Stefano Ruggeri
Editor

Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings

A Study in Memory of Vittorio Grevi and Giovanni Tranchina

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In June 2011, in the context of this project, an international conference took place in Syracuse, where distinguished scholars of international and European criminal law and practitioners from eleven countries both from inside and outside Europe met to expose and discuss the provisional results of their investigations. This book brings together the final surveys from a four-level perspective.

Many things have happened since the beginning of the present research, especially the death of two outstanding scholars of Italian criminal procedures, namely Prof. Vittorio Grevi and Prof. Giovanni Tranchina. As a consequence of this, I have chosen to dedicate this project to both of them, in memory of the high human and scientific value of these two Masters. Furthermore, today I would also like to remember Prof. Dr. Günter Heine, who took part actively in this research but unfortunately could not see this book, since he died shortly after our conference in Syracuse.

Many people have contributed to the realization of this project, and I would like to thank firstly all the outstanding colleagues who have taken part in this research for their valuable contributions. A special thank goes to Springer Verlag for its interest and sensitivity towards this project and especially to Miss. Brigitte Reschke for constantly trusting this initiative and patiently awaiting its results. I am very grateful to Mr. Christopher Schuller for his professional editing of the whole manuscript. Moreover, I am very proud of the quality of the work performed by my entire chair team, and I would like to thank especially Simona Arasi, Alessandro Arena, Rossella Bucca, Giusy Laura Candito, Marta Cogode, Federica Crupi, Diego

Fundamental rights are not a flag one can wave only under a shining sun. They are the main sail which must always be protected without being lowered even when a storm arises. For instance, it is significant that the European Convention on Human Rights distinguishes, within the sphere of the rights it deals with as fundamental, between those that can be suspended or limited in exceptional circumstances (albeit, of course, compensated by some "institutional" guarantees) "in time of war or other public emergency" and other rights which can never be either suspended or limited.

It is not my task to enter into the merits of the approaches to these problems of the various contributions of this book. However, focusing on these problems and involving so many outstanding scholars to provide information and express their opinions thereon are a credit both to the contributors and to the editor of this project.

Torino, Italy Mario Chiavario

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The Fight Against Organized Crime. Amid Contrasting Strategies and Respect for Human Rights

Paola Maggio

Contents

Abstract Regulatory interventions and the application of lessons from outcomes together with the renewed value of human rights in criminal proceedings demonstrate that the fight against organized crime at the European level requires constant attention to the balance between individual rights on the one hand and the need for an effective investigation on the other.

Abbreviations

Cass.	Court of Cassation
CCP	Code of Criminal Procedure
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU FRCh	Charter of Fundamental Rights of the European Union
EUCMACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

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ICCt	Italian Constitutional Court
OCTA	Organized Crime Threat Assessment
TFEU	Treaty on the Functioning of the European Union
UN CTOC	United Nations Convention against Transnational Organised Crime

1 Introduction

The relationship between internal authority and supranational resolve, as they specifically relate to the phenomenon of organized crime, requires the adoption of a multidimensional approach upon which regulatory norms can be based, taking account of the ability to monitor the enforcement of outcomes and the repercussions on fundamental procedural rights.

For the first aspect, regulation takes the form of prevention and controls, which in turn are characterized by the willingness to make diverse national legislation balanced and homogeneous. This feature of criminal intervention reflects the need for a vast, large-scale social defense against serious forms of transnational organized crime.

The second aspect examines actual operating projections of government organizations regarding cross-border investigations and the jurisdictional relationships between different countries. The slow overcoming of operational difficulties and the ever-increasing need for consolidation has marked recent history and cooperation among existing institutions, of which Eurojust is the most prominent example.

The third aspect seeks to bring cohesion to the methods by which European regulations and laws have reacted and will react to national models with the intention of transforming them. The influences run both ways. On the one hand, the harmonization of internal rights with other member states with the intention of better, more effective protection of the Union's interests has had a notable impact on national Italian procedures, though not without the benefit of prior background knowledge and experience. On the other hand, the escalating push to recognize fundamental rights, with respect to a human-rights-centered view of the criminal law system, represents a true challenge for the future of these same structures and judicial outcomes.

