when applying mutual recognition. Although, such rights might be desirable at Union level, they do not solve the problem of incompatible national legal systems. So far, the only concrete measures to come out of the initiative is a directive on the right to translation and interpretation.

5.5 Mutual Recogntion and Human Rights

All the framework decisions on mutual recognition contain a clause that fundamental rights shall be respected, however none of them provide for an explicit, general ground for refusal in relation to procedural shortcomings. In the *Krombach case*, which concerned mutual recognition of a civil judgment, the ECJ accepted that a flagrant denial of a fair trial could be acceptable as a ground for refusal. One might think that the same conclusion should be reached with regards to mutual recognition of judicial decisions in criminal matters since criminal law is more severe than civil law for the person concerned, which therefore would need a stronger procedural protection.

Although none of the framework decisions contain a general human rights ground for refusal, most of them contain provisions on *ne bis in idem* and judgments rendered *in absentia*. The individual is thus protected from being tried more than once on the same facts and from being deprived from the right to defend him- or herself. However, one could argue that *ne bis in idem* is a natural outflow of mutual recognition. That no one shall be tried two times on the same facts is a generally accepted principle. Consequently, if a person is tried in one country and that Member State finally disposes the case then all other Member States should recognise that final decision and hence refrain from starting a new proceeding regarding the same circumstances. This is mutual recognition in favour of the individual.

The *ne bis in idem* ground for non recognition in the EAW is the subject of a recent opinion of the Advocate general in the *Mantello case*. The Advocate general expresses an opinion that opens for far reaching interpretations. He states that Member State measures to implement Union acts must respect fundamental rights and that executing judicial authorities must ensure that the application of implemented legislation does the same. One could argue that the opinion gives the executing authorities the right to refuse recognition when it is apparent that fundamental rights, such as the right to a fair trial, are not respected in the issuing State. The Advocate general is careful to stress that the executing State shall not make any inquiry on its own initiative but that it is allowed to act upon information that it is given or posses. The case only concerns the *ne bis idem* clause in the EAW but the wording of the opinion makes it possible to generalise.

Hence, the conclusion might be applicable to mutual recognition instruments other than the EAW and in relation to procedural rights other that the explicitly mentioned *ne bis in idem* principle. However, the opinion of the Advocate general is only a recommendation to the ECJ and the Court remains free to make whatever judgment it finds suitable.

The Union seems to regard the ECHR as a foundation for mutual trust. It is strange that the framework decisions on mutual recognition do not contain an explicit human rights ground for non-recognition since the ECtHR case law makes it clear that a Member State's human rights obligations is not during all circumstances restricted to the territory of the State. In the *Soering case*, the ECtHR ruled that a State might be responsible for actions on another States territory. This case is relevant with regards to the EAW where in principle a Member State shall surrender a person to the issuing State without any further checks and controls. The only exception is if the person runs the risk of being exposed to torture or inhuman or degrading treatment. If the executing State suspects that the person in question will not be subjected to a fair trial that is not an explicit ground for refusal. However, since the ECJ approved refusal of recognition in a civil case when the right to defence was not respected, it would probably do the same in a criminal case. Nevertheless, the unclear relation between the States mutual recognition obligations and human rights obligations in relation to the ECHR is problematic.

5.6 Incompatibility of Mutual Recognition with the ECHR

The aim of mutual recognition of judicial decisions in criminal matters was that the principle should be applicable at all stages of the proceeding, both pre-trial, at trial and when enforcing the sentence. This vision has been realised through the adopted framework decisions. However, to apply mutual recognition at all stages of the proceeding mixes the legal systems of the Member States in an unforeseen manner. The application of mutual recognition thus provides fragmentation of the Member States' national legal systems. One of the main arguments in favour of mutual recognition of judicial decisions in criminal matters was that it would allow for enhanced cooperation while allowing the Member States to keep their national criminal law systems. Hence, mutual recognition would enable different legal systems to coexist. However, when applying mutual recognition, the coherence of each criminal justice system is threatened and it is questionable whether different legal systems can be mixed while still ensuring a fair trial.

The ECtHR always does an evaluation of the proceeding as a whole in order to examine if it meets the requirements of a fair trial. This means that it is very hard to say that a specific measure makes a proceeding unfair. A procedural shortcoming in one part of the proceeding might be compensated for in another part of the proceeding. For example, if a suspected person is questioned by the police without his or her counsel

present, it is not optimal but the proceeding might still add up to a fair trial. The ECtHR's reluctance to classify certain measures as incompatible with a fair trial is illustrated by the fact that the Court, during some circumstance, accepts unlawfully gathered evidence. As mentioned, it is possible that the ECtHR is extra careful when it comes to the admissibility of evidence since the differing national rules on the subject makes it a very sensitive area. ECtHR's holistic approach makes it possible for very different legal systems to provide a proceeding that meets the requirements of a fair trial in the ECHR. Different States might very well have different procedural rules and still be in accordance with the ECHR; the sum of the procedural rules is important and not each procedural rule in isolation.

