Stefano Ruggeri *Editor*

Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings

A Study in Memory of Vittorio Grevi and Giovanni Tranchina

Springer

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

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

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

Foti, Irene Giaimi, and Letizia Lo Giudice. But above all this research could be completed, thanks to the irreplaceable support of my family, my wife Norma and my two little daughters Anna Lucia and Maria Isabel, who have patiently tolerated my long absence while constantly encouraging my work.

Thank you all very much!

Messina, on 11 June 2012 Stefano Ruggeri

Preface

The value of this book is that its complex structure unifies three different subjects, each of which would itself raise considerable interest: criminal inquiries, transnational judicial cooperation, and fundamental rights.

This research has been carried out at a historical moment in which we are witnessing a strengthening of transnational judicial cooperation as essential means to fight against the expansion of criminal organizations that profit from their ability to operate across borders. These are – alongside organizations nurturing political terrorism, sometimes even working closely with them – the criminal groups behind the most serious economic and financial crime, those controlling among other things both production and smuggling of drugs and human trafficking.

The danger of new transnational crime has helped overcome traditional resistance to a strengthened and more efficient international cooperation between domestic states, which have always been jealous of their own sovereignty over everything concerned with the exercise of criminal jurisdiction. These resistances continue to be felt, and those that are still justified must be separated from those which are simply the remnants of obsolete nationalist mentalities. However, this is not the field in which the international community and its individual components are facing the most serious challenge as they try to improve and strengthen their instruments for combating transnational organized crime through international cooperation.

For at least 30 years I have argued that the issue of fundamental rights cannot be dealt with theoretically and handled practically as if the only question at stake were that of elevating the threshold of untouchable individual guarantees entailed by any of them. In particular, one cannot rule out that the increase of terroristic threats should lead to partially rethinking even the extension of some individual freedoms currently considered "fundamental."

This would not, however, be the same as sharing the logic of "*à la guerre comme à la guerre*," according to which any mode of fighting against terrorism and other dangerous forms of organized crime should be admissible, even in contempt of most fundamental rights.

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

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

Torino, Italy Mario Chiavario

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Part I
Introductory Part

Vittorio Grevi, Scholar and Master

Giulio Illuminati

When he happened to meet a young scholar at the beginning of her academic career or of her practice as a lawyer or a judicial officer, he loved to introduce himself plainly by name and surname: "Vittorio Grevi, pleased to meet you." A calculated understatement, conscious as he was of being already well known as prestigious author of juridical works and influential journalist and in particular as the editor, together with Giovanni Conso, of a well-appreciated textbook of criminal procedure, which for years has been adopted in many universities. For a graduate who has completed his studies not long before, making the personal acquaintance of a professor who until then had been just a name on a book cover is always an emotional moment, and one that inevitably intimidates. But the amiability of Vittorio Grevi and the true interest he showed in his interlocutors were such that soon afterwards, the conversation went on completely naturally, as between long-time acquaintances.

This is, perhaps, one of the many reasons why everyone who had the luck to know him remembers him with great affection, as witnessed by the large number of students and alumni who came to pay their last respects to the professor at his Pavia University together with the many personalities, judges, lawyers, and colleagues from all over Italy.

> However paradoxical it might appear, the dearer a person who dies is to us, the harder the mental and emotional work of forgiving him or her for having left us. And forgiveness requires that with effort, fragment after fragment, we find him or her again inside us and see him or her acting in the outside world.

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These words (in my translation) are by Sarantis Thanopoulos, a well known psychologist: I have kept the press clipping because it expresses exactly what I have been feeling after the departure of Vittorio Grevi, whom we are here today to remember.

I would like to thank the coordinator of this research for dedicating it to his memory. He was very fond of Sicily and in particular of Syracuse, where he very much liked to come, especially during the good season, so that he could take advantage of the sun, the sea and the beach as side benefits of the academic meeting.

Vittorio Grevi belongs to that generation of jurists who have deeply renewed the study of criminal procedural law in the period from the end of the 1960s to the beginning of the 1970s in which constitutional principles had been resolutely put in the middle of the academic work and served as a compass to rely on in the building of a system based on the safeguard of individual guarantees. It was in these years that the books *Nemo tenetur se detegere. Interrogatorio dell'imputato e diritto al silenzio nel processo penale* (1972) and *Libertà personale dell'imputato e Costituzione* (1976) were published: ever since then, they have been essential landmarks for scholars in these specific fields. And it was in the 1970s that there arose a pressing need for an organic reform of the code of criminal procedure, aimed at giving up the old process of inquisitorial roots and implementing the Constitution and international charters on human rights. Grevi was involved in the drawing up of the 1978 preliminary draft, which as we know remained only a draft, and afterwards in the drawing up of the code currently in force.

His position has always been coherently devoted to the safeguard of civil liberties, thanks to his steady consciousness of fundamental principles, even in times when such a position sounded almost subversive. But he couldn't stand the opportunistic champions of defense rights, who have been multiplying in recent years with the purpose of granting impunity to the powerful of the moment. For this reason he has always been fighting, not only in the scholarly field, but also through the newspaper he contributed to, against legislative tampering with the code of criminal procedure, bound as it is to obstruct the investigation of crimes without safeguarding citizens' fundamental rights: most recently in the form of the reckless bill on wiretapping, which in the end stalled in Parliament. Not every opinion of his was necessarily widely shared, but even in the face of disagreement, one couldn't help but acknowledge his great intellectual honesty. So, although it was not easy to make him change his mind, he had no difficulty admitting a mistake. He never forced someone else's opinions, but neither did he tire of trying to persuade others of his own.

He had repeatedly shown his civic commitment, putting his juridical skill at the service of public institutions (perhaps, the way things are today, it is worth specifying that we are not talking about lucrative consultancy assignments, but about voluntary work for free, that paid at most a reimbursement of travel expenses, which moreover came late and incomplete). Others have already said and written, and yet it must be said again and repeated: he had merit deserving of the highest appointments, perhaps even the Constitutional Court. But evidently he was considered politically not very reliable, not only by the right wing, but also by the left,

accustomed as he was to think on his own—according to the noblest academic tradition—and not being very prone to compromise. Now everybody, from both the right and the left, is ready to acknowledge his qualities as a jurist and as a man.

Whoever asked him for an opinion, an interpretation, or simple advice, almost always got a useful answer. Not only because of his broad and ever-current knowledge, but also due to the attention he paid to practical implications of criminal procedural law. Although he never practiced as a lawyer—a deliberate choice to avoid the risk of bias in his faculty of judgment—he always was in touch with the operational reality and with everyday problems of justice without losing the methodological rigor and systematic order that characterized his university teaching: after all, combining theory and practice is the specific task of the law scholar, and especially of the procedural law scholar. His published work confirms this, including among others the editing of the *Commentario breve al codice di procedura penale* and related *Complemento giurisprudenziale*, as well as the co-direction of the authoritative review *Cassazione penale*.

It would take too long to list even just his most important publications. It is better to remember his indefatigable activity as organizer of collective volumes and series, of research projects and lectures. Nowadays it has become fashionable to defame the whole institution of the Italian university, which has been transformed unexpectedly, and in most cases unfairly, into scapegoat for all the ills of the nation: even more paradoxical when one bears in mind the ethical state of the sources of this criticism and how little culture is worth in our miserable country. In the present climate, Grevi could be defined as an academic "baron:" full professor at only 29, senior member of his Faculty, respected by his colleagues. And indeed he has created a school of high-level scholars who are successful in the university and in the legal profession: a school based on scrupulous research and scientific precision, achieved through continuous application, excluding any superficiality or approximation. But although he participated with conviction in the politics of academic life, he never abused his power, applying his moral intransigence first and foremost to himself, and always recognizing merit where he found it, even beyond his own pupils.

He was a fundamental reference point. We will miss him.

In Memory of Giovanni Tranchina

Antonio Scaglione

To start with, I would like to thank Professor Stefano Ruggeri and the Law School of the University of Messina both for dedicating this research project to the memory of the unforgettable Professor Giovanni Tranchina who died before his time on 15 January of this year, and for entrusting me with the task of commemorating him. My loving greetings are addressed to Mrs. Nia Tranchina and her family.

I also join in the memorial to Professor Vittorio Grevi.

It is not easy, especially on an emotional level, to recall my mentor, whom I had the honour to meet in the 1970s and with whom I daily shared 40 years of academic life.

Giovanni Tranchina was born in Messina on 24 June 1937; he officially entered the academic community with his appointment first as research assistant in Criminal Procedure at the University of Messina under the supervision of Professor Girolamo Bellavista, and then as assistant professor at the University of Palermo.

