# EUROPEAN REVIEW OF PRIVATE LAW

Wolters Kluwer
Law & Business

Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by Turpin Distribution
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 0928-9801


This journal should be cited as (2012) 20 ERPL 2

The *European review of Private Law* is published six times per year.
Subscription prices for 2012 [Volume 20, Numbers 1 through 6] including postage and handling:
Print subscription prices: EUR 651/USD 867/GBP 478
Online subscription prices: EUR 602/USD 803/GBP 443 (covers two concurrent users)

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The *European review of Private Law* is indexed/abstracted in the *European Legal Journals Index*.
Printed on acid-free paper

# EUROPEAN REVIEW OF PRIVATE LAW
# REVUE EUROPÉENNE DE DROIT PRIVÉ
# EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT




Founded in 1992 by Ewoud Hondius and Marcel Storme

**ISSN 0928-9801**





*Typeface* ITC Bodoni Twelve
*Design* Dingoj | Peter Oosterhout, Diemen-Amsterdam
Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

European Review of Private Law 2-2012 [347–380] © Kluwer Law International BV. Printed in the Great Britain.

# Principles of European Criminal Law: Jurisdiction, Choice of Forum, and the Legality Principle in the Area of Freedom, Security, and Justice

MICHIEL LUCHTMAN*

**Abstract:** Developments in the European Union (EU) in the area of prosecution of transnational crime are tempestuous. Yet the debate on the role of the principles of criminal law in this area of the law is still in its infancy. This contribution explores the role of the legality principle (*nullum crimen, nulla poena sine lege*) in relation to choice of forum in the Area of Freedom, Security, and Justice (AFSJ). To what extent is the legality principle applicable in transnational cases? What must one think of current developments in light of this principle? Is the principle a factor of relevance for the European legislator and for the judiciary? It is advocated in this contribution that the legality principle of Article 49 of the Charter of Fundamental Rights (CFR) needs to be adapted to its transnational setting and that this must have implications for the state of play in European criminal law.

**Résumé:** En matière de poursuite des délits transnationaux, les développements au sein de l´Union européenne sont tumultueux. Pourtantle débat sur le rôle des principes de droit pénal dans ce domaine du droit en est encore à ses débuts. La présente contribution explore le rôle du principe de légalité (*nullum crimen, nulla poena sine lege*) en relation avec le choix du for dans l´Espace de Liberté, Sécurité et Justice. Jusqu´où s´applique le principe de légalité aux cas transnationaux? Que doit-on penser des développements actuels à la lumière de ce principe? Le principe est-il un facteur de pertinence pour le législateur européeen? Et pour le pouvoir judiciaire? La présente contribution défend le point de vue selon lequel le principe de légalité de l´article 49 de la Charte des Droits Fondamentaux a besoin d´être adapté à son cadre transnational et cela doit avoir des implications sur l´état du droit pénal européen.

**Zusammenfassung:** Die Entwicklungen in der Europäischen Union im Bereich der Strafverfolgung internationaler Verbrechen sind in großer Bewegung. Dennoch befindet sich die Debatte über die Rolle der Strafrechtsgrundsätze in diesem Rechtsbereich immer noch am Anfang. Der vorliegende Beitrag untersucht die Rolle des Legalitätsgrundsatzes (*nullum crimen, nulla poena sine lege*) im Verhältnis zur Rechtswahl im Bereich Freiheit, Sicherheit und Gerechtigkeit. In welchem Ausmaß ist der Legalitätsgrundsatz in internationalen Fällen anwendbar? Wie sind die derzeitigen Entwicklungen im Lichte dieses Grundsatzes einzuschätzen? Ist dieser Grundsatz für

* Associate Professor, Willem Pompe Institute for Criminal Law and Criminology, Utrecht University, Utrecht, The Netherlands. Email: <m.luchtman@uu.nl>. This article was made possible under the Innovational Research Incentives Scheme of the Netherlands Organisation for Scientific Research (NWO). Many thanks to Prof. Dr John Vervaele, Dr Renée Kool, Dr Elise Muir, Dr Tony Marguery, Dr Jan Inghelram, and Dr Hein Wolswijk for their valuable comments on earlier versions of this article.

den europäischen Gesetzgeber ein relevanter Faktor? Und für die Rechtsprechung? Im vorliegenden Beitrag wird argumentiert, dass der Legalitätsgrundsatz des Artikel 49 der Grundrechtecharta grenzüberschreitend angewandt werden und Auswirkungen für den „*state of play*" im europäischen Strafrecht haben muss.

## 1. Introduction

This article focuses on the role of principles of criminal law in the transnational context of the Area of Freedom, Security, and Justice (AFSJ). This is a relatively new area of competence for European Union (EU) law. Since the integration of the former third pillar of the EU into the framework of the former first, it is not an exaggeration to say that the competences of the EU have been considerably widened. Parameters for criminal justice, particularly in relation to cross-border crime, are increasingly set at the European level. EU Member States transferred a significant part of their powers to the European level. That being so, it made sense to introduce a Charter of Fundamental Rights (CFR) at that level, too. The Charter nowadays has the same binding status as the Treaties themselves (Art. 6(3) of the Treaty on European Union (TEU)).

At present, however, it is unclear to what extent the provisions of the Charter that contain the core principles of criminal law also apply to the relationships between the Member States. Many, if not all, principles of criminal law were after all developed *within* the context of the Westphalian nation states. Their conceptualization and consequent application in a transnational context, that is, in relationships *between* European Member States, is not self-evident and requires a high degree of mutual trust. Only the *ne bis in idem* principle (Art. 50 CFR) and the right to free movement and residence (Art. 45 CFR) explicitly refer to (the territory of) the EU as a whole. Other Charter provisions are silent on their territorial scope. Does this mean that only Articles 50 and 45 CFR have transnational application, or do these Articles only clarify their territorial scope, because their counterparts in the European Convention on Human Rights (ECHR) and its Protocols are explicitly limited to national territory?[1] In that case, references to the 'territory of the Member States' (Art. 45 CFR) and 'the Union' (Art. 50 CFR) leave the interpretation of other articles unaffected. So, what exactly is the potential of a transnational application of (other) Charter rights? Do we need this in European criminal law and why?

These questions are almost impossible to discuss *in abstracto*, precisely because EU law's interaction with national criminal law is a relatively new phenomenon, in which many elements are in a state of flux and many questions are still open. In this contribution, the focus is on one fundamental principle of criminal law. The role of the legality principle of criminal law (*nullum crimen, nulla poena*

1 See Art. 4 of the 7th Protocol and Art. 2 of the 4th Protocol to the ECHR, respectively.

*sine praevia lege*; Art. 49 CFR)[2] is explored in relation to the problem of the choice of forum. Criminal cases with cross-border elements easily involve the jurisdictions of two or more Member States. The jurisdiction to *prescribe* norms ('offences') is still largely a matter for national law and not one that is necessarily limited to the territory of a state.[3] Unlike in private international law, the criminal courts of the forum state as a rule apply their national criminal law. The jurisdiction to *adjudicate* follows, as a rule, the jurisdiction to prescribe. There is no statutory mechanism like the Brussels Regulation (44/2001) that allocates jurisdiction over the courts of the Member States. This means that conflicts of jurisdiction occur frequently in criminal law. This, in turn, may have serious consequences for the individual.[4] He may, for instance, have to defend himself in more than one country and/or be confronted with a legal system with which he is not familiar. This will become even more problematic as long as it is not clear in what instances jurisdiction is claimed by a certain state or divided over states.[5] Choice of forum in criminal law therefore refers first and foremost to a choice *for the judicial authorities* and occurs in an area of law capable of severely restricting personal freedom.[6] It raises fundamental questions as to the accessibility and foreseeability of the territorial scope of the criminal law of the European Member States.[7]

In the context of public international law, these questions have already led to much debate, as we will see below (section 3). Yet in relation to the AFSJ, there is not much material yet, even though developments in this specific area are tempestuous and have far-reaching consequences for EU citizens (section 4). In section 5, our aim is to demonstrate that the full potential of the *nullum crimen*

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2 Hereinafter referred to as the *nullum crimen* principle.

3 For an illustration of the differences between private international law and international criminal law in the area of speech offences, see M.J.L. DECROOS, 'Criminal Jurisdiction over Transnational Speech Offences – From Unilateralism to the Application of Foreign Public Law by the National Courts', *European Journal of Crime, Criminal Law and Criminal Justice* 2005.

4 Positive conflicts – as opposed to negative conflicts – occur when more than one Member State is competent to prosecute an offence. I will interpret conflicts of jurisdiction in a wide manner, so as to include *potential* conflicts as well, i.e., conflicts which *may* occur as a result of criminal law systems that overlap in their territorial scope.

5 On the latter issue, see also 'Einführung', nos 214–225, in U. SIEBER *et al.* (eds), *Europäisches Strafrecht*, Nomos, Baden-Baden 2011; U. SIEBER, 'Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems', *Zeitschrift fur die Gesamte Strafrechtswissenschaft* 2009; M.J.J.P. LUCHTMAN, 'Choice of Forum in an Area of Freedom, Security and Justice', 7.*Utrecht Law Review* 2011, pp. 74–101.

6 Concepts like choice of forum (or forum state) therefore refer to the (outcome of the) decision on where in the AFSJ to initiate criminal proceedings, including criminal investigations, and bring cases to trial in cases of transnational crime. Choice of forum in the stage of the execution of sanctions is largely disregarded in this article.

7 As is also demonstrated by the much discussed ruling of the German Constitutional Court in the *Darkanzanli* case; *Bundesverfassungsgericht*, 18 Jul. 2005, 2 BvR 2236/04.

principle of Article 49 CFR for positive conflicts of jurisdiction is, as yet, far from being realized. There, I will defend my position that principles of criminal law – the *nullum crimen* principle in particular – must be interpreted in light of free movement. By this, I mean that the principle needs to be adapted ('modernized') to the new, transnational setting of the EU, because the free movement of EU citizens in an AFSJ is one of the main goals of the TEU (particularly Art. 3(2) TEU). This interpretation of Article 49 CFR provides us, first of all, with a yardstick to assess the state of play in the EU (section 5.2). Indirectly, it could influence the reach of Union law (section 5.3), for instance where provisions of secondary EU law are interpreted in light of the redefined principle of *nullum crimen*. The situation might also occur that national law that interferes with the Treaty freedoms is assessed in light of its justifications, proportionality, *and* its compatibility with EU fundamental rights, including the *nullum crimen* principle.[8] Yet before we come to all this, we will start our analysis by briefly introducing the legality principle in criminal law.

