In socio-legal perspective, ‘crime’ appears as a concept established both *politically* by ‘official’ processes guaranteed by states, and *culturally* in communal understandings emerging in various kinds of networks of social relations. The dialectic between these determinations of the meaning of crime is longstanding, but is assuming increasing complexity as efforts are made to adapt ideas of crime, law and society to the current proliferation of transnational social relations and jurisdictions. Reliance on nation states to determine entirely independently their own understandings of crime now seems unsatisfactory for many reasons. But how far can crime as an idea be re-envisioned beyond the limits of state jurisdiction and state interests, and as the product of transnational networks of community? This paper notes challenges which transnationalism poses to the monopolisation of criminalisation by states, and explores possibilities for coherent conceptualisation of crime on a transnational basis. It argues that cultural elements in a viable concept of crime indicate bases for – but also necessary limits on – its transnational extension. At the same time political elements show how hard it is to free the idea of crime from nation state moorings when it is operationalised in criminal justice practices.
Higher-order comparisons and lower-level truths  
David Nelken, Universities of Macerata and Cardiff

In these reflections on the epistemology of comparative criminal justice I will discuss five levels of interpretation of criminal justice behaviours and attitudes. I shall focus on the way the highest level definitions of others people's interpretations then acquire constitutive force and are used for the purposes of transnational communications which concern the signaling conformity and the sanctioning of deviance from the norm.

Policing and Political Economy: A Tale of Two Freudian Slips  
Robert Reiner, London School of Economics and Political Science

Political economy and criminology have been closely intertwined historically. However, in the last four decades criminology has focussed largely on cultural and policy analyses that bracket out political economy. In the last few years there has been some resuscitation of political economy in the analysis of punishment. This paper will argue the case for a similar approach to the study of policing. Policing studies used to pay some attention to the impact of the wider political economy, but this too has been occluded in recent decades by cultural and policy concerns. The reasons for this double 'forgetting' will be analysed, and the insights gained by earlier political economy perspectives on policing will be excavated to shed light on current controversies.

13.00 Lunch

14.00 Panel 1: Transnational Crime and Globalisation

Key EU Principles to Combat Transnational Organised Crime  
Tom Obokata, Queen’s University Belfast

The purpose of this paper is to explore key EU principles relating to organised crime, with particular reference to approximation of national criminal laws and procedures, mutual recognition of judicial decisions, and the principle of availability (intelligence gathering and exchange). After tracing the historical development of these principles, the paper looks at some of the key measures including the Framework Decision on Organised Crime and European Arrest Warrant, as well as the role of key institutions such as Eurojust and Europol. In so doing, the paper will critically highlight key issues and problems inherent in these principles/measures as well as practical difficulties of their implementation at the national level, such as a negative impact upon human rights, a lack of political will and challenges posed by enlargement. The main conclusion reached is that while the development within European Union can be regarded as a good example of globalisation of criminal laws and procedures compared to other regions of the world, there still is a room for improvement if the EU and Members States truly wish to facilitate effective responses to transnational organised crime.
The criminal sanctions against the illicit proceeds of criminal organisations
Anna Maria Maugeri, University of Catania

Confiscation of illegal proceeds is very important in the fight against organised crime in order to avoid the reinvestment of such proceeds in economic activities as well as the infiltration of illegal organisations in the economy and in the politic. The fight against the economic power of criminal associations responds to the need to more widely protect the rules of the market economy; the entry into business of individuals who use illicit capital seriously alters the basic conditions for free competition and blocks the development of competitive dynamics.

Such an aggressive and wide ranging phenomenon, subject to frequent transformations linked to processes of finance and globalisation that characterise today’s world economy, has pushed the modern criminal legislator in Italy and in other countries to develop a complex system of laws in order to fight the economic power of organised crime.(1)

In the comparative survey of the actual law systems it is possible to identify four models of confiscation intended to fight organised crime: the criminal penalty; the confiscation based on the presumption of the illegal destination of the assets; the confiscation of the suspected illicit proceeds, based on the assumption of the unlawful source of the proceeds, and the actio in rem.(1)

(1) For a wide overview of the sanctions against illegal proceeds in Italy, in Germany, in French, in England, in Ireland, in Swiss, in Austria, in the United States and in Australia, see MAUGERI, Le moderne sanzioni patrimoniali tra funzionalità e garantismo, Milano 2001.

Transnational Criminal Law!
Neil Boister, University of Canterbury, New Zealand

In 2003 I published an article that asked whether it was possible to distinguish a system of transnational criminal law (TCL) (1) from core international criminal law and purely domestic criminal law. This paper, a reprise to that article, examines the law itself, to argue that it is both possible and desirable to do so.

Transnational crime is now a commonly used – if highly criticised - criminological term used to describe cross-border or potentially cross-border crime. Transnational law was originally defined by Phillip Jessup to include ‘all law which regulates actions or events that transcend national frontiers’. (2) Transnational criminal law is that law that suppresses crime that transcends national frontiers; it can be defined as ‘the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects’. (3) Neither international crimes in the strict sense of crimes in international law, nor purely domestic crimes, transnational crimes – drug trafficking, human trafficking, corruption etc - have also been called ‘crimes of international concern’ (4), but ‘transnational criminal law’ reveals a little more about the nature of these crimes, and something of their process of criminalization. It is a system with two functions: (i) to suppress transnational crime; and (ii) to transnationalize criminal law by diffusing criminal offences that originate in one or more states through the agency of international law into other states.

This paper suggests then that the system has both a distinguishable (i) formal and (ii) conceptual doctrinal basis. The formal nature of the doctrinal obligations can be distinguished from the core international criminal law and from national criminal law. The conceptual foundation of these obligations as defined in the conduct and fault elements of the particular crimes, also suggests the use of a distinctive model of transnational criminal
activity. Finally, it can be shown that this formal and conceptual coherence give these rules a systemic nature. I shall explore each of these elements it turn, but before I do so I shall set out the rationale for trying to describe and distinguish a system of transnational criminal law.

There are various reasons for doing so. Transnational criminal law has for too long been the handmaiden of the core international criminal law. In most specialist international criminal law textbooks the various crime control treaties - or ‘suppression conventions’ - and the national crimes they spawn are dealt with as a less than interesting adjunct to the core international crimes. There has been an increasing growth in transnational influence on domestic criminal law, but that influence has always been seen by lawyers as part of either international or national criminal law. The study of this influence is the province of sectoral specialists on drugs, money laundering, asset forfeiture, and so forth. But there is very little work done on the system as a whole. Who, for example, would identify themselves as a scholar of “crimes of international concern”? Looking transnational criminal law square on as it were helps to focus attention on the different crime control policies which this international influence reflects, the influence of certain hegemonic states on its content as a whole, and the democratic deficit in the making of this policy. It focuses attention on quality of the implementation of these treaty obligations through law reform and compliance with these obligations through law enforcement. Finally, it focuses attention on the convergence of laws and practices and the potential for harmonisation of domestic criminal laws and procedures, which I suggest, give it a distinct systemic nature.

2 P Jessup, Transnational Law (1956), 2.

---

**Fighting criminal economy: A global challenge not only for criminal justice?**

**Fabio Licata and Costantino Visconti, University of Palermo**

Globalization represents not only an extraordinary opportunity to open up global markets and interconnected gateways, but implies also new opportunities for all kind of individual and organized criminals.

In this framework, economic power of organized crime, together with the pressure of dirty money, is one of the major threats for free market and economic development.

Academic studies and judicial findings show that criminal organizations use free market to disguise and secure the proceeds of crimes, as well as to produce new resources ready to be used for financing further illegal activities.

Using both the pressure of dirty money and illicit practices, criminals take control, exploit, influence, or simply use, a business or a company for illicit purposes.

As a result, free market could be seriously distorted, while centres of illicit powers (e.g. mafia, terrorism) could control wide and significant sectors of economy, or even whole countries, where economic and political context is weak or corrupted.

Acting in this way, the actual leaders of terrorist and criminal organizations, as well as serious individual offenders (corrupted officials, white collars), make possible to distance themselves from the actual criminal acts, rendering a criminal conviction nearly unattainable.

Facing these phenomena, national and international organizations have experienced the difficulty to give evidence, according the classic criminal law standards, of the link
amongst criminal acts of individuals or organizations and their immense proceeds.

Therefore, a new international approach has been adopted, called “proceeds of crime strategy” or “assets recovery strategy”, whose main feature is the use of extended and non-conviction based confiscation, aimed to directly target illegal revenues and assets of the alleged offenders by using non criminal standards of proof.

Notwithstanding that, when the combination between legal and illegal business is particularly blurring, this approach could result inadequate to lift the corporate veil or to block the allegedly or suspected illegal activities of companies influenced or controlled by criminals.

These shortcomings have been addressed by states and international organization, as United Nations or European Union, by adopting administrative and non criminal legal instruments, actually aimed to manage subjects traditionally covered by criminal law and its high-guaranteed standards, just by using more flexible instruments.

This is the core of preventive approach, not directly aimed at the offenders, but rather at the various circumstances that facilitate organised crime: governments, civilians and enterprises are addressed in the attempt to make them feel responsible for reducing the opportunities for crime.

A typical example is the freezing orders regime, adopted against allegedly supporters of terrorist groups, that has raised serious concerns for the respect of fundamental and individual rights.

Further examples of this paradigm could be found in the extended use of corporate liability, with particular reference to the use of compliance programs as a mean to reduce risks of criminal acts, or in the special instrument of “Judicial administration”, set out in the Italian antimafia legislation.

This last tool, in particular, provides that individuals or legal persons could be suspended by the administration of a business, a company or other relevant activities and properties, if there is the suspect that these items could be used to support illegal activities of organized crime. Moreover, the order could be pronounced even if the person under investigation does not want the alleged support or is not aware of it (e.g. a victim or a big company unaware of the conduct of a manager).

In this context, the purpose of the paper is to analyse all these forms of use of administrative means, finding common features, testing their effectiveness in fighting organized crime and terrorism, as well as verifying their compliance with standards of human rights protection. On the other hand, the research aims to focus on complex situations, where it is tangible the risk that dirty money or illicit activities could affects a company that could be unaware of illegal activities.

According to recent studies, public powers should tend to seek cooperation of honest private stakeholders in the struggle for a free, safe and lawful economy. Besides, European and American judicial experience offer a number of case studies, where criminal authorities used administrative, regulatory and non criminal instruments to involve individuals and legal persons with the aim of reducing both the risk of new crimes, and reduce negative consequences for the company.

The evaluation of the following cases should verify if they present the same situational approach to face the economic side of criminal powers, and if common features could be observed.

Siemens Case: U.S. Department of Justice v. Siemens for violations of Foreign Corrupt Practices Act (FCPA). 2008. In this case Siemens AG, Europe’s largest electronics and engineering company, entered into a plea agreement to resolve bribery investigations being conducted simultaneously by the DOJ and by German authorities. The agreement was the result of the cooperation of the company with investigators and of its commitment in improving its compliance policies and procedures;
**TNT Case.** Case of an Italian Preventive Measure of “suspension by the administration of assets” (art. 3 quarter l. 575/65, now substituted by the “Judicial administration” provided by decree n. 159/11): The Court of Milan (Tribunale di Milano), declared that six detached branches of T.N.T. Italy (part of the multinational company T.N.T.) were suspected to support the activity of the ‘Ndrangheta, since they were controlled by individuals linked to this criminal organization. Consequently, suspended the aforementioned company from the administration of these six detached branches. At the end of a five-months term of judicial administration, the court revoked the suspension, considering the commitment of TNT in cooperating with investigations, renewing management and improving compliance programs.