After winning an entrance examination in 1971, he became a tenured professor, and, at only 34 years of age, he was appointed Chair Professor of Criminology. He subsequently became a professor of Criminal Procedure. Under his supervision, entire generations of students were formed who later entered the judiciary, the legal profession, public administration and, of course, the university.

During his university career, Giovanni Tranchina combined his generous and passionate teaching roles in Palermo and Trapani with his institutional offices. With prestige, expertise, authority and balance, he served as Director of the Department of Criminal Procedure, President of the Law School, Co-ordinator of the Ph.D. Programme in Criminal Procedure, Dean of the Law School (twice), Vice-President of the University, and also Director of the Department of Criminal Law, Criminal Procedure and Criminology.

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"As a result of his exemplary personality, characterized by vast culture, sternness and commitment," and because of his "exceptional contribution" to the development of the study of Criminal Procedure, Professor Giovanni Tranchina was awarded the title of *emeritus* on December 1, 2010.

In his role as a scholar, it is quite a complex task to give even a general outline of his numerous publications in the fields of Criminal Procedure, General Trial Theory, and Criminology.

I will just recall some excellent research papers as *L'autorizzazione a procedere* (Giuffrè, Milano, 1967), *La potestà di impugnare nel processo penale* (Giuffrè, Milano, 1970), *Le premesse per uno studio della vittima nel processo penale* (Palermo, 1974), encyclopaedia entries, papers, sentence comments, and articles published in the most authoritative journals. He also made very important contributions to the new editions of *Lezioni di diritto processuale penale* written by his Mentor Girolamo Bellavista, as well as to the *Criminal Procedure Code* in the series "Le fonti del diritto." In addition, he co-authored the Criminal Procedure manual with Delfino Siracusano, Antonino Galati and Enzo Zappalà, the latest publication of which Professor Giovanni Tranchina personally edited in the very last days of his life.

In addition to his extraordinary career as an expert on law, Giovanni Tranchina was also a lively and refined journalist who contributed to the daily evolution of legal matters with severe criticism always prompted by the ideals of justice.

The following are the fundamental concepts and ideas that he strongly believed in and that he maintained throughout 50 years of Italian criminal legislation that alternated between safeguarding the society on one side and safeguarding a person's civil rights and liberties (*garantismo*) on the other:

- That the liberty of each person is bound to be reconciled with respect for the liberty of all the others;
- That certainty is "*the same as law; the question is not whether to be certain of the law, but that certainty is in the law, as, for the same reason, the law, a rule (or a system of rules) is certainty, with the purpose to give certainty, or, better, security*;"[1]
- That the criminal process, defined as *"the balance between the supremacy of the government and the subjection of the individual"* is not aimed at criminality suppression; on the contrary, it is meant as an *instrument of justice*. It constitutes the main instrument of protection for all of the principles and essential human rights which the Italian Constitution of 1948 recognizes and preserves[2];
- That judicial independence and impartiality are deeply rooted in the very essence of jurisprudence and in its values, i.e., "*the pursuit of the truth and the preservation of human rights*."[3]

[1] Tranchina (2007), p. 22.

[2] Tranchina (1996), p. 15.

[3] Tranchina (2007), p. 24.

I will further commemorate him with his latest publications, those from the last few months of his life, when he was physically weak but with a clear mind.

On October 27, 2010, in the auditorium of the Law School, Professor Giovanni Tranchina closed his long university career with a superb *lectio magistralis* entitled "*Il diritto al servizio della speranza*" (Law in the service of hope) which he delivered in a loud powerful voice and which was followed in utter silence by a crowd of colleagues, students and admirers. The speech concluded with a long, enthusiastic applause which touched him enormously. This last lesson showed once again his deep and vast knowledge as well as his sensitive heart.

His *lectio* was inspired from a passage by Gabriel Garcia Márquez (one of his favourite writers together with Leonardo Sciascia), which he included in one of his "minor" papers published in 1996, entitled *Giustizia penale e rispetto della dignità dell'uomo*:

> With great respect two students stop to speak with me. 'What do you study, lads?'
> They proudly answer 'Derecho' ('Law').
> I can't conceal a sceptical face:
> 'Do you study Law in this continent?'
> 'You shouldn't be surprised – they say – these are lands where the people are still able to live on hope.'

Law in the service of hope.

On his latest interview published on Giornale di Sicilia on 27 October 2010, he stressed once again his idea of criminal process: "I have always been a defender of civil rights, that is, the criminal process is bound to protect the defendant, who claims respect as a human being."

However, because the process is a "vital instrument that guarantees every person's civil rights"—he claimed—it is also bound to ensure "life and liberty rights" to the victims who have seen their essential rights infringed upon.

These ideas are firmly asserted in one of his latest papers, dated April 24, 2010, and posthumously published in the journal *Cassazione penale* in February of this year. In this paper, he reasserted the need to protect the victim, as stated in Article 111 of the Italian Constitution on fair trial rules; he also complained that the legislator "continues to be extremely indifferent" towards victims, in spite of having long been urged by supranational law toward reform.[4]

Professor Tranchina's last writing, also published posthumously, is the preface to an essay about evidence, which was written by judges and lawyers.[5]

Quoting Vittorio Denti, he pointed out that "the trial … cannot be abstract theory;" it has to work in close contact with "what the actual society needs." In addition, he went on to say that evidence "is to be seen not from the point of view of the effect that can be reached through each piece of evidence", but—quoting Alessandro Giuliani, another distinguished scholar—as "a chapter in the politico-constitutional history of a certain era." This will lead to the creation of "blending

[4] Tranchina (2010), pp. 4057 ff.

[5] Tranchina (2011), pp. XV ff.

and clashing relationships of logical and ethical principles on one side, and institutions on the other."

In the same work, by broadly outlining the evolution of the law of evidence from the 1930 Inquisitorial Code to the 1988 Adversarial Code he underlined a nostalgia for the inquisitorial system following the historic decision 255/1992 of the Constitutional Court, which confirmed the superiority of the principle of "non-dispersion of pieces of evidence" over the right to cross-examination.

However, "the revenge of a fair trial"—as Professor Tranchina had it—was finally implemented by Article 111 of the Italian Constitution. That article declared the right to cross-examination a constitutional rule.

Giovanni Tranchina left a legacy of critical thoughts, memories, affection, and nostalgia, for anyone who had the chance to meet and listen to him or read his works. Future generations will also have the opportunity to shape their own knowledge based upon his fundamental writings, knowledge which can cross over the borders of earthly life.

Thank you very much for your attention.

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Like a Flame: Remembering Giovanni Tranchina

Giuseppe Di Chiara

1. When, in October 2010, the Law Faculty of Palermo University celebrated 50 years of the teaching of Giovanni Tranchina on the occasion of his farewell public lecture on "The right to the service of hope," colleagues and students presented him with a plaque: a simple, unadorned silver sheet which bore a message—engraved not only in the metal—conveying the faculty's "inexpressible gratitude to a Master of law and life." At the top of the plaque we had also decided to have engraved a phrase of Piero Calamandrei: a reflection on the "square boxes of procedural law," whose study "is sterile abstraction, unless it is also the study of the living man." It seemed that this reference to the deeper dimensions of the human outlined, with powerful evocative force, the heritage of a *humanitas* that in Giovanni Tranchina had become an icon of virtue.
2. I would now like to fondly recall two other episodes. One, and it is no coincidence, is from a student periodical which bears the date of February 2003: the small local newspaper called *L'Universitario*, whose subheading reads *Notiziario studentesco del Polo didattico di Trapani*. On the cover of this thin pamphlet, unpretentiously printed using office laser equipment, we find an unsigned editorial entitled *The gentle giant*. The text, superimposed on a beautiful photo of Giovanni Tranchina, begins with a wide-angle view:

   > There are men who with their modesty, wisdom and honesty have written the finest pages of human history. They embody the art of moderation, common sense and dialogue. They are men of peace, democracy, justice and freedom.

   In this article, Giovanni Tranchina, at the time Dean of the Palermo Law Faculty and Deputy Chancellor for the teaching facility at Trapani, was presented as a "dove," whose prestige and determination could combat the "hawks." "The hope," it concluded (and this was during the Iraq war, with its series of trials, doubts and recriminations),

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> "is that the principles and methods followed by the 'doves' of the world may prevail over the arrogance of ambition, money and power," everywhere: so that "the values of freedom, democracy and solidarity between peoples do not fly on the wings of bombers" but "are carried in the hearts of men like Giovanni Tranchina."