## 2. The Legality Principle in Criminal Law

Criminal justice involves the use of intrusive investigative powers and sanctions, capable of severely restricting personal freedom. Moreover, having to face the burden of being charged with a criminal offence is something one may wish to avoid in itself. Criminal law, therefore, does not only protect the rights of citizens by criminalizing certain conduct (protection *by* the state), but the fundamental rights are *also* – or maybe even *particularly*[9] – in play as a safeguard against arbitrary state intrusion with personal autonomy and freedom (protection *against* the state).

The way a state pursues these tasks was profoundly influenced by the French Revolution and the great philosophers of the Age of Reason. It led to the omnipotent Sovereign being replaced by a lawmaker that is subjected to the rule of law. Ever since, interferences with the fundamental rights of individuals by state actors are only justified where there is, among other things, a decent legal basis in domestic law, so as to prevent an abuse of state power. Although it is not the only safeguard against abuses, it is not far-fetched to maintain that the principle of legality is a – if not, *the* – cornerstone of every European criminal law system.

The importance of the principle is clearly reflected in the system of the ECHR and the case law of the European Court of Human Rights (ECtHR). Interferences with convention rights must have, in order to be 'in accordance with the law' within the meaning of the relevant provisions, a decent legal basis in

8 On the (possible) problems with respect to Art. 51(1) CFR, see *infra* n. 59.

9 This is a controversial topic. In his influential inaugural lecture, A.A.G. Peters defends this latter position; however, in their equally influential work, Focqúe and 't Hart criticize Peters for this. See A.A.G. PETERS, *Het rechtskarakter van het strafrecht*, Kluwer, Deventer 1972, and R.G.M.E. FOQUÉ & A.C. 'T HART, *Instrumentaliteit en rechtsbescherming: grondslagen van een strafrechtelijke waardendiscussie*, Gouda Quint, Arnhem 1990.

domestic law. Moreover, this phrase also refers to the quality of the law and, in particular, to its accessibility and foreseeability. This is closely connected to the notion of the autonomous and rational citizen, as it has been given shape in the Age of Reason. That citizen is not completely free to act as he sees fit; the law may also impose obligations on him for the sake of the common good and enforce these obligations with sanctions. At the same time, however, the Strasbourg Court consequently stresses that 'a norm cannot be regarded as a "law", unless it is formulated with sufficient precision to enable the citizen to regulate his conduct'.[10]

The object that must be defined with sufficient precision depends on the subject matter of the law. For instance, certain coercive measures in criminal law, like house searches, may be carried out at the premises of third parties, which, by definition, have not been able to foresee these measures, as they were not the ones who attracted the attention of the judicial authorities. In a similar vein, laws on covert investigative techniques (the interception of telecommunications, for instance) will not enable a citizen to predict the application of these techniques, precisely because they are covert. This does not, of course, mean that these government actions can never be 'lawful' within the meaning of, in this case, Article 8 ECHR (or Art. 7 CFR), nor that the requirement of foreseeability is of no use. Legislative intervention is required in these cases in order to allow the executive to do what is otherwise not permitted, while simultaneously offering protection to citizens by regulating the executive bodies. The law then aims to provide its citizens with an adequate indication of the scope of criminal investigative powers.[11] Clearly, this is quite an abstract concept of foreseeability, as it is not *directly* related to one's own actions but to those of government bodies. The concept of legality (and foreseeability) primarily refers to the fact that the executive or judiciary are not allowed to make or change the rules of the game as they go along.

The elements of foreseeability and accessibility gain weight as soon as the law aims to regulate the behaviour of its citizens. These elements are so important in the sphere of criminal law that they have been shaped as an autonomous human right. The principle of *nullum crimen, nulla poena sine praevia lege* (Art. 7 ECHR and Art. 49 CFR) contains a series of requirements towards the criminalization of behaviour. It holds, *inter alia*, that only a legitimate lawmaker may criminalize conduct and that this lawmaker may only do so with respect to the *lex certa* principle.[12] The ECtHR has repeatedly stressed that:

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10 *Cf.* ECtHR 26 Apr. 1979, *Sunday Times* v. *United Kingdom*, para. 49 (Art. 10 ECHR); ECtHR 23 Sep. 1998, *Steel a.o.* v. *United Kingdom*, Appl. No. 24838/94, para. 54 (Art. 5 ECHR); ECtHR 17 Sep. 2009, *Scoppola* v. *Italy (No. 2)*, Appl. No. 10249/03, para. 99 (Art. 7 ECHR); ECtHR 12 Jan. 2010, *Gillan and Quinton* v. *United Kingdom*, Appl. No. 4158/05, para. 76 (Art. 8 ECHR).

11 *Cf.* ECtHR 2 Aug. 1984, *Malone* v. *United Kingdom*, Appl. No. 8691/79, para. 67.

12 Other requirements are the prohibition of analogous interpretation (*lex stricta*) and the prohibition on applying the criminal law retrospectively (*lex praevia*).

> offences and the relevant penalties must be clearly defined by law. This requirement is satisfied only where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.[13]

The concept of legality may, therefore, be used in different meanings, depending on the addressee of the law and the functions of that law. With regard to modern nation states, it is useful to make a distinction between a state's jurisdiction to define prescriptive rules for citizens (jurisdiction to prescribe), its jurisdiction to apply these rules in criminal proceedings (jurisdiction to adjudicate), and its jurisdiction to enforce the rules or orders of the legislator or the judiciary (jurisdiction to enforce).[14] The legality principle has not only made sure that *only* the lawmaker may define the prescriptive rules that are enforced through the criminal law (*nullum crimen, nulla poena sine praevia lege*; Art. 7 ECHR and Art. 49 CFR) but also that any resulting criminal charge may be tried only by courts that have been established by law and follow the proper proceedings (*nullum judicium sine lege*; Art. 6 ECHR and Art. 47 CFR). Finally, where sanctions or preliminary measures are in play in the context of criminal justice, these infringements of fundamental rights also need to respect the law. These interferences must meet the standards of 'law', contained in, for instance, Article 5 ECHR (e.g., custodial sanctions) or Article 1 of the First Protocol ECHR (e.g., financial sanctions).[15]

Why is this of relevance for the debate on the choice of forum in European criminal law? There are two reasons. First of all, the distinction between the three types of jurisdiction is of assistance in understanding the role of the legality principle in relation to the limits imposed on the lawmaker when defining the territorial scope of its criminal law. Clearly, the latter is of great concern to that lawmaker. However, why is this so precisely? For one thing, the law on jurisdiction helps define the scope of competence of national courts and other state actors involved in criminal justice.[16] Those faced with a criminal charge may only be tried by a properly – lawfully – established court.[17] For that particular purpose, it is not necessary to define court competence exclusively on the basis of factors that were cognizable *before* the offence was committed. The proper administration of justice,

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13 *Cf.* ECtHR 22 Jun. 2000, *Coëme et al.* v. *Belgium*, Appl. No. 32492/96, Reports 2000-VII, para. 145; ECtHR 12 Jul. 2007, *Jorgic* v. *Germany*, Appl. No. 74613/01, para. 100. See also Case C-303/05 *Advocaten voor de Wereld* [2007] *ECR* I-3633, paras 49–50.

14 European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction*, Council of Europe, Strasbourg 1990, p. 18; C. RYNGAERT, *Jurisdiction in International Law*, OUP, Oxford 2008, p. 10 *et seq*.

15 The latter two guarantees have equivalent provisions in Arts 6 and Art. 17 CFR.

16 Strictly speaking, it is conceivable that courts (and other actors of criminal justice) apply the law of a foreign legal system. In criminal law, as said, this is highly unusual.

17 LUCHTMAN, 'Choice of Forum in an Area of Freedom, Security and Justice', pp. 86–89.

and the court competence needed for this, may also depend on factors like the availability of evidence or a suspect, a connection to another criminal case, etc. These may all be relevant and perfectly justifiable circumstances, even though they come into play *ex post* and are difficult to foresee beforehand for citizens. This changes, however, if one is of the opinion that the territorial scope of national criminal law is also a relevant factor for citizens in the process of determining the possible consequences of their actions under the criminal law. In the latter situation, the law on jurisdiction may, in addition, have to meet the requirements of the *nullum crimen* principle (Art. 7 ECHR and Art. 49 CFR).

The second reason is connected to the fact that the picture that was presented above is currently undergoing changes in the EU. As we will see below, the EU's mutual recognition project has the potential of extending a Member State's jurisdiction to enforce to the whole AFSJ, whereas under public international law that type of jurisdiction is limited to the territory of one's own state.[18] Simultaneously, the Member States' jurisdiction to prescribe and adjudicate remains fairly unaffected by Union law. This, as we will see, means not only that full mutual recognition may be hampered as a result of interstate conflicts of jurisdiction but also that a European citizen may be increasingly confronted with coercive measures from other states that he was not able to foresee. It stresses the need for a debate on the role of the legality principle in the AFSJ.

In order to further illustrate both points and their importance for the discussion on the role of the legality principle in the AFSJ, in the next section we will focus, first, on conflicts of jurisdiction under the framework of public international law, and in sections 4 and 5, we will focus on the potential changes to this in the context of the AFSJ.

## 3. The Position of the Individual in the Context of International Cooperation in Criminal Matters

### *3.1. The Law on Criminal Law Jurisdiction and the Nullum Crimen Principle*

The processes of internationalization and, of course, European integration have deeply influenced national criminal law. It has already been analysed how these processes led legislators to gradually expand the territorial scope of their criminal laws in order to cover situations that have not, or only in part, occurred on their territory.[19] In this way, the interests of criminal justice are also looked after in the increasing number of cross-border criminal cases. Partly at the instigation of numerous international and European instruments, jurisdiction is increasingly

18 This holds true in any event where the exercise of extraterritorial executive jurisdiction is not approved by the state concerned.