**Centralgas S.p.A. Case.** Another case of Italian Preventive Measure of “suspension by the administration of assets” (art. 3 quarter l. 575/65, now substituted by the “Judicial administration” provided by decree n. 159/11). In this case, the executives of the two companies “Centralgas S.p.A.” and “Virgogas s.r.l.” were suspected to support Cosa Nostra, in consideration of their links with a member of this criminal organization that owned also shares of the companies. The Court of Palermo (Tribunale di Palermo) in 2006 suspended the aforementioned company from the administration of these two companies. Then, the Court ordered the confiscation of the companies on the grounds that the accounts and balance sheets were counterfeit and that there wasn’t any licit explanation for several significant investments. The decision was confirmed by the Court of Appeal and by the Supreme Court of Cassation (November 2011).

**Essential bibliography:**
2. Wim Huisman, Monique Koemans, administrative measures in crime control, Erasmus Law Review, 2008, Volume 01 Issue 05
4. Costantino Visconti, Contro le mafie non solo confisca ma anche “bonifiche” giudiziarie per imprese infiltrate: l’esempio milanese (working paper), in www.penalcontemporaneo.it
5. Fabio Licata, La sospensione temporanea dall'amministrazione dei beni e la successiva confisca ex artt. 3 quater e 3 quinquies, l. n. 575/1965. L'agevolazione incolpevole delle attività mafiose - la previsione e la sanzione, in La giustizia patrimoniale penale, A cura di A. Bargi e A. Cisterna, Torino, UTET, 2011
whether they review them and how. The case law shows that domestic courts regularly review international decisions for their compliance with domestic law. The review most often focuses on ‘fundamental rights’ and although equivalent international norms exist, domestic courts frame their review in exclusively domestic terms. In the end, they strike down domestic implementing measures giving force to international decisions; they order their governments to achieve implementation in other ways, etc. These acts clearly amount to strong review in which courts assert their power over the Executive but also, as recognised by some scholars and even courts, indirectly challenge the international institution. Such challenges are surely not beneficial for the international institution or the international legal order since they encourage disobedience in other jurisdictions and undermine the effectiveness of the whole international legal order. It is in this context that I examine whether an alternative review of international decisions is possible in which domestic courts can be regarded as acting as ‘global’ actors. Adopting Tushnet’s distinction between strong and weak review (Weak courts, strong rights), I analyse what could be gained for international law and the international legal order if domestic courts adopted weak review instead of striking down implementing measures. Translating Tushnet’s argument into the vertical relationship between international institutions and domestic courts, I show how engaging the international institution into a dialogue about the meaning of international rules neither directly nor indirectly challenges its authority, but instead strengthens the international rule in question. This in turn leads to a stronger international rule of law and provides the foundation for an effective pursuit of international peace and security.

Extending the Criminological Imagination: Globalisation, state crime and the foundations of criminological theory

Wayne Morrison, Queen Mary University of London

Criminology - the logos of crime – has traditionally reflected the institutional structures of punishment and methodological nationalism. The criminal was s/he who was punished, what was not punished was not a true crime and the state determined the processes of norm creation (criminalisation) and norm enforcement (criminal justice and penal systems). Claims to ‘general theory’ (e.g. A General Theory of Crime, Gottfredson and Hirschi, 1990) were constituted in a positivist fashion around data produced in particular nation states (i.e. the US), but it was assumed that the conclusions reached were capable of general applicability. While such criminology claims an empiricist epistemology it is in fact limited pragmatism (a positivism, or ethnology of locality). Critics of such a criminology often resort to comparative studies of criminal justice and contrast different cultural and socio-economic localities, which may or may not be put into some form of globalisation; this offers a ‘international’ or comparative criminology.

This paper, by contrast, asks if a global criminology is possible? What, imaginatively, would it look like? What would be its data set? What if we include the whole data set of the genocides, state sponsored massacres and crimes of omission that (excluding the causalities of war) in the twentieth century probably took the lives of over 170 million people? Different question immediately arise which destabilise normal work: did Eichmann suffer from low rates of self-control? Why does the controversy over Arendt’s ‘the banality of evil’ not appear in major mainstream criminological text books? (Is it because it undercuts the foundations of a ‘sociology of deviance’?) What is policing if members of Police Battalions that killed tens of thousands of Jews in face to face conditions were easily back to the jobs in the new Germany? What of statistics? The US homicide rates for the 1960s and 70s do not include, for example, the deaths caused by US bombing in Vietnam,
Cambodia, and Laos (the vast majority of which was clearly ‘illegal’ and officially denied). In which positivist data base do the civilian deaths caused by US drone killings in Pakistan and Afghanistan belong?

The Pitcairn Prosecutions and the Rule of Law
Stephen Allen, Queen Mary University of London

Christian and Others v The Queen ([2006] UKPC 47; [2007] 2 AC 400) concerned the legality of prosecutions brought by the British Crown under the Sexual Offences Act 1956 against seven male inhabitants of Pitcairn Island, a remote British Overseas Territory, for the rape and indecent assault of numerous female children (mostly between the ages of ten and fifteen) between 1964 to 1999. As Lord Hope explained:

‘This case is about child sexual abuse on a grand scale. The extent to which it was practised on Pitcairn is deeply disturbing. Conduct of this kind cannot be regarded as other than criminal and deserving of punishment [48].’

Notwithstanding the abhorrent nature of the offences in question, the Crown’s Legal Adviser for Pitcairn acknowledged:

‘… it is possible although perhaps unpalatable, to attribute a degree of responsibility for the unbridled sexual licence of Pitcairn men over past generations to the absence of any meaningful civil authority and actual system of justice representing the guidance and supervision of the colonial power.’

Moreover, English law had been incorporated into ‘Pitcairn law’ by general reference and the provisions of the 1956 Act were not published on Pitcairn Island during the relevant period. These circumstances led Lord Hope to observe that the prosecutions ‘raise some fundamental issues about the rule of law in remote communities and about the responsibilities of the colonial power’ [47].

The paper assesses the balance between the legal principles of ignorantia juris non excusat and nulla poena sine lege in the light of the Pitcairn prosecutions from a range of philosophical perspectives – universalism (mala in se), relativism (enculturation) and legal positivism and non-positivism. This presentation explores the international law dimension of the appellants’ claim that the Pitcairn prosecutions were an abuse of process. First, it considers the international legal obligations that the UK owes to this non-self-governing territory, which were ignored by the Privy Council in its assessment of the legality of the prosecutions. Second, the presentation identifies the international legal standards underpinning the principle of nulla poena sine lege and those relating to the elimination of sexual violence against women and children. Third, it considers the application of the ECHR to Pitcairn. The established view is that the Convention does not apply to a member State’s Overseas Territories unless it has been extended to that territory (Art 56, ECHR). The presentation re-evaluates this position in the light of the Strasbourg Court’s endorsement of the Convention’s extra-territorial reach in Al-Skeini v UK (2011). It is suggested that the outcome in Christian and Others might have been different if the appellants' actions could have been balanced with the UK’s failure to meet the international legal obligations it owed to the inhabitants of this non-self-governing territory, in a way that the Privy Council conspicuously failed to do.
Proportionality testing in the European criminal law and justice area: Are we using canons to shoot mice?
Karen Weis, Vrije Universiteit Brussel

The procedural limb of judicial cooperation in criminal matters in the European Union is, as was decided at the 1999 Tampere European Council, based on the principle of mutual recognition. The application of this principle was intended to empower authorities in the Member States to cooperate „fluently”, without the need to harmonise their differing national laws. Mutual recognition namely essentially entails respect for diversity. Several Member States however recently complain about the disproportionate use of the European Arrest Warrant. Whereas before, traditional cooperation in criminal matters only obliged Member States to extradite in cases concerning forms of serious crime, the European arrest warrant can apparently also be applied for petty crimes. The principle of mutual recognition prevents national authorities from refusing the execution of such a warrant issued for minor offences. This „compulsory” execution of such warrants leaves judges in Member States with a discontent feeling, as they find that the surrender has disproportionate effects for the person concerned when compared to the seriousness of the crime for which the European arrest warrant was issued. This sentiment of discontent has had, and still has, severe consequences for the much needed feeling of mutual trust. This paper will therefore try to find a more successful solution for this proportionality problem, thereby taking into account all of the interests concerned.

Panel 3: Globalisation and EU Criminal Law from Practitioners’ Perspective: A Roundtable Discussion

Running before we can walk? Mutual recognition at the expense of fair trials in Europe’s area of freedom, justice and security
Emily Smith, Fair Trials International

The last decade has seen the EU place unprecedented emphasis on increasing and improving cooperation between Member States in criminal justice matters. However, for most of this period the fundamental rights of suspects and defendants have been largely ignored. This paper examines the steps necessary to establish an effective and coherent system of EU criminal justice procedure: one which enables Member States’ prosecution and judicial authorities to cooperate effectively in the fight against serious cross-border crimes, while also ensuring efficient protection for the fundamental rights of suspects and defendants. Fair Trials International’s case studies are used to demonstrate the dangers of introducing mutual recognition instruments such as the European Arrest Warrant for prosecutors when suspects and defendants do not have tangible, enforceable fair trial rights in many EU countries.

Criminal justice under the influence of supranational law and international law: Complementarity or multiplication of efforts?
Martin Wasmeler, European Union’s Anti-Fraud Office (OLAF)
While criminal justice essentially remains a domain of national law, over the past 15 years the EU has built up a considerable *acquis* in this area. At the same time, the global dimension of the fight against crime and the role of the UN and other international organisations has become more and more prominent. Thus, national criminal law is increasingly superimposed by supranational and international law.

So far, policy and research efforts have focused on the interaction between national and EU law and between national and international law.

This contribution attempts to highlight the relation between EU and international criminal law. Recalling one of the original objectives of EU policy in this field, i.e. to make cross-border cooperation in criminal matters more efficient and taking into account that EU legislation cannot replace international law but only add specific rules for the cooperation among EU Member States, one could argue that an additional “layer” of EU rules can even increase the complexity of the legal framework, even if it simplifies cooperation within the EU.

Therefore, and also because of the close relation between internal and external security, it is legitimate to ask whether the EU should give more weight to international or external aspects, in its consideration whether to adopt new instruments on criminal justice.

In this vein, it may be advisable to include international aspects in the decision making and evaluation process, particularly in impact assessments and implementation reports. The added value of EU instruments would then not only be measured against a national background, but also against an international one.

Based on such a broadened analysis, in certain matters one might arrive at the conclusion that it may be preferable to promote action at an international level (as was done on crimes against humanity). On the other hand, where an EU project passes this test, i.e. where its advantages in comparison to international instruments can be clearly demonstrated, stronger acceptance and support by practitioners and other stakeholders can be expected. In these cases, EU instruments may also serve as examples and trailblazers for a more efficient cooperation on the international level.