It is both a surprise and a consolation to rediscover these forgotten lines, many years later, after the flood.

3. I would like to take the other fragment from a page full of pain, which I know well, signed by Giovanni Tranchina. As yet unpublished, it will soon be available in a book scheduled to come out in a few months' time, a compilation of essays originating from a workshop a few years ago in memory of Silvana Giambruno. Giovanni Tranchina gave me permission to publish, as an appendix to the book, the words he spoke at the funeral of his student: a few short lines in which, providing a few details of Silvana, he drew an extraordinary portrait of someone who had devoted their life to teaching, "to *leaving their mark* on others [which is the literal sense of the word to teach, *insegnare*, in Italian], teaching with the word, but above all teaching with life and teaching for life." And he continued: "This is what the work of the university teacher is all about, and his vocation lies not in following the triumphant University, but professing the militant University." These words, reread today, after the flood and in the middle of the dusty desert, really sound like an inheritance of the spirit that resonates.
4. There is, in the great fresco of Giuliano Vassalli's famous essay on personal freedom in the light of the Italian Constitution,[1] a beautiful passage concerning the start of the work of the Constitutional Court, which in hindsight transcends its original context.

> "When those first decisions were handed down" – recounts Vassalli, with all the freshness of a page in his diary – "it seemed that there finally emerged, freed from the fog of fear and convoluted intrigues, the Law, as Calamandrei had always practised and taught it: simple, clear, intelligible to all, and, above all, honest; the expression not of opportunism or skills but of truth."

These are lines in which I have always seen the portrait of Giovanni Tranchina, his simplicity and, at the same time, his boundless culture, his human fibre and his dedication to the service of hope, as with crystalline clarity he entitled his great, monumental yet conversational final lesson: a sea chart of man, of the man Giovanni Tranchina and of the man who belongs to mankind.

5. *In obscura nocte sidera micant*: there thus re-emerge, from the surrounding night, the traces of light of this gentle, enlightened giant, following in Sciascia's footsteps, in this land of Sicily. Those who met him on his path today feel both the numb vacuum left by his absence and the reassuring warmth from the fire of his presence that remains in what he gave us. The wake of light left by his profound culture remains; his attention to small things, his undying ability to get excited; his indomitable faith in freedom, the shrewd wisdom of his smile, the priceless treasure of his gestures—a look, a hug—with which his heart managed,

[1] Vassalli (1958), p. 355 ff.

beyond the strictures of the spoken word, to express the inexpressible. And today, once again, it is time, following in his footsteps, for words to stop: they have brought us to mysterious thresholds, giving form to a loss and a presence, to a call—as Mario Luzi sang—"that now, in pain, you do not heed. / But it's there, and it holds strength and song / the perpetual music . . . will return. / Be still." There remains this faith in freedom, this hope that feeds on the future, this look straight ahead to tomorrow, the greatest and most lasting lesson of Giovanni Tranchina, and of Vittorio Grevi, such different characters, yet men who shared a common ideal in their dedication to humanity and to this country. Their ability to light our way lives in our hearts, and will continue to accompany us, in the days ahead, like a flame.

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Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees

Giulio Illuminati

Contents

Abstract The paper emphasizes that fair-trial guarantees represent the core of the legal struggle against transnational crime, however important it is for the protection of citizens' rights. Indeed, all the international charters on human rights recognize the guarantee of due process of law. It is then argued that the issue of transnational cooperation in criminal matters involves three different levels of analysis: judicial cooperation among states, relationships with international criminal tribunals, and European integration in criminal justice. The definition of transnational crime is followed by an outline of the main cooperation instruments provided, with a specific reference to the Resolution adopted by the XVIII Congress of the International Penal Law Association in 2009. As regards international criminal tribunals, a major issue is the admissibility of evidence collected by a state agency in violation of fundamental rights that should be excluded. Finally, the paper deals with cross-border investigations within the European Union, exchange of evidence, and minimum standards concerning procedural rights of the accused.

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Abbreviations

AChHR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AFSJ	Area of Freedom, Security and Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EUFRCh	Charter of Fundamental Rights of the European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICCt	Italian Constitutional Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
TEU	Treaty on the European Union
UDHR	Universal Declaration of Human Rights
USSC	The Supreme Court of the United States

1 Human Rights and the Fight Against Transnational Organized Crime

In his introduction to the United Nations Convention against Transnational Organized Crime (Palermo, 2000), UN Secretary-General Kofi Annan emphasized

> the political will to answer a global challenge with a global response. If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes, then we must exploit those very same factors to defend human rights and defeat the forces of crime, corruption and trafficking in human beings.[1]

He continued, quoting the Millennium Declaration adopted by the Heads of State meeting at the United Nations in September 2000:

> the Declaration states that 'men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice;'[2]

and therefore

> with enhanced international cooperation, we can have a real impact on the ability of international criminals to operate successfully and can help citizens everywhere in their often bitter struggle for safety and dignity in their homes and communities.[3]

[1] Annan (2004), p. iii.

[2] *Ibid*., p. iii.

[3] *Ibid*., p. iv.

What right could be more fundamental than the right to life and security? Yet this is only one side of the commitment to the protection of human rights, as we all know very well. No less important is compliance with the rules in enforcing criminal law. As Raimo Lahti has written, "the penal system must be both rational concerning its goal (utility) and rational concerning its basic values (justice, humanity)."[4] If we apply this reasoning to criminal proceedings, we understand that fair-trial guarantees still represent the core of the legal struggle against transnational crime.

When dealing with cross-border investigations and international cooperation, what is usually emphasized is the goal of realizing an efficient system of law enforcement. Even the action in the so-called AFSJ within the European Union has been so far committed almost entirely to the improvement of security, if one takes into consideration the European agencies that have been established and the content of the Framework Decisions that have actually been issued. Indeed, it seems very hard to reach unanimity or even any political agreement on the formal recognition of a common standard of procedural safeguards throughout the Union.

As legal scholars, we must not forget that the protection of individuals against state authority's use of its coercive power in criminal justice is just as important at the international level. It is no accident that the international charters on human rights, long before the actual conventions on international cooperation in criminal matters, all defined the right of the accused to a fair trial in very similar terms. Thus the UDHR, Article 10 (1948); the ECHR, Article 6 (1950); the ICCPR, Article 14 (1966); as well as the ACHR (1969) and the AChHR (1981). And it must be remembered as well that Article 6(1) TEU provides for the recognition of the rights, freedoms and principles set out in the EU FRCh (2000), whose title VI (Articles 47–50) is devoted to procedural justice and to defendants' rights. In addition, the same Article 6 of the Treaty refers to the ECHR, stating that the Union will accede to the ECHR (paragraph 3) and that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, will constitute general principles of the Union's law (paragraph 3).

Through the charters of rights and, in particular, as a result of the decisions issued by the relevant international courts, a pattern emerges of slow but constant penetration of common minimum standards for the safeguards of individuals' rights in the national systems of criminal procedure. This leads directly to an increasing cultural consciousness of the fundamental role human rights play in a modern democracy.

Even at international level the usual tensions between the fight against crime and the guarantee of due process of law replicate the same way they do in national legislation and practice.

[4] Lahti (2010), p. 25.

2 Three Levels of Debate

From a theoretical point of view, it is of great interest to note the progressive advent of a new perspective, which has been defined as 'polycentric.'[5] The internationalization of criminal justice tends to transform traditional legal systems in many diverse ways.

The first is in the relevant sources of law. Today, there is a multiplicity of sources of law, and the sources are no longer hierarchically ordered as they were under the various domestic legal systems. They must be coordinated and interpreted systematically.

For the same reason, one single case may potentially fall under different jurisdictions, so that it becomes necessary to set out objective and recognizable criteria for identifying the competent court or authority and avoiding duplications. This implies that as long as a variety of jurisdictions is involved, the same situation assumes different legal values: the same question may find different answers. And the answer often depends on the methodology applied, in particular the rules of procedure and evidence peculiar to a given justice system.

The polycentric approach requires an ever-increasing interaction among legal systems, both with respect to investigation methods and to the forms of safeguards of fundamental rights. This can lead to a certain level of harmonization—for which at least the Europeans have been striving for years—starting from a common recognition of general principles at the constitutional level. Another inevitable consequence is the need for a dialogue among the courts, especially among supreme or constitutional courts of each state and the international human-rights courts. An example could be, in Italy, the well known decisions of the Constitutional court on the obligation on the national judge to interpret national law, as far as possible, in conformity with the rules established by the ECHR, which in turn is subject to binding interpretation only by the ECtHR.[6]

More generally, internationalization requires that specific attention be dedicated, even in common practice, to comparative and foreign law. The more international cooperation that is needed for transnational inquiries, the more juridical tools will have to be refined, requiring an improvement in mutual knowledge of legal systems and adaptation of the modes of operation.