19 *Cf.* C.F. RÜTER & A.H.J. SWART, 'De toepasselijkheid van de Nederlandse strafwet; van locus delicti naar goede rechtsbedeling', in J.P. Balkema *et al.* (eds), *Gedenkboek honderd jaar Wetboek van Strafrecht*, Gouda Quint, Arnhem 1983.

accepted on various grounds of *extraterritorial* jurisdiction, such as the nationality of the offender (the active personality principle), that of the victim (the passive personality principle), and the presence of essential state interests or universal legal interests (the protection principle and the universality principle). Moreover, jurisdiction is also accepted on the basis of interstate solidarity or an interstate division of labour. The 1972 Council of Europe Convention on the Transfer of Proceedings in Criminal Matters provides, for instance, for what has been termed subsidiary jurisdiction, that is, jurisdiction based on the fact that another party to the convention has established jurisdiction and has asked the requested state – which itself has no (original) jurisdiction – to take over proceedings (Art. 2).[20]

The question is to which extent the *nullum crimen* principle is in play here, particularly in relation to extraterritorial jurisdiction.[21] The issue is mostly discussed in relation to the retroactive application of criminal law.[22] Yet questions related to *lex certa* are also relevant. There are authors who disregard or deny this application.[23] They may point to the fact that jurisdiction is, in many criminal codes, not a part of the offence, but a preliminary issue, concerned primarily with the demarcation of a state's criminal jurisdiction to prescribe, adjudicate, and/or enforce *vis-à-vis* those of other states. They may also be of the opinion that the law on jurisdiction is concerned with securing and defining the competence of judicial and police authorities to investigate, prosecute, and try criminal offences. It is then regarded as a matter for procedural law. A lack of jurisdiction means that there is no jurisdiction to adjudicate and to enforce; it does not affect the validity of the norm as such. This seems to be confirmed by the wording of, for instance, Article 7 ECHR, stipulating that the law should (only) define the *offences*, not the territorial scope of the criminal law.

The aforementioned viewpoint brings along that the law of another country may be applied to the individual without him being aware of it *ex ante*, that is, before the commission of the offence. Particularly in continental literature, the above-mentioned viewpoint on jurisdiction has attracted criticism.[24] Although the

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20 No. 73 European Treaty Series.

21 I will disregard the discussion on the territoriality principle. Depending on how this principle is interpreted, its effects may be criticized from a *nullum crimen* perspective, too; see, *in extenso*, H.D. WOLSWIJK, *Locus delicti en rechtsmacht*, Gouda Quint, Deventer 1998 and European Committee on Crime Problems, pp. 23–24.

22 The outcome of this differs per country.*Cf.* the position of the Spanish courts, discussed by K. AMBOS, *Internationales Strafrecht*, C.H. Beck, Munich 2006, p. 6, versus the position of the Dutch Supreme Court (*Hoge Raad*), 18 Sep. 2001, *Nederlandse Jurisprudentie* 2002, p. 559, and the Belgian Constitutional Court (*Arbitragehof*), 20 Apr. 2005, no. 3034, B.7.

23 *Cf.* H.-H. JESCHECK & TH. WEIGEND, *Lehrbuch des Strafrechts*, Duncker & Humblot, Berlin 1996, pp. 163–167.

24 *Cf.* D. OEHLER, *Internationales Strafrecht: Geltungsbereich des Strafrechts, internationales Rechtshilferecht, Recht der Gemeinschaften, Völkerstrafrecht*, Heymanns, Cologne 1983, pp.

rules on jurisdiction are usually not considered to be part of the offence, it is often said that they do determine the substance of the criminal law. Without jurisdiction, the territorial scope of the *offences* cannot be determined. The same holds true, as a result, for the territorial scope of a state's *ius puniendi*. A state's jurisdiction to prescribe rules therefore certainly touches upon the issues that are dealt with by Article 7 ECHR and Article 49 CFR. The existence of criminal law jurisdiction needs to be accessible and foreseeable to the individual.

However, even those who share the latter viewpoint usually reject the position that it must also be foreseeable that a *certain* state has criminalized violations of certain norms.[25] They do not consider extraterritorial claims of jurisdiction to be (too) problematic, *as long as* the offence is also a criminal offence in the state where the crime was committed (double criminality) and/or where there can be no misunderstanding that one's actions are criminal, as will be the case with, for instance, homicide.[26] In these cases, the perpetrator was in the position to know that his actions were criminal in any event.[27] The fact that he will not always know that a state other than the state of the *locus delicti* also claims jurisdiction is not problematic from the perspective of the *nullum crimen* principle. Limitations on such extraterritorial claims lie in public international law or in national requirements with respect to procedural law.

It is submitted here that this latter viewpoint is not self-evident.[28] Criminal law measures, after all, are then applied by the state exercising extraterritorial jurisdiction without a foreseeable and accessible link to its jurisdiction and, hence, to its provisions of substantive criminal law. Principles like the passive personality principle, the principle of subsidiary jurisdiction, or perhaps even the protection principle may, for various reasons, encounter problems, because of their *potential* lack of foreseeability. They may link criminal offences to the jurisdiction of a particular state through a factor that is unknown to the perpetrator (the nationality of the victim, for instance) and/or through circumstances or events that occurred *after* the offence was committed (for instance, the place of arrest). The fact that a violation of a particular *norm* is a criminal offence in the state of the *locus delicti* in itself provides no indication for the applicability of the criminal law of any other state. Still, that violation is an *offence* in the latter state too. It is only *because* of the latter and not because he has violated a norm that sanctions and coercive measures

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131–132; G.A.M. STRIJARDS, *Internationaal strafrecht, strafrechtsmacht – Algemeen deel*, Gouda Quint, Arnhem 1984, pp. 42–52; European Committee on Crime Problems, pp. 22–25; WOLSWIJK, pp. 82–84; AMBOS, p. 5; B. HECKER, *Europäisches Strafrecht*, Springer, Berlin/Heidelberg/New York 2005, p. 28.

25 *Cf.* H. SCHOLTEN, *Das Erfordernis der Tatortstrafbarkeit in § 7 StGB*, Max-Planck-Institut, Freiburg im Breisgau 1995, p. 65 *et seq.*; AMBOS, pp. 6–7.

26 European Committee on Crime Problems, pp. 23–24.

27 *Cf.* AMBOS, pp. 5–6.

28 *Cf.* WOLSWIJK, p. 81.

are a possibility and that the individual may have to face the burden of criminal proceedings, perhaps even in a legal system that he does not know. In order for the individual to be able to avoid these *particular* consequences and for the criminal law of that particular state to achieve its goal of preventing crime, it is not enough to assume that his actions are an offence in the state of the *locus delicti*. Arguably, its own link to the offence must be foreseeable too.[29]

The aforementioned viewpoint is presumably to be understood as the outcome of a balancing exercise between the opposing interests of the individual and those of the states involved. Under the framework of public international law, it is not always guaranteed that conflicts of jurisdiction will be solved. If a state wants to protect its citizens against crimes committed abroad, it is not always certain that the state of the *locus delicti* will prosecute. This may require unilateral measures by individual states. These limitations on the proper administration of justice in the international context have to be taken into account and balanced against the need for legal certainty.

### *3.2. Choice of Forum and Transnational Cooperation in Criminal Matters*

It follows that the question of whether the law on jurisdiction must meet the criminal law standards of the *nullum crimen* principle, the *lex certa* in particular, is the subject of debate.[30] Partly as a result of this and before we come to the specifics of the AFSJ, we must point to the fact that *conflicts* of jurisdiction are also not framed as a matter for substantive criminal law but for procedural law. The aforementioned expansion of the European states' criminal law jurisdiction goes hand in hand with increasing efforts to enhance interstate cooperation and consultation in order to avoid conflicts of jurisdiction. This has led to new mechanisms for dealing with these conflicts, as extradition law – the oldest form of cooperation – and mutual legal assistance (MLA) in gathering evidence have demonstrated several shortcomings. These types of assistance only function adequately where the state requested for assistance has no opposing interests itself. In the latter case, it simply will not cooperate.

The Council of Europe has been particularly active in this development. Within this forum, new types of cooperation were introduced. The 1972 Convention on the transfer of criminal proceedings allows states to transfer the responsibility for criminal proceedings from one state to another. The 1983 Convention on the Transfer of Sentenced Persons introduced the same mechanism in the stage of the execution of custodial sanctions.[31] These treaties may be termed innovative for another reason: They are the first to stress the importance of justice and social

29 *Cf.* STRIJARDS, pp. 43–47.

30 On those standards, see *supra* n. 12.

31 ETS no. 112.

rehabilitation of offenders in the context of international cooperation.[32] The latter treaty even goes so far as to make the consent of the sentenced person a requirement for transfer.[33]

These developments were welcomed by many. However, some were also critical of the fact that the individual, apart from the latter example, had no position of his own *vis-à-vis* the cooperating states. Under the logic of public international law, his interests were thought to be represented *by* the states. This logic also applied to the choice of forum. It was the late Dutch professor and judge Bert Swart, in particular, who identified a fundamental flaw in the system of international cooperation: No matter how much the importance of, for instance, the proper administration of justice and the reintegration of the offender are stressed, this emphasis easily remains empty rhetoric, as long as the executive powers are the only actors that have a say in this. Precisely in order to prevent this, the constitutions of many EU countries, like Germany (*gesetzlicher Richter*), France (*juge naturel*), and Italy (*giudice naturale*), require statutory provisions to designate court competence as precisely as possible.[34] Yet at the international level, these provisions are lacking. As interstate cooperation and coordination are traditionally regarded as a nation state's international affairs, to be dealt with by their ministries of Foreign Affairs, there is not much to expect from national courts in this regard. Swart therefore argued that the suspect should be given the right of consent in cases of international cooperation.[35] It is not far-fetched to maintain that he was one of the first to lift one central element of the 'principle debate' (protection *against* the state) from the national to the international level (protection *against* states). Yet Swart also emphasized the importance of ensuring certain procedural safeguards for the suspect and, hence, approached the choice of forum as a matter for procedural law. In the following two sections, we will discuss whether or not this approach fits the EU as well.

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32 *Cf.* C. VAN DEN WYNGAERT, 'Double Criminality as a Requirement to Jurisdiction', in N. Jareborg (ed.), *Double Criminality*, Iustus Förlag, Uppsala 1989, p. 45; T. VANDER BEKEN *et al.*, *Finding the Best Place for Prosecution – European Study on Jurisdiction Criteria*, Maklu, Antwerp 2002, pp. 22–23.

33 See Art. 3(1)(d) of the Convention. This is the main rule; exceptions are possible.

34 *Cf.* LUCHTMAN, 'Choice of Forum in an Area of Freedom, Security and Justice', pp. 74–101, with further references.

35 *Cf.* A.H.J. SWART, 'De overdracht van strafvervolgingen', *Nederlands Juristenblad* 1982, p. 222; A.H.J. SWART, *Goede rechtsbedeling en internationale rechtshulp in strafzaken*, Kluwer, Deventer 1983. See also N. WITSCHI, *Die Übernahme der Strafverfolgung nach künftigem schweizerischem Recht*, Stämpfli Verlag, Bern 1977, p. 83, and T. VANDER BEKEN, *Forumkeuze in het internationaal strafrecht: verdeling van misdrijven met aanknopingspunten in meerdere staten*, Maklu, Antwerp 1999, pp. 214–215.