The ECHR and the case law of the ECtHR put pressure on existing multi-level systems to re-examine procedural guarantees with specific regard to combatting these types of criminal phenomena.

2 Strategies for Counteraction and Harmonization

The intervention of the European Union in the fight against organized crime has translated into the moving away from a series of existing Council Framework Decisions. Prompted by the need to streamline different national systems and counteract crime, an intensified focus has been placed upon cooperation and mutual

recognition of judicial decisions. To avoid undesirable forms of forum shopping due to national regulations often being contradictory and assorted in terms of homogeneity of crimes and consequences, regulatory proceedings have employed a wide notion of what defines organized crime, including economic crimes, forgery, corruption, and tax fraud.[1]

The process of harmonizing national thresholds of criminalization[2] aims primarily to equalize the fundamental elements that define crimes, especially the punishable conduct and the level of sanctions, while maintaining constant attention to the implementation of mutual recognition.[3]

This goal is expressed in Article 1 of the Council Framework Decision 2008/841/JHA on to the fight against organized crime, which contemplates the largely borrowed notion of organized crime in the text of the Palermo Convention of 2000.[4] Taking into account the differing traditions of standards regarding crimes of association in Anglo-Saxon countries based on Common Law, the decision brings into the broad concept of punishable conduct offences structured according to a model of conspiracy.[5] Several problems arise directly out of this choice.

On a procedural level, criminal jurisdiction remains anchored to the territory of the Member State in which the crimes were totally or partially committed, regardless of where the criminal association has its base. From the criminal policy contained in the Council Conclusions, setting up the Euro Priorities in the fight against organized crime based on the OCTA, it is easy to infer a continuous, pressing call for member states and Union organizations created to contrast transnational crime to evaluate data analysis conducted by Europol and summarized in the OCTA when adopting strategic initiatives and operations.

From the perspective of the European Council, the fight against organized crime serves to reduce the potential of threats and damage to modern democracies. The capacity for infiltrating the criminal landscape of different countries is an important facilitating factor for organized crime rings. The resulting demand for a more unified treatment of these phenomena with measures that ensure a greater capacity to effect single national laws is echoed in the Treaty of Lisbon and the Stockholm Conference.

The Lisbon Treaty confirms the decision, already in operation during the Summit of Tampere in 1999 (Concl. 33–36), and has reiterated the fundamental principals of mutual recognition of judicial procedures (Art. 82 TFEU).

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[1] Action Plan against organized crime (adopted by the Amsterdam European Council on the 16th - 17th June 1997).

[2] See http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_organised_crime.

[3] The Framework Decision 2008/841/JHA substituted the Joint Action 98/733/JHA (21 December 1998) on the offense of participation in organized crime, aiming to strengthen the fight against organized crime inside European Union.

[4] UN CTOC of 13 December 2000, concluded on behalf of the European Community with the Council Decision 2004/579/CE.

[5] Article 2 of the Council Framework Decision 2008/841/JHA of 24 October 2008, describes the conduct of criminal law.

The prospect of realigning legislative and regulatory provisions between member States will likely be a strong reinforcement of reciprocal trust between judicial authorities in member countries and is the basis of ensuring continuing mutual recognition.

Title V of the TFEU contains significant innovations in the realm of criminal judicial cooperation (Chap. IV, Arts. 82–86). When implemented, these innovations will provide further progress in creating an area of freedom, justice, and security by overcoming the intergovernmental method and introducing new mechanisms for establishing regulations.

With regards to the substance of criminal law, under Article 83, the European Parliament and the Council, acting by means of directives adopted according to standard legislative procedure, can establish minimum common standards for the definition of crimes and appropriate sanctions for serious cross-border crimes when their nature implicates a need to combat them on a common basis. Among these spheres of crime (along with terrorism, human trafficking and the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting, and computer crime), organized crime is also included.