After these preliminary remarks, which must be kept short even though they go to the very roots of the question, let us turn our attention to the programme of today's conference. Here we can speak of at least three levels of discussion: (a) judicial cooperation among states; (b) relationships with the ICC and other

[5] Burchard (2010), p. 51.

[6] ICCt, Decisions 348/2008 and 349/2008. See also ICCt, Decision 80/2011. See however Caianiello (2011), p. 686, on the direct application by the national judge, of the ECHR and the EU FRCh as European Union law, after the entering into force of the Lisbon Treaty, which incorporates both sources.

ad hoc tribunals; and (c) European integration in criminal justice, both at European Union level and with reference to the Council of Europe and the ECHR.

2.1 Transnational Cooperation: Scope and Limits

We can find a definition of transnational crime in Article 3 of the United Nations Palermo Convention of 2000 mentioned above. Article 3(2) states that an offence is transnational in nature if it is committed in more than one state, if a substantial part of its preparation takes place in a state other than the one where it is committed, if it involves organized criminal groups active in more than one State, or if it has substantial effects in another state. In such cases the Convention applies to criminal activities undertaken by organized criminal groups; to money laundering; to corruption; to obstruction of justice; and also to other serious crimes (defined by Article 2 as those punishable by a maximum deprivation of liberty of at least 4 years). In addition, it must be remembered that the Protocol against trafficking in persons, the Protocol against the smuggling of migrants, and the Protocol against trafficking in firearms, have all been annexed to the Convention, albeit at different times.

The Palermo Convention provides a broad spectrum of cooperation instruments. Among others, it is worth mentioning mutual assistance in the enforcement of coercive measures (arrest, seizure, confiscation); the rules for establishing jurisdiction over the offence and coordinating state actions in this respect; the improvement in mutual assistance in taking evidence and providing information; the establishment of joint investigative bodies; the conclusion of agreements on the use of special investigative techniques; and the establishment of channels of communications between the competent authorities.

Moreover, one must keep in mind the numerous international conventions against terrorism. Without enumerating all of them, it might be sufficient to say that there have been as many as 13 from 1963 to 2005. The fight against terrorism has opened new scenarios in cross-border judicial cooperation, not just criminalization and punishment of specific conduct with severe penalties. Besides the engagement in mutual assistance, it is worth pointing out the freezing of assets, through the United Nations or through multilateral and bilateral initiatives; and, in particular, a sort of first step towards the universal jurisdiction for such kind of crimes, based on the principle *aut dedere aut iudicare*.

It is all too obvious that the international framework has been reflected in domestic legislation, leading to a profound transformation in the criminal justice system and procedural law. Things have progressed so far that the issue of the human-rights compatibility of these measures, adopted in the interest of global security in the fight against terrorism and organized crime, has become an urgent one. The issue was addressed to by the XVIII Congress of the International Penal Law Association held in Istanbul in September 2009. The Resolution adopted within Section III of the Congress (Special Procedural Measures and Protection

of Human Rights) emphasizes in the preamble the endeavour "to raise standards in the area of combating organized crime and terrorism, by which law enforcement, security, and human rights are not mutually exclusive."[7]

The content of the Resolution must be recalled here because it draws up a series of tenets that should always be taken into account, no matter how urgent the need to take emergency measures could be.

In general, states should respect human rights and accept the jurisdiction of human rights courts. The punitive reaction to crime is reserved to criminal courts of justice and should not be replaced by administrative measures. The said court is defined as being an independent, impartial and regularly constituted judge, with prohibition of extraordinary courts. In any case non-derogable rights such as the right to life, the prohibition against torture and the right to recognition as a person before the law and to equality under the law should under no circumstances be infringed.[8]

In particular, with regard to investigative powers and fair trial, the presumption of innocence and the right to remain silent must be respected, as well as defence rights and equality of arms. The remedy of *habeas corpus* must be available in every case of police arrest and detention. Equality of arms includes the same access to evidence for both parties. In the end, evidence obtained by means that constitute a violation of human rights or domestic legal provisions shall be inadmissible.[9]

2.2 *Cooperation with the ICC and* Ad Hoc *Tribunals*

Cooperation of the states with international criminal tribunals is not simply a means for improving effectiveness of law enforcement and for a smooth collection of information and evidence in foreign countries. It is an indispensable prerequisite for allowing such courts to operate. In other words, the ICC and *ad hoc* tribunals are not empowered to exercise coercive powers, and are obliged to rely on the active help of states in order to start proceedings, to ascertain the facts, and to execute a sentence.

Sovereign states, even if they are parties to the treaties which have established the international jurisdiction and imposed the related duty to cooperate, maintain discretionary powers over the modes of their cooperation. The international tribunals have given themselves the power to issue cooperation orders,[10] but the actual enforcement of an order depends on the willingness of the requested institution.

[7] Minutes of the Congress (2009), p. 548.

[8] Minutes of the Congress (2009), pp. 548–549.

[9] Minutes of the Congress (2009), pp. 550–551.

[10] See, *e.g.*, ICTY, 18 July 1997, Prosecutor v. Blaskić; ICTY, 12 March 1999, Prosecutor v. Radislav Krstić.

The issue of the protection of individual rights in front of international tribunals intertwines with the need to guarantee the national interests of the state or the states involved. Which right should have priority could be a difficult choice, depending on the circumstances of the case. Take for instance the possibility for the tribunal to make an agreement with a state in order to get information on the condition of confidentiality[11]: as a consequence, the data received must remain secret, and perhaps even the evidence collected may not be used at trial. This could lead to a violation of the defendant's rights as far as exculpatory evidence is concerned.[12] On the other hand, the states' consensus is vital for international justice, and the use of such investigation methods might be crucial in pursuing and punishing war crimes or crimes against humanity.

As regards fair trial guarantees, it must also be considered that cooperation by state agencies with the tribunal might involve conduct which, according to international standards, would entail a violation of fundamental rights. Since legal provisions on admission and exclusion of evidence are not always uniform, the question arises of whether evidence resulting from a violation by the state of due process guarantees would be admissible at trial before the international tribunal. Can the court take advantage of the results of an illegal action of the cooperating authority? A problem in some respects similar occurs within the American federal system, regarding the relationship between state and federal jurisdiction. Following the so called "silver platter doctrine", state officials used to be allowed to turn over illegally obtained evidence to federal officials, and have that evidence be admitted into trial. But in the end such jurisprudence was reversed, and held unconstitutional under the Fourth and the Fourteenth Amendments to the US Constitution.[13] Should we apply the same approach to international tribunals, evidence obtained from an illegal arrest, unreasonable search, illicit wiretapping or coercive interrogation would be certainly excluded from trial, according to the so called "fruit of the poisonous tree"[14] doctrine, and the international tribunal would be assigned the task to verify the lawfulness of the action of state agencies. However, according to Article 69 paragraph 8 of Rome Statute of the ICC, "when deciding on the relevance or admissibility of evidence collected by a state, the Court shall not rule on the application of the state's national law."

The problem becomes more complicated when the action of the state is taken following a cooperation order by the tribunal. Does the order involve a responsibility on the issuing tribunal for any violation of individual rights?

[11] See Rome Statute of the ICC, Article 54(3)(e).

[12] In the Lubanga-Dyilo case, the ICC decided the stay of the prosecution as a consequence of non disclosure of exculpatory evidence according to Article 54(3)(e) of the Statute (ICC, 2 July 2008, Prosecutor v. Thomas Lubanga-Dyilo). The decision was reversed by the Appeal Court (21 October 2008).

[13] USSC, Elkins v. U.S., 364 U.S. 206 (1960).

[14] As first named by USSC, Nardone v. U.S., 308 U.S. 338 (1939).

In any case, Article 69(7) of the Rome Statute provides that evidence obtained by means of a violation of internationally recognized human rights shall not be admissible. But at the same time it says that such evidence is not admitted only if the violation casts substantial doubt on its reliability or if the admission would seriously damage the integrity of the proceedings. So the court enjoys a broad discretion in evaluating the consequences of any violation: as a result, the eagerness to ensure punishment of crimes, however serious, might at times overcome the need to protect human rights.