---

**Novel Legal Issues in Criminal Justice Directives post-Lisbon**  
*Harriet Nowell-Smith, Ministry of Justice Legal Directorate*

---

**15.30 Tea**

**16.00 Plenary session 2: Keynote Speakers:**

‘When the wheel comes off’: Maintaining Police Legitimacy in a Globalized Era  
*Margaret Beare, Osgoode Hall Law School*

Picking up on Robert Reiner’s description of the socially invisible workings of the police when everything goes along well, this paper looks at the ‘newer’ methods by which the police attempt to maintain legitimacy when camera and video surveillance, international media, national inquiries and commissions of investigation, and legislative requirements—including the exclusionary and Charter of Rights provisions, invade their secrecy and turn what might be normalized police work into scandal or controversy. While the focus is most specifically on the police in Canada, the findings are internationally relevant as jurisdictions...
adopt or adapt the 'harmonized' language, policies, and legal requirements of control to the realities of local policing tasks.

Illicit Globalization: Myths, Misconceptions, and Historical Lessons  
Peter Andreas, Brown University

Standard accounts of the illicit cross-border movement of people, goods, and money depict states as increasingly bullied, bypassed, and bought off by ever-more powerful and sophisticated clandestine transnational economic actors. This illicit “underside” of the global economy is viewed in both scholarly and policy debates as an extreme case of globalization run amok. I argue that these popular claims of loss of state control are overly alarmist, misleading, and suffer from historical amnesia. Drawing from historical and contemporary empirical illustrations, I challenge common myths and misconceptions about “illicit globalization” and emphasize ways in which states shape and even exploit the illicit global economy. Contrary to conventional wisdom, illicit globalization is not new, and its relationship to the state is not only antagonistic but often symbiotic.

18.00  Reception

DAY TWO: Wednesday 27 June

9.00  Plenary session 3: Keynote speakers:  
The UK and EU criminal law: Should we be leading, following, or abstaining?  
John Spencer, University of Cambridge

Professor Spencer will examine the UK’s legal position in relation to the EU’s powers to legislate in the area of criminal justice, and against that background, outline the UK’s policy (or what appears to be its policy) towards EU criminal law. With particular reference to the EU “Roadmap” of proposed measures designed to reinforce the rights of criminal defendants, he will argue that the UK has more to offer Europe than to fear from it. The UK should therefore co-operate in the creation of these measures, with the aim of “selling” the principles of the Common Law to Europe. It should not stand aside from them, lest our system be contaminated by European ideas.

Transnational evidence gathering in the EU from a global and regional perspective  
John Vervaele, University of Utrecht

My paper will deal with substantial changes in the way criminal evidence is gathered abroad, especially within the regional EU setting. I will address three main changes. The first one is a global one: In the information society there is a clear shift from criminal investigation towards building up information positions and pro-active intelligence; intelligence-led policing becomes dominant in mutual legal assistance (MLA). This is also reflected in the EU treaties in the field (US bilateral treaties on judicial cooperation in criminal matters, Convention with EU on financial transactions, Convention with the EU on
PNR data). The second and third are dealing with new phenomena in the EU. Within the EU, since the coming into force of the Treaty of Amsterdam (1999) there is a policy shift from MLA to mutual recognition (MR), also in the field of evidence gathering, replacing the mother conventions of the Council of Europe and the Schengen acquis. Finally, the EU is establishing and operationalising European law enforcement agencies (Europol, Eurojust, OLAF) and the Lisbon Treaty contains a legal basis for an European Public Prosecutor. Is this a silent process of EU-federalisation of national law enforcement or rather a strengthening of the European dimension of the national law enforcement in the EU?

The Rise and Rise of Mutual Evaluation: A Reassessment
Michael Levi, Cardiff University and Bill Gilmore, Edinburgh University

Responses to transnational crime have taken many forms. We focus in this paper on two of them: trends in the criminalisation of ‘financial crimes’ and in the process of ‘soft law’ usually termed ‘mutual evaluation’.

First, the key drivers of criminalisation in the financial crime arena appear to be (for elaboration in the piece):
1. Pressures for Political Respectability/ Economic Survival
   a. External Evaluation
      i. FATF/FSRB, OECD Corruption, OECD Tax competition, GRECO, OAS, UNCAC, EU (Lisbon Treaty), Financial Stability Board
      ii. Copying the reference groups’ processes, aka ‘policy and practice transfer’
   b. Scandal and its consequences
      i. Role of the media (which media are relevant to whom?)
2. Pressures from domestic and international NGOs and other ‘civil society’
3. Pressures from elites
   a. Corporate, ‘High Net Worth’ individuals and tax/legal professionals, resisting changes that affect their interests.

Second, a decade ago, Levi and Gilmore (2002) elaborated the phenomenon of ‘mutual evaluation’ and charted its rise as a mechanism of legal policy and practice transfer. In this paper, we examine what has happened to this phenomenon, what is known about its impacts on law, on enforcement and on the levels and forms of the predicate crimes at which it is aimed. Finally, the paper will conclude with a brief overview of the responses of the public and private sectors to these transnational crime realities and imaginaries, focusing not just on the UK but also a selection of other advanced economies, in working out the symbolic and instrumental dimensions of how financial crimes are constructed and reconstructed in the aftermath of the Financial Crisis.

11.00 Coffee

11.30 Panel 4: Human trafficking and globalisation

The Dark Side of the Laws against Human Trafficking: The Need for a New, Not
Exclusively Legal, Approach and the ‘Italian Way’ in a Global World Perspective  
Antonello Miranda, Università degli Studi di Palermo

This study exposes from one side the latest development of the Italian statutory law on human trafficking and from the other side my personal doubt that approaching the question only by a criminal law point of view it is really effective. I remark that true situation is going from bad to worse, statutes are more restrictive then ever but the phenomenon is still present and the demand of protection of human rights of migrants is dramatic and actual. The point, in my opinion, is more political and juridical than strictly legal. In Italy and all over Europe the law seems to fight the irregular or clandestine migration with two different options. From one side our criminal rules have been modified to increase the punishment against the persons and criminal organisations, which make profit from human trafficking and smuggling. From another side the law, even recently, has been modified to increase the punishment against the irregular or clandestine migrants, i.e., in a great numbers of cases, against the victims. But even if so the immigration problems is far from be solved: the undifferentiated arrest and deport of thousands peoples is an unrealistic prospective even from a simple and cynical “costs and benefits” balance. Furthermore one simple dramatic consequence of potential increasing of risks for criminal organisations trafficking in human beings is the concrete and effective increasing of costs and prices (in a very wide sense) for the migrants. On the contrary, we need a different loom providing for massive international cooperation and collaboration with the weak and developing Countries; we need also to fight the irregular immigration not only with a narrow “criminal law” or statutory approach, but also in a “multidisciplinary” way using the instruments offered by private law, international law, economics, sociology etc. In my opinion the point is to face the phenomenon from one side increasing obviously the control on irregular immigration (and this is only possible in a wider collaboration among European Member States), but from the other side increasing the possibilities to enter regularly in our Countries and at the same time trying to eliminate or to contribute to eliminate in origins the real causes of the emigration. I suggest, maybe in a provocative manner, to abolish any kind of restrictions and limits to the immigration. But in the meanwhile I think that there is room for an “alternative” use of the law shifting from the (merely) criminal approach to a “remunerating” ones even using the private law rules as consumer protection, antitrust laws, competition law, tax law and so on.

Legal Responses to Transnational Crime and Corruption:  
Trafficking in Human Beings in Macedonia  
Bela Belojevik, University of Palermo

Human trafficking in Macedonia is a relatively recent phenomenon which had its beginning in the 1990’s with the break up of Yugoslavia. It evolved during the transition period becoming stronger and more evident with the globalisation processes that the country has been facing ever since. Analyzing human trafficking in Macedonia is closely related to other Balkan countries since it is a transnational phenomenon. This is an important dimension to bear in mind in order to better understand the origin and modus operandi of this particular type of organized crime and how to fight against it.

Macedonia is considered to be transit and destination country for human trafficking. In the latest Trafficking in Persons Report 2011 issued by the US Department of State, Macedonia figures also as a source country with increased internal trafficking that has been undermined by the local authorities.

The purpose of the paper is to demonstrate the position of Macedonia in coping with
human trafficking and the vital importance of the international presence and European Union recommendations and support for detecting, preventing and fighting human trafficking. A great know-how was transferred from international organisations, Ngo’s and foreign governments to Macedonia in the past decade with more or less promising results. Yet the biggest challenge regards the region’s security and stability that is the first threat to organised crime spill-over. Macedonia is still fragile in terms of corruption and economic development. However the progress in harmonising legislation made so far with the implementation of international treaties and conventions and multilateral and bilateral agreements was fundamental for enhancing the country’s position in the management of human trafficking. Macedonia is the only one in the region with the strongest anti-trafficking legislation. Could this be enough for enabling a strong and efficient judicial response to human trafficking and to what extent the laws enacted are actually implemented.

The paper addresses these issues using the evaluations contained in international organisations reports, European union country progress reports and the Macedonian government National Action Plan for combating human trafficking. It is also a result of interviews made with Macedonian judges, police officers and other stakeholders working in the field.

References:
US Department of State, Trafficking in Persons Report, 2011
European Commission, The Former Yugoslav Republic of Macedonia 2011 Progress Report
Macedonian National programme for combating human trafficking, 2002
National programme for action and strategy in combating human trafficking, 2009-2012
Macedonian Criminal Code
Macedonian Criminal Procedure Code
Law on Witness Protection, 38/05 Official Journal of Republic of Macedonia

Agustina Iglesias Skulj, Universidade da Coruña

This paper aims to carry out an analysis of the design and implementation of policies against trafficking in Spain. According to the Executive summary of the Global Report on trafficking in persons of the United Nations Office on Drugs and Crime (UNDOC) in 2009 - containing information from 155 countries and territories on measures to combat trafficking-, in November 2008, 63% of the world’s countries had adopted measures against trafficking in general, while 16 percent had adopted measures to combat only certain elements contained in the Protocol to Prevent, Suppress and Punish trafficking in persons. The Spanish case is included in the latter group.
Stewart Field, Cardiff Law School and
David Nelken, Universities of Macerata and Cardiff

In this paper we will examine data from case-files drawn from a larger study of youth justice in Italy and Wales part-financed by the Italian Ministry of Education and the ESRC. We will compare and contrast the discourses and outcomes in the two research sites in relation to cases involving shoplifting, supply of drugs, street robbery or bag snatching, car or motorbike theft with dangerous driving or riding; domestic burglary, public violence, and assaulting or abusing authority of state officials. We will seek to get beyond simple contrasts between tolerance and punitiveness to explain difference in terms of interrelations between underlying aspects of legal and political cultures and their social contexts.