The holistic approach of the ECtHR and the fragmentation of national legal systems that mutual recognition brings about might be an incompatible combination. The focus of much of the discussion regarding mutual recognition has been on whether there exists enough mutual trust in order for the principle to work and how to enhance such trust. However, even if one presumes that all Member States respect the right to a fair trial in ECHR, which should be sufficient to create mutual trust and thus facilitate the function of mutual recognition, this still might not be enough to justify mutual recognition in criminal matters. The reason for this is that the Member States are allowed to fulfil their obligations in respect to the ECHR in very different ways. Since mutual recognition fragments national legal systems the coherence of each system is taken away. Precisely herein lies the problem; it is the coherent national system that (ideally) provides for a fair trial. If different national legal systems are mixed through the application of mutual recognition it will be very hard to predict if the proceeding as a whole will amount to a fair trial.

Mutual recognition of evidence is a good illustration of the problem. Different Member States have different ways to regulate the admissibility of evidence. Some States have very strict rules on the admissibility of evidence and would never allow unlawfully gathered evidence in court. Other States have almost no rules on the admissibility of evidence but leave it to the courts to decide the weight of the evidence, the weight of the evidence will thus compensate for the manner in which it was obtained. The evidence itself cannot be separated from the way it was obtained. The idea of mutual recognition is that the executing State shall recognise a request without questioning it and that the issuing State shall recognise the way the executing State performs the request without interference. However, this is not possible with regard to evidence. Suppose that a State issues a warrant to obtain a piece of evidence in the executing State, which is needed in a criminal proceeding in the issuing State. If the executing State obtains the evidence in accordance with its own rules but not in accordance with the issuing State's rules and the issuing State then recognises the evidence as if it was obtained in accordance with its rules, it would destroy the coherence of the national legal systems. Then, if the evidence is used in court and valued as if it had been obtained in accordance with national rules, it leaves the individual in a disadvantageous position since the way the evidence is obtained is not taken into account when valuing the evidence. One could argue that this type of procedure would not

be considered fair according to the ECHR and that the individual thus could complain to the ECtHR. However, the ECtHR is not a Court of appeal. Furthermore, it would not solve the basic problem of incoherent systems.

The EEW tries to deal with the problem by stating that each Member State shall ensure that a warrant is only issued if the evidence can be obtained under the law of the issuing State in a comparable case although a different procedural measure might be used, Article 7(b). Furthermore, the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority in order to ensure admissibility of the evidence, the exception being if it would be contrary to the fundamental principles of law of the executing State, Article 12. These provisions are a deviation from the strict application of mutual recognition, which leaves it up to the executing State to perform the request according to its national rules. This version of mutual recognition shows that strict mutual recognition is (almost) impossible to achieve when national rules differ too much.

6 Conclusion

Mutual recognition was introduced into the AFSJ as a way to intensify criminal law cooperation, and thus increase security within the EU, without requiring alternation of the Member States' criminal law systems. However, the relationship between mutual recognition of judicial decisions in criminal matters and harmonisation of both substantive and procedural criminal provisions has never been clearly articulated. On the one hand, already at Tampere, the need for accompanying harmonisation was recognised. On the other hand, the ECJ has very clearly stated that harmonisation is not a precondition to mutual recognition in relation to the EAW. One could argue that while mutual recognition in the context of the Internal Market is justified with reference to accompanying harmonisation, in the AFSJ it was justified with reference to mutual trust. Mutual trust is a very difficult concept since it lacks legal significance. The term has been used both to justify mutual recognition and to promote procedural safeguards which seems contradictory.

The Union itself has recognised the need for procedural rules at Union level, i.e. harmonisation of criminal procedure. The Union considers procedural safeguards necessary in order to promote mutual trust and thus facilitate the function of mutual recognition but also to protect the procedural rights of the individual. The focus of the Union so far has been on practical safeguards, relevant in cross-border cases such as the right to translation and interpretation. Of course, specific procedural safeguards which allow the individual to understand the legal system he or she is in at the moment is important, but they might not be sufficient. Due to the fragmentation of national criminal law systems which mutual recognition creates, one could argue for the Member States' need to have legal systems of a more similar structure. In my opinion, mutual recognition requires further reaching harmonisation of criminal procedure than the procedural safeguards suggested by the Union.

It is the fact that mutual recognition is applicable at all stages of the proceeding that makes the principle problematic in relation to ECtHR's holistic approach on a fair trial. If mutual recognition only applied to final decisions, the national legal system would still be able to provide a fair trial. Since mutual recognition is applicable at all stages of the proceeding, one coherent system no longer exists to guarantee a fair trial. It is more or less impossible when mixing different legal systems, to foresee whether they together will fulfil the requirement of a fair trial. If procedural rules were harmonised, the application of mutual recognition would not be as problematic since the Member States' legal systems would be more compatible. As in the context of the Internal Market, mutual recognition of judicial decisions in criminal matters requires some degree of harmonisation in order to be justifiable.

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