A further problem is the lack of effective remedies against the possible violation of human rights, and generally of the right to a fair trial, if perpetrated by the international tribunal itself. Human rights courts have no jurisdiction over international tribunals. Not even the International Court of Justice can be addressed for such violations, since it only has jurisdiction over disputes between sovereign states. The International Court of Justice is able at most to deal with questions of jurisdiction.

However, Article 21 of the Rome Statute recognizes as applicable law the general principles of law derived by the court from national laws of the legal systems of the world, and includes a final clause stating that the application and interpretation of law must be consistent with internationally recognized human rights.

2.3 The European Perspective

European law on protection of fundamental rights develops on the basis of two different, although concentric, sets of rules. The outer circle refers to the Council of Europe, which gathers 47 states, all of them parties to the ECHR, and the inner one refers to the 27 states bound by the TEU.

Within the European Union, the basic norm is Article 6(1) of the TEU, which refers to the EU FRCh. As set out above, there is a strong connection between the rights recognized by the EU FRCh and the ECHR: Article 52 of the EU FRCh states that the rights recognized therein which correspond to rights guaranteed by the ECHR are the same in meaning and scope (without prejudice for Union law providing more extensive protection).

As regards criminal justice, the Treaty of Lisbon of 2007 has had a considerable influence on the existing legislation at European Union level. The AFSJ, belonging to the former third pillar, is now subject, as the other fields of action, to the qualified majority principle in the Council of the European Union and to the procedure of co-decision with the European Parliament. The Council and Parliament are entitled to adopt not only framework decisions but also self-executing directives subject to the *acquis communautaire*, provided that they are detailed enough.

In 2009, the Council adopted a resolution on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, which was later included in the Stockholm programme of the same year. The suggested measures concern the right to translation and interpretation, the right to information

on rights and information about the charges, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and special safeguards for suspected or accused persons who are vulnerable.

At present only the directive on the right to interpretation and translation in criminal proceedings has been adopted, while a directive on the right to information (so called 'letter of rights') is still under way. It should be noted, as mentioned before, that no action has yet been taken for a substantial implementation of the basic due process guarantees and defence rights, as enshrined in the ECHR and in the EU FRCh. It seems difficult to predict further developments in that direction.

On the other hand, emphasis is usually put on the Union's ability to fight crime and terrorism and to respond to threats to the security of European citizens. A common criminal policy requires coherent and consistent legislation, and common rules facilitating cooperation and mutual trust among the judiciaries and law enforcement authorities of the member states. After Lisbon, planned improvements in the field of criminal justice include the strengthening of the role of Eurojust and the creation of a European Public Prosecutor's Office.

Even before Lisbon, several measures had already been adopted in order to improve cooperation. Particularly notable is the Framework Decision on the European evidence warrant (which Italy has not yet implemented through domestic legislation). This instrument applies the principle of mutual recognition to a judicial decision for the purpose of obtaining objects, documents and data in criminal proceedings, speeding up the process by which the evidence is transferred from one state to another. Cross-border investigations are thus made more efficient for the prosecution, as the warrant seems to be advantageous chiefly to law enforcement agencies: in particular, it is not specified that the mechanism should be available for use by the defence or accused.

A further step forward might be represented by the proposed directive on the European investigation order. The declared objective is to create a single, efficient, and flexible instrument for obtaining evidence located in another state.[15] Such an instrument would replace, as far as obtaining evidence is concerned, mutual assistance protocols and convention, as well as the framework decision on the evidence warrant.

Some criticism was raised as to the impact of the original draft proposal for a directive on an European investigation order on individual freedom, with reference, for example, to the incomplete judicial control and the lack of a proportionality test[16]; and so the suppression of the double criminality rule.[17]

Apart from that, the trend is increasingly towards a speedy and easy exchange of evidence from one state to another. The main problem with the transfer of evidence is the setting out of specific criteria for its validity and admissibility, since the rules on gathering and handling evidence can vary significantly in different legal

[15] See Jiménez-Villarejo (2011), p. 176.

[16] Sayers (2011), p. 16.

[17] Jiménez-Villarejo (2011), pp. 183–188; Sayers (2011), p. 8.

systems. In the absence of common minimum standards, a piece of evidence might be transferred in violation of these rules and in complete disregard of fair trial guarantees. What if the methods for the collection of evidence following an investigation order violate the law of the requested state? Would the court of the issuing state be allowed to scrutinize the application of the foreign law, in order to admit that evidence? And conversely, what if a procedure properly followed conflicts with the general rules of or an individual right recognized by the issuing state?

It is apparent that the roots of the problem lie with the very premise of European cooperation in the AFSJ. Mutual recognition alone might be quite insufficient without the adoption of common standards and the approximation of national legislation. Harmonization is one of the political objectives of the European Union, but it is a very difficult task, especially in the field of criminal law and procedure, which more than others involves issues of state sovereignty. Yet this is the only way to achieve that mutual trust which so often has been declared as the basis of mutual recognition. And, last but not least, setting common standards at procedural level might prove to be ineffective until a real harmonization of substantial criminal law is reached, with reference to the types and definitions of criminal offences.

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Part II
Multilevel Protection of Fundamental Rights in Transnational Investigations

Transnational Inquiries and the Protection of Human Rights in the Case-Law of the European Court of Human Rights

Richard Vogler

Contents

Abstract This chapter examines the existing approach taken by the European Court of Human Rights in relation to problems arising from transborder inquiries. It argues that the rights of defendants are particularly vulnerable in connection with such inquiries, and may often slip through the jurisdictional cracks between nations. The chapter examines the Court's caselaw in a number of areas relevant to international investigation; notably the transfer of witness evidence, the foreign provision of information and DNA evidence, the time taken by inquiries, the recognition of foreign judgements and extradition. It is suggested that this caselaw cannot provide an adequate and comprehensive basis for the protection of rights in transborder inquiries, particularly during a period in which new investigatory methodologies, such as the European Investigation Order or common access to DNA databases, are proliferating.

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Abbreviations

AFSJ	Area of Freedom, Security and Justice
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMACM	European Convention on Mutual Assistance in Criminal Matters
ECO	European Confiscation Order
ECoHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EEO	European Enforcement Order
EEW	European Evidence Warrant
EFO	European Freezing Order
EIO	European Investigation Order
EPO	European Protection Order
ESO	European Supervision Order

1 Introduction

International inquiries present a very different and much more complex array of challenges to human rights than domestic inquiries. "Process-laundering"[1] and "Forum-Shopping,"[2] for example, allow international investigators in many cases to target states with the weakest rights protections for particular investigative procedures and prosecutions. The rights of suspects in international cases also have a tendency to slip through the jurisdictional cracks between nations. How can an individual in one country know that evidence is being collected about him or her in another country, still less have the resources to investigate and challenge its validity? How can anyone who is burdened with "arguing his or her defence in at least two states with different languages and different procedural codes"[3] hope to protect their interests?

There is no doubt that the slow and cumbersome inter-state investigatory procedures which have been bequeathed to us by the system of *Commissions Rogatoires* and Mutual Legal Assistance Treaties[4] represent an inadequate response to the growing flexibility and sophistication of internationally mobile crime.[5] However in recent decades we have witnessed an acceleration in the development of strategies for mutual assistance between European states in criminal matters, which

[1] Gane and Mackarel (1996).

[2] Luchtman (2011).

[3] Zimmermann et al. (2011), p. 71.

[4] Such as the much-amended 1959 ECMACM.

[5] Shelley (2010).

is unprecedented at any time or in any place. In order assist our understanding of the direction of travel of such initiatives, Van Hoek et al.[6] have very helpfully set out four models of international assistance which can be seen as representing progressive shifts in favour of the requesting state and its interests:

1. The first is the *Rechtshilfe* model, where a state receives a request for assistance from another and may decide whether or not to assist based upon its own national discretion. On the principle *locus regit actum*, any such inquiries would be conducted in accordance with the law of the requested state. This is very much the approach adopted by the 1959 ECMACM.
2. The second model is similar to the first but the requested state has no discretion to refuse the enquiry, although evidence is still collected under the *locus regit actium* principle.
3. The third model envisages that the powers of the requested state are delegated to the requesting state to act directly under their authority and under that of the law of the requesting state.
4. The fourth model is where the requested state allows the authorities of the requesting state to carry out investigations directly on its territory. Examples of this might be "hot pursuit" arrangements under the Schengen Treaty.