Transnational trends in criminal justice reform?
Comparing France with England and Wales
Renaud Colson, European University Institute/University of Nantes, and
Stewart Field, Cardiff Law School

Various terms have been used to capture the notion that traditional distinctions in the criminal justice processes of different European jurisdictions are becoming attenuated: there is talk of convergence, rapprochement and even unification. In this presentation we seek to scrutinize these claims through a bilateral comparison of certain contemporary discourses surrounding criminal justice reform in France and England and Wales which seem to have a particular resonance in both countries: the appeal to the concept of ‘fair trial’, the growth of ‘penal populism’ and the development of new managerialist models for the administration of criminal justice. Examining the construction and impact of these themes in our two jurisdictions, we argue that there is a need to be conceptually clearer in our use of terms like convergence and rapprochement in order to make sense of both differences and similarities. Finally we ask whether these apparently disparate reform discourses may have something important in common which gives them their transnational and international resonance.

Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence
John Jackson, University of Nottingham, and
Sarah Summers, University of Zurich

In the light of concerns over whether the European Court of Human Rights is over-reaching itself in its review of national jurisdictions’ compliance with the ECHR, this paper examines the response of the UK and Swiss courts towards its rulings on criminal evidence. The paper focuses particularly on their treatment of the issue of confrontation in the light of the European Court’s decisions in Al Khawaja and Tahery. Both countries have developed well-established, distinctive approaches towards criminal evidence and the paper argues that the Strasbourg Court has to do more to explain its case law if it expects domestic courts to follow suit in applying its principles.

Formalising the criminal courts of Ethiopia: Judicial accountability, social trust and, community responsiveness
Rasmus H. Wandall, University of Lund
Every criminal justice system has to enforce the rule of law and it has to be responsive to the moral communities of the public. Only by doing both can it hope to ensure a system that is meaningful, legitimate, and trustworthy to the public. These are both challenges that are central to the discussions on law and trust and which are intrinsic to the current discussions on how to relate restorative justice with principles of a legal accountability (Dignan 2002; Walgrave 2008). In this paper, I seek to get a better contextual understanding of the seeming very low public trust in the formal criminal justice system in Ethiopia, that decisively establishes a model of legal accountability. Comparing the public trust in the formal criminal justice system with the public trust in the alternative and widely used local customary dispute resolution institutions in Ethiopia, the paper shows that the formal criminal justice system invites only for one particular kind of public trust; one which is impersonal, state-based and abstract and relies on the exclusive relationship between the state and the individual offender. The customary dispute resolution institutions invite for a contrastingly different trust; one which is concrete, personal, and bound to the community and its social structures. Secondly, the paper uses the case of Ethiopia to illustrate that we cannot see trust as a one-to-one relationship between the formal justice institutions and the public, but that we should invite the interpretative framework that sees trust in the formal system in the light of the simultaneous but different trust in existing and alternative institutions of justice (Nelken 1994). The paper explains how, in Ethiopia, the particular form and low level of trust in the formal justice system is tied closely to the contrastingly different and seemingly higher level of trust in the customary dispute resolution institutions. Trust in the two different institutions is tied together as each other’s opposites, each defining the other and reinforcing their trust/distrust relationship with the public. The reason is to be found in the modernisation strategy of the formal criminal justice system during the twentieth century.

11.30 Panel 6: Globalisation and European Criminal Law: The European Arrest Warrant and Suspects’ Rights

‘This town isn't big enough for the both of us’:
EU Law, the ECHR and Criminal Suspects’ Rights
Steve Peers, University of Essex

This paper will examine whether the 'roadmap' of EU measures on suspects' rights adds value to the ECHR provisions (as interpreted by the European Court of Human Rights) on the same issue. In particular, does the adoption of EU law on these subjects risk confusion and overlap with the ECHR rules? Or does the adoption of EU law in this area have a distinctive purpose, due to higher substantive levels of protection, a link with the system of mutual recognition in EU law or the nature of the EU legal order and judicial system?

Globalised Criminal Justice in the European Union Context: How Theory Meets Practice
Joanna Beata Banach-Gutierrez, University of Bergen
This paper will explore a question about the operation of an increasingly globalised criminal justice system in the European Union context. The emergence of European Union criminal law, characterised by its legal supremacy and universalism is a relatively new research area in penal science. This raises the need for some discussion of governing rules and principles. European Union criminal justice should be based on the principle of mutual recognition which is now formally recognised as a foundation stone of judicial cooperation in criminal matters among the Member States. Such an approach presupposes that each competent national authority should trust the criminal justice systems of its peers. This allows therefore for some legal pluralism. However, the principle of mutual recognition does not have an absolute character, in the sense of allowing for the adoption of rules and procedures in a pure legal form in another Member State.

The right to a fair trial and the Dutch Constitution: Constitutionalizing rights in a multilevel and globalizing legal order
Bas Leeuw, Leiden University

The aim of this paper is to discuss whether the constitutionalization of fundamental rights at the national level can have a positive effect on the problematic relationship between national criminal justice systems and international fundamental rights conventions, such as the ECHR? In this paper I aim to contribute to this debate from the perspective of the Netherlands.

International fundamental rights conventions have significantly influenced the Dutch criminal justice system. One of the most influential conventions in this respect is the European Convention on Human Rights (ECHR). The Convention has led to several changes within the Dutch criminal justice system. The impact of the Convention has not always resulted in a harmonious relationship between the national criminal justice system and the ECHR and the European Court of Human Rights (ECtHR). Because of the weak position of constitutional rights in the Netherlands there is a great reliance on the ECHR. This reliance is problematic for several reasons. Firstly, problems have arisen in cases where the Netherlands has been found to be in violation of the Convention by the ECtHR. Secondly, national courts have had, and continue to have, difficulties with applying the Convention at the national level, especially with regard to the question which standards the Convention sets and demands. Constitutional rights on the national level can provide a basis for the national courts to engage in a dialogue with the ECtHR in order to clarify the exact norms that the Convention sets.

The question I want to discuss in this paper is whether the constitutionalization of fundamental rights at the national level can have a positive effect on the sometimes problematic relationship between the national criminal justice system and the international supervisory mechanisms and international fundamental rights norms. This specific topic has also been part of recent political and academic debates in the Netherlands.

The conclusions that I have drawn with regard to the Netherlands could be of importance to other member states of the Council of Europe. Also experiences in other countries can perhaps serve as examples on how to deal with the interaction between national legal systems and international fundamental rights norms. Many of the problems encountered with regard to the influence of the Convention that are seen in the Netherlands, are also experienced in other countries. In the United Kingdom for instance there has been an intense debate about the countries relationship with the ECtHR and the incorporation of the ECHR via the Human Rights Act. Also in the UK the question has been asked whether constitutionalizing fundamental rights on the national level, in the form of a UK Bill of Rights, can guarantee a better relationship between the national (criminal) legal system and
the international legal order.

13.00 Lunch

14.00 Plenary session 4: Keynote speakers:

'Us' and 'Them': Some Challenges and Learning from Comparative Penology
Alison Liebling, University of Cambridge

This paper will draw on a recent attempt to use Appreciative Inquiry with Aboriginal offenders in remote prisons and communities in Northern Territory and Western Australia as part of an Australian Research Council study of quality of life. Do prison quality dimensions like ‘humanity’, ‘staff-prisoner-relationships’, ‘respect’, ‘fairness’ or ‘safety’ work in prisons with colonised indigenous populations? It will also explore some of the new cultural challenges in long-term prisons in the UK, as prison population compositions change, and faith identities rise in prominence in the prisoner experience. The experience of being the ‘other’ or seeing ‘otherness’ is common to both of these studies. How are concepts of trauma, recognition, spirituality and identity relevant in both contexts? How is globalisation reaching into the prison, in England and Wales, Australia and elsewhere, with what implications for prisoners, staff, and the prisons research community?

Evidence-based what? Thinking comparatively about knowledge and action on crime control
Richard Sparks, University of Edinburgh

We can argue that social scientific knowledge has long been and remains, contrary to some widely canvassed accounts of the matter, deeply involved in framing policy. We need not however assume that this is inherently benign. In recent work Ian Loader and I have explored some questions concerning the uses, abuses and non-uses of expert knowledge in crime control, and the often polarized and unhelpful ways in which these questions have been debated. For example, the knockabout over the notion of ‘evidence-based policy’ has often been oddly unedifying (in criminology at least). How much more helpful might it have been had it instigated some comparative reflection on what is meant by ‘policy’? Arguments about the bearing of research on policy currently resound across the social sciences, for example in debates on health, or bio-technological innovation, or environmental risk, or education as much as on crime and punishment. Sometimes these appear as a matter of anxious self-questioning, sometimes as confident, even evangelizing, assertion. There is a case for treating the terms of these discussions as objects of inquiry in their own right if we wish to clarify what is at stake in debates concerning theory and policy, evidence and action, knowledge and politics. One benefit of thinking in these terms may be to begin to tease out the respective impacts of ‘local’ conditions (meaning here not just political dynamics as such but also of such matters as arrangements for funding, conducting and using research) and of wider circulations of ideas and influences.

Migration and Punishment in Europe and the United States:
Between the Economy and the Law
Dario Melossi, University of Bologna

Should we perhaps think that migrants in Europe and ethnic minorities in the US (such as, especially, African Americans), have something in common? On the one hand, one might think so, considering what we might want to call the “overrepresentation” of both categories in the penal systems of the two societies. On the other hand, African Americans can hardly be described as “immigrants”, and migrants in Europe are for a good percentage perceived as “white”. This is a still exploratory, tentative presentation, where I would like at least to show a possible path in order to start thinking about how to address those questions. And this will take us through a sort of comparison around the issue “punishment and migration” between the United States and Europe. Legal status, culture, and the economy are all crucial in order to understand why a hyperpunitive society is not so punitive toward migrants and why mildly punitive societies are instead extremely punitive about migrants.

16.00 Tea

16.30 Panel 7: Globalisation and the Political Economy of Punishment

Penal Ideology, Sentencing and Globalisation
Ralph Henham, Nottingham Trent University

The key objective of this paper is to explore the case for changing the penal ideology that informs the norms, practices and impacts of sentencing. It is argued that the interdependence of these factors means that the present approach of continually restructuring norms and practices to accommodate restorative and other alternative justice mechanisms is bound to fail unless penal ideology embodies shared social values that validate these kinds of changes. The implication of such a failure for criminal justice governance is likely to be a further weakening in the state’s capacity to enforce the rule of law so that sentencing loses legitimacy in the eyes of citizens. The paper considers these issues in the context of international and domestic criminal justice and the impact of globalisation.

The Politics of Punishment and the World Economy
Sappho Xenakis, CESDIP, Paris
and Leonidas K. Cheliotis, Queen Mary University of London

This paper seeks to provide a novel theoretical framework for the interpretation of international trends in state and public punitiveness over recent decades. The analysis offers a critique of standard accounts of the political economy of punishment, and calls for an enriched perspective that pays consideration to pressures on state-level policy-making from the global economy, on the one hand, and the domestic psychosocial environment, on the other. To demonstrate the need for such a perspective, the paper goes beyond the Anglophone world to the European periphery.

