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**Human Rights Guarantees for Criminal Law
and Procedure in the EU-Charter
of Fundamental Rights**

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**I. Introductory Survey on Different European Institutions
and Human Rights Guarantees**

When one looks upon Europe and its political landscape from the outside, one might get a very confusing picture. There are quite a few legal institutions and conventional instruments which sound and appear very much alike, although, in fact, they may be quite different and serve divergent functions.

So, in order to find through the complicated terminology of organisations, organs, legal instruments and judicial authorities which do exist on the European continent under sometimes very similar names and labels, a short introductory survey on the political structure of Europe and some of its most important institutions and human rights guarantees may be helpful.

Instead of presenting a full picture, however, we will have to concentrate and limit our view to those European institutions which are of essential importance for the protection of human rights, and still more narrowly focused on human rights guarantees in criminal law and procedure, this being the topic of my presentation. Within this scope, in particular two European institutions ask for closer attention and distinction: the Council of Europe (CoE) and the European Union (EU) which appear very much alike and for this reason like to be confused with each other, but which, in fact, have a different territorial reach and serve different political functions. Therefore, they must be distinguished.

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1. The Council of Europe (CoE) and European Convention on Human Rights (ECHR)

With regard to its foundation and coming into existence, the CoE is the considerably older European organisation and broader in its territorial reach.

The Council of Europe was founded in 1949. It seeks to develop throughout Europe common and democratic principles with particular attention to the protection of individual human rights. With its presently 47 member countries, the CoE has a genuine pan-European dimension. To a certain degree, the CoE even transgresses European borders with regard to so-called “observer countries”, at present five in number, beside the United States also including Japan.

The probably most important contribution of the CoE for the protection of Human Rights and Fundamental Freedoms was the “European Convention on Human Rights” (ECHR), adopted in 1950. This convention is considered the first binding international codification of Human Rights at all. In combination with certain additional protocols it provides a minimum standard of rights and freedoms, including procedural guarantees, for the most entire continent of Europe.¹⁾

At least three features which have been novel when the European Human Rights Convention was created deserve to be mentioned:

First, whereas traditionally only States were enabled to be actors in International Law, the ECHR concedes an active role in the international arena also to individuals. This is made possible by setting up a mechanism for the enforcement of the obligations entered into by contracting states and the right of individuals to bring in complaints against violations of their Human Rights.

Second, in order to enforce the protection of Human Rights, at first the European Commission of Human Rights (set up in 1954) and the European Court of Human Rights²⁾ (set up in 1959 at Straßbourg) were established, both of which have in 1998 been followed by a single full-time court.

And although the Court cannot enforce its decisions in the same direct way as judgements of a domestic court may be executed, decisions of the European Court of Human Rights are not without any legal binding force, though in an indirect manner only: so, if, for instance, the European Court has found a national police authority responsible for torturing a suspect, the respective member state is expected under Art. 46 ECHR to comply with the European decision, supervised by the Committee of

1) For further details on the European Convention on Human Rights see CLARE OVEY/FRANCIS GEOFFREY JACOBS/ROBIN C.A. WHITE, *The European Convention on Human Rights*, 4th ed., Oxford, 2006.

2) For an inside into the recent history of the European Court of Human Rights see LUZIUS WILDHABER, *The European Court of Human Rights 1998-2006 History, Achievements, Reforms*, Kehl, 2006. For more background information on the court's creation and its enlargement see NINA-LOUIS AROLD, *The Legal Culture of the European Court of Human Rights*, Leiden, 2007, pp. 19-41.

Ministers of the CoE.³⁾

In sum, there are so far no other international criminal rights agreements which would provide such a high degree of individual protection. Further progress, however, may be made if the Charter on Fundamental Rights of the European Union succeeds in finally being approved. Thus, we have to turn to the second organisation which plays a still stronger role on the European continent:

2. The European Union (EU) and the EU Charter on Fundamental Rights (ECFR/EU-Charter)

Different from the Council of Europe which with its 47 member states comprises almost whole Europe, the European Union (EU) is a political and economic community of, at present, 27 member states. Due to its primary function of creating a common market within central Europe, guaranteeing the freedom of movement of people, goods, services and capital, it was mainly directed as a promotion of economic welfare rather than for the protection of Human Rights. The more, however, it expanded from originally six member states, including Germany, to meanwhile 27 member states by incorporating almost all former East European socialist countries, the more the concern for Human Rights was increasing.

Before following this development with its impacts on criminal law and procedure, certain institutional and terminological peculiarities of the European Union may be distinguished from those of the Council of Europe.

With regard to the creation of so-called “community law” of the EU, there can be three bodies involved:

- the “Council of the European Union”,⁴⁾ composed by the ministers of the member states (and therefore in German commonly called “Ministerrat”) and on a rotational basis presided for six months by each member state, which functions as the main decision-making body of the European Union,
- the “European Commission”⁵⁾ (EC), located in Brussels, comparable to the government of a state, thus, primarily functioning as the executive branch of the European Union, but also responsible for proposing legislation, and
- the “European Parliament”,⁶⁾ located in Strassburg, functioning as the main

3) The enforcement mechanisms of the CoE are indeed quite weak, perhaps surprisingly so. Art. 46(1) of the ECHR requires states to “abide by the decisions” of the Court, but Art. 46 (2) puts the supervision of the execution of ECtHR judgments in the hands of the CoE’s Committee of Ministers, a body that has been notoriously reluctant to exert political pressure on member states.

4) For further information on the Council of the European Union see MARTIN WESTLAKE/DAVID GALLOWAY/TOON DIGNEFFE, *The Council of the European Union*, 3rd ed., London, 2004.

5) For further information on the EC see DAVID SPENCE, *The European Commission*, London, 2006.

6) For further information on the European Parliament see RICHARD CORBETT/FRANCIS JACOBS/MICHAEL SHACKLETON, *The European Parliament*, London, 2005.

legislative body.

To make this structure even more complex, there exists an additional “European Council” (commonly referred to as “European Summit”) which functions as the highest political body of the European Union, though not having any formal executive or legislative powers.

So, when the term “council” appears in connection with Europe, one has to be aware that the “Council of Europe” (CoE) is responsible for the “European Convention on Human Rights”, while the “European Council” is functioning as political body of the heads of state or government of the EU-member states, and the “Council of the European Union” as the main legislative body of the EU.

Similar caution is asked for when the term “convention” appears: in connection with the CoE it stands for the “European Convention on Human Rights”, in connection with the EU, “Convention” is referring to the committee in charge of drafting the EU-Charter.

As far as the judicative power is concerned, the ultimate say on matters of EU law is with the “Court of Justice of the European Community”, usually called the “European Court of Justice” (ECJ).⁷⁾ This court has not only to ensure equal application across the various EU-member states, rather it is also empowered to sanction violations of EU law. Established in 1952, the court is composed of one judge per member state and assisted by a lower court, the “Court of First Instance”⁸⁾ dealing with certain issues. Though again sounding very similar, this “European Court of Justice”, located in Luxemburg City (unlike most other EU institutions which are based in Brussels, Belgium), should not be confused with the “European Court of Human Rights” which is part of the Council of Europe and located in Strassburg/France.

Another difference between institutions of the CoE and the EU exists with regard to the binding impact of decisions by their courts: whereas the European Court on Human Rights can only indirectly cause national organs or authorities to abide by rules and decisions for the protection of Human Rights,⁹⁾ judgements of the EU-Court of Justice have direct binding effect on member states.¹⁰⁾

7) For further information on the ECJ see ANTHONY ARNULL, *The European Union and its Court of Justice*, Oxford, 2006.

8) For further informations on the Court of First Instance see TIMOTHY MILLET, *The Court of First Instance of the European Communities*, London, 1990.

9) See GERTRUDE LÜBBE-WOLFF, *ECHR and national jurisdiction – The Görgülü Case*, HFR 2006 (12), pp.1-6.

10) In the case *Van Gend en Loos vs. Nederlandse Administratie de Belastingen* (1963), the ECJ ruled that the protection of EU law applied to individuals as well as member states, created the principle of *direct effect*. In the case of *Costa vs. ENEL* (1964) ruled that in the case of a clash between EU and national law, EU law is the higher authority, thus establishing the *supremacy* of the ECJ. The principles of direct effect and supremacy of EU law guide the implementation of ECJ rulings and the legal framework within which it acts. These joint principles give the ECJ a large degree of judicial power on member states. Supremacy allows the ECJ to establish *primacy* for European laws while

On the other hand, however, as concerns the promulgation of own provisions for the protection of Human Rights, the EU for a long time was quite reluctant. As the EU itself never became member of the CoE nor of the ECHR, the protection of Human Rights within the EU was depending on national guarantees of Human Rights in the individual member states or on their adherence to the ECHR of the Council of Europe. Although the idea of an own EU Bill of Rights had been on the table for some years, mostly supported by the European Parliament, it finally occurred in 1999 on a German initiative that, with a decision taken by the European Council in Cologne¹¹⁾, the process of the later on so-called “Charter of Fundamental Rights of the European Union” was launched. From then on the promulgation process ran rather quick, allowing the “solemn proclamation” of the Charter¹²⁾ by the European Parliament, the Council of the European Union and the European Commission on December 7th, 2000.