## 4. European Integration and Criminal Law after 'Lisbon'

The debate on the choice of forum and the position of the individual therein seems to be deeply influenced by the fact that under public international law, nation states are the dominant actors. Even those who defend the position that an individual should be able to predict *a priori* which particular state may claim jurisdiction ultimately concede that this can be a (non-enforceable) instruction norm for the legislator at most, certainly not a norm to be applied in court proceedings.[36]

Now, has this changed as a result of the European integration process? Do conflicts of jurisdiction need a new approach in the EU? Although criminal law in general is not a policy domain of the EU,[37] the AFSJ certainly is. The EU has obliged itself to offer its citizens an AFSJ without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to, *inter alia*, the prevention and combating of crime (Art. 3(2) TEU). In order to achieve this, it has set itself the task of preventing and solving conflicts of jurisdiction (Art. 82(1)(b) TFEU). This task has been taken up mainly by harmonizing substantive criminal law and by enhancing transnational cooperation and coordination.

### *4.1. Harmonization of Substantive Criminal Law and Jurisdiction*

The EU has been quite active in the area of substantive criminal law. Many framework decisions that deal with particular forms of crime (counterfeiting, terrorism, etc.) contain rules on the establishment of jurisdiction, including extraterritorial jurisdiction.[38] The latter usually concerns the mandatory use of the active personality principle,[39] sometimes restricted by certain conditions, such as double criminality. In few – if any – cases do these instruments oblige Member States to create jurisdiction on the basis of, for instance, the passive personality principle.[40] This is left to national law.

There are indications that this approach is changing. Under 'Lisbon', the EU has been given wider powers to intervene in national criminal law, particularly in the area of serious, cross-border crime (*cf.* Art. 83 TFEU). Recently, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims was adopted.[41] This directive also contains provisions on jurisdiction. Article 10(1) obliges the Member States to establish jurisdiction on the

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36 STRIJARDS, pp. 115–118.

37 ECJ 18 Apr. 2011, Case C-61/11 PPU *Hassen El Dridi* [nyr], para. 53.

38 For overviews, see A. KLIP, *European Criminal Law*, Intersentia, Antwerp/Oxford/Portland 2009, p. 187 *et seq.*; SIEBER *et al.*, p. 281 *et seq.*

39 In addition, jurisdictional rules with respect to legal persons, which I will not discuss any further.

40 It is likely that this is the result of the old unanimity rule under the former third pillar.

41 Incidentally, the same approach is currently followed in a proposal for a directive on combating the sexual abuse of children; COM(2010) 94.

basis of the territoriality and active personality principles. However, Member States must furthermore inform the Commission where they decide:

> to establish further jurisdiction over the offences referred to in Articles 2 and 3 [the trafficking offences, *ML*] committed outside its territory, *inter alia*, where (a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory, (…) or (c) the offender is an habitual resident in its territory (Article 10(2) Directive).

It turns out, furthermore, that Member States are no longer *allowed* to require, *inter alia*, double criminality in relation to the active personality principle and that they *may* decide not to use that condition in relation to the principles, mentioned in Article 10(2). The latter means that, according to the European legislator, even jurisdiction on the basis of the passive nationality principle does not have to be limited by the condition of double criminality.

The fact that jurisdiction on the basis of the passive personality principle is not discouraged and that limits are imposed on the condition of double criminality clearly reveal that the European legislator is striving to avoid negative conflicts of jurisdiction as much as possible.[42] It also reveals that this approach was not considered to be problematic from a *nullum crimen* perspective. One explanation for this may be that trafficking is 'considered one of the most serious crimes worldwide, a gross violation of human rights, a modern form of slavery, and an extremely profitable business for organised crime'.[43] In other words, there can be no doubt as to its criminality, not even in relation to cases involving third countries. Yet the legislator may also have been of the opinion that the *nullum crimen* principle is simply not an issue in relation to jurisdiction. Be this as it may, its approach calls for mechanisms to deal with the resulting positive conflicts, as we will see in the following section.

### *4.2. Choice of Forum and Transnational Cooperation in the AFSJ*

The EU is currently replacing the Council of Europe framework by instruments of European law that are adapted to the specifics of the AFSJ. Almost all forms of cooperation under international law, briefly mentioned in section 3.2, now have European counterparts, with the transfer of proceedings as the important exception. The dominant principle is that of mutual recognition (*cf.* Arts 67(3) and 82 TFEU): Where the authorities of a Member State issue a European warrant – for

42 Incidentally, this approach was *also* chosen in order to tackle problems of jurisdiction in relation to third countries. It must be stressed here that this article only focuses on choice of forum within the AFSJ.

43 COM(2010)95, p. 2.

instance, an arrest warrant – the authorities of another Member State are obliged by law to execute it, without much further ado or formalities.

Since the introduction of mutual recognition as the dominant concept for cooperation, the question has been whether recognition is possible without harmonizing criminal law and procedure. The ambition to facilitate interstate cooperation has been one of the main reasons for the EU's activities in the area of substantive criminal law, transnational crime in particular. However, the EU is becoming increasingly active in the field of criminal procedure too (Art. 82 TFEU). Ambitions are put forward in the Stockholm Programme,[44] in the Roadmap with a view to fostering the protection of suspected and accused persons in criminal proceedings[45] and in the Communication on Strengthening victims' rights in the EU.[46] The latter document states that measures that ensure that victims of crime are given non-discriminatory minimum rights across the EU, irrespective of their nationality or country of residence, are needed. This will not only facilitate free movement but also enhance mutual recognition. Recent directives[47] and legislative proposals[48] therefore strive for the (minimum) harmonization of areas of criminal procedure with a view to improving the position of the defendant and the victim.

By contrast, conflicts of jurisdiction do not seem to occupy a high position on the political agenda, apart from the ongoing debate on the competences of Eurojust (Art. 85 TFEU) and the establishment of a European prosecution service (Art. 86 TFEU). To a certain extent, this is surprising, because the European Commission already stressed in its 2000 Communication on Mutual Recognition of Final Decisions in Criminal Matters that, given the potential for jurisdictional conflicts:

> in the absence of a ranking of competent jurisdictions, all one could do would be to foresee a derogation from mutual recognition in cases where the recognising Member State has jurisdiction and does prosecute or had jurisdiction but decided not to take proceedings. This, however, appears like a serious undermining of the principle of mutual recognition.[49]

Indeed, many instruments that implement the principle of mutual recognition allow for the refusal or postponement of European warrants, as long as, *inter alia*,

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44 *Cf.* The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens, Brussels, 2 Dec. 2009, Council Document 17024/09.

45 Council Document 11457/09, Brussels, 1 Jul. 2009.

46 COM(2011) 274.

47 *Cf.* Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280/1.

48 *Cf.* the proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326.

49 COM(2000) 495, p. 18.

national investigations into the same or related offences are ongoing in the executing state. Not even Eurojust is currently in the position to settle conflicts in cases were Member States cannot reach an agreement.[50] In addition, the framework decision on the prevention of conflicts of jurisdiction only obliges Member States to search for 'effective solutions' in *ne bis in idem* situations, without defining these solutions. The proposal for (what was then still) a Framework Decision on the transfer of proceedings in criminal matters does seek to bring about binding legal consequences. Its goal is 'to increase efficiency in criminal proceedings and to improve the proper administration of justice, including the legitimate interests of victims and suspected or accused persons, within the area of freedom, security and justice by establishing common rules facilitating the transfer of criminal proceedings between competent authorities of the Member States' (Art. 1 Proposal). It was, however, never enacted into law.[51]

## 5. The Position of the European Citizen in the AFSJ

### *5.1. Free Movement as an Approach to the Problem*

Reflecting on these developments, the EU at first sight appears to proceed in a way that is very similar to that of the Council of Europe. Positive conflicts *in abstracto* are deemed inevitable in order to prevent criminals from escaping justice. Rather than striving for binding solutions at the European level, for instance, through a mandatory ranking of jurisdictional principles, by defining statutory rules to divide cases over the Member States where conflicts of jurisdiction remain and/or by giving binding powers to Eurojust, the parameters for the Member States, set by the EU legislator, are not very strict. Any resulting conflict *in concreto* is solved *ex post* and in a horizontal relationship, through consultation and coordination between the parties involved. This leads to what has been termed a network approach. The EU mutual recognition instruments moreover resemble their Council of Europe predecessors so closely that one may ask whether 'mutual recognition' has really caused the proclaimed paradigm change in cases of transnational cooperation.[52] In any case, compared to the framework under public international law, current EU developments will not reduce the amount of discretion of the executive when choosing the proper jurisdiction.

The question is to which extent this amount of discretion does do justice to the position of the individual. The argument that the individual is not an autonomous actor under public international law may not necessarily be valid in the

50 Admittedly, peer pressure by Eurojust or its members will be an equally effective weapon in many cases.

51 See LUCHTMAN, 'Choice of Forum in an Area of Freedom, Security and Justice', pp. 74–101, for further analysis and references.

52 *Cf.* E. VAN SLIEDREGT, 'The European Arrest Warrant: Extradition in Transition', 3.*EuConstLR* 2007, pp. 244–252.

EU legal order. Nor can we say that the Westphalian nation state perspective must necessarily be the predominant point of departure. The EU is after all a legal order in which sovereignty is shared between the national and supranational levels. Concepts that were previously used to define the parameters for and the limits of state sovereignty – territory, citizenship, and state power (*ius puniendi*) – now have European counterparts in the form of the AFSJ (comprising the territories of the Member States),[53] European citizenship, and once again, the AFSJ (this time in its meaning as a policy objective of the EU), respectively.[54]

Although the EU approach may, therefore, *appear* to be similar to that of the Council of Europe, its parameters are different. There are developments that already point to this. Transnational cooperation in criminal matters in the AFSJ is, for instance, no longer considered to be a matter for the *states* but for the *judicial authorities* of these states. Direct contacts between the judicial authorities of the Member States have become the main rule (instead of the traditional diplomatic channels), not only because it is practical[55] but also because it is an essential part of the mutual recognition regime.

What certainly should not be overlooked is the potential of Union citizenship in relation to free movement. Even though EU citizenship at present is not to be regarded as the European equivalent of national citizenship, based on the notions of *liberté*, *egalité*, *fraternité*, the Court of Justice has repeatedly confirmed that it is 'the fundamental status of nationals of the Member States'.[56] Its added value lies specifically in the attribution of political rights at the *European* (and local) level and in *free movement* rights in transnational relations.[57] The EU has attributed its citizens the enforceable right to move over and reside somewhere on the European territory. Is this development capable of changing the role of the *nullum crimen* principle in relation to conflicts of jurisdiction? Do jurisdictional claims now need to be interpreted in light of the concept of free movement? If so, what does that mean?