In the second paragraph of Article 83 TFEU, competences are not identified for specific sectors but are instead linked to the realigning of legislative and regulatory provisions, limited only when the same norms have previously undergone measures for harmonization. Under these conditions, new directives can be adopted which aim to introduce minimum standards for the definition of crimes and sanctions. Once legislation has been realigned, these standards will be indispensable for guaranteeing an effective implementation of EU policies.

Eurojust possesses significant power to initiate investigations, reinforced by coordinated powers within supranational investigations through express recognition of its ability to prevent and resolve conflicts of jurisdiction. It seems that finally a proper investigative body is taking shape, even if not yet fully authorized to prosecute, and has exceeded Eurojust's initially limited capacity to formulate proposals addressed to the competent authorities and to initiate criminal investigations. These initiatives will have an even greater impact when implemented according to the plan of action by the Stockholm Programme, which has established the committee for 2012, and the adoption of a regulatory proposal that will confirm the role of Eurojust.[6]

The formal expansion of these bodies does not always reflect their full utilization. In fact, the organization and institutional discipline of the European Public Prosecutor is generic in many ways. Many particulars remain unresolved, especially with respect to the second paragraph of Article 86, which deals with criminal

[6] The initiatives for its establishment will be up to the Council, which should act according to special legislative procedures, unanimously and after having obtained the consensus of the European Parliament.

jurisdiction in the European Union.[7] A reference to economic interests complicates the matter, creating convergences and overlapping with the OLAF, and make necessary ulterior agreements and actions of coordination.

The Stockholm Programme approved by the European Council on 10–11 December 2009, with an eye to further developing of an area of liberty, security and justice, proposes a joint plan by European institutions that is consistently oriented towards the protection of the interests and needs of its citizens. Such measures will promote and respect fundamental liberties, contextualized by elevated standards of European security (Point 1.1).

The areas of police cooperation and criminal justice are affected by the predictions in points 3 (A Europe of Law and Justice), 4 (A Europe That Protects), and 7 (The Role of Europe in the Globalized World-The External Dimension) in the Programme. In this context, the Commission and the Council will be counted upon to assure a full and integral utilization of existing tools through an attentive monitoring of procedural implementation in the various member States to ensure a greater integration and cohesion of the entire plan (points 1.2.4). The Council must define a European standard of maximum sanctions for crimes of a particularly serious nature. On a procedural level, a general, comprehensive system of measures based on the principal of mutual recognition will substitute for the current mechanisms that are still primarily focused on the system of rogatory letters (point 3.1.1).

A new political resolve must be extended to operational aspects as well. The Commission and the Council are invited to propose further secondary measures until agencies and bodies like Europol, Eurojust[8] and Frontex are utilized more efficiently by authorities of member States, for example through systemic involvement in cross-border investigative cases of high importance—not just those of terrorism (point 4.3.1). Likewise, organizations of the Union must adopt initiatives that encourage the use, where appropriate, of joint investigative teams.[9] The emphasis on operational cooperation is perfectly in line with actions recently announced by the EU through the legal acts adopted at the end of 2008.[10] Recently, the European Commission reasserted these objectives, emphasizing that criminal law of the European Union, flanked by principles of subsidiarity and

[7] The arrangement provides that the European Prosecution is competent to identify, prosecute and bring to trial, possibly in conjunction with Europol, those responsible for crimes against the financial interests of the Union.

[8] Eurojust plays a central role in overcoming the previous model of liaison magistrates and points of contact. The organization has proved capable of facilitating the enforcement of judicial rogatory letters and to fulfill a role of coordination.

[9] In Italy, the Assembly Senate approved on first reading (7 April 2011) the legislative draft proposal No. 804, aimed to implement the Framework Decision 2002/465/JHA (13 June 2002) on "joint supranational investigative teams."

[10] The Decision 2009/371/JHA (6 April 2009) is directed at strengthening Europol and fully replaces the Convention of 1995.

proportionality, must be oriented towards maximum respect for human rights,[11] including interventions in organized crime.