The stated purpose of this EU-Charter, as eventually reflected in its Preamble, was to strengthen the protection of fundamental rights in the EU, not by changing the rights as such, but by making them more visible to the EU citizens.

The Charter process should be seen in the broader context of the debate on constitutionalization of the European Union. Not only did the idea of a Charter appeal to Member States with constitutional and federal ambitions for the future of the EU; it was also welcomed by other Member States as a sensible way to bring the Union closer to the citizens and gain more popular support for the EU. Some see in the very topic of human rights a new project for the EU that could help keep up momentum in the integration process, among the peoples as well as among the governments, now that the huge projects of the 1980s and 1990s, the Internal Market and the Monetary Union, are more or less in place. The enlargement negotiations with 12-13 countries, including ten former members of the Eastern Bloc and Turkey, also provided a good reason to devote more energy to the topic of human rights in the EU.

With regard to the further development, it was expected to integrate the EU-Charter in the planned EU-Constitution. After this project had failed and was substituted by the Treaty of Lisbon, amending the existing treaties of the European Union, on December 13th 2007, the EU-Charter was not included as an integral part of the treaty and, thus, does not have the status of community law. Yet, since the Treaty of Lisbon makes reference to the EU-Charter, it is, in fact, guaranteeing the enforcement of the Fundamental Rights.¹³⁾

“direct effect” means that these laws then apply to people as well as to states – making them more like domestic laws than international acts.

11) See European Council Conclusions from Cologne, Annex IV, “*Decision on the Drawing up of a Charter of Fundamental Right of the European Union*,” dated June 3-4.

12) Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 (Dec. 7, 2000).

13) See Article I-9 of the Lisbon Treaty which establishes a – though officially not so-called “constitution” for Europe.

“1. The Union shall recognise the rights, freedoms and principles set out in the Charter of

The rights provisions contained in the EU-Charter are basically a restatement or compilation of existing rights. The Charter lists all the fundamental rights under six major headings: Dignity, Freedom, Equality, Solidarity, Citizenship and Justice. It also proclaims additional rights not contained in the European Human Rights Convention of the CoE, such as personal data protection, bioethics and good administration, the right to a clean environment and the rights of the disabled.¹⁴⁾

3. Relationship between the European Convention on Human Rights (ECHR/CoE-Convention) and the EU-Charter on Fundamental Rights (ECFR / EU-Charter)

Although both European codifications are covering most of the same Human Rights and, thus, are overlapping each other to a high degree, they are not completely identical. This raises the question of their relationship.

Certain answers can be found in Articles 52 and 53 EU-Charter (Artt. II-112 and II-113 Lisbon Treaty). They require the EU Community Courts to interpret rights in the EU-Charter that “correspond” to the rights in the ECHR as having the equivalent meaning to that decided by the European Court of Human Rights. Although the EU-Charter does not expressly pronounce which of its rights are equivalent to those in the ECHR,¹⁵⁾ Article 53 EU-Charter can be understood as a provision similar to those found in many human rights instruments.

Thus, the ECHR is an essential source of law in the EU human rights jurisprudence, even if the EU/EC is not a Contracting Party to the ECHR. The EU-Court generally adheres to the ECHR human rights provisions as a minimum level of protection, and often delves into close examinations of the CoE and the case law of the European Court of Human Rights.¹⁶⁾

Fundamental Rights which constitutes Part II.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Constitution.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

14) Articles 21, 37, 41 EU-Charter = Artt. I-36, I-37, I-41 Lisbon Treaty.

15) At any rate, however, the equivalence of certain rights is set out in an explanatory memorandum commissioned by the Presidium (Convention document CHARTE 4473/00). Yet, since this memorandum is lacking authority status, the question remains whether, were the EU-Charter to be made formally legally enforceable, this list of “corresponding” ECHR/EU-Charter provisions should be given more authoritative status.

16) The recognition of the ECHR as a minimum standard “is entirely compatible with the ECHR, Article 53 of which indicates that the ECHR is not intended to impose a uniform level of protection [. . .], but solely to ensure a minimum standard” (see document 4961/00 CONTRIB 356, of November 13, 2000). Since 1974 all Members of the European Union have been Contracting Parties to the ECHR of 1950 under the auspices of the Council of Europe. Based on the drafting history of Article 53 EU-Charter (Art. II-113 Lisbon Treaty) and the special significance of the ECHR in the EU Community human

The conclusion to be drawn from this observation to the main topic of this paper is that the protection of Human Rights in criminal law and procedure within the European Union cannot be fully understood without paying due attention – beyond the EU-Charter also to the ECHR of the Council of Europe and its Court on Human Rights.

4. General pre-remarks to human rights guarantees in criminal law

With regard to the question in which sequence Human Rights in criminal law and procedure should be dealt with, it may appear advisable to follow the order in Chapter VI of the EU-Charter on “Justice” in which various rights relevant for criminal law and procedure are guaranteed. On a closer look, however, the relevant Articles 47 EU-Charter (Art. II-107 Lisbon Treaty) to Article 50 EU-Charter (Art. II-110 Lisbon Treaty) do not follow any meaningful system because they contain a mixture of substantive rights and procedural rights. So, instead of dealing with Article 47 EU-Charter to Article 50 EU-Charter with one after the other, I prefer to start with substantive rights in Article 49 EU-Charter (Art. II-109 Lisbon Treaty) on principles of legality and proportionality (II), followed by Article 48 EU-Charter (Art. II-108 Lisbon Treaty) on presumption of innocence and rights of defence (III), continued with Article 47 EU-Charter on guarantees of an impartial court and efficient remedy (IV) and concluding with Article 50 EU-Charter on the principle of “ne bis in idem” (V). Finally we shall have to ask whether there are further human rights in criminal law and procedure that are not expressly recognized in the EU-Charter.

Before coming to special comments, four more general features of these guarantees may be highlighted:

First, as concerns their fundamental character, the guarantees of this EU-chapter on “justice” are not merely “citizens’ rights” as those in Chapter V, rather they are truly “human rights” guaranteed to everybody regardless of his or her citizenship.

Second, the guarantees at stake here do not only bind the authorities of the European Union, but also its member states. Therefore, if the national criminal law or procedure of a member state lacks the formal recognition of certain rights, as one could be afraid of with countries from former socialist law, they would internally be bound by these supranational EU human rights.

Third, since this catalogue of EU human rights is not to be considered a closed list, it is open for amendments, as in particular by reference to more concrete guarantees in the ECHR as, in particular, will be seen with regard to defence rights.

Fourth, EU Human Rights are not without limitations, as in particular provided for in

rights doctrine and in the EU-Charter itself, one could argue that the only natural reading of Article 53 EU-Charter is to see it as an equivalent to Article 53 ECHR. As such, the provision is simply a politically valuable safeguard, found in almost all human rights instruments in order to calm any concerns readers may have that the EU-Charter could be used as a pretext to cut down protection enjoyed on the basis of other rules. Thus, the legal significance of Article 53 EU-Charter is identical to that of Article 53 EC-Convention (ECHR).

Article 52 EU-Charter (Art. II-112 Lisbon Treaty) and Article 53 EU-Charter (Art. II-113 Lisbon Treaty).

II. Legality and Proportionality of Criminal Law

Article 49 EU-Charter (Art. II-109 Lisbon Treaty): Principles of legality and proportionality of criminal offences and penalties:

1. *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.*
2. *This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.*
3. *The severity of penalties must not be disproportionate to the criminal offence.*

1. Genesis and scope of these guarantees

Although dealt with in the same article, this provision does, in fact, pronounce three different human rights:

First, the principle of legality (Sect. (1) and (2) (1st and 2nd sentence) which, as one of the most significant human rights in criminal law, was very similarly formulated in Art. 7 ECHR. Also known under the Latin term of “*nullum crimen, nulla poena sine lege*”,¹⁷⁾ phrased by J. P. A. FEUERBACH,¹⁸⁾ this principle has from the very outset been uncontested in the negotiations on the EU-Charter. At a closer look, it can be subdivided in four different principles to be dealt with individually later on:

- the basic principle of legality in terms of requiring a legal basis for both the criminal prohibition and the sanction (infra 2),
- the principle of legal certainty (infra 3),
- the prohibition of analogy (infra 4),
- the principle of non-retroactivity (infra 5).