Elements of all four models can be distinguished in the new approaches which have been being introduced in Europe since the landmark Lisbon Treaty of 2007. "Mutual recognition" conceived along the lines of Van Hoek et al's second model, is increasingly being identified as the "motor of European integration in criminal matters"[7] and as an essential basis for judicial cooperation.[8] This is a doctrine which has been transferred from the Single Market to the criminal law field with, according to Sayers "scant regard to the differences in contexts or rationale."[9] Instead of being protective, it has instead rapidly become a threat to human rights because, as Keijzer puts it "the common market is interested in the distribution of well-being; the business of criminal law is meting out suffering."[10]

There is insufficient space here to examine in detail the wealth of existing initiatives in transnational European inquiries, such as the EAW, the EFO, the ECO, the EEW, the EEO and/or the ESO and the EPO. These schemes have already raised profound due process concerns and they have not yet been fully tested against ECHR jurisprudence. However, it is now proposed to take this process a significant step further and to end this "fragmentation"[11] with the introduction of the EIO which would provide:

[6] Van Hoek et al. (2006), p. 63. See also the six "cluster" models proposed in Vermeulen et al. (2010b).

[7] Mitselegas (2009), p. 6.

[8] Suominen (2011).

[9] Sayers (2011), p. 3.

[10] Cited in *ibid.*

[11] European Commission (2009).

> a comprehensive system to replace all the existing instruments in this area . . . covering as far as possible all types of evidence and containing deadlines for enforcement and limiting as far as possible the grounds for refusal.[12]

It is encouraging that the text of the original initiative asserts that:

> This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and by the Charter of Fundamental Rights of the European Union, notably Title VI thereof.[13]

However, the EIO regime itself fails completely to establish clear provisions for a fair trial, such as access to a lawyer, the presumption of innocence or equality of arms. A failure of due process is not in any event, a ground for a refusal to execute[14] any more than is double jeopardy, dual criminality or lack of proportionality.[15] Many commentators have argued, however, that these radical transitions in international investigations cannot be safely undertaken before the due process protections announced under the 2009 Stockholm programme[16] have been put in place.[17] Moreover, given the unique vulnerability of defendants facing international investigations, these protections should surely *exceed* those currently available in domestic proceedings.

The proposals for international investigations mentioned above have been described as "a fundamental threat to the rule of law"[18] and deserve a wider human rights scrutiny than is possible within the scope of this discussion. Equally, any consideration of the developing competence of the European Court of Justice in the Area of Freedom, Security and Justice is also outside the ambit of this review. Instead, in order to establish the existing baseline for the debate over these new measures, I will focus on the current approach taken by the ECtHR to the problem of transnational enquiries within the Council of Europe area. The intention is to consider to what extent the existing "shield" protections which have been developed by the ECtHR, are adequate to meet the increasing demands of the new "sword" measures which are being created in Europe.

To carry out this task I will look at the jurisprudence of the ECtHR as it concerns some of the most important modalities of international inquiries, such as the gathering of witness and other evidence overseas, the delays occasioned by foreign inquiries, the problems of extradition of suspected persons and the recognition of foreign judgements. Human rights, for these purposes will be defined in terms of the ECHR process provisions, Articles 3 (freedom from torture), Article 5 (freedom from unfair detention), Article 6 (right to a fair trial) and, to some extent Article 8 (right to privacy and family life).

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[12] Article 6, Council of the European Union (2010).

[13] *Ibid*., Article 17.

[14] Sayers (2011), p. 12.

[15] Peers (2010), p. 6.

[16] Guild and Carrera (2009), pp. 1–11.

[17] Murphy (2011).

[18] *Ibid*., p. 7.

2 Witness Evidence

Arkadiusz Lach has argued that cooperation in evidence gathering has become the most important topic in the Third Pillar area.[19] Mechanisms are currently hopelessly out of date and requests not infrequently go astray or are lost in a manner which scarcely contributes to the establishment of the proclaimed AFSJ. International teleconferencing of evidence, although considered by the ECtHR not to contravene Convention rights[20] is scarcely any substitute for face to face encounter with witnesses in court.

One of the obvious initial problems in establishing a mutually secure system of rights protection in this area is that the ECHR has no imperative provisions regarding evidence, which is a matter left largely to national jurisdictions. Generally the principle of *locus regit actum* will apply. However, a further systemic difficulty in many current cases involving overseas witnesses, particularly those that are spread across the common law/civil law fault line, is that an interview conducted by officers purely as pre-trial preparation, may itself become the evidence when transferred to a foreign court. States asking other states to take evidence abroad may therefore find themselves potentially involved in breaches of the right of the accused under Article 6 (3)(d) ECHR "to examine or have examined witnesses against him."

This was exactly what happened in *AM v. Italy* (1999).[21] G (who was a minor) complained on his return to the US of an indecent assault committed during a holiday in Italy. The Florence prosecutor sent *Lettres Rogatoires* to the Seattle police asking them to interview the complainant G., his father (Mr D.) and Miss F., the doctor in whom G. had first confided. The prosecutor set out in detail the questions which he considered should be put to the witnesses and the manner in which the record of interview should be drafted. He insisted that no lawyer should be present during the interview. The US authorities decided that it would be traumatising to interview G so instead they interviewed the mother and a child therapist in California, all of whom gave hearsay accounts with no lawyer present. This evidence was duly read into the trial record in Florence and AM was convicted. Under the *locus regit actum* principle, acts performed under *Lettres Rogatoires* had to be regulated by the law of the foreign State, provided that the foreign law was not incompatible with Italian public order and in particular "defence rights." The applicant in this case pointed out that witnesses not specified in the *Lettres Rogatoires* had been interviewed by an authority to which the request had not been addressed! Moreover, no lawyer had been present when the interviews and herarsay statements were obtained and the persons concerned had not been

[19] Lach (2009), p. 109. The "Third Pillar" area is now known as "Police and Judicial Co-operation in Criminal Matters."

[20] ECtHR, 5 October, 2006, Marcello Viola v. Italy, Application No. 45106/04 and 8 January 2008, Conde Nast Publications Ltd & Carter v. UK, Application No. 29746/05.

[21] ECtHR, 14 December 1999, AM v. Italy, Application No. 37019/97.

asked to take the oath. This indicated that the documents did not constitute "testimony," but merely "preliminary investigative acts." Because there was no opportunity for the defence to challenge the evidence of the prosecution witnesses, and it had not been established that the procedure adopted offered the "accessibility and effectiveness" required by the US/Italy Mutual Assistance Treaty, there was a breach of Article 6(3)(d).

This case can be distinguished from *Solakov v. The Former Yugoslav Republic of Macedonia*[22] where witnesses (whose evidence proved to be very incriminating) were interviewed directly by a Macedonian Examining Magistrate in the US, without a lawyer being present. In fact, the lawyer had been given this opportunity but decided that it was not necessary to attend, so had waived the right and there was therefore no violation of Article 6(1) and (3)(d). Similarly, in 2010 the case of *Sommer v. Italy*[23] (arising from the wartime massacre of Sant'Anna di Stazzema) was held to be inadmissible by the Commission, notwithstanding that a witness whose evidence was read out at the trial had been examined abroad and not called in person. The defence had exercised the opportunity to attend the interview and this was not the only evidence.

The active support by the ECtHR for mutual assistance in criminal matters has been demonstrated in a number of cases. In *Rantsev v. Cyprus and Russia*[24] the court emphasised that a failure to take advantage of the opportunity to obtain extra-territorial evidence could in itself amount to a procedural breach of the Right to Life enshrined in Article 2 ECHR. In this case a Russian cabaret artiste died in unexplained circumstances in Cyprus. Incredibly, given the very suspicious facts surrounding her death, including an autopsy carried out in Russia when the body was returned, the Cypriot authorities concluded that it was accidental and there was no need for any prosecution. They even refused an unsolicited offer of help by the Russians and declined to ask them to interview two women who had worked with the deceased at the time of her death. In finding a procedural breach of Article 2 (by Cyprus but not by Russia) the Court made it clear that member States were required to take necessary and available steps to secure relevant evidence, whether or not it was located on their territory, particularly in a case such as the instant one, in which both States were parties to a convention providing for mutual assistance in criminal matters.[25]

[22] ECtHR, 31 October 2001, Solakov v. The Former Yugoslav Republic of Macedonia, Application No. 47023/99.

[23] ECtHR, 23 March 2010, Sommer v. Italy, Application No. 36586/08.

[24] ECtHR, 7 January.2010, Rantsev v. Cyprus and Russia, Application No. 25965/04.

[25] At 241.