At the same time a new Resolution[12] seeks to combat organised crime and encourages Member States to strengthen their judicial authorities and police forces on the basis of the best current experience, including by comparing the legislation and resources designed to support their activities, and to assign adequate human and financial resources for that purpose. It calls on the Member States to pursue a proactive approach to investigation, draw up national plans to combat organised crime, and provide for central coordination of activities through appropriate specific structures, taking their cue from the most successful experiences of some Member States. Resolution of 25 October 2011 specifies that all measures to counter organised crime must respect fundamental rights in full and be proportionate to the objectives pursued and that these objectives must be necessary in a democratic society, in accordance with Article 52 EU FRCh, without unduly restricting the freedom of individuals, as enshrined in the ECHR, the EU FRCh and constitutional principles common to the Member States.

3 The Application of Outcomes

Regulatory indicators attest to the demand for integration of structures and apparatuses with an aim to set down legal rules that promote uniformity.[13] The ability to apply these rules limits, however, interventions into basic procedures of EU laws for judicial cooperation and depends on the principle of mutual recognition. Therefore, the endeavor to overcome the narrow confines of the state is flanked by numerous operational obstacles. Eurojust, for example, an institution which is not yet fully developed but certainly destined to increase in scope in the future, remains largely underutilized by national judicial authorities.[14] Italy, for example, has made only a small number of communications under Article 7(3) of the Italian Law 41/2005, which governs the investigative tasks of coordination.

The situation requires the fostering of a professional culture that recognizes Eurojust as a privileged interlocutor that should be involved in all investigations and proceedings with a cross-border dimension.[15] This is confirmed by the recent Council Framework Decision 2009/948/JHA adopted by the Council on 30 November 2009 pertaining to the prevention and resolution of jurisdictional conflicts in penal proceedings (Art. 12). In this Framework Decision, in line with Article 85(1)(c)

[11] COM(2011) 573 final (20 September 2011).

[12] European Parliament Resolution (25 October 2011) on organized crime in the European Union (2010/2309 INI).

[13] Melillo (2006), p. 272, hopes for bold vertical forms of cooperation.

[14] http://www.eurojust.europa.eu/press_releases/annual_reports/2010/Annual_Report_2010_IT.pdf.

[15] Spiezia (2010), p. 655.

in the Treaty of Lisbon, we can expect that Eurojust will be involved almost on an obligatory basis in cases where the national authorities, after the necessary joint consultations, have failed to reach agreement on the concentration of proceedings at one court.

Since some States (including Italy) did not ratify the EUCMACM and the corresponding Protocol of Amendment of 2001, the action of Eurojust was so far inhibited. Another obstacle was the delay in the reception of the Council Framework Decision regarding Joint Investigative Teams of 2002.

As a result, it is impossible to refer to a conventional framework regarding requests for judicial assistance that involves specific measures (an example is the activation of video-conference, increasingly requested by national judicial authorities in proceedings dealing with organized crime), therefore necessitating the practice of international comity. Nevertheless, the UN CTOC of 2000, ratified by Italy with Law 146/2006, represents an exception.

An original experience of judicial cooperation at the EU level like Eurojust does not became less important in spite of gaps, delays and other obstacles. The development of a supranational coordination[16] suggests further steps in this direction.

Eurojust is in fact given the power to deflate situations, even mere potential situations, of concurrent jurisdiction between different states regarding investigations or crimes with a transnational dimension. Eurojust can intervene when a crime is likely to make an impact on a supranational level, with investigations being led by judicial authorities in multiple states, by virtue of the principal of territoriality. This results in the adoption of criteria for extraterritorial jurisdiction, provided by the national legislations and international conventions. In light of this, it seems unavoidable that the coordinating role assigned to Eurojust will be reinforced in the future.

Among applicable cases that have benefitted from judicial coordination, a recent Italian case called Gomorrah is a noteworthy example. The situation required the coordinated efforts of Eurojust, Europol, and the competent national judicial authorities, and its success (police operations, the implementation of precautionary measures and simultaneous seizures of evidence in various countries of the Union) was indicated as a model for cooperation among member states of the EU.[17]

The request to open criminal proceedings was solicited by a national member of Eurojust, pursuant to Article 5 of the Italian Law 41/2008 and Article 6 of the Council Decision of 28 February 2002. As a result, the *Direzione Distrettuale Anti-Mafia* of Naples wrote a dossier on the existence of

> an international organization, with its base in Naples and linked to the Camorra, concentrated on the importation from China of various counterfeit products which are then commercialized in numerous member states, Australia and other countries outside the Union.