Ultimately, all these principles serve the same purpose: the protection of individual freedom by requiring for the punishability of conduct prior to legal prohibition as well as the protection of confidence in terms of predictability and accountability of criminal

17) “No crime (can be committed), no punishment (can be imposed) without (having been prescribed by a previous penal) law.”

18) JOHANN PAUL ANSELM FEUERBACH, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts*, 9th ed., Gießen 1826, S. 23.

law. Consequently these principles provide safeguards in favour of the perpetrator. Second, the right of a convicted perpetrator to benefit from mitigating changes of punishments after the commission of the crime (Article 49 (I) (3rd sentence) EU-Charter): although this retroactive application of a law was already known in certain domestic justice systems and eventually recognised in Art. 15 (1) (3rd sentence) of the International Covenant on Civil and Political Rights (ICCPR), it had not yet been recognised in the ECHR. Thus, its recognition in the EU-Charter can be considered a further human rights improvement.

Third, the principle of proportionality of penalty, pronounced in Article 49 (3) EU-Charter again is a real novelty by not having a predecessor in any other international written instrument. Although inserted in the EU-Charter only in the last phase of negotiations, in its substance it had already enjoyed Europe wide national recognition.

2. The principle of legality (*lex scripta* ?)¹⁹⁾

At first glance, the principle of legality as it is pronounced in Article 49 (1) EU-Charter does not seem to pose any serious question since in basic it is a well recognised principle. At a closer look, however, the manner in which it is phrased may give rise to questions out of which only a few can be addressed here.

Since the headline of this article speaks of “legality”, one could conclude from its Latin origin in “lex” as synonym for “statute” that the criminal conduct must be prohibited in written form, as it is required in most civil law countries, as for instance in Germany (§ 1 Penal Code). This would mean that unwritten case law could not suffice for criminal prosecution. By changing from the headline of Article 49 EU Charter to the wording of its Sect.(1), however, one must realise that the criminal offence does not need to be constituted by a statute but merely under national or international “law”. This, however, is a broader term which must not necessarily require a written basis but which may be rather founded on customary and judge-made law as well.²⁰⁾ On this way, the EU-Charter is opening an emergency exit for

19) For more details on “the principle of legality” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 49*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 509-512, paras. 12-19; available on internet through <http://freidok.uni-freiburg.de/volltexte/4245/> . For an overview on the principle of legality see CLARE OVEY/FRANCIS GEOFFREY JACOBS/ROBIN C.A WHITE, *The European Convention on Human Rights*, 4th ed., Oxford, 2006, pp.162-164. For an overview from a legal history point of view see VOLKMAR SCHÖNEBURG, *Nullum crimen, nulla poena sine lege. Rechtsgeschichtliche Anmerkungen*, UTOPIE kreativ 94 (1998), pp. 60-70.

20) At this point reference might be taken to the jurisprudence of the ECtHR, which in its *Tolstoy Miloslavsky v. UK* judgment of 13 July 1995, Series A No 316-B, pp. 71-2, para. 37 stated that “[. . .] when speaking of “law“ Article 7 ECHR alludes to the very same concept as that to which the Convention refers elsewhere using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability”.

the Common Law tradition of unwritten criminal law since it remains not only applicable with regard to criminal offences developed in the past, rather is this method of creating criminal law not even blocked for the future. Furthermore, merely requiring “law” and not a statute as legal basis of a criminal offence will also be welcomed as an approving stamp on customary international criminal law, as it was applied in the war crime trials of Nuremberg and Tokyo after World War II.²¹⁾

The same purpose of substituting the requirement of a statute by a less formal basis is pursued by Sect. (2) of Article 49 EU-Charter, by being satisfied that an act or omission was at the time of its commission criminal “according to the general principles recognised by the community of nations”. This provision follows its predecessor in Art. 7 (2) ECHR almost word by word, with one interesting deviation: While therein reference had been made to “civilised nations”, the EU-Charter, after laborious negotiations, took resort to the recognition of general principles by the “community of nations”, in order to avoid any discrimination of eventually “uncivilised” nations.

This broadening, if not even softening, of the legality principle, however, gives rise to the question if it is still correct to speak of “*nullum crimen sine lege*” (in terms of a statute) or whether it would not be more correct to speak of “*nullum crimen sine iure*” (as the Latin equivalent of law). At any rate, the traditional requirement of a “*lex scripta*” (in terms of “written” law) cannot be upheld any longer on the level of international and supranational criminal law. This, of course, raises further questions with regard to transnational proceedings if, for instance, the jurisdiction where the crime was committed requires a statutory crime prohibition, whereas the jurisdiction where the trial is held on behalf of the victimised citizen is satisfied with a customary criminal prohibition. These and further divergences between different national jurisdictions in Europe and between national and supranational prosecutions are still too controversial as to be dealt with here.

Different from the punishability of conduct, the possible punishments to be applied seem to need no certain legal basis since not expressly required in Article 49 EU-Charter. Yet, not only that this requirement could at least indirectly be deduced from the penalty references in the 1st and 2nd sentences of Article 49 EU-Charter, it rather can be considered a well-established human rights requirement.

21) Under General Assembly Resolution 177 (II), para. (a), the International Law Commission was directed to “formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.” In the course of the consideration of this subject, the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and judgment constituted principles of international law. The conclusion was that since the Nuremberg Principles had been affirmed by the General Assembly, the task entrusted to the Commission was not to express any appreciation of these principles as principles of international law but merely to formulate them (see *Yearbook of the International Law Commission*, 1950, Vol. II, pp. 374-378). Authentic text: English Text published in *Report of the International Law Commission Covering its Second Session, 5 June-29 July 1950*, Document A/1316, pp. 11-14.

3. The principle of legal certainty (*lex certa*)²²⁾

Law can only perform its task as an authoritative basis for punishability if it describes with sufficient legal certainty both the criminalized act and the consequences thereof. With a view to citizens' interests this serves a double end: guaranteeing both equal application of the law and countability of the law which in turn is essential for controlling behaviour.

That is to say that it denotes to legal certainty the precondition of describing punishability as precise as the consequence and scope of the criminal law provisions either arising from the wording or being determined through interpretation. In as much as this is not done through statutory law, but as it is in part the case in common law through case law, the matter of facts that constitute punishability have to be fixed and the range of punishment must be clearly defined.

Such legal certainty is lacking if the facts of the case, due to their formulation, open the door for a eventually arbitrary application, or if the interpretation is not anymore in line with what could be called "a visible norm of punishment for a layman". The description of punishability must have such a grade of legal certainty that it determines the behaviour and prevents judicial arbitrariness.²³⁾ Just as well the legal consequences of the action need to be grounded on a legal basis.

4. Prohibition of analogy (*lex stricta*)²⁴⁾

Analogy is a method of developing law by judicial interpretation with the aim both to find and to fill gaps in the law. While Art. 22 (2) (1st sentence) ICC Statute explicitly prohibits the expansion of the definition of a crime by way of analogy, such a prohibition is neither spelled out in Art. 7 (1) ECHR nor in Article 49 EU-Charter.

According to the jurisprudence on Art. 7 (1) ECHR,²⁵⁾ however, which pursuant to

22) For more details on "the principle of legal certainty" with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 49* in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 512-513, paras. 20-22. For a general overview see JUHA RAITIO, *The Principle of Legal Certainty in EC Law*, Dordrecht, 2003. See also KEIR STARMER, *European Human Rights Law*, London, 2000, pp.222-224.

23) The ECtHR found that "It is . . . essential that the conditions for deprivation of liberty under domestic law should be clearly defined and that the law itself be foreseeable in its application"; it must be possible to "foresee, to a degree that is reasonable in the circumstances, the consequences with a given action may entail." *Baranowski v. Poland*, § 52; *Kawka v. Poland*, § 49; *Steel and others v. United Kingdom*, § 54; *Laumont v. France*, § 45; and many others.

24) For more details on "prohibition of analogy" with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 49*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 513-514, paras. 23-26. For general reading on the prohibition of analogy see CLARE OVEY/FRANCIS GEOFFREY JACOBS/ROBIN C.A WHITE, *The European Convention on Human Rights*, 4th ed., Oxford, 2006, pp.164-166.