The Control of Irregular Migrants in Spain and the (Criminal) Law of the Enemy:
Notes on the Exclusion and Inclusion in the Field of Penal Policy
José Ángel Brandariz García, University of A Coruña

The paper examines how the administrative and criminal measures of control and punishment of migrants have been manifested through the (Criminal) Law of the Enemy in Spain during the past decade. For these purposes, the article seeks to clarify whether or not this body of legalized norms and practices is designed with the intention to exclude irregular migrants. From this standpoint, the paper concludes that the rationale for this framework of punishment is quite complex: in addition to the exclusionary goals of the (Criminal) Law of the Enemy, the techniques of control and punishment also entail a differential and subordinate inclusion of migrant subjects.

During the first decade of the 21st century, the Spanish legal system, following a common trend in all EU states, implemented a significant set of measures to fight irregular migration. In this realm of control policies, the (administrative) expulsion, (section 57 of the Spanish Immigration Act) and the internment in detention centers for migrants (sections 62 ff. Spanish Immigration Act) became central measures. In its respective field of criminal law, the enforcement of the penal expulsion (section 89 Penal Code) was remarkably extended during this period, and any sort of cooperation with irregular migration was severely criminalized (section 318bis Penal Code). Despite the introduction and enforcement of this set of control measures, Spain experienced during the first decade of the century a migration flow unparalleled in the entire EU. The foreign population increased almost six fold over the decade (from a percentage of 2.2 of the total population in 2000 to a percentage of 12.1 in 2010), exceeding the rates of foreign residents of other major EU countries. Evidently, such an important phenomenon entailed a vast amount of irregular migration; indeed, irregular migration remained a constant reality throughout the period. Despite several processes of regularization, reliable studies estimate that by end of 2010 the amount of irregular migrants in Spain was approximately one million people. This situation could be used to analyze the real effectiveness of the control measures already mentioned. The paper focuses on this issue, albeit only indirectly. As its main objective, the paper seeks to understand, given the actual enforcement of the measures of migrants’ control implemented during the period, whether we really see a symptom of what in continental Europe is commonly named (Criminal) Law of the Enemy. To that end, the paper seeks to understand, from a perspective of the Political Economy of Punishment, the meaning of the complex relationship between the alleged exclusion/inclusion dichotomy in the context of the penal policies established in Spain against irregular migrants.

16.30
Panel 8: Globalisation and Comparative Criminal Justice II

Transnational criminal investigations and procedural imperatives: Comparing different regional approaches
Saskia Hufnagel, Griffith University

With growing globalisation the investigation of transnational crime has increased in significance. While police cooperate and exchange information internationally to prevent and investigate crimes, states are not always legitimising these efforts through bilateral and/or multilateral legislation. This lack of legal coordination between states with sometimes considerably different criminal procedure laws can lead to the inadmissibility of evidence in ensuing criminal trials and a high degree of legal insecurity for police and citizens alike. However, the harmonisation of procedural norms could result in a settling for the lowest standard, leading to a weakening of fair trial rights. The present study addresses
this potential contradiction from a comparative socio-legal perspective. It considers not only global legal trends in the area of transnational policing and legal harmonisation, but also focuses on the comparison of regional cooperation mechanisms, in particular the European Union, as a very advanced system of cooperation and harmonisation, and the Australasian region, as a very diverse system of criminal jurisdictions and procedural standards. The study aims at defining the concrete possibilities of harmonising procedural norms in different regional contexts considering the varying political, cultural, historical and organisational implications. It is further assessed whether international norms in the field of criminal procedure would at all add value to the present situation or whether regional solutions are preferable.

Polish criminal law and globalization

Dr Celina Nowak, Institute of Legal Studies, Polish Academy of Sciences

Globalisation changed the Polish criminal law. During the last 15 years the Polish criminal law has been transformed under the influence of globalization. The purpose of this study is to assess the extent and character of this process. The change was mainly a result of the implementation of legal instruments adopted by international organizations, to which Poland already belonged or aspired (European Union, Council of Europe, OECD, UN). This is what we can call the internationalisation of the Polish criminal law. Modifications affected many areas, in particular criminalisation. Definitions of certain existing offences were extended to cover interests which were not protected before (i.e. corruption offences). Also, new definitions were introduced (i.e. act of terrorist character). Additionally, other elements were changed, e.g. liability of legal persons was introduced. However, the impact of globalization on Polish criminal law goes beyond internationalisation. Certain criminalisations were introduced under the influence of foreign laws as a tool of fight against new types of crime, characteristic for the era of unification of cultural and social behaviours (e.g. stalking).

Africa’s Evolving Transnational Criminal Justice System

Selemani Kinyunyu, Advocate of the High Court of Tanzania

With the re-emergence of a shared vision for Africa under the aegis of the African Union (AU), increased emphasis has been paid on the need to prevent conflict and maintain peace and security as a conditional precedent to socio-economic development on the Continent. Likewise, research has steadily continued to show linkages between transnational organised crime and national and regional stability. To this end, the AU, in step with other regional groupings has developed regional instruments aimed to prevent the proliferation transnational organised crime. Despite the increased regional focus on curbing transnational organised crime on the Continent, implementation of such measures has largely remained the purview of municipal jurisdictions. However in 2008 in what shall prove a legal first, the AU actively began exploring measures to empower the African Court of Justice and Human Rights (ACJHR) with the jurisdiction to try international and transnational organised crime. Despite the increased regional focus on curbing transnational organised crime on the Continent, implementation of such measures has largely remained the purview of municipal jurisdictions. However in 2008 in what shall prove a legal first, the AU actively began exploring measures to empower the African Court of Justice and Human Rights (ACJHR) with the jurisdiction to try international and transnational organised crime. In addition to the core crimes of genocide, war crimes and crimes against humanity, the AU seeks to vest the African Court with jurisdiction over the crimes of international corruption, trafficking in drugs, persons and hazardous waste, terrorism, mercenarism, piracy and the novel crime of unconstitutional changes of government. The...
A broad list of crimes includes related inchoate offences as well as financing and laundering the proceeds of crime. The AU is also in the process of developing a model law on universal jurisdiction that will spell out measures to ease extradition of offenders and strengthen interstate cooperation in the prosecution of transnational crimes. The development of a Draft Protocol to extend the jurisdiction of the African Court has reached an advanced stage. The Draft Protocol is currently awaiting the approval of the Ministers of Justice/Attorneys General at a meeting scheduled for February 2012. Thereafter, it will be placed before the Executive Council of Ministers for consideration before being forwarded to the Assembly of Heads of State and Government for formal adoption and signature at the Half Summit of the Union in July 2012. These developments have been scarcely publicised and received little attention from researchers, practitioners and academics despite the far-reaching consequences they may have at the international and municipal level. This paper shall focus on the evolving development of a continent-wide legal response to transnational crimes in Africa. It is divided into four parts. Part one shall trace the thematic economic, socio-political and related underpinnings that drove African States to create a transnational criminal justice system. It shall examine in brief the current measures to combat transnational crimes and the efficacy of such endeavours. Part two shall examine the current push to vest the Continent’s apex court with a transnational crimes mandate. It shall delve into the content of the Draft Protocol, its salient features and also examine to what extent international best practises in transnational crime prevention have been emulated. It shall critically assess this measure with a view to understanding the legal, practical and policy ramifications of creating a novel regional transnational criminal justice architecture. Part three shall explore some of the prospects and the implications such actions shall have on the national, sub-regional and international sphere. Part four shall provide a summary, raise ancillary issues and provide some concluding recommendations.

Suspects’ rights in custodial interrogation in Greece and France: 
Isolationism, legal cosmopolitanism and local resistance 
Dimitrios Giannoulopoulos, Brunel Law School

This paper discusses isolationism, cosmopolitanism and local resistance as conflicting powers shaping law reform. It concentrates on legislation recently introduced in France giving suspects the right to be assisted by a lawyer when questioned by the police. France has for a very long time maintained an idiosyncratic position on this issue, effectively barring lawyers’ presence in police interrogations, thus diverging from the solutions adopted by most legal systems in Europe and the Western world. However, under pressure from the ECtHR (post Salduz v Turkey jurisprudence and, notably, Brusco v France), France has finally abandoned this position. The focus then moves on to Greece, where isolationism similar to that previously exhibited in France can be demonstrated with respect to notification of the right to silence and suspects’ rights during custodial interrogation more generally. The two countries are compared and contrasted in relation to their ‘spontaneous’ cosmopolitan attitudes and reactions to external cosmopolitan pressures for reform. The conclusions allow for reflection on legal cosmopolitanism’s assumed ubiquity.
Panel 9: The Future of Prosecution in Europe

Implementation of Articles 85 and 86 TFEU: Coordination, hierarchy or collective?
Simone White, European Union’s Anti-Fraud Office (OLAF)

The author argues that a decentralised European Public Prosecutor could be envisaged, going further than a reinforcement of coordination by Eurojust, but not as far as the European Public Prosecutor as envisaged in the Corpus Juris in 1997. The Corpus Juris had envisaged a purely vertical, 'command and control' model: certain national prosecutors would be subordinated to (or delegates of) a central European Public Prosecutor. By contrast, a decentralised EPPO could mean that Heads of all national prosecution authorities would be appointed as national EPPs. At EU level they would form a college with a rotating chair. These three models (reinforcement of Eurojust; top-down Corpus Juris-style EPPO; decentralised EPPO) need to be discussed in the context of the need to show effectiveness and added value in a climate of economic austerity and lack of faith in grand projects.

The Evolution of European Criminal Justice and Equality of Arms
Marianne Wade, Birmingham Law School

The development of Institutions and particularly criminal procedural mechanisms within the Framework of the European Union has long been subject to criticism as being one-sided; favouring purely investigative efficiency and thus the repressive side of criminal justice. Given that criminal justice related matters, even within the EU, have until very recently been based purely upon governmental (i.e. executive) co-operation, this is perhaps not surprising. Nevertheless even within this context, the deficits of this situation have been noted with concern as demonstrated by the successive attempts associated with the proposed (and abandoned) Framework Decision on Procedural Rights in Criminal Proceedings. The asymmetric nature of European criminal justice evolution can currently be witnessed when contrasting the slow and controversial progress being made in relation to the Roadmap of defence rights with the powers being consolidated at Eurojust and Europol as well as the pending Commission proposal for a European Public Prosecutor’s Office. This paper sets out to explore the effect of this criminal justice Europeanisation upon the central idea of equality of arms in criminal justice by studying the impact of such measures upon the defence. Fundamentally the defence has an important role to play in all member states’ criminal justice systems and it is essential to understand how the supra-nationalisation of some executive powers or actions is affecting this role. Issues range from the defence’s ability to challenge the mutual recognition of foreign judgments to the defence right to investigate independently (an, at least theoretically, important right in half the EU member states). In tackling these issues, the author draws upon a recent empirical study she carried out during the course of which 132 prosecutors, 60 defence lawyers and 30 practitioners working in supra-national institutions were interviewed, amongst other things, about the experiences of the defence in “European” cases. This contribution will explore the current reality as well as the potential impact of developments already on the EU horizon contrasting these with the traditional expectations of the function the defence should perform within criminal proceedings.
Resolving Prosecutorial Jurisdiction and the Principle of Ne Bis in Idem:
EU and International Criminal Law Perspectives
Gerard Coffey, University of Limerick

The process of establishing prosecutorial jurisdiction by the ICC and commencement of criminal proceedings is one of the most important aspects of the relationship between the ICC and states parties. The principle of complementarity governs the functional relationship between domestic courts and the ICC, either separately or in conjunction with each other, which is fundamental to the effective operation of international criminal law. The analyses of the principle of ne bis in idem as applied in the Rome Statute of the ICC has led to the conclusion that the principle can be understood and applied only in conjunction with the principle of complementarity. The principle of ne bis in idem, which is provided for by the ECHR and ICCPR, provides that a defendant cannot be prosecuted once he has been finally acquitted or convicted by another State. While Article 54 CISA applies the principle between Member States there is no international provision against concurrent prosecutions. The Commission’s Green Paper on “Conflicts of Jurisdiction and the Principle of Ne Bis in Idem in Criminal Proceedings” [COM(2005) 696] evaluates conflicts of prosecutorial jurisdiction between the courts of Member States in criminal matters in the light of the ne bis in idem principle and outlines proposed legislation to create a mechanism for the allocation of for allocating cases to an appropriate jurisdiction where a conflict arises as to the ‘best place’ to prosecute transnational crimes. The proposed mechanism would complement the principle of mutual recognition in criminal matters and suggests possible solutions including a tripartite mechanism for resolving conflicts of jurisdiction, such as informing and consulting, and a mediation process where an agreement cannot be reached, together with the establishment of an EU level body such as the proposed EPP. This paper will critically examine the symbiotic relationship between these fundamental principles and how the decisions of the ICC can foster international collaboration of courts and prosecutors in state parties, and will also critically evaluate the principle of ne bis in idem pertaining to the prosecution of transnational crimes within the EU.