The information transmitted from the Member States was regarded as *notitia criminis*. Italian judicial authorities requested that acquired information be

[16] Council Decision 2009/426/JHA.

[17] The case was presented at the round table of Bruges, "*Eurojust and the Lisbon Treaty: towards more effective action*," like "*A model for judicial and police cooperation*."

transmitted directly through Eurojust. In this manner, the acquisition of information was undertaken according to the formalities of Article 330 f. of the Italian CCP, with the stipulation that the complaint came from a foreign authority. Subsequently, on the initiative of the French office at *Eurojust,* coordination meetings were held between numerous judicial authorities of member States in relation to investigative hypotheses regarding proceedings initiated by the Office in Naples. Europol made an important contribution by creating a detailed report that contains numerous investigative checkmarks.

The exchange of information and analysis gathered by judicial authorities and police in a coordinated effort brought to light circumstantial elements that infer the importation from China of numerous counterfeit products and the subsequent transportation and sale of these same products in many European countries by an organization with mafia (named Camorra) characteristics. This episode has created a precedent likely to give rise to others while taking into account the evolution of criminal judicial cooperation in the EU, and also in light of regulations contained in the Treaty of Lisbon and in the Stockholm Programme.

4 Human Rights and Criminal Responses

In a global landscape where the sources, the nature, and the purpose of criminal actions have changed and expanded, growing attention must be paid to the fundamental rights.

The structure of renewed cooperation between states in criminal matters and the first applicable consequences require a "denationalization" of guarantees.[18] The goal is that they no longer reflect the sovereignty of individual countries but rather universally recognized rights able to be fully realized in "procedural containers" that differ considerably from one to the next.[19]

We hear with increasing frequency of "procedural humanism,"[20] which stresses the need to place the accused, and the fundamental values that concern them, at the center of the proceedings. If national borders appear to be increasingly blurry, it is necessary "that the principles of legality and justice in procedures continue to constitute clear horizons and a shatter-proof frame from acts of repression."[21]

These essential "indicators" outline a perimeter, an essential background of guarantees, in the enlargement of European criminal competence. Any imposition of full cohesion on regulations of judicial cooperation must give due priority to principles from the EU FRCh, by means of balancing strategies of counteraction and repressive efficiency.

[18] Pulito (2010), p. 891.

[19] Di Martino (2007), p. 100; Piattoli (2007), p. 1105.

[20] Brenner (2010), p. 175.

[21] Rafaraci (2007), pp. 3 ff.

The ECHR system has contributed to designing a model of "fair trial", particularly attentive to the rights of the accused, that exerts it's effects on the individual case while maintaining a notable influence on single national legislation and common European law as a whole.

The decisions of the ECtHR impose forms of forced adaptation on every occasion where there is inequity regarding a specific trial, regardless of what has caused the violations, which can either be represented by structural profiles or distortions applicable to a single case. A recent decision of the Italian Constitutional Court has even created a new case of review of final judgments (*revisione*) in order to implement European decisions.[22]

The model of "fair trial" also provides an ideal map of safeguards against which the rules adopted by each procedural system can be checked. In this respect the Italian judicial experience provides an important reference point, so much so that its ability to achieve a differentiated treatment in trials of organized crime is often held up as an example (rules on pre-trial detention, interceptions, mechanisms for acquisitioning conflicting evidence at the outset of cross-examination, as well as the penitentiary system of Article 41bis of the Italian Law 354/1975).