25) See the ruling of the ECtHR in *Kokkinakis v. Greece*, 25 May 1993, Case 3/1992/348/421, stating in para. 52 that "[...] criminal law must not be extensively construed to an accused's detriment, for instance by analogy".

Article 52 (3) EU-Charter (Art. II-112 (3) Lisbon Treaty) is material to the meaning and scope of the rights enshrined in Article 49 EU-Charter, legal analogy is prohibited.

By requiring differentiation between (permissible) interpretation and (prohibited) analogy, the outermost conceptual boundary of a criminal provision is at the same time the boundary for interpretative valuation of the judge, at which its predictability is to be determined from the perspective of the norms' addressee. In order to prevent a shifting boundary at citizens' expense, according to the European Court of Human Rights, any extensive interpretation of the criminal law at the expense of the accused should be prohibited by way of Art. 7 ECHR.

5. The principle of non-retroactivity (*lex praevia*)²⁶⁾

If a citizen shall be urged to behave in compliance with the law, this only makes sense if punishability is ascertained by law before the commission of the crime. And if a citizen should be able to make use of his liberties in a way that is in compliance with the law, this, in turn, requires that his behaviour is not declared punishable *ex post*. These reasons that serve both the guarantee of freedom and security, eventually could give an explanation why the explanatory notes of the Presidium of the EU-Convention to Article 49 (1) EU-Charter merely mention the principle of non-retroactivity and why in the Rome Statute of the International Criminal Court the principle of non-retroactivity is stipulated in Article 24 as a self-contained provision. Just to mention two consequences resulting from this principle:

With regard to punishability, the *ex post* creation and extension of norms establishing criminal law provisions is prohibited. For that reason the principle of non-retroactivity applies for the *ex post* introduction of special elements of crime. Not the least, this principle has already shown its practical importance with regard to EU-regulations. So, the principle has been applied by the ECJ to ban Member States' imposition of criminal liability for breach of an EC Directive or Regulation before Member States implement that measure in their national law.²⁷⁾ *Mutatis mutandis*, the ECJ has applied this principle to the imposition of criminal liability for breach of EU

26) For more details on "the principle of non-retroactivity" with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 49*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 514-516, paras. 27-33. See also KEIR STARMER, *European Human Rights Law*, London, 2000, pp.225-226.

27) See the ruling of the ECJ in the case *Berlusconi and others*, 3 May 2005, Joined cases C-387/02, C-391/02 and C-403/02: "In a situation such as that in issue in the main proceedings, First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, cannot be relied on as such against accused persons by the authorities of a Member State within the context of criminal proceedings, in view of the fact that a directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons."

Framework Decisions, as regards substantive criminal law (but not criminal procedure).²⁸⁾ Similarly, the ECJ has ruled that Member States cannot apply criminal sanctions for breach of Community law for events which occurred before adoption of that EC legislation.²⁹⁾

With regard to the legal consequences, it is explicitly prohibited to apply the retroactive criminal liability in a more severe way as it has been declared at the time of crime (Article 49 (1) (2nd sentence) EU-Charter).

On the other hand, a question still left open is whether and in how far the principle of non-retroactivity applies in criminal procedure.

6. Retroactive effect of more lenient penalty (*lex mitior*)³⁰⁾

Superficially looking upon, it might seem as if the retroactive application of a law not yet existing at the time of commission of the crime was a breach of the principle of non-retroactivity. In fact, however, this is not the case because this principle merely aims at preventing a retroactive effect at the expense, but not in favour of the perpetrator.³¹⁾

While the ECHR does not, Art. 15 (1) (3rd sentence) ICCPR does entail the principle of retroactive effect of more lenient penalties as Article 49 (1) (3rd sentence) EU-Charter

28) See the ruling of the ECJ in the case *José Teodoro de Andrade v Director da Alfândega de Leixões, intervensor: Ministério Público*, 7 December 2000, Case 213/99 stating that “it is settled case-law, (. . .) that where Community legislation does not specifically provide for any penalty for an infringement or refers for that purpose to national legislation, Article 5 of the EC Treaty (now Article 10 EC) requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the choice of penalty remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.”

29) See the ruling in the case *Archer Daniels Midland and Archer Daniels Midland Ingredients v. the Commission*, 9 July 2003, Case T-224/00. “The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It takes its place among the general principles of law whose observance is ensured by the Community judiciary.”

30) For more details on “the principle of legality” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 49*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 516-517, paras. 34-35.

31) See the ruling of the ECtHR in *Kokkinakis v. Greece*, 25 May 1993, Case 3/1992/348/421:

“The Court points out that Article 7 para. 1 (art. 7-1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage. It also embodies, more generally, [. . .] that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law.” See also the ruling of the ECtHR in *G. v. France*, 27 September 1995, Case 29/1994/476/557: “[. . .] article 7 para. 1 (art. 7-1) of the Convention embodies generally the principle that only the law can define a crime and prescribe a penalty and prohibits in particular the retrospective application of the criminal law where it is to an accused’s disadvantage. [. . .]”

stipulates. This provision is to be understood in such a way that each revision of the law from which the perpetrator may benefit and which comes up between the time of commission of a crime and the final judgement the more favourable legislation has to be applied. Implicit in this provision is the principle of retroactivity of subsequent law, but this does not imply a breakdown of the principle of non-retroactivity. Under certain circumstances even a more lenient inter-mediate law can be applicable.

Whether and eventually which law is to be regarded as comparatively more lenient than a previous or subsequent one, is to be determined by taking into consideration the entire actual legal state, from which the “whether” and “how” of punishability depends. An abstract comparison of the matters of the facts and their degree of penalty does not suffice at this point, rather it has to be determined which law allows the most lenient judgment in regard to the concrete case.

7. Proportionality of crime and penalty³²⁾

As already mentioned, the express recognition of this principle, recognized in section (3) of Article 49 EU-Charter, is a novelty in international instruments, though not in national law and practice throughout Europe: not only that it is enshrined in the common constitutional traditions of the EU Member States, rather it is also recognized in the case law of the Court of Justice of the European Communities. There are two different levels on which this principle requires attention:

On the legislative level the principle of proportionality allows for criminalization and sanction of behaviour only in so far as it is required, appropriate and suitable for protecting the object of legal protection within legitimate goals of penalty.

On the judicial level the penalty must not be disproportionate to the offence. At this level both the objective severity of the wrong and the individual severity of blameworthiness have a particular meaning. In every single case it has to be examined whether the imposition of a criminal sanction is required in order to reach the general purpose of punishment and whether the importance of the objects of legal protection are in a proportionate relation to restrictions on the rights of the person concerned.

In sum, even if the performance of certain requirements of the principle of legality, in particular with regard to non-retroactivity, may not be perfect yet, the confirmation of the principle of *nullum crimen, nulla poena sine lege* (or more correctly: *sine iure*) is to be appreciated. Similarly, by explicitly recognizing the principle of proportionality both towards the legislator and the judicature progress has been made.

32) For more details on “the principle of legality” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 49*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 517-518, paras. 36-39.

III. Judicial remedy Fair trial Legal aid

Article 47 EU-Charter (Art. II-107 Lisbon Treaty): *Right to an effective remedy and to a fair trial*

- (1) *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
- (2) *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
- (3) *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

This article guarantees in its three sections different procedural rights. To a certain degree, they are connected with each other as well as they partly overlap with procedural rights in other articles. This is particularly obvious with every person's right to be advised, defended and represented according to Article 47 (2) 2nd sentence EU-Charter and the additional guarantee of defence rights in Article 48 (2) EU-Charter (Art. II-108 (2) Lisbon Treaty). Another, though less obvious, inconsistency may be seen in the guarantee of the right to go to court in Article 47 (1) 2nd sentence EU-Charter while the realisation of this right will depend on the prior establishment of a court, as apparently presupposed in Article 47 2nd sentence EU-Charter. Nevertheless the various rights in this article may be dealt with separately in its given order.