18.30  Workshop Dinner

DAY THREE: Thursday 28 June

9.30  Plenary session 5: Keynote speakers:

EU Economic Sanctions and the Rule of Law: Have the courts got it right?
Takis Tridimas, Queen Mary University of London

The purpose of this paper is to assess the case law of the EU courts on economic sanctions and its impact on political discourse, accountability regimes, and the rule of law. The paper has two strands. The first concentrates on issues of competence, governance, and the inter-relationship of decision-making at UN, EU and national level. It also seeks to place economic sanctions within the wider context of anti-terrorism legislation. The second strand focuses on models of judicial review under an
emergency constitution, the way the ECJ and the GC perceive the limits of their functions, and the way the case law may have influenced judicial review in other areas of EU law. The paper concludes by attempting to evaluate possible outcomes of the Kadi II litigation and their implications.

The interplay of criminal and administrative law in the context of market regulation:
The case of serious competition law infringements
Christopher Harding, Aberystwyth University

The developing legal regulation of business and economic activity has necessarily entailed an ongoing discussion of approaches to and the method of such regulation, especially regarding issues of compliance and enforcement. Typically the debate has tested the respective merits of softer and more hard-hitting models of investigation and sanctioning, and in some situations it is possible to detect movement along a trajectory away from more consensual and mainly administrative processes towards a tougher rhetoric of enforcement and resort to more confrontational and adversarial procedures and measures. The field of competition regulation has proven a notable site for this shift in approach, at both the EU and national levels. More specifically, in relation to serious ‘hard core’ competition infringements, there has been a significant development of juridification, adoption of adversarial process and application of sanctions. This context has thus proven an important testing ground for both policy and practice concerning the choice of procedures and sanctions and the interplay of ‘administrative’ and ‘criminal law’ models. Moreover, the European level regulation of competition has been a significant motor of legal development, while also providing a case study in ambiguity: formally an administrative procedure, yet in substance sometimes more akin to criminal law. In the meantime some EU Member States have opted to criminalise individual involvement in cartel activity, while retaining administrative or non-criminal law regulation of the corporate involvement (as for instance in the UK). What informs and motivates this significant but variable choice between administrative and criminal law models in this context?

This discussion should now also be set in the context of the emergent ‘EU criminal law’, as a field of law and policy which has recently been mainstreamed in the TFEU following the Lisbon Treaty. The EU Commission in September 2011 drafted a Communication to the Member States, Towards an EU Criminal Policy, which interestingly urges careful consideration of moves towards criminalisation and of alternatives models of legal control, in particular the use of administrative procedures and sanctions. It may be asked, therefore, whether this represents the beginning of an EU-led move towards a more principled and structured supranational ordering and deployment of administrative and criminal law models of achieving compliance and enforcement.

Cartel Enforcement: A product of globalisation
Michael O’ Kane, Peters & Peters

11.30 Coffee
Panel 10: Globalisation and the Interplay between Criminal and Administrative Law

Legal questions on financial market abuse: Criminal penalties versus remedies?
Alessandra Pera, University of Palermo

The aim of the present study is to underline the impact that the globalization of financial markets has on national punishment policies, with special regard to the dramatic consequences that the 2000-2007 U.S. sub-prime securitization disaster has had.

Shortly after the effects of U.S. financial giants’ losses spread abroad, foreign regulators accused U.S. regulators of laxism, a drastic change of attitude compared to the usual complaints about U.S. strict regulations. Furthermore, new regulations have more recently been adopted.

As a matter of fact, the EU financial market was already strictly regulated before the crisis \(^{(1)}\), more strictly than the U.S. one \(^{(2)}\), so that most of the banks’ and professional investors’ unfair and unfaithful behaviours have been considered illegal and punished under both criminal and private law. Private law remedies, in particular, are the ones that interest private consumers as they can result in a recovery of the damages and economic losses due to the behaviours of big economic players.

Scholars talk about “responsibility vs public at large” and the answers of different juridical systems are various: somewhere the solution comes from contract law, somewhere else from the area of tort law (criminal or private remedies). All these possible solutions do not take in consideration the theme of “quis custodiet ipsos custodies?” \(^{(3)}\), as they focus on the pathological moment, when the damage has been already caused.

For example, under private law rules, Italian courts have recognized a breach of the banks’ contractual duties as they had induced their clients to first buy, and then retain, so-called “toxic bonds” in their investment portfolios. In particular, with decision n. 7674/2010, Tribunale di Torino has ruled that the banks and the professional intermediaries members of “Consorzio Patti Chiari” involved in the allocation of Lehman Brothers’s toxic bonds, had violated their informative contractual duties, coming from the agreement between the parties and not from Italian legislation\(^{(4)}\), as the agreement itself provided strict information standards in the consumers’ interest, about any significant variations in the investment risks regarding certain bonds. Moreover, the significance of the afore-mentioned Court decision is that, for the first time in Italy, a Court has rejected the banks’ defensive thesis according to which Lehman’s default was not predictable.

On a similar basis, the investors involved in the Bankers Life Insurance Co. v. Credit Suisse First Boston Corp., et al\(^{(5)}\) litigation, claimed that they did not possess some material information on the status of the company’s MBSs which, if properly disclosed, would have resulted in the downgrade of the securities by Moody’s rating agency.

The liability of professional investors, intermediaries – namely banks and savings and loan associations, lenders of the mortgage-backed securities, sometimes guarantors of the collaterals – and even of the rating agencies responsible for the evaluation of the risks, is a critical issue, broadly discussed not only by jurists, economists and scholars, but also by judges.

The UN, the IMF, the OCSE, the U.E., G20 and G 8 Countries, stakeholders and professors are wondering if new rules should have a national or global dimension. Certainly, private globalisation of financial markets is at the end and needs a public policy intervention.

The idea of a national competence is wide spread and more common, also because of the emergency measures that the economic crisis have required. In fact, a global policy and international agreement on this field are not a fast and immediate result to obtain ant this would decrease even the minimum economic growth of the world economy.
The public survey of financial institutions has avoid the total black out of the economic system, but have caused different kinds of problems.

The emergency intervention with public money odds with antitrust rules, so that States have to rethink those rules under the light of the economic crisis: the idea that there are financial or industrial actors "too big to fail" and that they must be saved by public money (in many different ways) legalization an unjustified privilege. These actors have received a public gift for their insolvency, for the difficult economic situation, only because of their dimension, as their bankruptcy will determine the crack of the hole system.

It’s hard to think that the national States will appoint their power and competences, waiving part of their sovereignty to an international authority; and it’s harder to think the IMF as the global lender of last resort, a sort of world central bank.

Actually, the national authorities, censors, central banks are the main guilty actors. They have been unable to predict the crisis and they have increased its dimension.

These are some of the main topics that give chance to some of the following questions. Analyzing the rules governing the EU integration process in a more global view, is it possible, or even useful, to discuss about a lex mercatoria for the financial markets? What would be the most efficient level of censorship for the regulations punishing economic players responsible for the damages suffered by consumers? Which behaviours should identify forms of accountability? In this view, what could be the best answer from the different States in terms of punishment policies: a punitive damages model of responsibility, as in the U.S. legal system, or a compensatory one, more common among the EU member states? Does a punitive damages tout court and class action model ensure a sustainable solution for the economic system? Or does it imply the risk of a total default for the market actors, with prohibitive macro-economic costs, that, at the end, damage consumers them selves and their access to borrowing?

2) As an example, as the Credit Rating Agency Act comes out in the 2006, the Wall Street Reform and Consumer Protection of 2009 and the Restoring American Financial Stability Act of 2010 are strong answers to the financial market crisis and distortions of the previous years.

---

**Criminal responsibility for excessive risk in business transactions:**

**A comparative study**

Stanislaw Tosza, University of Luxembourg

The current financial crisis put into question the classic liberal economic approach that attributed to the market the self-curing ability, highlighting in the same time the high extent of inter-dependence of economic actors in the globalised world. Therefore it seems very likely that more regulation will be necessary from now on in order to control certain market players’ activities which in particular led to the present situation. One of the most important factors that has been identified as a main cause of the crisis is excessive risks taken by different economic actors. Though it is true that these negligently run enterprises might suffer serious economic consequences for their bad transactions, however, the consequences for the whole economy might be so grave that the general consensus appears to support more regulatory intervention in order to minimise risk-taking by economic...
actors, without forgetting that risk stands in the core of business and thus cannot be completely avoided. The paper will examine already existing provisions in different legal systems criminalising excessively risky transactions. The crime of abuse of trust in German law (Untreue, § 266 StGB) punishes improper conduct in relation to entrusted property if the conduct results in damage. The theory of ‘schadensgleiche Vermögensgefährdung’ associates mere endangerment with damage and thus enables sentencing the responsible person. The new art. 296 § 1a of the Polish Criminal Code criminalises the direct endangerment of entrusted property. Similarly, Section 4 of the UK Fraud Act 2006 considers exposure to risk as a way of committing abuse of trust. It seems likely that in the future other legal orders will also introduce similar criminalisation of risky economic activities or broaden the interpretation of existing criminal provisions in order to allow for the punishment of excessive risk-taking in business transactions. Therefore the paper shall raise questions as to the necessity of a common EU framework penalising excessive risk or even of a need to draft an international legal instrument on this matter (e.g. a UN convention).

Catch Me If You Can! The regulatory circus of the online gambling phenomenon: National market and European law v. globalized market and lex electronica
Salvatore Casabona, University of Palermo

The online gambling phenomenon seems to me paradigmatic of the so called “crisis of the juridical modernity”: I mean crisis of the traditional sources of law and of traditional divide of law (mainly public and private divide) as well as crisis of the State as unique entity that holds the regulatory power in a certain territorial context.