3 Foreign Provision of Information

The same principles seem to apply in the case of other kinds of evidence, such as tape-recordings obtained in breach of Convention rights in a another member state, or in a manner which would have been in breach of Convention rights, had they been applicable in the foreign state. Here again, public interest in mutual assistance seems to take precedence over a strict interpretation of Convention rights. For example, in *Chinoy v. UK*,[26] the applicant was contesting extradition from the UK to the US where he would face serious money-laundering charges. The US authorities had waited until he travelled from France to England to arrest him in a classic exercise of "process-laundering."[27] Evidence presented by counsel on behalf of the US included tapes of private conversations covertly recorded by US Drugs Enforcement Agency (DEA) officials in France. A number of distinguished French academics, including Professors Soyer and Pradel were called to give evidence that the investigation was carried out without the knowledge of the French authorities, in breach of French sovereignty and without resort to the accepted procedures governing mutual assistance between the respective governments. The expert evidence also concluded that the actual recording of the conversations, constituted offences contrary to Article 368 of the French Criminal Code and that the dissemination of the recordings was contrary to Article 369 of that Code. Nevertheless, the Court found that the English court was not acting in an arbitrary way or in breach of Article 8 rights to family life by admitting the evidence of the tape recordings, particularly since only business conversations and not those relating to the complainants family, were relied upon.

Moreover, in the case of *Echeverri Rodriguez v. Netherlands*[28] the applicant, a Columbian convicted of smuggling drugs into Holland, complained that the US authorities had tapped his telephone in the US in breach of his Convention rights and provided the Dutch police with a transcript of conversations which were used in the Dutch Court to convict him. In finding that the application was manifestly ill-founded, the Court noted that there is nothing in the Convention to prevent evidence from foreign sources, however obtained, being used at the investigating stage. But there seems to be a more rigorous test for the use of such evidence at trial. It pointed out:

> ... the subsequent use of such information can raise issues under the Convention where there are reasons to assume that in this foreign investigation defence rights guaranteed in the Convention have been disrespected.

[26] ECtHR, 25 June 1991, Chinoy v. UK, Application No. 15199/89.

[27] Gane and Mackarel (1996).

[28] ECtHR, 27 June 2000, Echeverri Rodriguez v. Netherlands, Application No. 43286/98.

However, in this case there were no such reasons. A similar principle of qualified non-inquiry seems to apply to evidence obtained through searches and seizures carried on in a foreign state.[29]

The international transfer of biometric information and DNA evidence presents a specific set of difficulties involving potential assaults on Article 6, right to a fair trial, Article 8 right to privacy, and to general data protection principles. Different states may operate different technologies and have different levels of safeguards and different analysis procedures. This was recognised as long ago as 1992 when the Committee of Ministers endeavoured to establish the principles to be observed in collecting and analysing such evidence, insisting that:

> (t)ransborder communication of the conclusions of DNA analysis should only be carried out between states complying with the provisions of this recommendation and in particular in accordance with the relevant international treaties on exchange of information in criminal matters and with Article 12 of the Data Protection Convention.[30]

Notwithstanding these concerns, the European Union Council of Ministers, under its Hague Programme for Strengthening Security, proposed what it described as an "innovative approach to the cross-border exchange of law-enforcement information."[31] From January 2008 these exchanges would be governed by the "principle of availability,"[32] involving direct, reciprocal access to national databases using the full range of new technologies. The plan involved six safeguards but, according to Bunyan:

> (t)he accessing and processing of data/intelligence within the EU and outside – about which the individual will have no right to be informed – may well take on ominous implications with the growth of "watch-lists" (eg: to travel, financial transactions etc.).[33]

In furtherance of the Hague agenda, some of the Schengen states signed the Prüm Convention[34] in 2005, which encouraged the collection, autotomated exchange and analysis of DNA data, fingerprints and vehicle registration numbers between signatories. The Convention has been subjected to intense criticism for the manner of its creation and subsequent translation into the EU *Acquis*, without the greater consultation and scrutiny which it should have received under the Lisbon Treaty.[35] It has also been criticised for failing to address human rights concerns:

> (u)neven participation of EU member states and non-EU member states in EU systems of information exchange not only poses problems as regards complexity and comprehensibility of the systems but also as regards democratic control and the coherent protection of fundamental rights.[36]

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[29] See ECtHR, 6 March 1989, S. v. Austria, Application No. 12592/86.

[30] Paragraph 12 of the Council of Europe Committee of Ministers (1992).

[31] See Geyer (2008), pp. 2–3.

[32] Bunyan (2007).

[33] *Ibid*., p. 7.

[34] See Council of the European Union (2005).

[35] McGinley and Parkes (2007), pp. 10–11; McCartney et al. (2011), pp. 314–315.

[36] Geyer (2008), p. 10.

No case involving DNA or biometric data transfer has yet reached the ECtHR but this is surely only a matter of time. Domestic misuse of DNA by unnecessary retention of samples was the subject of forthright criticism by the court in *S & Marper v. the United Kingdom*.[37] The court took the view that:

> the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests.[38]

Such *dicta* seem hardly compatible with the current regime of automatic searching and transfer.

4 Time Taken by Inquiries

Article 6(1) ECHR requires a fair trial "within a reasonable time." However, international inquiries obviously take considerably longer than domestic ones. Even in an age of instantaneous communications, extra time may be needed for routing inquiries via different national authorities, for obtaining the necessary consents, for translation and for the officers in the requesting state to familiarise themselves with the case. The ECtHR has therefore been more indulgent with time delays than would be the case in domestic procedures. However, it has distinguished sharply between different circumstances, taking into account the behaviour of both the requesting state, the requested state and the complainant. For example, in *Ikanga v. France*[39] where the Examining Magistrate sent off a *Commission Rogatoire* to Zaire and then took no further follow-up action in a procedure which lasted for six years, there was a clear breach of 6(1). Equally in *Pietiläinen v. Finland*[40] the complainant was the co-accused in a tax fraud case together with "MI", who was living in Germany and refusing to respond to Finnish summonses. The German authorities failed to co-operate and again the delay resulted in a breach of Article 6(1). However, in *Włoch v. Poland*[41] a case involving allegations of trading in children, where delays were caused by the failure of the Italian, French and US authorities to respond in a timely way to *Lettres Rogatoires*, the Polish government did all it could to expedite inquiries in those countries but to no avail. There was therefore no breach of 6(1). In *Sari v. Turkey and Denmark*[42] the two

[37] ECtHR, 4 December 2008, S & Marper v. the United Kingdom, Application No. 30562/04 & 30566/04. See also the decision of the ECJ, 16 December 2008, Heinz Huber v. Germany, C-524/06.

[38] ECtHR, S. & Marper v. the United Kingdom (footnote 37), § 112.

[39] ECtHR, 2 August 2000, Ikanga v. France, Application No. 32675/96.

[40] ECtHR, 22 September 2009, Pietiläinen v. Finland, Application No. 13566/06.

[41] ECtHR, 19 October 2000, Włoch v. Poland, Application No. 27785/95.

[42] ECtHR, 8 November 2001, Sari v. Turkey and Denmark, Application Nr. 21889/93.

countries involved in a simple homicide prosecution wrangled for 8 years over jurisdiction and who would provide evidence to whom. In the end the complainant took matters into his own hands, fled Denmark and disappeared for 2 years. He was eventually recaptured and sentenced by Turkey to 5 years imprisonment. In finding no breach of Article 6(1), the ECtHR took the view that Mr. Sari had himself contributed to the delay and that international inquiries, for which both countries had to take responsibility, were nevertheless inherently lengthy.

5 Recognition of Foreign Judgements

The main issue in relation to the recognition of foreign judgements in this context is whether a state is obliged to inquire if a judgement of a court in another state was reached in accordance with Article 6 provisions before it enforces the judgement or acts in accordance with it?[43] In *Drozd & Janousek v. France and Spain*[44] the applicants were convicted of armed robbery by an Andorran court, sitting with French judges. They complained that identity procedures had been flawed, they hadn't had proper access to a lawyer, the prosecution witnesses weren't isolated and the whole proceedings were conducted in Catalan, a language which neither understood. On conviction they elected to serve their 14 year sentences in France as Andorra had inadequate prison facilities. This gave them the opportunity to complain against the French government to the ECtHR (which, unlike Andorra, was a Council of Europe member state) that the original proceedings had been conducted in breach of Article 6 and France, by enforcing the penalty was upholding a flawed procedure. The view of the ECtHR was that:

> (a)s the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 (Article 6) of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.[45]

These principles apply irrespective of whether the state in which the alleged breaches occurred was a Convention state or not. It does, however seem entirely contrary to the spirit of a state's obligations under the ECHR to require it to uphold automatically a judgement reached in clear (if non-flagrant) breach of Article 6. However, as Van Hoek and Luchtman point out, this dilemma is avoided when the

[43] Clearly the jurisprudence of the ECJ suggests that this question should be answered in the negative. See Borgers (2010).