1. Right to an effective remedy (Article 47 (1) EU-Charter)³³⁾

This right is not a complete novelty since it is based on Art. 13 ECHR after it had already been proclaimed in the Universal Declaration of Human Rights (Art. 8). Since its scope was unclear in various respects, however, the EU-Charter tried to strengthen it by way of a better judicial protection. Again, only a few features can be highlighted here:

While Art. 13 ECHR would merely guarantee everyone the right to have an effective remedy "before a national authority", the EU-Charter guarantees access to a "tribunal". This means that a person who feels violated in his or her rights must be given more than the possibility of a more or less informal complaint, the person

33) For more details on "the right to an effective remedy" with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 47*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 478-485, paras. 2-19. See for a more general overview on the right to effect remedy KATHARINA PABEL, *The Right to an Effective Remedy Pursuant to Article II-107 Paragraph 1 of the Constitutional Treaty*, in: German Law Journal, Vol. 6, Nr. 11, 2005, pp. 1601-1616.

concerned rather must get access to a court or a comparable institution. This implies at least an examination and decision procedure in which the complainant must have the right to be heard at least in writing and, in case of a proven violation of rights, must be given the option for an adequate remedy.³⁴⁾ Furthermore, the way to a remedy is not only to a national authority but also open to international and supranational tribunals, if in existence.³⁵⁾

With regard to the right of freedom the complainant considers violated, the EU-Charter again is broader than the ECHR: Whereas the latter ensures the remedy only if one of its convention rights is claimed as violated, the EU-Charter opens access to a tribunal for any violation of the law of the Union, thus, not necessarily limited to rights guaranteed in the EU-Charter. Whether, however, this includes the violation of any national law or another international convention, if not part of the Union Law, is still in dispute.

Another point but not yet satisfactorily solved is the question whether the complaint is only allowed against rights violations by the executive or whether legal remedy may also be asked for against violations of the judiciary or the legislature. But for the same reason as the ECHR gave access to a legal remedy only against rights violations by the administration, this limitation still prevails since in this respect an enlargement of existing legal remedies was not pursued by the EU-Convention.

Although speaking of an “effective” remedy seems to imply the successful result, “effectiveness” of the legal remedy is not to be equated with a guarantee for success. Like in the case law to Art. 13 ECHR, for being considered “effective” neither more nor less is necessary than a tribunal’s impartial examination whereby the court must be independent from the organ which is allegedly responsible for the rights violation. In case that the appealed action proves to be well-founded, it goes without saying that this action has to be annulled or modified according to the procedures provided for such outcomes; that is to say that the court decision has to be implemented and an adequate compensation or sanction should be taken into consideration.

Obviously, even a broadminded legal remedy as it appears guaranteed by the EU-Charter very much depends on the existence of a tribunal to apply to. As a legal remedy is only available “in compliance with the conditions laid down in this article” (i.e. Article 47 EU-Charter (Art. II-107 Lisbon Treaty)), it is questionable whether a claimant, if a competent tribunal is not yet existing, may be left alone or whether the guarantee of an “effective” legal remedy would rather require a state to establish a

34) For the jurisprudence of the ECtHR on the “right to an effective remedy” see instead of many others *Silver v. UK*, A. 61 (1983) 5 EHRR 347. For a detailed analysis see ALASTAIR MOWBRAY, *Cases and Materials on the European Convention on Human Rights*, 2nd ed., Oxford, 2007, pp.789-806.

35) In fact the ECtHR has been extremely reluctant to interfere with the findings of the national court, see for example *Garcia Ruiz v. Spain*, 1999-I 87; 31 EHRR 589, paras. 28-9.

competent tribunal. As long as such a wishful obligation cannot be enforced, legal protection will only be accessible in the framework of already existing procedures. These, however, must not be shaped as it may please a State, but must apply with the next human right guaranteed in Article 47 EU-Charter.

2. Right to a fair trial (Article 47 (2) EU-Charter)³⁶⁾

The heading of this section as “right to a fair trial” is somehow misleading since it does not fully reveal the variety of the different guarantees comprised under the umbrella term of “fair trial”.³⁷⁾ Basically already recognised in Art. 10 Universal Declaration of Human Rights, confirmed and more detailed in Art. 6 ECHR, Article 47 (2) EU-Charter, to a certain degree, falls back beyond the more concrete pronouncements in the Human Rights Convention of the CoE. The sole novelty in the EU-Charter is the rather soft “possibility of being advised, defended and represented”. Yet, with regard to defence rights the ECHR offers more guidance, as will be seen later. At any rate, with regard to the individual guarantees enshrined in Article 47 (2) EU-Charter one is well-advised to consult the corresponding specifications of Art. 6 (1) ECHR in analogous manner.

Although the requirements of a fair trial should meanwhile be taken for granted, even on the European level they repeatedly need to be enforced. Therefore the main guarantees contained in Article 47 (2) EU-Charter (Art. II-107 (2) Lisbon Treaty) may in short be listed.

As basic pre-condition of a fair legal process, first and foremost access to a court must be ensured.³⁸⁾ That requires not only that the responsible court is existing or, if necessary, is set up, but that such a court is in fact accessible pursuant to the standards developed by the European Court of Human Rights with regard to Article 6 (1)

36) For more details on the “right to a fair trial” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 47*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 485-490, paras. 20-37. For a more general description of “the right to fair trial” see SARAH J. SUMMERS, *Fair trials. The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, 2007. See also CLARE OVEY/FRANCIS GEOFFREY JACOBS/ROBIN C.A. WHITE, *The European Convention on Human Rights*, 4th ed., Oxford, 2006, pp.122-161; STEVEN GREER, *The European Convention on Human Rights*, Cambridge, 2006, pp. 251-255.

37) The ECtHR pointed out that the principle of the Rule of Law implies the need for a proper administration of justice and a fair trial, see *Antonetto v. Italy*, *Salabiaku v. France*, Series A no. 141-A; *Sovtransavto Holding v. Ukraine*, Reports 2002-VII; *Surugiu v. Romania*, 20.04.2004.

38) The right of access to court was for the first time recognized by the ECtHR in the case *Golder v. United Kingdom*, Judgment of 21 February 1975, Series A, No. 18; (1979-80) 1 EHRR 524.: “It would be inconceivable that Article 6 (1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings”.

ECHR.³⁹⁾ For that purpose court fees must not be excessive,⁴⁰⁾ and obstacles that need to be overcome must not hinder or exclude legal remedies. The enforcement of the procedure must be possible and implementation of the decision must be ensured.⁴¹⁾ As the proceeding must be performed before a “tribunal previously established”, Ad Hoc tribunals are excluded.

The required independence⁴²⁾ of the court is not just the expression of the principle of separation of powers which applies to all member states, but also an imperative of the rule of law, because effective legal protection is ensured only through judges who are independent. Such independence cannot simply be said to be lacking because the members of the court are appointed by an organ of the executive or because the time of office or functional area is limited from the outset, provided, however, that within these limits it is at least guaranteed that judges cannot be removed and do not have to obey orders.⁴³⁾

With regard to impartiality of the tribunal,⁴⁴⁾ the subjective attitude of the individual

39) The ECtHR stated in the *Ashingdane* case (Series A no. 93) that, although limitations may be imposed, “it must . . . be established that, the degree of access afforded under the national legislation was sufficient to secure the individual’s right to a court; having regard to the Rule of Law in a democratic society . . . the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired . . . Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

40) In its *Kreuz v. Poland*, judgment of 19 June 2001, the ECtHR found that excessive court fees violate the right of access to court.

41) In its *Hornsby v. Greece* judgment of 19 March 1997 (Reports 1997-II, p. 510. para. 40) the ECtHR held that the execution of a judgment given by a court must be regarded as an integral part of the “trial” for the purposes of Article 6 ECHR.

42) The ECtHR stated in its *Findlay v. UK* judgment of 25 February 1997, Reports 1997-I, p. 198, para. 73 that “[. . .] in order to establish whether a tribunal can be considered as ‘independent’, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. . .”.

43) On the concept of an independent and impartial tribunal see for example the rulings of the ECtHR in: *Golder v United Kingdom*, 21 February 1975; *Sramek v Austria*, 22 October 1984; *Langborger v. Sweden*, 22 June 1989; *Pullar v UK*, 10 June 1996; *Gautrin et al. v France*, 20 May 1998; *Waite and Kennedy v Germany*, 18 February 1999; *Buscemi v Italy*, 16 September 1999; *Kyprianou v. Cyprus*, 27 January 2004.

44) On the origins of “judicial impartiality” in the European Tradition see SARAH J. SUMMERS, *Fair trials. The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, 2007, pp. 29-31.

According to the case law of the ECtHR, in order to satisfy the requirement of “impartiality” the tribunal must comply with both a subjective and an objective test. In *Hauschildt v. Denmark* (Series A no. 154 (1989) 12 EHRR 266, para.46) the Court stated: “ The existence of impartiality for the purposes of Article 6 must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this

judge is of essential significance: In principle neutrality towards the participants of proceedings is expected as well as an appropriate reasoning. Such impartiality is assumed as long as the contrary has been proved.