These questions cannot be discussed properly without clarifying the concept of free movement first. This concept is after all used in different ways in the Treaties. Free movement for citizens appears as an abstract concept, that is, as a goal to be achieved in relation to the AFSJ (Art. 3(2) TEU). Free movement is also a concrete right for economic actors – the four traditional freedoms – or EU citizens – the so-called fifth freedom (Art. 21 TFEU). Article 45(1) of the Charter moreover holds that every citizen of the Union has the right to move and reside freely within

53 I will further disregard the special position of some Member States.

54 The term 'AFSJ' must, therefore, be understood as both a geographical unit, as well as a EU policy area; see MONAR, p. 557, in A. VON BOGDANDY & J. BAST (eds), *Principles of European Constitutional Law*, Hart/Beck, Oxford/Munich 2011.

55 Incidentally, many treaties under international law allow for 'direct contacts' as well.

56 *Cf.* ECJ 8 Mar. 2011, Case C-34/09 *Gerardo Ruiz Zambrano*, para. 41.

57 *Cf.* KADELBACH, pp. 454–462, in VON BOGDANDY & BAST.

the territory of the Member States. Its inclusion in the Charter suggests that free movement is now no longer only a means for promoting European (economic) integration but also a citizen's right.[58]

In the remainder of this article, free movement is referred to as a goal to be achieved. As I stated in section 1, this specific and abstract understanding of free movement implies that what is about to follow is not an attempt to redefine the current institutional parameters of the EU by redefining the scope of any of the five Treaty freedoms.[59] Rather, the goal is to discuss whether or not principles of criminal law – the *nullum crimen* principle of Article 49 CFR in particular – need to be interpreted in light of free movement. By doing so, we will be able to provide, first of all, a yardstick by which to assess the state of play, described above (section 5.2). Indirectly, however, it seems inevitable to me that the interpretation of provisions of secondary EU law in light of Article 49 CFR is capable of indirectly influencing the reach of Union law. I will come back on this in section 5.3.

## 5.2. *Nullum crimen in Light of the Free Movement of Citizens*

### 5.2.1. *Article 3(2) TEU: Free Movement as a Goal to Be Achieved*

It has already been analysed by many authors how the European market citizen is gradually evolving towards a Union citizen.[60] The aforementioned Article 3(2) TEU refers to the AFSJ not only as a policy area but also as a geographical entity without internal borders. Individuals, in their capacity as European citizens, are free to move over the European territory, although the common good may call for limitations on this. AG Bot refers to one element of this where he states in *Wolzenburg* that where:

> a Union citizen (…) has, in every Member State, largely the same rights as those of that State's nationals, it is fair that he should also be subject to the same obligations in criminal matters. That means that, if he commits an offence in the host Member State, he should be prosecuted and tried there before the courts of that State, in the same way as nationals of the State in question, and that he should serve his sentence there, unless its execution in his own State is likely to increase his chances of reintegration.[61]

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58 *Cf.* KADELBACH, p. 455, in VON BOGDANDY & BAST.

59 After all, as we have seen, criminal law jurisdiction is predominantly still a matter for national law. That means that, in many cases, the Charter of Fundamental Rights will not be a direct issue. However, assuming that the CFR is applicable in cases of negative integration (*cf.* Art. 51(1) CFR), the EU could indirectly exert its influence via the (then redefined) five freedoms. That is not what is meant below.

60 See, for instance, the opinion of AG Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano*.

61 AG Bot, Case C-123/08 *Wolzenburg* [2009] *ECR* I-9621, Opinion, para. 142.

Indeed, those who travel over the European territory may be expected to obey the laws of their host state. This, however, is not the end of the story. Positive conflicts of jurisdiction are particularly capable of causing difficulties that go far beyond differences in the treatment of nationals and non-nationals in the host state. Those difficulties also exceed the ambitions of the Stockholm Programme or Roadmap, mentioned above.[62] As a general rule, after all, precisely those citizens who travel over the European territory run the risk of being subjected to multiple jurisdictional claims as a result of their movement. In fact, their actions may have an impact on other citizens too. Those who did not exercise their right to free movement may, for instance, be confronted with the consequences of their 'encounters' with EU citizens from other states.[63]

Although extraterritorial claims of jurisdiction may be termed a necessary precondition for effectively fighting crime and may, therefore, impose corresponding duties upon citizens, they also multiply the possibility of punitive state reaction(s) to the actions of EU citizens. This may, for instance, lead the state of origin of the offender[64] and/or that of the victim[65] to prosecute the offender for acts that were committed on the territory of the host state. In those instances, free movement and residence is hampered or perhaps even terminated as a result. The situation is complicated even further as soon as the citizen is confronted with two (or more) proceedings, conducted simultaneously (or, where *ne bis in idem* does not apply, consecutively) by different Member States. All of this boils down to a *double regulatory burden* placed on the individual as a result of his (or that of his fellow citizen's) movement over the European territory.

Criminal proceedings on the basis of extraterritorial jurisdiction, and any resulting conflict of jurisdiction, are therefore capable of causing two things in the AFSJ. First of all, they may lead to (multiple) criminal prosecution(s) *as a result* of free movement. Second, they are capable of causing impediments to *future* free movement, as criminal proceedings will also hinder or even prevent such movement. Clearly, therefore, there is a nexus between free movement and the law on criminal jurisdiction of the Member States. However, the question is whether this nexus will *always* offer a sufficiently strong link to the European legal order. In other words, are these conflicts by definition a problem in terms of free movement? Regarding the first situation, one may oppose that free movement in itself will not always be the *cause* of any following extraterritorial claim. Why, then, should those who have used that right be treated any differently from those who have not? In the second situation, the link with the EU legal order is arguably even weaker where reference

62 *Supra* n. 44 and n. 45.

63 For instance, by the application of the passive personality principle by the state of origin.

64 Jurisdiction on the basis of the active personality principle.

65 The so-called passive personality principle.

is only made to future situations. Those types of situations are after all generally not covered by EU law.[66]

Taking into account these questions, it is notable that the Court of Justice nevertheless seems to combine the two interpretations in its reading of Article 54 of the Convention Implementing the Schengen Agreement (CISA) on *ne bis in idem*. The facts of the case in *Gözütok*, for instance, reveal that Gözütok, a Turkish national living in the Netherlands, was prosecuted in Germany for dealing in narcotics in the Netherlands. He was arrested in Germany only *after* the commission of these offences.[67] Although it remains unclear on what grounds Germany exercised its criminal law jurisdiction, the link with the free movement of persons appears to be rather weak. Still, the Court argued that:

> Article 54 of the CISA, the objective of which is to ensure that no one is prosecuted on the same facts in several Member States *on account of his having exercised his right to freedom of movement* [emphasis added, ML], cannot play a useful role in bringing about the full attainment of that objective unless it also applies to [out of court settlements].[68]

In *Gasparini*, the Court added to this that:

> [Article 54 CISA] ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. They *must be able to move freely* without having to fear a fresh prosecution for the same acts in another Contracting State [emphasis added, ML].[69]

Clearly, the latter sentence refers to future situations rather than to the past. Once the first set of criminal proceedings is concluded, the individual is free to go where he wishes; he is not to be prosecuted again for the same set of facts anywhere in the Schengen area. One might say that he has paid his dues and is now entitled to reintegration into the European AFSJ.[70]

It certainly is puzzling to find out what the Court means precisely with the aforementioned references to free movement. Is the Court only aiming to facilitate the future exercise of specific free movement rights as such, or is the reference to free movement an indication of a recalibration of the concept of individual liberty and autonomy, to the extent that – according to the Court – EU citizens are not only

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66 *Cf.* Case C-299/95 *Kremzow* [1997] *ECR* I-2629, para. 16.

67 Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] *ECR* I-1345, paras 9–16.

68 *Cf.* R. LÖÖF, '54 CISA and the Principles of Ne bis in idem', 15.*European Journal of Crime, Criminal Law and Criminal Justice* 2007, pp. 309–334, 324–325.

69 Case C-467/04 *Gasparini and Others* [2006] *ECR* I-9199, para. 27.

70 LÖÖF, pp. 309–334, 325, refers to the AFSJ as a 'single contractual unit' *à la Rousseau*.

offered protection against the nation state but also against the joint crime-fighting efforts of those states and the EU? The latter interpretation would be a clear departure from the situation under public international law.

Both interpretations are reconcilable with the wording of Article 3(2) TEU. However, it is the latter interpretation that, in my opinion, would do most justice to the particularities of the AFSJ. References to free movement are then interpreted as an expression of the fact that EU citizens are entitled to protection against *arbitrary* governmental power, not only within the context of the nation state but within the entire area referred to in Article 3(2) TEU. This interpretation goes further than any of the five specific free movement rights (the five freedoms), which seem to be conceived primarily as (directly enforceable) instruments to promote further European integration, not as fundamental rights.[71] This interpretation might also explain why the Court does not seem to be too concerned with the fact that free movement does not always appear to be directly in play in the cases put before it.

Precisely because of the latter interpretation departing from the state of the art in European law, the question arises as to why this must be so. The most plausible answer to that question would be that the ongoing process of European integration not only offered European citizens new opportunities – the AFSJ as a geographical area – but also brought into life a framework – the AFSJ as a policy area – that makes it increasingly difficult to attribute interferences with personal freedom and autonomy to one particular Member State. In many cases, those interferences are the result of the – coordinated or uncoordinated – efforts of several Member States in combating crime. In those instances, the elements of arbitrariness that the principles of criminal law aim to prohibit are located partly outside the sphere of influence of the individual Member States. By opening up their internal borders, fighting crime has become the joint responsibility of the EU Member States in many different ways.[72] This is precisely why the institutional framework of the EU offers the necessary instruments for a multilateral approach. It brings into sight solutions that cannot be achieved by the individual Member States.[73] The transfer of powers to the European level, as a means to cope with increasing transnational crimes as a result of European integration, then needs to be accompanied by appropriate protection of fundamental rights at that level.

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71 If I am not mistaken, there is, for instance, no general requirement that restrictions on free movement need to have a decent legal basis in (European or national) law, although this may follow from national law itself. On this topic in general, see R. WINKLER, *Die Grundrechte der Europäischen Union*, Springer, Vienna/New York 2006, p. 23 *et seq.*; G. NICOLAYSEN, 'Die gemeinschaftsrechtliche Begründung von Grundrechten', *Europarecht* 2003; D.H. SCHEUING, 'Freizügigkeit als Unionsbürgerrecht', *Europarecht* 2003; KÜHLING, in VON BOGDANDY & BAST.