If I try to observe the phenomenon of online gambling from a dominant point of view, and so at a certain distance by the mere normative profiles, I am able to isolate three main aspects of a certain relevance for my reasoning:

Firstly, under a purposive perspective, the legislations of the European countries on gambling share in common some tasks: to counter criminal activity; to face negative social and economic effects of gambling addiction; to safeguard consumer protection interests, and to apply the profits from lotteries to objectives which are in the public interest or socially beneficial. Having said that, the online gambling phenomenon imposes to the observer a necessary open minded and interconnected approaches: juridical analysis beside sociological and economical one of the problems.

Secondly, under a more strict juridical perspective about gambling’s regulations in the European context, the jurists have to cope with complicated (and not always coherent) interplay among different norms: criminal law (gambling without license; money laundering; financing of international terrorism), administrative law (monopolies of the operation of internet casino games; concessions and license granted to private operators), consumer law (preventing incitement to squander money on gambling and protecting consumers of games of chance against fraud and other offences), private law (gaming trust, gaming contract, legal regime of operators), European law (freedom to provide services and freedom of establishment of the operators). The consequences of this bundle of rules is a continuous overlapping not only among different juridical categories and remedies, but also among different rule makers and rule enforcers (national administrations and municipal courts, independent agencies, European court of justice and so on). Finally, gambling via Internet reveals the all limits of the traditional supremacy of the State: the public sovereign power consisting into making law, monitoring the compliance by the citizens, and sanctioning the eventual violations appears no more an efficient and efficacy perspective for understanding the new complexity of reality and for coping with the new challenges of
the globalized world. The Net in fact allows also to a middle skilled teenager to avoid, without too much difficulties, the limits and conditions sanctioned by national criminal rules; the world market with its multinational enterprises make easy to override the legal national (and also European) barriers and fences; the rules, thought for a material and limited space, seem sometime inappropriate and outdated for regulating the new immaterial and global environment of Internet reality.

Drawing conclusions from these short considerations, I wonder which should be the good question that I have to ask myself for enhancing the understanding of certain globalized themes, like the online gambling and betting.

I am not so sure in fact that the question is that one regarding the effect or the influence of globalization on a specific field of law, e.g. criminal law and criminal justice. I rather argue that the good questions are: 1. Thinking the legal world split up into different and separated fields (criminal law, private law, administrative law and so forth) is still a useful approach for facing the complexity of reality? 2. The mere normative scholarly inquiry is still a fruitful method for coping those fields that are ontologically multidisciplinary like the online gambling? And finally 3. Does the digital era need a new conception of law, a “lex electronica”, not more founded on the sovereignty of a State, but mainly founded on its global validity and technical efficacy?

12.00

Panel 11: Criminalisation and Enforcement in European Criminal Law

The Unintelligent System of Criminal Intelligence in Europe
Michele Panzavolta, University of Maastricht

The paper discusses the role of criminal intelligence within the European Union. It focuses in particular on the interplay between criminal intelligence and criminal justice in the globalized world and it highlights the difficulties in building an efficient system of European intelligence and the dangers for fundamental rights. In times of globalization, we assist to an increasing importance of the role played by intelligence in the criminal justice system. Economic and social globalization brings about the globalization of crime, for instance, terrorism and large-scale organized crime. These globalized forms of delinquency are so heinous and dangerous that they call more for prevention than for repression. It is essential to anticipate the commission of the crime and hence intelligence is a key tool since it should permit to map the risks and to foresee future threats. But as the divide between prevention and repression becomes more and more blurred, intelligence could turn out useful for repressive purposes too. Given the transnational nature of the crimes in question, intelligence activities must face the challenge of international cooperation. There is a growing need for an integrated intelligence system at supranational level, where authorities network together. Regional organizations can drive the development of this new supranational dimension. In our continent, the European Union has taken action in the field. It has established agencies such as Europol and, partly, Eurojust, it has created mechanisms for bilateral cooperation and information exchange, such as the Schengen Information System and other databases, the Prüm Decision and the Framework Decision (FD) 2006/960/JHA on the exchange of information and intelligence. Clearly, an integrated system of European intelligence coordinated with those of the Member States could highly contribute to the making of a real Area of freedom, security and justice within the Union. However, the present picture of the European criminal intelligence appears fragmented and confused and hence it casts several doubts on its efficacy. The paper contends that the Union’s approach on criminal intelligence has mostly been that of multiplying the channels of intelligence and information exchange, following a “the more, the better” logic. The
paper criticizes this approach, because it jeopardizes people’s right, particularly the right to privacy, without offering significant advantages. In fact, it has so far proved largely inefficient. The same EU Commission has deplored the chaotic status of the information system. Several working documents and studies have showed that the channels developed for intelligence exchange do not function as expected. For instance, Europol does not receive the information it would need; only few States use FD 2006/960 on a regular basis. Researchers and practitioners have observed that national authorities are still quite reluctant to exchange especially the most sensitive information on terrorism. The paper argues that three are the main flaws of the system. First, the Union has not adequately considered the definitional issue, which should lie at the heart of any common policies on intelligence. The Union’s concept of intelligence remains largely vague, with intelligence mostly being equated to information. At the same time, there is a linguistic and cultural divide in the Member States on intelligence. In some states (e.g. Germany, Italy) intelligence refers like in the U.S. to the protection of national or military security (carried out by secret services, the military, etc.), where secrecy is a vital ingredient. Elsewhere (in the UK and the Netherlands, for instance) intelligence is intended in a broader manner, which covers all fields of law enforcement and, in particular, the whole area of policing (intelligence led policing). If not properly addressed, these definitional complications bring about two opposite risks: one is the risk of an excessive and chaotic flow of data between Member states, the other is the risk that Member States might be unwilling to exchange their data. Second, the Union still accepts that national authorities might refuse to exchange data, which could harm essential national security interests (see, for instance, Article 10 of the framework decision 2006/960/JHA). Similar barriers hamper at the very heart the European cooperation in the fight against serious transnational crime. On top of all, it remains unclear whether the Union favors more a centralized system of intelligence, or instead a decentralized one, based on a multi-agencies approach. Confusion on such a crucial policy-issue is a disincentive for the authorities of the Member States to cooperate and network in a coordinated system. The paper concludes by making suggestions for possible improvements in line with the detected flaws. In particular, it advocates that the Union’s next steps should be to start promoting a concept of “European security” and to shape the system of intelligence accordingly.

Core Values in the Modern EU Investigative and Judicial Web: Transparency, Accountability, Objectivity and Coherence
Gavin Robinson, University of Luxembourg

Cooperation by the European Union and its member states with third countries in the exchange of personal data (Passenger Name Record, Terrorist Financing Tracking Protocol, *inter alia*) in the name of increased security brings into relief the difficulty of protecting individual rights to privacy and data protection – enshrined post-Lisbon in a Charter of Fundamental Rights of equal legal value to the Treaties – in the era of global flows of capital, information and individuals.

The first EU-US PNR agreement entered into force despite objections from the European Parliament, data protection authorities and representatives of civil society, and survived legal challenges before the European Court of Justice. Anticipated fundamental rights violations, a lack of proportionality, necessity and proven added value, in addition to general concerns based on respect for the rule of law and criminal law principles (eg. the presumption of innocence) were all cited. Nonetheless, the controversial EU-third country schemes are likely to be replicated by an internal EU-PNR system covering domestic flights and aiming at less serious offences than international terrorism, *cause célèbre* of the initial
transatlantic set-up. More recently, EU-US exchange of financial transaction data (the TFTP or “SWIFT agreement”) provided the European Parliament with a first opportunity to wield its power, post-Lisbon, to greatly influence the content of measures on which the assembly would previously merely have been consulted. Meanwhile, a 2006 Directive on the blanket retention of citizens’ telecommunications data for law enforcement purposes – originating not from cooperation with third states but within the Union – exemplifies current tensions between amorphous conceptions of security and privacy. Implementing measures have been subject to successful challenges before national constitutional courts, whilst a reliable gauging of the scheme’s true impact on criminality remains elusive.

These developments are taking place amidst a proliferation of large-scale databases (SIS, SIS II, Prüm, *inter alia*), increased sophistication of surveillance and data mining technologies, and concurrent political decisions to increase interoperability and maximise data sharing (the European Council’s “principle of availability”). The shift from largely reactive policing to profiling and risk prevention raises the prospect of new, as yet unforeseeable, forms of criminalisation and social control. Yet the informationalised preventive shift under way appears to be increasingly outstripping comprehensive public scrutiny of the measures – and actors – in question.

Intensified transnational police cooperation in Europe has diffused the power to investigate criminal activity formerly reserved to centralised nation-state institutional structures across a burgeoning informal network of supranational, state, regional and local actors. The EU Joint Investigation Teams instrument is notable in this regard for its organisational framing of organic multi-state, cross-disciplinary police and judicial cooperation, producing an opaque relationship with data protection rights and standards presented as fundamental in top-down policy documents (eg. Internal Security Strategy).

Can a package of tighter data protection rules, independent oversight and judicial control be relied upon to strengthen the rule of law and protect criminal law principles in the modern EU investigative and judicial web?

Can democratic legitimacy be ensured through traditional parliamentary scrutiny of regional/global information systems which are becoming increasingly complex and interlinked?

Might a good starting point be to insist on both the transparency and coherent evaluation of existing inter-connected EU systems before introducing more in step with the inevitable march of technology?

---

**The criminalisation power of the European Union**  
**Perrine Simon, University of Poitiers**

The “democratic legitimacy” of the European Union (“EU”) is often questioned, while at the same time, the EU is confronted with legislative “inflation”. For these reasons, concerns about “better law making” have been largely acknowledged by the EU, and special attention paid to the principles of subsidiarity and proportionality. However, legislative inflation has a special resonance in criminal law matters because it leads to “overcriminalisation” and directly affects people; and consequently when guiding the adoption of European criminal law these principles may require even greater consideration.

This article proposes to scrutinise the process of enacting substantive criminal law under the new competence of the Lisbon Treaty, namely under article 83 in light of the notion of legitimacy, derived from the principle of legality (the nullum crimen sine lege parlementaria and lex certa requirements).

We will see in a first part that the Union can now define, by way of directives, criminal offences and sanctions in the areas of particularly serious crime with a cross-border
dimension (83§1) or where the creation of such offences proves essential to ensure the effective implementation of Union policy in an area which has been subject to harmonisation measures (83§2). This has been welcomed for officialising a “clear” competence for harmonising substantive criminal law. However, this new competence still appears to be tainted by uncertainty when looking at the wording of the article 83 TFEU.

In a second part, after envisaging the application of the current principles of subsidiarity and proportionality to article 83 TFEU and observing their limited roles (could also be singular, if you want to say that the two principles are substantially the same…), we will consider options to enhance the democratic legitimacy of the adoption of European criminal law. Our assertion will be the need to adapt the existing tools of subsidiarity and proportionality into “special” tests articulated around the principle of ultima ratio – the use of criminal law as a last resort.