The principle of fairness which is borrowed from the common law tradition, is a specificity of the rule of law, as it is reflected in various procedural guarantees. It ensures both sufficient rights for interventions by asking questions or making statements as well as it protects against one-sided disadvantages. In doing so the European Court of Human Rights (ECtHR) uses to examine the procedure on its entirety with regard to fairness. Above all the principle of “equality of arms”⁴⁵⁾ belongs to it.

The requirement of a public hearing⁴⁶⁾ is another instance of the rule of law.⁴⁷⁾

The right to a hearing within reasonable time⁴⁸⁾ commits to a rapid and efficient accomplishment of proceedings in order not to endanger the credibility of the judiciary.⁴⁹⁾ The importance of this principle is reflected in the rising number of

respect”. See also *Sigurdsson v. Iceland*, judgment of 10 April 2003. See also KEIR STARMER, *European Human Rights Law*, London, 2000, pp. 261-264.

45) The concept of “equality of arms” was first mentioned by the ECtHR in the case *Neumeister v. Austria*, Judgment of 27 June 1968, Series A, No. 8; (1979-80) 1 EHRR 91. For further reading on the doctrine of “equality of arms” and its relationship to the requirement of an adversary procedure see SARAH J. SUMMERS, *Fair trials. The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, 2007, pp. 103-112. On the jurisprudence of the ECtHR on “equality of arms” see ALASTAIR MOWBRAY, *Cases and Materials on the European Convention on Human Rights*, 2nd ed., Oxford, 2007, pp. 399-408.

46) ANSELM FEUERBACH, *Betrachtung über die Öffentlichkeit und Mündlichkeit der Gerechtigkeitspflege*, Gießen, 1821&1825, para.i, at 96: This requirement that the court be open to the parties, in the sense of ensuring the personal presence of the parties or their representatives, is the focal point at which all the strands of a sensible conception of the public hearing requirement come together and from which all the other aspects derive their full power and meaning. See for a thoroughly description of the public hearing requirement SUMMERS SARAH J., *Fair trials. The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, 2007, pp.38-47. See also CLARE OVEY/FRANCIS GEOFFREY JACOBS/ROBIN C.A WHITE, *The European Convention on Human Rights*, 4th ed., Oxford, 2006, pp. 140-142; KEIR STARMER, *European Human Rights Law*, London, 2000, pp. 264-266.

47) The rule of law may have a variety of meanings throughout Europe, see DALE MINESHIMA, *The Rule of Law and EU Expansion*, Liverpool Law Review 24 (2002), p. 73.

48) Article 6 (1) ECHR is comparable to Article 5 (3), but the right guaranteed under Article 5 (3) ECHR applies only to persons detained on remand on a criminal charge whereas the scope of Article 6 (1) ECHR is wider, see CLARE OVEY/FRANCIS GEOFFREY JACOBS/ROBIN C.A. WHITE, *The European Convention on Human Rights*, 4th ed., Oxford, 2006, pp. 143-145. On the jurisprudence of the ECtHR see ALASTAIR MOWBRAY, *Cases and Materials on the European Convention on Human Rights*, 2nd ed., Oxford, 2007, pp.426-429. See also KEIR STARMER, *European Human Rights Law*, London, 2000, pp. 241-243.

The case law of the ECtHR clearly shows that in criminal matters “reasonable time” covers the whole of the proceedings, including appeal proceedings (see *Wemhoff* judgment, pp. 26 and 27, paras. 18 and 20; *Neumeister* judgment, p. 41, para. 19; *Delcourt* judgment of 17 January 1970, Series A No. 11, pp. 13-15, paras. 25 and 26).

49) According to the case law of the ECtHR the reasonableness of the duration of proceedings covered

complaints that are addressed to the ECtHR because of excessive length of trial. What is new in the EU-Charter and what, as already mentioned, goes beyond the ECHR is the pronouncement of the possibility to be advised, defended and represented.

3. Legal aid (Article 47 (3) EU-Charter)⁵⁰⁾

The broad availability of legal aid as guaranteed in Article 47 (3) EU-Charter “to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”, does not have an explicit predecessor in the ECHR. This gap, however, did not hinder the ECtHR to fill it by case law.⁵¹⁾ Starting points of this jurisprudence can be found in the guarantee of access to courts pursuant to Article 6 (1) ECHR, the implied right to ensure practical access to the court and to enable the filing of an appeal as well as in the right to free assistance of a duty counsel in case of indigence pursuant Article 6 (3) (c) ECHR. In order to find a clearer and broader fundament, legal aid was comparatively thoroughly discussed in the EU-Convention, in particular in so far as member states do not have any common principles on legal aid since financial support used to be merely provided in criminal proceedings in form of free assistance of a defence counsel. Now, without being restricted to criminal proceedings, legal aid can in particular also be granted in administrative proceedings.

With regard to criminal justice, the EU-Charter deviates from other legal aid guarantees mainly in two respects:

Whereas the EU-Charter does not even in connection with the guarantee of defence rights in Article 48 (2) EU-Charter (Art. II-108 (2) Lisbon Treaty) explicitly deal with legal aid, the ECHR in its Art. 6 (3) (c) and to even a higher degree international instruments like the ICCPR (Art. 14 (3) (d)) expressly guarantees payment of a defence counsel in case of indigence.

This lack of specified criminal defence assistance has, thus, to be substituted by taking resort to the general legal aid guarantee in Article 47 (3) EU-Charter.

by Article 6 (1) ECHR has to be assessed in each case according to its circumstances. The Court has taken into account the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities, etc. (see *Neumeister* judgment, pp. 42-3, paras. 20-1; *Ringelsen* judgment, p. 45, para. 110).

50) For more details on “legal aid” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 47*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 491-492, paras. 38-41. For general information see STEFAN TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, 2006, pp. 270ff. See also KEIR STARMER, *European Human Rights Law*, London, 2000, pp. 268 ff.

51) See for example the rulings of the ECtHR in: *Garcia Manibardo v Spain*, 15 February 2000; *Kreuz v. Poland*, 19 June 2001; *Mamatkulov and Abdurasulović v. Turkey*, 6 February 2003; *Steel and Morris v. United Kingdom*, 15 February 2005.

IV. Presumption of innocence Defence rights

Article 48 EU-Charter (Art. II-108 Lisbon Treaty): Presumption of innocence and right of defence

1. *Everyone who has been charged shall be presumed innocent until proved guilty according to law.*
2. *Respect for the rights of the defence of anyone who has been charged shall be guaranteed.*

This article combines two guarantees which are of genuinely criminal procedural nature. Whereas the wording of the presumption of innocence (Sect. 1) is nearly identical with Art. 6 (2) ECHR, the right of defence in Sect. 2 is scarcely more than the general endorsement of defence rights guaranteed in other international instruments.

1. Presumption of innocence⁵²⁾ (Article 48 (1) EU-Charter)

As already proclaimed in Art. 11 (1) UDHR of 1948, confirmed in Article 6 (2) ECHR, nearly identically formulated in Article 48 (1) EU-Charter and, last but not least, meanwhile affirmed by all states under the rule of law, presumption of innocence is, in principle, an undisputed human right. With regard to its meaning, scope and implication, however, a closer look into this principle will reveal both lack of clarity and frictions, resulting from the inner inconsistency of this principle as it is traditionally phrased and understood.⁵³⁾

In short, the basic problem lies in what consequences may, or may not, be drawn from “presuming” a person as “innocent” as long as is “not proved guilty”. If this, taken at its word, was to mean that this person has to be treated as innocent, how would it then be feasible to subject him or her to any prosecutorial proceedings or measures which an innocent person may not be subjected to? If presumed innocent and, thus, to be treated as innocent, it would not even be possible to consider him a suspect normally capable of being investigated. As a consequence it would not even be possible to perform a trial in order to prove a person guilty since a person presumed and treated as innocent might not

52) For more details on “the presumption of innocence” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 48*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 494-500, paras. 2-19. See also STEFAN TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, 2006, pp.153 ff. The principle of the presumption of innocence is derived both from Article 6 ECHR and the principle of the Rule of Law, see inter alia the ECtHR case of *Englert v. Germany*, Series A no. 123. For more details on the presumption of innocence see STEFAN TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, 2006, pp.153 ff.