72 *Cf.* AG Bot, Case C-123/08 *Wolzenburg* [2009] *ECR* I-9621, Opinion, para. 105.

73 See also *infra* sec. 5.3.

This interpretation of free movement appears attractive for principles other than *ne bis in idem* as well. The Preamble to the Charter seems to refer to this by stipulating that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law' and that '[i]t places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'. Both the Preamble and the Court's case law on *ne bis in idem* indicate that the individual has standing against all government power within the scope of EU law, regardless of whether this power is exercised by EU institutions; in the national context; in the vertical relationship of cooperation between EU institutions and the Member States (*cf.* competition law); or in cases of horizontal, transnational cooperation between EU Member States.

This, in turn, implies a recalibration of the concept of individual freedom and autonomy, which traditionally was used within the context of the nation state, but is now interpreted in light of the transnational context of the AFSJ. Fundamental rights do not only offer the individual protection against unjustified interferences with his sphere of autonomy as far as the authorities of one particular EU Member State are concerned but also where these interferences are the result of the efforts of multiple Member States. This implies that free movement, in the way it is defined here, may also involve situations where the five Treaty freedoms are not (yet) in play (but the EU citizen is, nevertheless, confronted with criminal proceedings, commenced by another Member State) and that it has a negative connotation too, that is, a right *not* to be moved arbitrarily across the AFSJ.

### 5.2.2. *Consequences for the Interpretation of Article 49 CFR*

Interpreting Charter rights in light of free movement therefore means that these rights are also concerned with offering the individual protection against *arbitrary* interferences with his sphere of autonomy in transnational constellations. In itself, however, this does not answer the questions of whether extraterritorial claims of jurisdiction lead to arbitrary results and whether Article 49 CFR aims to avoid this. There is no doubt that the changing parameters of the AFSJ pose difficult questions in relation to the foreseeability of government action as a response to (alleged) offences. The mutual recognition scheme, for instance, is capable of confronting European citizens with European warrants from other Member States that must, as a rule, be executed. The situation may occur that a citizen is arrested on the basis of a European warrant, issued for the prosecution of offences that were committed outside the territory of the issuing state.[74] Such proceedings will interfere with free

74 Article 4(7) of the Framework Decision on the European Arrest Warrant, incidentally, will not always prevent the execution of such warrants.

movement as it has been defined above.[75] Yet whether or not such interferences must be termed 'arbitrary' very much depends on one's views on what precisely should be foreseeable for European citizens and at what time.[76] For instance, is our example of the arrest warrant a problem that is concerned with the foreseeability of (a) the conditions for the investigative measures as such (the warrants);[77] (b) how transnational criminal cases are divided over the courts of the Member States;[78] and/or (c) the fact that proceedings *may* be commenced in states other than the host state (too)?[79] Only if one is of the opinion that the latter question must be answered in the affirmative is Article 49 CFR likely to come into play.

In my opinion, there are roughly two approaches to this. One approach, similar to the one discussed in section 3.1, is that particularly where the criminal law jurisdiction of a Member State is dependent on the condition of there being a criminal offence in the host state too (the condition of double criminality), the problem of the (potential) double burden is not a problem from a *nullum crimen* point of view. Arguably, that condition may even be dropped in areas where substantive criminal law has been harmonized. In the latter case, a minimum set of conduct rules for EU citizens (and others) has after all been introduced through conventions, framework decisions, and directives.[80] These rules, once implemented by the Member States, will allow citizens to foresee the possible consequences of their actions anywhere in the AFSJ, *assuming*, of course, that all Member States have correctly transposed these *rules* into *offences* under their criminal law. (Minimum) harmonization thus implies a certain degree of understanding of these norms, all over the AFSJ. Why should those citizens then be able to foresee which Member State precisely is in the position to prosecute? Their actions are criminal in any event and are often even directed specifically against exploiting the differences between the legal systems of the Member States. Is not the *possibility* of multiple prosecutions then simply the flip side of a citizen's right to free movement? In fact, demanding that European citizens must be in a position to predict which Member

75 See, for instance, the facts of the case in the *Darkanzanli* ruling of the German Constitutional Court; *Bundesverfassungsgericht*, 18 Jul. 2005, 2 BvR 2236/04.

76 Depending on, *inter alia*, the question of who is the addressee of a law and the functions of that law, the legality principle relates to different things, see *supra* sec. 2.

77 Those conditions relate specifically to the (concept of legality used in) Arts 6, 7, and/or 8 CFR.

78 *Cf.* Art. 47 CFR, stipulating that tribunals must be 'established by law', but what does this mean in relation to choice of forum in the AFSJ?

79 *Cf. supra* sec. 2. Incidentally, this is why I consider the *Advocaten voor de Wereld* case, *supra* n. 13, to be a missed opportunity. Questions put before the Court of Justice only related to the mitigation of the condition of double criminality for so-called list offences in Art. 2(2) FD EAW in light of the *nullum crimen* principle. The foreseeability of arrest warrants, based on extraterritorial claims of jurisdiction, in light of Art. 5 ECHR (Art. 6 CFR) was not put before the Court.

80 I will disregard the fact that in most cases we are dealing with minimum harmonization. The offences are, therefore, not entirely the same in substance.

State precisely is competent to prosecute could boil down to overstretching the concept of free movement, as it could facilitate *forum shopping* by criminals.

It is true that the foreseeability of extraterritorial claims of jurisdiction is not concerned with the 'outer markers' of criminal liability, particularly where offences have been harmonized or double criminality is a condition. We are not dealing with the question of whether one's actions are criminal or not but *where* they are criminal. Be that as it may, our position is different nevertheless. This is because the aforementioned arguments address the individual *primarily* as a – what Willem Pompe has termed[81] – *bourgeois*, that is, a calculating individual, rationally striving for what satisfies his needs most. Correspondingly, in order for the criminal law to achieve its goal of preventing crime, what this individual needs to know first and foremost is whether his actions are *offences* in the common European area (and not just violations of *norms*). In this way, that individual will be able to foresee the possible adverse consequences of his actions under the criminal law. The goal of the *nullum crimen* principle, however, is not to allow citizens to predict where in the AFSJ offences and sanctions are least harsh. That would come close to an abuse of free movement rights.

This approach, so it seems to me, is well suited to the concept of the market citizen.[82] Our objection against it is that it barely addresses the individual as a – in the words of Pompe – *citoyen*, that is, an autonomous individual, a member of a social and political entity, and an individual who is concerned with his protection, through legal and political means, against arbitrary interferences with his position. In the context of public international law, the status of *citoyen* is almost inextricably linked to the nation state context. Yet in the EU, as we already noticed, Member State powers have been transferred to a supranational polity at European level, concerned with offering all European citizens an AFSJ and stressing that EU citizens must be at the heart of its activities. While it is true that this new context also entails duties and obligations for EU citizens, it equally calls for a reorientation on the position of the individual *vis-à-vis* state power and on the notion of personal liberty in this joint area.

The *nullum crimen* principle not only serves to *prevent* future crime by clearly defining the criminal offences and sanctions of a state but also offers

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81 W.P.J. POMPE, 'De Mens in het strafrecht', *Rechtsgeleerd Magazijn Themis* 1957, p. 91 *et seq.*; see also *Gedachten van Willem Pompe over de mens in het strafrecht*, Boom Juridische Uitgevers, The Hague 2008, p. 12 *et seq*. Pompe's observations of 1957 only refer to the Dutch Penal Code. He traces the concept of the individual as a *bourgeois* back to Jeremy Bentham, whereas the concept of the *citoyen* is highly influenced by Cesare Beccaria. Needless to say, of course, that both are fairly abstract concepts that have, nevertheless, influenced many European criminal justice systems.

82 On the various positions an individual may have in the common European areas, see C. MCCRUDDEN, 'The Future of the EU Charter of Fundamental Rights', NYU School of Law, Jean Monnet Working Paper Series, no. 10/01, p. 20 *et seq*, and the opinion of AG Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano*, para. 3.

individuals protection against *arbitrary* interferences with personal liberty and autonomy. This is done by defining, first and foremost, the criminal offences and sanctions by a legitimate lawmaker. The criminal law thus not only provides protection to its citizens, by prohibiting state actors to investigate, prosecute, and try actions of citizens that were not *offences* at the time of action, but also provides state actors with the power to proceed where citizens do violate the law. These particular functions of the *nullum crimen* principle, so it seems to me, address the individual not so much as a *bourgeois* but rather as a *citoyen*, who has handed over personal freedom and autonomy for the sake of the common good but subject to the conditions that only a legitimate lawmaker may define the common good and that the latter does so as precise as possible.

The foregoing is not to suggest that duties under the criminal law may only be imposed upon European citizens by the legal system of the Member State of nationality (or residence perhaps). To the contrary, in a legal order like the EU, free movement as referred to in Article 3(2) TEU implies that EU citizens have been given the right to subject themselves to the legal system of any EU Member State. As soon as a European citizen commits a crime in a particular Member State, he will know (or could have known) that his actions may entail consequences under the criminal law of *that* state. Yet in itself, this does not mean that he is also in the position to foretell that other states may commence criminal proceedings *too*. In this context, the problem is, first of all, that a citizen may be confronted with (the consequences of) criminal proceedings of a legal system he may not know and could not have known. In the second place, those proceedings may be commenced in *addition* to the proceedings of the state of the *locus delicti*.

Either way, that citizen will find himself in a worse position than the citizen who is confronted with a purely domestic criminal case. These consequences cannot be properly assessed with reference to the legal system of the host state alone. The condition of double criminality (where applicable at all) in itself fails to provide a foreseeable link to other jurisdictions than that of the *locus delicti*. Harmonization of criminal offences will not do the trick either. Directives need to be transposed into national law after all,[83] which means that national law will remain the point of focus for citizens. Yet that law will not provide clarity on the applicability of the legal systems of other Member States, certainly not as long as criminal law as such is the competence of the Member States.[84]

From a citizen's perspective, the aforementioned consequences are therefore capable of leading to arbitrary results, when they cannot reasonably be foreseen. This statement of a rather *normative* nature, which finds little support in European law (yet), is best illustrated by asking the question of whether the criminal law of a

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83 Articles 82 and 83 TFEU explicitly refer to directives, thus excluding the possibility of legislative intervention through (directly applicable) regulations.