The phenomenon can be described as a "double track."[23] This not technical expression hints at a "specialized approach to procedures[24] linked to the actual dimensions of the conflict". The real extent of the offence and its juridical ontology may justify differing procedural responses.[25]

On a national level, this type of approach has encountered numerous criticisms. The Italian doctrine has suggested to

> expunge from the text of the code the norms constituting the subsystem on procedural forms in order to assess offenses of organized crime and similar misconduct.[26]

In other words, since it is not possible to erase the intrinsic features of these rules, it seems opportune to limit them with rules that are uncodified (*extra codicem*), therefore enhancing diversity and promoting intelligibility for operational purposes.

Other interpretations recognize the danger of affecting the ultimate outcome of the trial by resorting to media coverage to shape public representation of the proceedings.[27] Keeping a fair judgment as the objective not only defends against conflicting interests surrounding the legal case but also looks to fully realize the larger policy objectives of the State.[28] This, in turn, has to be balanced against with dogmatic concerns related to prejudice against the equality principle. Nor does it

[22] ICCt, Decision 113/2011.

[23] Bitonti (2005), pp. 393 ff.

[24] Scaglione (2009), p. 129.

[25] Riccio (2001), p. 1327.

[26] Amodio (2003), p. 7. In Italy, on 15 June 2011 a legislative decree was issued for anti-mafia laws and measures of prevention (the so-called "Anti-Mafia Code").

[27] Piziali (2000), p. 975.

[28] Tranchina (1970), p. 700.

exclude the possibility that in attempting to treat often unequal situations as equal, serious discrimination could arise all the same.

Principles of the ECHR have also had a cultural influence on standards relating to acts of organized crime. Among the exceptional provisions, Article 190bis of the Italian CCP provided a procedure for the collection of evidence in cases of serious offences laid down in Article 51(3bis) CCP, allowing a wider use of pre-trial evidence than in ordinary proceedings. The original formulation of the standards was corrected nonetheless by the Italian Law 63/2001 to make it compatible with constitutional principles of "fair trial" of direct European derivation.

The Italian Constitutional Court has, up to now, approached Article 275(3) of the Italian CPP, which provides a presumption of adequacy in respect of remand detention ordered for the offences provided for in Article 416bis of the Italian CP, from the perspective of strict exceptionality in respect of organized crime.[29] Furthermore, it has adopted a similar approach in relation to other exceptions to the code[30] and penitentiary treatment.[31]

According to the Italian Court of Cassation,[32] proceedings related to organized crime have subjective and objective characteristics, and for this reason it is not always possible to administer adequate resolutions when following ordinary codes of standards. Continuing in the same vein, the ECHR has approved the specific assessment of facts related to cases of organized crime.[33]

The road travelled thus far has confirmed the possibility of diverse regulatory strategies that, without altering the framework of the process, maneuver with obvious respect for the underlying principles of the system.[34] At its core, the flexibility of certain rights and certain guarantees has been justified in balancing conflicting calls for security.[35]

Evidence shows that the issue here today has generated renewed interest and is enriched by cultural stimuli. The future task put to the doctrine of procedural criminal law[36] will be the difficult work of constant verification that the various interests in a multi-dimensional perspective are balanced and not exclusively national. This is an objective that cannot be pursued abstractly, but instead only by looking at each individual standard or institution, with full respect for human rights and the trial guaranties of the accused.

[29] ICCt, Decision 265/2010, commented by Tonini (2010), p. 955.

[30] ICCt, Decision 372/2006, stressed the presumptive capability of mafia-related of causing social alarm.

[31] Article 41bis of the Italian Law 354/1975 has, however, produced many interpretative problems.

[32] Cass. 12 June 2001, Bagarella, in *CED Cass.* 219626; Cass. 22 January 1997, Dominante, Giustizia penale 1998, II, p. 499.

[33] ECtHR, 24 August 1998, Contrada v. Italy, Application No. 27143/95. See Kostoris (2008), p. 8.

[34] Garofoli (2008), pp. 945 ff., criticized the differentiated trial regulation for crimes of Article 51 (3bis) of the Italian CCP.

[35] In these terms cf. Viganò (2006), p. 648; Giunchedi (2008), p. 22.

[36] Fiandaca (2011), pp. 5 ff., insists on the balance between general security and human rights. For a complete analysis, see too Fiandaca and Visconti (2010), pp. 9 ff.

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