53) For further reading on the jurisprudence of the ECtHR in this regard see MOWBRAY ALASTAIR, *Cases and Materials on the European Convention on Human Rights*, 2nd ed., Oxford, 2007, pp. 445-453.

be exposed to a trial at all. This creates the dilemma of either being blocked from prosecuting a person presumed innocent at all or having to make certain exceptions from the presumption of innocence, as it is, in fact, the more or less silent but, thus, hardly controllable practice. This dilemma can probably be solved only if the presumption of innocence is understood to mean not more than that the person concerned must not be described or treated as guilty as long as he is not proved guilty in the appropriate procedure.⁵⁴⁾

This prohibition of calling or treating a non-convicted person as guilty has, in particular, three consequences:

- On the one hand, until a person is not formally proved guilty, he or she must neither be called guilty nor subjected to any punishment or penalty-like sanction. This understanding also excludes “Verdachtsstrafen” (sanctions on the basis of probable cause) or anticipation of guilt as well as burdening a not yet convicted person with encroachments which in case of a punishment would presuppose proof of guilt.
- On the other hand, however, the prohibition of treating a person as guilty prior to formerly found guilty does not preclude preceding investigations which serve the determination of guilt, as it would also allow interferences according to particular suspicion.⁵⁵⁾ Thus, seizures or pre-trial detentions as they are permitted in case of a certain suspicion according to Art. 5 (1) (c) ECHR, are admissible without being explicitly stated in the EU-Charter. Accordingly, raising and expressing suspicion does not automatically constitute a violation of the presumption of innocence, provided that lack of guilt has not yet been formerly determined.
- The, thus, required demarcation between prohibited describing and treating as guilty prior to formal proof and permissible preceding measures is to be aligned in view of what, according to the principle of least possible interference, might be feasible against a person ultimately found innocent.

Among further points which are not fully nor finally solved by the EU-Charter, only

54) See also STAVROS STEPHANOS, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights*, London, 1993, p. 50/51: “The principle does not preclude preventive or investigative measures against the accused, such as searches for evidence, pre-trial detention to protect against absconing, or requiring handcuffs to be worn as a safety measure in or outside the courtroom. What it does require, however, is that any such measures should only be taken if there are clear grounds in the circumstances of each case to justify subordinating the accused’s right to be treated as an innocent person to the public interest in the effective administration of justice”.

55) SARAH J. SUMMERS, *Fair trials. The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, 2007, pp. 164: “Although the Convention sets out guidelines in Article 6 for the regulation of the trial and although it is well established that in relation to arrest and detention Article 6 should give way to Article 5, there is no mention of the procedure to be followed in relation to proceedings before trial. As the investigation phase follows the detention but precedes the trial, it seems to slip between these two provisions. This lacuna has had a substantial effect on the interpretation of Article 6.”

these three may be shortly addressed:

When Article 48 (1) EU-Charter speaks of “charged” and “guilty according to law”, it is not clear whether the charge has to be understood in terms of a criminal accusation and the guilt to be proven in a criminal trial, as it is translated in the German version of the EU-Charter, or whether the presumption of innocence should also apply to charges of administrative offences and sanctions. While the latter position is supported by academic commentators, the EU-Commission and Court seem to prefer the narrower criminal understanding.

In temporal perspective the presumption of innocence is not to be waited with until a formal charge has been raised; rather has the presumption be applied, as adjudicated by the European Court of Human Rights, as soon as a person is investigated as suspect in a criminal prosecution.

With regard to the possible significance of the presumption of innocence beyond criminal accusations in the public at large, some academics would like to see in it a constitutive legal principle of modern form of social life, essential for peaceful coexistence between individuals. However, since no indications of this sort can be found in any international instrument, at present such demands are not more than socially wishful expectations.

2. Defence rights (Article 48 (2) EU-Charter)⁵⁶⁾

On the face of it, this clause does not say more than that respect for the rights of defence, if and as far as they exist, shall be guaranteed. This principal recognition of defence rights, however, leaves open what rights are meant and to which degree they must be respected. This would seem to suggest that defence rights are guaranteed only in so far as they are recognized in the various national laws. This would entail that the standard of defence rights among the member states of the EU might be different according to the respective national law. As such a development, however, would be hardly reconcilable with the uniform guarantee of European human rights, recourse must be taken to Article 52 (3) EU-Charter (Art. II-112 (3) Lisbon Treaty) according to which rights contained in this Charter shall be applied in the same meaning and scope as laid down by the CoE-Convention. As according to the explanations of the Presidium of the EU-Convention the defence rights in Article 48 (2) EU-Charter correspond the detailed setting of defence rights in Art. 6 (3) ECHR, these rights have to be read into the general clause of Article 48 (2) EU-Charter. This means that the defence rights, listed in Art. 6 (3) ECHR and as interpreted by the ECtHR, are as “minimum rights” also to be respected under the EU-Charter.

56) For more details on “defence rights” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 48*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 500-504, paras. 20-32.

Most significant are the following rights:

In order to be able to defend oneself against a criminal charge, it is first and foremost important to be informed in detail of the nature and cause of the accusation (Art. 6 (3) (a) ECHR). Furthermore the person concerned must have adequate time and facilities for the preparation for his or her defence (Art. 6 (3) (b) ECHR).

The person concerned must have the right to defend him- or herself in person or through legal assistance of own choosing. Although, thus, both the right to self-representation and the right to be defended by counsel are recognized, there is an increasing dispute, most prominently provoked by *Milošević* in his trial at the ICTY, whether these rights may be exercised in an alternative or also in a cumulative way. If only alternatively in terms of either self-representation or assistance by counsel, as it is the prevailing practice in common law jurisdictions, the accused would, on the one hand, lose his right to additional assistance by a counsel while, on the other hand, he could reject to be assigned an unwanted counsel. More convincing, however, is the cumulative interpretation according to which both self-representation and additional assistance must be possible; otherwise neither the human dignity of the defendant nor his standing as a “subject” rather than a mere “object” of the proceeding would find due respect.⁵⁷⁾

In case of indigence, the accused has a right to be given free legal assistance, if the interest of justice so require⁵⁸⁾ (Art. 6 (3) (c) ECHR).

A similar right is guaranteed to indigent defendants with regard to the free assistance of an interpreter if not able to understand or speak the language used in court⁵⁹⁾ (Art. 6 (3) (e) ECHR).

Of particular importance for an efficient defence is the defendants right to examine or having examined witnesses against him and to attend the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him⁶⁰⁾ (Art. 6 (3) (b) ECHR).

In order to make the defence rights as efficient as possible, they are guaranteed

57) For more details on the guarantee and relationship of both the right to self-representation and to assistance by counsel see ALBIN ESER, *Verteidigung in der internationalen Strafgerichtsbarkeit*, in: HEINZ SCHÖCH et al. (eds.), *Strafverteidigung, Revision und die gesamten Strafrechtswissenschaften. Festschrift für Gunter Widmaier*, Köln 2008, pp. 147-176 (available on internet at: www.freidok.uni-freiburg.de/volltexte/6276) and, with special attention to „legal representation”, see KEIR STARMER, *European Human Rights Law*, London, 2000, pp. 269-272.

58) For an overview on the jurisprudence of the ECtHR on this issue see ALASTAIR MOWBRAY, *Cases and Materials on the European Convention on Human Rights*, Oxford, 2007, pp.454-459.

59) See the ruling of the ECtHR in the case *Brožicek v. Italy*, A. 167 (1989) 12 EHRR 371, para. 41 and *Luedicke, Belkacem and Koc v. Germany*, A. 29 (1978) 2 EHRR 149, paras. 38-50.

60) For more details on witness examination with regard to Article 6 ECHR see SARAH J. SUMMERS, *Fair trials. The European Criminal Procedural Tradition and the European Court of Human Rights*, Oxford, 2007, pp. 132-155.

already prior to a formal accusation, namely as soon as a person on the basis of a certain suspicion is exposed to concrete investigating measures.

After all, however, one must be aware that not any and every violation of a defence right necessarily leads to the exclusion of evidence. According to an “overall view”, as required by the jurisprudence of the ECtHR, the testimony of a witness which has been examined in the absence of the defence counsel, may still be used for corroborating other valid evidence.

In sum, although it is deplorable that the creation of the EU-Charter was not used for an own comprehensive catalogue of defence rights, in combination with the ECHR guarantees, the EU-Charter is still providing a higher standard of defence rights than certain national criminal jurisdictions so far lagging behind.

V. *Ne bis in idem* - Prohibition of double jeopardy⁶¹⁾

Article 50 EU-Charter (Art. II-110 Lisbon Treaty): Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

The EU-Charter is certainly not the first international instrument to recognize this principle. After having already been pronounced in Art. 14 (7) ICCPR, it was confirmed in Art. 4 Protocol Nr. 7 of the ECHR⁶²⁾. In similar terms also recognized in various national jurisdictions under the notion of “*ne bis in idem*” or as prohibition of “double jeopardy”,⁶³⁾ this principle is to protect a defendant from being punished for the same crime twice or even more often. Nevertheless, Article 50 EU-Charter is of additional significance: Whereas other international instruments oblige the national jurisdiction merely to respect the intrastate prohibition of double jeopardy, Article 50 EU-Charter goes further by extending the prohibition of multiple prosecutions beyond national borders within the European Union.