84 *Supra* n. 37.

particular Member state is a matter that must *per se* be clear, *ex ante*, to European citizens. There are after all other mechanisms to avoid abuses of choice of forum, which will offer more flexibility to do justice to the administration of justice.[85] One may also ask the question of whether it really makes a difference for an individual to know *where* his actions may lead to criminal proceedings, in addition to his knowledge of the criminality of his actions as such. Our answer to both issues is that it is one thing to accept lower standards of accessibility and foreseeability where the outer markers of criminal liability are not a direct concern but quite another to accept that the (European) *legislator* does not *exclude* that European citizens are caught by complete surprise by the applicability of the criminal law of a particular Member State.

*Unforeseeable* claims of jurisdiction, and any resulting conflict of jurisdiction, lead to the situation where those EU citizens were never truly in the position to avoid these *specific* consequences.[86] Those consequences will cause them additional difficulties, compared to criminal cases without transnational elements. They are the result of the (coordinated or uncoordinated) actions of either the host state and other Member States together or the other Member State(s) individually. In this specific context, free movement, as we defined it at the end of section 5.2.1, implies (or rather should imply) that European citizens are entitled to protection against these (coordinated or uncoordinated) efforts as well, under the condition that the political and social entity to which they belong – the EU – is indeed capable of solving these problems. We will address the latter point in section 5.3.

We therefore conclude that genuine free movement in the AFSJ requires the foreseeability of *any* Member State's criminal law jurisdiction. Yet we also would like to stress that this in itself does not exclude the possibility of several Member States claiming jurisdiction simultaneously. This is why the aforementioned argument that the *nullum crimen* principle should not protect forum shopping by criminals is inconclusive: Our argument is not against positive conflicts of jurisdiction or extraterritorial claims of jurisdiction as such but against claims that could not have been reasonably foreseen by EU citizens and thus interfere with their position *vis-à-vis* the coordinated or uncoordinated efforts of the EU Member States to fight crime.

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85 For examples, see the propositions, referred to in *infra* n. 102.

86 Incidentally, arbitrary results remain possible where it is clear from the start which Member State(s) has (have) jurisdiction. In those instances, too, the question remains after all which of these Member States should ultimately investigate, prosecute, and try the offences. Abuse of powers is a possibility in these cases. As I see it, these problems are not related to Art. 49 CFR. They may, however, invoke other Charter rights. For a first attempt to illustrate the problem of choice of forum from the perspective of Art. 47 CFR, see LUCHTMAN, 'Choice of Forum in an Area of Freedom, Security and Justice', pp. 74–101.

### 5.2.3. *Assessment of the Status Quo*

Now, what are the consequences of the foregoing? In the first place, our position calls for a reorientation on the principles of criminal law jurisdiction in the AFSJ, because they all depart from a nation state perspective. Particularly problematic from a EU citizen's perspective are those (extraterritorial) claims of jurisdiction that are not cognisable *a priori* either because of an unknown link to a particular jurisdiction at the time of the commission of the offence (*cf.* the passive personality principle) or because of the fact that that link was established *ex post* (*cf.* the principle of subsidiary jurisdiction). It is true that the foreseeability of, for instance, the passive personality principle may not *always* be problematic. Certain forms of crime – many human trafficking cases for instance – are often even specifically related to victims of a certain nationality.[87] Yet this does not do away with the problems related to the application of this principle in other cases and, hence, the principle as such. In addition, it will be quite interesting to discuss which principles of jurisdiction do *not* pose problems in terms of their foreseeability. There is a certain consensus that this holds true for the territoriality principle.[88] However, is this also true for, for instance, the principle of active nationality, which in the EU context might be reformulated to (or supplemented by) jurisdiction on the basis of domicile? Even though these are highly relevant questions, I will not deal with them here for the sake of conciseness.

At the same time, it is also clear that some of the developments in the EU go in a different direction than advocated here. The foregoing also provides a frame of reference for assessing these developments. This second conclusion leads to a further series of findings.

First of all, it transpires that European policymakers and the European legislator seem to be of the opinion that the suspect's position only comes into play after the decision to start criminal proceedings has been made. Efforts are geared towards harmonizing defence and victims' rights.[89] These efforts will provide all European citizens with a minimum set of rights, also in domestic cases. Yet even though these developments must be welcomed, they do not go far enough. They leave the issue of multiple prosecutions wide open. Approaching conflicts of jurisdiction from a European citizen's perspective not only poses the question to which extent positive conflicts of jurisdiction need further justification as they are capable of limiting free movement[90] but also to which extent these conflicts need to

87 If only because in trafficking cases victims are often required or forced to hand in their passports to their smugglers.

88 *Cf.* WOLSWIJK, pp. 85–86.

89 See the policy documents and legislative instruments and proposals, briefly discussed at the end of sec. 4.2.

90 *Cf.* M. BÖSE & F. MEYER., 'Die Beschränkung nationaler Strafgewalten als Möglichkeit zur Vermeidung von Jurisdiktionskonflikten in der Europäischen Union', *ZIS* 2011.

be foreseeable in order to prevent arbitrary interferences with the free movement of EU citizens.

It is also clear that the views expressed here are different from those of the legislator in specific dossiers, such as human trafficking. The legislator is primarily concerned with avoiding negative conflicts of jurisdiction in the AFSJ.[91] References to the seriousness of these types of crime and their (often) transnational character reveal that the legislator is of the opinion that conflicts of jurisdiction cannot be prevented. As such, this is not irreconcilable with the position advocated here. The specific approach chosen by the legislator, however, is. Efforts are after all geared towards a further reduction of the condition of double criminality and towards the acceptance of the principle of passive nationality.[92] I will come back to this briefly in the next section.

In the third place, it transpires from the developments described in section 4 that jurisdiction as such is only taken up by the EU legislator in relation to serious forms of cross-border crime (*cf.* Art. 83 TFEU). This, however, is only the tip of the iceberg. Jurisdiction and conflicts of jurisdiction are not regarded as a problem from the perspective of European citizenship in general (*cf.* Art. 21(2) TFEU). This means that in all other cases where EU citizens have crossed internal borders – for work, a holiday, study, retirement, or whatever other reason – and become involved in a criminal case as a result of this, the Member States' jurisdiction to prescribe is left largely untouched. Union law – and hence Article 49 CFR – is then not applicable (Art. 51(1) CFR).[93] Free movement may thus effectively be hampered by extraterritorial claims of jurisdiction (and any resulting positive conflict) as a result of the European legislator remaining silent.

Finally, it must be noted that the concept of EU citizenship is, at present, not linked to legislative action in relation to jurisdiction.[94] Member States seem to be unwilling to accept (mandatory) jurisdiction on the basis of the domicile principle, possibly in addition to jurisdiction on the basis of nationality. The question is, of course, to what extent this approach is in line with the concept of free movement. Their reluctance also implies that recourse to other jurisdictional principles is necessary in order to avoid negative conflicts.

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91 *Supra* n. 42.

92 *Supra* sec. 4.1.

93 It might be, however, that issues of so-called negative integration (national law coming into conflict with EU law, one of the Treaty freedoms for instance) are regarded as a situation in which EU Member States are implementing EU law, as meant in Art. 51(1) CFR; see WINKLER, pp. 129–131, 153–162.

94 *Cf.* the analysis in sec. 4.1.

### *5.3. Free Movement (Art. 3(2) TEU) as a Means for the Interpretation of the Nullum Crimen Principle*

The central position defended above was that the ongoing process of European integration, and the key role of EU citizenship and free movement therein, is capable of influencing the interpretation of criminal law principles. With the transfer of powers to the European level and with national criminal justice systems increasingly being used as a means for implementing EU policy objectives in the area of criminal law, so should the interpretation of principles of criminal law be adapted to this new, supranational setting. For this, it is not enough to formulate a set of fundamental rights and principles at the European level, as has been done in the Charter. These rights and principles need to be adapted to their new context too.

However, even if one agrees with this thesis, two issues still need attention. First of all, the question is whether it is actually possible to interpret any principle of criminal law in light of free movement outside the context of a specific statutory framework at the European level. This may well be a bridge too far. In the second place, we should also take into account that free movement is not an absolute concept and neither is the autonomous position of the EU citizen. On the contrary, the concept of citizenship by its very definition implies the existence of some form of political and social entity, even though this entity does not necessarily have to be the nation state. For the sake of the general interest, citizens' rights may be restricted. That entity therefore needs to have the powers to deal with the problems that are identified by its citizens or their representatives. Where those powers are not available, the attribution of rights to citizens exceeds its goal and may even be detrimental to the common good. This is also where the constitutional principles of (limited) conferral (Art. 5(1) TEU) and subsidiarity (Art. 5(3) TEU) kick in.

These issues are interrelated. Indeed, free movement is not an absolute concept. It was interpreted above in an abstract fashion, in the way it is used in Article 3(2) TEU. That article connects free movement to equally abstract concepts like 'appropriate measures with respect to prevention and combating of crime'. Therefore, where one wishes to interpret Article 49 CFR in light of free movement, so should that interpretation take into account this factor too. To a certain extent, this also follows from the *nullum crimen* principle itself. Complete and absolute predictability of the reach of the criminal law is an untenable goal and one that would fall short of other interests. It could easily lead to excessive statutory rigidity.[95] Particularly in our case, the choice of forum, there is ample reason to recognize that it may be in the interest of a proper administration of justice, including the interests of the accused, to leave open the possibility of multiple competent jurisdictions. Neither the concept of free movement nor the *nullum*

95 *Cf.* ECtHR 17 Sep. 2009, *Scoppola* v. *Italy (No. 2)*, Appl. No. 10249/03, paras 100 and 101.

*crimen* principle therefore excludes the existence of conflicts of jurisdiction as such. Rather, they call for justifications of interferences with free movement and for the protection of EU citizens against arbitrary claims of criminal law jurisdiction.

There are good examples of how the existence of secondary legislation reconciles free movement with opposing interests and aids the interpretation of fundamental rights. The Court of Justice only interpreted Articles 54–58 CISA in light of free movement after having stressed that the Member States themselves *agreed* on 'hard and fast', transnational *ne bis in idem* rules, regardless of the degree of harmonization in criminal matters. Only because of this, Dutch out-of-court settlements (*transacties*) preclude other states from starting a second set of proceedings.[96] In this way, the Court has effectively tackled the argument that, in the complicated institutional setting of the EU, full mutual recognition of final decisions from other states is a bridge too far, at least without accompanying legislative intervention.[97]

In another example, the area of pre-trial detention, the EU clearly took the lead by introducing the so-called European Supervision Order (ESO).[98] This instrument aims at enhancing the protection of the general public through enabling a person resident in one Member State, but subject to criminal proceedings in a second Member State, to be supervised by the authorities in the State in which he or she is resident while awaiting trial. Whatever one may think of its contents, its Preamble stresses that:

> [t]he measures provided for in this Framework Decision should also aim at enhancing the right to liberty and the presumption of innocence in the European Union and at ensuring cooperation between Member States when a person is subject to obligations or supervision pending a court decision. (…) In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident.