---

**Criminalisation as a last resort:**

**A national principle under the pressure of Europeanisation?**

Jannemieke W. Ouwerkerk, Tilburg Law School, The Netherlands

In the Netherlands, as well as in several other European countries, the last resort principle has long been considered a fundamental guideline used to determine the scope of substantive criminal law. In the context of criminalisation of conduct, it demands the national legislator invokes the path of criminalisation only as an utmost means, and considers alternatives to criminal law measures. A reserved approach towards calling on the criminal law is considered to be not only desirable from the perspective of limited governmental powers and the interfering character of criminalised conduct, but also from the perspective of enforcement possibilities.

Today, the criminalisation of conduct is no longer automatically the outcome of national law-making, but is increasingly imposed by the international and European legislator. This raises the question whether or not national principles on criminalisation are in harmony with rationalisations on criminalising conduct at the transnational level. This paper will focus on the influence of Strasbourg case-law and EU law.

Departing from the Dutch level in particular, the proposed paper undertakes the challenge to connect different levels of legislation. The analysis does not hesitate to question the tenability of a classical principle of criminal law theory in today’s society.

---

### 12.00

**Panel 12: Globalisation, Criminalisation & Judicial Cooperation in Criminal Matters**

**Not Dying, Just Fading Away: Death Penalty Clauses Limiting Mutual Assistance**

Eef Vandebroek and Frank Verbruggen, University of Leuven

The Council of Europe and, in the last two decades, the European Union has stressed the fight against the death penalty as part of Europe’s penal identity. After having succeeded in banning capital punishment from the European continent, the new ambition is global abolition. The combination of successful diplomacy and a jurisprudential turn of the ECtHR in the Soering-case confirms Europe’s willingness to foment abolition. On the one hand EU member states lobbied successfully for the exclusion of the death penalty as a penalty in international criminal tribunals, notably the ICTY, ICTR and ICC. On the other hand, judicial cooperation has been used to support abolitionism, by refusing or limiting extradition and legal assistance to retentionist countries, when international cooperation has
become vital to fight transnational crime and terrorism. The *Soering* doctrine, developed in 1989 and fine-tuned in *Drozd* (1992) and *Pellegrini* (2001) obliged European states to develop and use cooperation mechanisms which do not only address the traditional interests – international relations and effective prosecution – but also have to show respect for fundamental rights. Human rights and death penalty exception clauses have become a standard. This paper assumes that in extradition that position may be maintained, but that the use of mutual legal assistance diplomacy to further death penalty abolition is likely to be undermined by the future evolution of mutual legal assistance in criminal matters. This evolution is already visible within the EU and is likely to be extended to cooperation with third states. It rests on principles of mutual recognition and availability of information. A decreasing role of politics and diplomacy are key features of the evolution. These fast and almost unrestricted forms of cooperation, when expanded beyond European borders, may render traditional death penalty clauses superfluous. This paper discusses the future relevance of death penalty clauses in agreements on judicial cooperation, notably mutual assistance in criminal matters.

**From Illegal Fishing to Waste Dumping: The Law and Politics of Interstate Criminal-Law Cooperation in the High Seas**

**Ricardo Pereira, Imperial College London**

Interstate cooperation for the management of shared natural resources poses significant challenges to international law and criminal law enforcement bodies. When natural resources are found in areas beyond national jurisdiction (e.g. in the high seas and deep seabed), the need for international cooperation for enforcement of conservation measures and for controlling pollution under the criminal law could be crucial.

International law recognises the exclusive jurisdiction of flag states in the high seas, which includes the right to enforce standards against crime, such as illegal fishing,(1) shipping pollution and waste dumping. Moreover, all states enjoy fishing and navigational freedoms in the high seas.(2) Yet flag states have been notoriously unwilling or unable to bring enforcement action against their own vessels, in particular in areas beyond national jurisdiction. This problem is further complicated since flag states are often registered in flag of convenience states, and thus do not have the incentive to bring prosecutions. However, other states must cooperate with the flag states by reporting infringements of international regulations occurring in the high seas.

Hence international legal regimes have emerged under a number of international (environmental) agreements, including MARPOL 73/78, the London Dumping (1972) and OSPAR (1992) Conventions, the UN Convention on the Law of the Sea (1982) and the Fish Stocks Agreement (FSA, 1995), to facilitate interstate cooperation for the effective and equitable management of shared natural resources and to control pollution. Yet this paper finds that the enforcement of those standards under those agreements remains deficient and fragmented, especially in the high seas where the responsibilities and rights of flag states and coastal states are not well defined. Moreover, the accountability for environmental damage is to be decided under national legislation as the harmonisation of standards by the relevant international agreements have not led to significant harmonisation of liability standards. This calls for better coordination between the national and international enforcement agencies in the high seas, including, where necessary, the harmonisation of liability standards. (3)

Only exceptionally, such as in the exercise of the right of hot pursuit, can a coastal state take enforcement action against a foreign vessel in the high seas. So unlike other
transnational crimes in the seas such as piracy or drug smuggling, where a stronger legal framework for states to cooperate under the criminal law have been established, the scope for cooperation between international and national enforcement agencies for the environmental protection and conservation of shared natural resources remains limited. This can be explained by the fact that most international environmental agreements lack appropriate enforcement structures, such as the Convention on International Trade in Endangered Species (CITES, 1973), which only prohibits trade in endangered species (hence largely relying on the enforcement by customs authorities), rather than protecting them in situ. Moreover, even though some international or regional standards have been adopted against illegal fishing in the high seas, regional fisheries organisations are given no legal standing to enforce their own allocation regimes against non-members, thus are powerless against illegal fishing by non-parties.

Traditionally, States have been unwilling to transfer the powers to harmonise criminal offences and penalties to a supranational institution, which they have tended to regard as belonging to the sphere of sovereignty of the nation state. However the need to combat crimes effectively, in particular transnational crimes, calls for a degree of harmonisation of criminal-law standards. In the European Union, where measures to combat crimes are often regarded as a counterweight to reduced border controls, the European Court of Justice has played a crucial role in clarifying the competences of the Union and EC to lay down criminal law measures, which ultimately led to the adoption of the directive on environmental crimes in October 2008 and the ship-source pollution crime amending directive in September 2009. Subsequently, the ratification of the Lisbon Treaty in December 2009 abolished the third pillar (the original intergovernmental forum established for Member States to cooperate in criminal matters), allowing Member States to pursue further integration in the (environmental) criminal law field at the supranational level. The Ship-Source Pollution Directive (2005/2009) is of particular interest for this paper, as it requires Member States to criminalise pollution not only in European waters but also in the high seas (although discretion is left to the Member States regarding the actual enforcement action taken in individual cases).

The paper assesses the rationales and the effectiveness of the existing mechanisms for interstate criminal-law cooperation for environmental protection and conservation of marine natural resources in areas beyond natural jurisdiction (also known as ‘the global commons’). It also discusses whether existing international environmental bodies and agencies are able to enforce environmental conservation standards effectively, drawing on the experience of international and regional fisheries commissions. The paper then examines whether the present standards and mechanisms for interstate cooperation in criminal matters (such those adopted by the European Union and Council of Europe on mutual assistance and extradition) could assist with the enforcement of the conservation standards and ultimately provide a deterrent against illegal activities in the high seas.

1) See e.g. the 1993 FAO Compliance Agreement under which states have the duty to take all measures necessary to ensure that ships flying their flag to do engage in any activity to undermine the effectiveness of conservation measures.
2) For example in the Fisheries Jurisdiction Case (Jurisdiction) (Spain v. Canada), 1998, the ICJ held that inspectors may be placed on the board of inspection vessels of another party only by agreement and that it is the sole prerogative of the flag state to take a decision on possible prosecution in the event of an infringement of conservation and management measures taken by a regional fisheries commission.
3) The International Convention on Civil Liability for Oil Pollution Damage (CLC 1969/1992) on civil liability for oil pollution damage does not apply to environmental damage occurring in the high seas.
5) See the FAO2010 Agreement on Port State Measures to Prevent, Deter and Eliminate illegal, unregulated and unreported fishing.
Has the last word been said on Universal Jurisdiction? 
Current state and future development

Natalie Rosen, The Hebrew University of Jerusalem

In the past decade, many universal jurisdiction (UJ) proceedings have been launched around the world and against perpetrators from many countries. However, most of the cases that eventually led to indictments and trials targeted perpetrators from African countries, whereas alleged perpetrators from powerful countries managed to escape accountability. This political-selectiveness application led to a severe criticism and damaged the credibility of the principle. The politicization of UJ, however, goes beyond states' foreign policy considerations. Interestingly, even among those who strive for broad application, e.g. victims, human rights’ groups and lawyers, the actions are sometimes driven by their own politics. More then once, such private actors initiated proceedings against acting heads of State and foreign affairs ministers or against state officials visiting the forum state, knowing that such proceedings deem to fail due to immunity protections. Nevertheless, they initiated the proceedings to emphasize that no one is immune from prosecution. The reiterated failure to promote these cases further damaged the principle of UJ when such private actors were accused of abusing the principle and governments were called to restrict the latter’s rights to action and thereby to restrict the principle itself. Not by coincidence, those demands came from countries whose officials were targeted and were directed at countries in which UJ was exercised the most and in the broadest way. Recent years have witnessed that at least where powerful countries are involved, the increasing pressure eventually led to domestic legislations’ amendments which restricted the scope of UJ application. Additional difficulties with the practice of universal jurisdiction are the criminalisation gaps due to the different laws and procedures from which each country derives its obligations. This leads to serious inconsistencies of the entire process both in scope and in application of the principle. For example, some domestic legislation require that the targeted perpetrator be either a resident of the forum state or present in its territory in order to initiate and/or continue investigation, while others have no such prerequisites. Beyond the inconsistency caused by such application, the requirement of presence pose a severe obstacle in pursuing a universal jurisdiction case as it is unlikely that the prosecution would be able to comply with the time limitations before such visit ends and it is not unlikely to assume that in such cases the law enforcement authorities will have no motivation to investigate and bring the matter forward as this would cause a diplomatic tension. My research reviews these practices through the analysis of UJ proceedings that took place in the past decade, addressing both situations where indictments were filed and trials took place as well as attempted cases in which proceedings ceased soon after the initial stages. The research also intends to examine domestic legislations and procedures in order to learn the practical difficulties when attempting to bring forward a UJ case. The aim of the thesis is to identify and suggest better “checks and balances” system which strikes the right balance between judicial independence and political motivations when applying the principle of UJ globally.
Health Crimes and Globalisation:
A case for extra-territorial jurisdiction and enforcement?
Jean McHale and Sheelagh McGuinness, University of Birmingham

The criminal law has been increasingly utilized over the last twenty five years in England and Wales in the area of health care to prohibit activities. Ethical controversy, public debate and condemnation have been followed by specific statutory criminal prohibitions. From organ selling, to commercial surrogacy organizations, from human reproductive cloning to the sex selection of embryos the criminal law has been steadily employed as a means of curtailing patient autonomy and clinical decision making. Yet over the same time period globalization has opened up patient choice. Patients are increasingly travelling to other jurisdictions to receive health care and in some instances with the precise aim of avoiding domestic criminal prohibitions upon certain health care services. This paper examines this phenomenon and asks whether the status quo can and indeed should continue or whether “health crimes” should be a matter for extra-territorial enforcement.

13.30 Lunch
End of Workshop