61) For details on the “*ne bis in idem*” prohibition of double jeopardy” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte*, Art. 50, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 518 -525, paras.1-25.

62) The case law of the ECtHR confirms the prohibition of double jeopardy see the judgment in *Gradinger v. Austria*, A. 328-C (1995), paras. 53-55. For an overview on the jurisprudence of the ECtHR on Article 4 of Protocol 7 of the ECHR see MOWBRAY ALASTAIR, *Cases and Materials on the European Convention on Human Rights*, 2nd ed., Oxford, 2007, pp. 1004-1010.

63) In common law systems, the principle of “*ne bis in idem*” is better known as the rule against “double jeopardy”.

For more details on the prohibition of double jeopardy see STEFAN TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, 2006, pp. 381 ff.

Although the wording of Article 50 EU-Charter only refers to the Union, its purpose aims at three different levels⁶⁴⁾:

1. Intra-state “ne bis in idem” on the national level⁶⁵⁾

Though it may be assumed that no modern court under rule of law would completely ignore the fact that the defendant had already been punished for the same crime by another court, there are still two main ways to take a former conviction and punishment into consideration. According to the traditional “principle of accounting” (in German known as “Anrechnungsprinzip”)⁶⁶⁾, the antecedent judgment of another court would merely be deducted from the own subsequent judgment; this means that the subsequent court will not be hindered from prosecuting and sanctioning the same crime for a second time. Since such a double proceeding is not only burdensome for the defendant but also costly for the justice system, the more modern “principle of recognition” (in German “Erledigungsprinzip”⁶⁷⁾) goes further by already blocking a second proceeding for the same crime.⁶⁸⁾ By obliging its members to this second principle, the EU-Charter strengthens the human rights significance of “ne bis in idem” for those domestic jurisdictions of member states in which it is still lacking constitutional recognition and/or the ratification of the CoE-Protocol Nr. 7.

2. Horizontal transnational “ne bis in idem”⁶⁹⁾

This level is even more important since Article 50 EU-Charter is the first international instrument to prohibit border-crossing “double jeopardy”, at least for the member states of the

64) For a comparative survey to the differentiation of these various levels see ROLAND MICHAEL KNIEBÜHLER, *Transnationales “ne bis in idem – Zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension*, Berlin, 2005, pp. 1 ss. as well as SIBYL STEIN, *Zum europäischen ne bis in idem nach Artikel 54 des Schengener Durchführungsabkommens*, Frankfurt am Main, 2004, pp. 153 ss.

65) For more details on intrastate “ne bis in idem” on the national law with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 50*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 521-522, paras. 6-10; ROLAND MICHAEL KNIEBÜHLER, *Transnationales “ne bis in idem – Zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension*, Berlin, 2005, pp. 16 ss.

66) In Germany, Italy and England the “principle of recognition” applies. See TOBIAS LIEBAU, *„Ne bis in idem“ in Europa*, Berlin, 2005, pp. 217, 218, 221 ff.

67) In the Netherlands, Spain and England the “principle of accounting” is applicable. See TOBIAS LIEBAU, *„Ne bis in idem“ in Europa*, Berlin, 2005, pp. 217 ff.

68) In most European countries a mixed system of both principles is applied, such as in Austria, France, Belgium, Luxemburg, Sweden, Denmark, Poland and Switzerland. See for details TOBIAS LIEBAU, *„Ne bis in idem“ in Europa*, Berlin, 2005, pp. 224-230.

69) For more details on horizontal transnational “ne bis in idem” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 50*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 522-525, paras. 11-16; ROLAND MICHAEL KNIEBÜHLER, *Transnationales “ne bis in idem – Zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension*, Berlin, 2005, pp. 64 ss.

EU; and still beyond its formal reach it may eventually function as a moral- political challenge.

To be correct, however, it must be mentioned that within the EU there exists already a special “ne bis in idem” regime for the so-called Schengen-States⁷⁰⁾ that have abolished any border-crossing controls. The practical importance of this regulation is already evidenced by remarkable case law of the European Court of Justice.⁷¹⁾

3. Vertical national-supranational “ne bis in idem”⁷²⁾

A third dimension in which under “ne bis in idem” may play an increasing role, is the relationship between national, regional (as, in particular, European) and supranational criminal courts, such as the ICC. Unlike the horizontal-transnational level on which different domestic jurisdiction are on the same footing, the vertical perspective to different directions must be distinguished and eventually treated differently: Whereas a national court may be prohibited from a second prosecution as far as a crime has been judged upon by a superior international court, this one may take up the prosecution again, so at least in those cases in which the proceeding for a domestic court was for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the international court, as, in particular, provided for in Art. 20 ICC-Statute.

4. Issues not yet solved

Out of quite a few points which are left open in the rather short “ne bis in idem” regulation of the EU-Charter, only three may be mentioned:

Although Article 50 EU-Charter is progressive by not only prohibiting a second punishment but already a second trial for an offence finally adjudicated, the question remains whether the final decision must have been taken in a genuine criminal trial by a criminal court or whether such a decision may also be taken within a special system of administrative offences and proceedings by the respective authority. Similarly questionable is whether the prohibition of a second “trial” may already foreclose a

70) See MARIA FLETCHER, *The problem of multiple criminal prosecutions building an effective EU response*, Yearbook of European Law, 2007, online available at: <http://www.eprints.gla.ac.uk/3811/>. The Schengen-States committed themselves in Articles 55-58 of the Schengen Convention to apply the “ne bis in idem” principle to judicial co-operation in criminal matters, subject to certain conditions and exceptions.

71) Judgment of the ECJ of 11 February 2003 in joined cases C-187/01 and C-385/01, *Hüseyin Gözütok and Klaus Brügge*; *F.M. Miraglia* judgment of 10 March 2005, C-469/03. See also NADINE THWAITES, *Mutual Trust in Criminal Matters: the European Court of Justice gives a first interpretation of a provision of the Convention implementing the Schengen Agreement*, European and International Law, Vol. 4 No. 3 (2003), pp. 253-262.

72) For more details on Vertical national-supranational “ne bis in idem” with regard to the EU-Charter see ALBIN ESER, *Justizielle Rechte, Art. 50*, in: JÜRGEN MEYER (ed.), *Kommentar zur Charta der Grundrechte der Europäischen Union*, 2nd ed., Baden-Baden, 2006, pp. 525, paras. 16-17; ROLAND MICHAEL KNIEBÜHLER, *Transnationales “ne bis in idem” Zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension*, Berlin, 2005, pp. 374 ss.

second investigation.

With regard to the nature of the “offence” the defendant has already been acquitted or convicted for, there exists some controversy between the common law and the civil law approach: Whereas the common law tradition is focused on the more normative description of the crime (such as “murder”), thus allowing a second prosecution for the same facts if the subsequent charge names a different crime (“manslaughter” instead of “murder”), the traditional civil law approach is focused more broadly on the historical facts which, regardless of the crime description or denomination, may not be investigated into a second time. As concerns the Japanese domestic position, I guess that the prevailing “count”-theory would come closer to the “offence”-oriented common law approach rather than to the “fact”-theory prevailing in continental Europe.⁷³⁾

Last not least, an even more progressive European endeavour should be mentioned: Since the need for taking resort to the principle of “ne bis in idem” results from the concurrence and frequent overlapping of different national and international jurisdictions, it would be much more preferable to avoid concurrence of various jurisdictions from the very beginning. How this ambitious aim could be reached, is elaborated in a project I had the chance to guide at our Max-Planck-Institute in Freiburg, published under the title of “Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union”.⁷⁴⁾

VI. Outlook

Although not everything is perfect yet, the protection of human right in criminal law and procedure in Europe has at least reached a rather high standard. Due to both the positive attitude of the European courts and the widespread political consciousness of European citizens towards human rights, further improvements can be expected. This may also be an encouragement for other regions of the world community.

73) This conclusion is drawn from the analysis of the recent Japanese case law by MORIKAZU TAGUCHI, *Der Prozessgegenstand im japanischen Strafprozessrecht*, ZIS online.com, Heft 2/2008, pp. 70-75, notwithstanding the wording of Art. 256 (2) (ii), (3) and Art. 312 (1), (2) Japanese Code of Criminal Procedure which traditionally seems to have been understood in terms of the “fact”-theory.

74) Available at <http://www.mpicc.de/shared/data/pdf/fa-ne-bis-in-idem.pdf> .