Without doubt, this framework decision will have implications for the interpretation of Articles 6 and 47 of the Charter. Whereas recourse to pre-trial detention or a European arrest warrant previously would have been a necessary step in order to prevent a suspect from escaping justice, the ESO has the capacity of changing the

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96 Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] *ECR* I-1345.

97 *Cf.* M. LUCHTMAN, 'Transnational Law Enforcement in the European Union and the *Ne bis in idem* Principle', 4.*Realaw* 2011, pp. 15–16.

98 Council Framework Decision 2009/829/JHA of 23 Oct. 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ EU 2009 L 294/20.

parameters of the right to personal liberty in this regard, by providing a less intrusive alternative, suitable for application in a transnational context.

By contrast, the debate on criminal law jurisdiction in relation to *nullum crimen* is far more complicated. As we have just seen, the European legislator is not too concerned with avoiding positive conflicts of jurisdiction or with the question of whether jurisdiction as such must meet the requirements of Article 49 CFR. It is in line with this that the Preamble to the Framework decision on settlement of conflicts of jurisdiction in criminal proceedings emphasizes almost exactly the opposite of what has been stated in the previous section: the choice of forum is first and foremost a (discretionary) matter for the prosecuting authorities.[99] Against this background, the interpretation of *nullum crimen* as advocated here would not be supported by the legislative framework but would rather run counter to it. Are principles capable of having this effect too?

I would be inclined to answer this question in the affirmative, at the least where these principles take the form of generally recognized European human rights standards and with the proviso that caution is required. The *nullum crimen* principle, defined in Article 49 CFR, meets these requirements, without doubt. In my opinion, the changed institutional setting of the EU has made automatic reliance on old, state-centred mechanisms for dealing with conflicts of jurisdiction problematic. This is not only because the EU has committed itself to upholding the rule of law and to putting its citizens at the forefront but also because the institutional parameters after 'Lisbon', including democratic decision-making[100] and wider competences in the area of, *inter alia*, choice of forum, allow for far more expedient and democratic legislative action. It then seems to me that the European legislator is required to choose, out of the available policy options, that option that does justice to the fundamental rights of all parties involved, including victims *and* suspects. For instance, where the passive personality principle, although already controversial under public international law,[101] may be termed a unilateral, yet necessary step for an individual state to protect its citizens, this principle is problematic in the AFSJ. In order to avoid negative conflicts of jurisdiction in the AFSJ, a whole range of different solutions are available that would do far more justice to the *nullum crimen* principle.[102]

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99 OJ EU 2009 L 328/42, Recital 4. On the other hand, Recital 17 also states that the framework decision 'does not affect any right of individuals to argue that they should be prosecuted in their own or in another jurisdiction, if such right exists under national law'.

100 EU Citizenship grants EU citizens the right to vote (and to be elected) at local and European levels; Art. 22 TFEU. In the AFSJ, as a general rule, the ordinary legislative procedure applies.

101 AMBOS, pp. 46–48.

102 *Cf.*, among many others, the proposals by VANDER BEKEN *et al.*; A. BIEHLER *et al.* (eds), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, Max Planck Institute for Foreign and International Criminal Law, Freiburg 2003; A.H. KLIP, *Uniestrafrecht*, Kluwer, Deventer 2006; B. SCHÜNEMANN (ed.), *Ein Gesamtkonzept*

What follows from this is that the reference in Article 3(2) TEU to 'appropriate measures' should be interpreted in light of the *institutional (constitutional?) setting* of the EU and not in light of the existing *legislative framework*.[103] What should be decisive for the interpretation of any provision of EU law (or national implementing legislation) in light of Article 49 CFR are the powers and competences of the EU to deal with conflicts of jurisdiction *in abstracto* and not the legislative state of play. Only where areas of competence fall outside the range of EU law would a unilateral approach to the problem still be acceptable.[104]

The Treaties have already defined the task of preventing and solving conflicts of jurisdiction. The EU has been attributed specific instruments for this (see Arts 82–86 TFEU). The full potential of these instruments is, however, far from exhausted. The current situation seems to be influenced a great deal by the Member States' desire to retain as much sovereignty as possible. Yet this, in my opinion, is where fundamental rights differ from fundamental freedoms.[105] While the Court of Justice has accepted that the absence of legislative measures may bring along limitations on free movement,[106] this conclusion cannot be accepted in relation to fundamental rights, as their function is to protect the EU citizen against all state power, including that of the legislator. The opposite view would leave it to the legislator to decide to which extent it wishes to bind itself to, in this case, Article 49 CFR. The foregoing therefore also implies that our interpretation of Article 49 CFR is something more than a 'normative horizon' alone. It is not only an instruction norm for the European legislator but also susceptible to interpretation by the judiciary.

## 6. Concluding Remarks

Criminal law is not only about the protection of citizens *by* the state but also, or perhaps even particularly, about protection *against* the state. It is an area of law that is increasingly influenced by European law. In turn, criminal law influences the state of affairs in European law. Over the last couple of decades, we have witnessed these processes, first, in the areas of substantive criminal law and the law on international cooperation and, recently, in the area of procedural criminal law. This

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*fur die europaische Strafrechtspflege – A Programme for European Criminal Justice*, Heymanns, Cologne/Berlin 2006; LUCHTMAN, 'Choice of Forum in an Area of Freedom, Security and Justice', pp. 74–101.

103 *Cf.* LUCHTMAN, 'Transnational Law Enforcement in the European Union and the *Ne bis in idem* Principle', pp. 5–29, with respect to Article 50 CFR (*ne bis in idem*). For a similar argument, see AG Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano*, para. 163.

104 That might be the case with respect to offences against, for instance, national security (the protection principle).

105 *Supra* n. 71. See also MCCRUDDEN, p. 20 *et seq*.

106 *Cf.* Case C-378/97 *Wijsenbeek* [1999] *ECR* I-6207, paras 40 and 44.

begs the question of what role principles of criminal law play in European criminal law and whether and how they are of concern to the EU.

The focus in this article was on the role of the *nullum crimen* principle in relation to the choice of forum in criminal matters. Our point of departure was the wide margin of appreciation national prosecuting services have when coordinating their efforts with respect to fighting transnational crime. As we have seen, these efforts raise concerns as to their foreseeability. Particularly in the specific, transnational context of the AFSJ, the debate on the role of principles of criminal law is, with *ne bis in idem* as the important exception, still in its infancy. This is clearly reflected in the current EU system for dealing with conflicts of jurisdiction. It is also relatively easy to explain. In the first place, criminal law, although it was never immune from EU law, has not been an EU policy area for that long. Expedient decision-making was hampered by institutional barriers, like the unanimity rule and limited powers for the European institutions, until recently. This is why as yet there is relatively little EU (or national implementing) legislation to interpret. In the second place, one cannot escape the impression that it is one thing to identify the legal values that all Member States of the EU share – who would (dare to) oppose the idea of, for instance, criminalizing human trafficking? – but quite another to create a mechanism that actually tells the Member States what to do (and, as a necessary corollary, tells others what *not* to do) in a specific case. This could be why all official actors seem fairly comfortable with the considerable amount of discretion that is left to the executive bodies and occasionally even fiercely defend this discretion.[107]

The result of these two factors has been that many issues related to the choice of forum are still left to the national level. Yet that does not necessarily mean that the aforementioned degree of prosecutorial discretion is to be accepted without debate. Our conclusions in this regard may, perhaps, be termed 'ambitious' by many. We defended the position that the current state of affairs is problematic from the perspective of the *nullum crimen* principle but only after we redefined that principle in light of the ambitions put forward in Article 3(2) TEU. Our position is that the European citizen is not only a device for promoting European integration. Nor is he only entitled to protection *by* the EU Member States against crime. He is also entitled to protection *against* their joint efforts to fight crime in the AFSJ. Genuine free movement, as we defined it at the end of section 5.2.1, implies (or rather should imply) that European citizens are entitled to protection against these (coordinated or uncoordinated) efforts as well, provided that the political and social entity to which they belong – the EU – is indeed capable of solving these problems. We answered the latter point in the affirmative in section 5.3.

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107 They are, in my opinion, rightly, criticized for it by AG Sharpston in Case C-34/09 *Gerardo Ruiz Zambrano*, Opinion, para. 169.

The current state of affairs therefore has not prevented us from doing two things. In the first place, the exploration of the role of the *nullum crimen* principle provided a yardstick for assessing that state of affairs (section 5.2.3). Moreover, we did not wish to exclude the possibility that at a certain stage, the judiciary, the Court of Justice in particular, will be asked to interpret existing provisions of EU law in light of Article 49 CFR (section 5.3). We concluded that it should not be left solely to the European legislator to determine the scope by which it wishes to be bound by the principles of criminal law, as contained in the CFR. That legislator cannot escape its responsibilities by remaining silent, where the Treaties give him the competences and powers to act.

Two final remarks must be made. In the first place, our critique in the above was geared towards *unforeseeable* claims of jurisdiction. That does not mean that conflicts of jurisdiction can and must always be avoided. Even in a situation where all jurisdictional claims are foreseeable, European citizens will continue to be confronted with multiple proceedings. In those instances, it seems to me, additional rules on the choice of forum may be necessary, but these rules will not pose problems from a *nullum crimen* point of view. That does not mean, however, that there are no issues under, for instance, Article 47 CFR, dealing with the organization of court competence ('tribunal established by law').[108]

Second, the dilemma that arises from our analysis is that any reduction of the Member States' options on account of their incompatibility with the *nullum crimen* principle of Article 49 CFR (or other Charter rights) will increase the need for binding rules at the EU level. In turn, this might increase the need for further European measures that are geared towards enhancing mutual trust. Member States need to be sure that in those instances where they are no longer competent, other Member States will investigate, prosecute, and try these offences in a way that meets the requirements of the Charter and the European Convention. This, in my opinion, is where one of the main challenges for European criminal law lies in the years to come.

108 *Cf. supra* n. 86.

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## Style guide

A style guide for contributors can be found in volume 19, issue No. 1 (2011), pages 155–160, and online at http://www.kluwerlawonline.com/europeanreviewofprivatelaw.

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