[44] ECtHR, 26 June 1992, Drozd & Janousek v. France and Spain, Application No. 12747/87.

[45] At 110.

complainant has failed to exhaust domestic remedies in the state where the breaches took place. This would amount to a waiver of Article 6 rights![46]

6 Extradition

In some cases the ECtHR has looked on extradition as not so much a criminal prosecution but mere procedural assistance.[47] But the court has always acknowledged that there is a balance to be struck between the legitimate interests of transnational co-operation in criminal matters and the protection of human rights against flagrant abuse. For example, in *Soering v. UK*[48] the principle was established that a Member State will violate its obligations under the ECHR if it permits extradition of an individual to a foreign state where the person would be likely to suffer inhumane or degrading treatment or torture contrary to Article 3 ECHR. The case involved the proposed extradition of German citizen to the USA, a non-member state, where he would be held, if convicted, on death row for a lengthy period. The judgement was contentious, not only because it concerned a future, rather than an actual breach of rights but also because it raised the prospect (in the eyes of some commentators at least) of the ECtHR attempting to impose its standards on non-member states. In determining whether an extradition is merely procedural assistance in the interests of transnational cooperation in criminal matters or whether human rights issues are engaged, the courts must balance the competing interests and consider questions of proportionality.

The EAW[49] is a mandatory fast-track extradition procedure which EU states are required to enact in their legislation on the basis of "non inquiry" in individual cases and with no discretion to refuse a request based on human rights concerns.[50] Who then, is responsible for breaches of human rights arising from the compliance of a member state with mandatory EU requirements? This question was answered to some extent in the case of *Bosphorus Hava Yollari Turizmve Ticaret AnonimSirket v. Ireland*[51] which involved the impounding of a Yugoslav aircraft by Ireland in pursuance of the EU sanctions regime. It was held that the ECtHR is able to undertake an unlimited review of EC measures adopted by member states where there is discretion as to their implementation but only a limited review where they

[46] Van Hoek et al. 2006, p. 43.

[47] See ECoHR, 6 July 1976, X v. Netherlands, Application No. 7512/76; 6 March 1991, Polley v. Belgium, Application No. 12192/86; 18 January 1996, Bakhtiar v. Switzerland, Application No. 27292/95.

[48] ECtHR, 7 July 1989, Soering v. UK, Application Nr. 14038/88.

[49] Council Framework Decision 2002/584/JHA of 13 June 2002.

[50] Although a number of states have introduced a human rights conditionality into their national legislation.

[51] ECtHR, 30 June 2005, Bosphorus Hava Yollari Turizmve Ticaret AnonimSirket v. Ireland, Application No. 45036/98.

have no discretion. The restriction to a "limited review" is based on the principle that the EU protects fundamental rights "as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides." The court further pointed out that "equivalent," meant "comparable" and not "identical."[52] Some commentators have argued that this was not a policing case and since the human rights protections in the Justice and Home Affairs area are clearly not yet sufficiently developed to ensure complete mutual confidence between member states, individual governments and the ECtHR itself, are still entitled to exercise full scrutiny, notwithstanding the "limited review" restrictions indicated in *Bosphorus*.[53] It is yet to be seen whether the ECtHR will consider that the EAW is more than "procedural assistance" and engages Article 6 (right to a fair trial) and Article 5 (right to liberty). If so then, as Sanger puts it "the rebuttable presumption that the EU and the ECJ (European Court of Justice) protects human rights to an equivalent level may come under scrutiny."[54]

7 Conclusion

To some extent, in its enthusiasm for encouraging mutual cooperation in transnational inquiries, the ECtHR seems to have taken a strong position that this imperative public policy interest overrides concerns about breaches of human rights committed abroad except in the most flagrant cases. This abdication is described euphemistically as the "*effet attentué*." In the legal no man's land of transnational inquiries, responsibility for breaches of Convention rights can be conveniently offloaded onto the other state concerned or onto international promoters of mutual assistance such as the EU. Worse still, the growing pressures to establish mutual recognition amongst sister states within the EU Area of Freedom, Security and Justice, have encouraged reliance on the principle of "non-inquiry"—the acceptance of foreign procedures and evidence at face value and without further scrutiny, before such confidence is fully justified and before the counterbalancing standards envisaged by the Stockholm process have been put into place.

It has been strongly argued that the ECtHR, with its incapacity to deal with issues of evidence, its case overload and the uncertainty of enforcement of its judgements, cannot hope to provide adequate oversight of a pan-European regime of evidence exchange as envisaged in the contemporary proposals outlined above.[55] Moreover, the objects of such investigations, so far from requiring only the *minimum* protections offered by the ECHR jurisprudence or the baselines envisaged in the

[52] At 155.

[53] Sanger (2010), p. 43.

[54] *Ibid*.

[55] Vermeulen et al. (2010a), pp. 49–50.

Stockholm process, actually require *enhanced* protection because of their uniquely vulnerable situation.[56]

There is no reason of principle why, as international criminal co-operation in Europe shifts from being a primarily diplomatic matter to a largely judicial one, that a court in London should have any more difficulty in verifying the legality of a domestic search carried out on its behalf by the *Police Nationale* in Paris, than one carried out by the London Metropolitan Police. This is an entirely legitimate ambition. However, the current tendency to press ahead with reciprocal policing and investigation procedures based on mutuality and non-inquiry before appropriate universal due process standards have been put in place, suggests that we may be entering a very dangerous and turbulent era in the development of European human rights.

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[56] *Ibid*., p. 57.

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The Inter-American System of Human Rights and Transnational Inquiries

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Contents

Abstract This chapter examines the developments that the Inter-American System of Human Rights has established in relation of transnational inquiries. Though there is no case before the Inter-American Court concerning mutual legal assistance in criminal matters directly, this study focuses its attention on the interpretation of the due process rights that could be applicable in international cooperation specifically with regard to the Inter-American Convention on Mutual Assistance in Criminal Matters and Fundamental Rights.

Abbreviations

ACHR	American Convention on Human Rights
ECtHR	European Court of Human Rights
IACoHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights

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1 Introduction

The IACtHR has not addressed the issue of mutual assistance in criminal matters directly. Its case law has usually dealt with more flagrant human rights violations due to the turbulent past of the region. Recently, the only matters relevant to the present discussion that the Court has dealt with are those such as due process violations.

Despite these shortcomings, it will be argued that it is possible to associate or even incorporate matters of transnational cooperation within the framework of the ACHR by applying the current case-law to this new topic. Additionally, it will also be argued that certain aspects of transnational inquiries have a direct impact on due process rights, so it is necessary to look into the scope of these rights and any possible violations in accordance with the current criteria of the Court.

The paper will first look at the only case of transnational inquiries which has been brought before the American Commission on Human Rights (but which did not reach the Court) to establish the background of the current discussion. Then, the case law regarding the duty to prosecute human rights violations will be studied to examine the possibility that States are obliged to request assistance from abroad when necessary in order to comply with the ACHR. Afterwards, the Inter-American Convention on Mutual Assistance in Criminal Matters [Hereinafter Mutual Assistance Convention] will be considered. It will be argued that there are at least two ways in which this treaty may be incorporated into the list of due process rights already recognized in the ACHR and other treaties; by applying the same arguments, the Court has used other cases where human rights are found beyond the basic conventional framework. Lastly, the due process clauses of the ACHR will be analyzed in an effort to determine where these impact mutual assistance and where possible violations can be found.

2 Cases Before the Inter-American System of Human Rights

For many years the IACtHR and the Inter-American Commission of Human Rights have dealt with grave violations such as torture,[1] forced disappearance[2] and extra-judicial executions[3]; but their involvement in due process issues has been very

[1] See IACtHR, 8 March 1998, Paniagua-Morales et al. v. Guatemala, Series C No. 37; 25 November 2000 ,Bámaca-Velásquez v. Guatemala, Series C No. 70.

[2] See IACtHR, 29 July 1988, Velásquez-Rodríguez v. Honduras, Series C No. 4; 22 November 2005 Gómez-Palomino v. Peru, Series C No. 136; 12 August 2008, Heliodoro-Portugal v. Panama, Series C No. 186.

[3] See IACtHR, 7 June 2003, Juan Humberto Sánchez v. Honduras, Series C No. 99; 8 July 2004 Gómez-Paquiyauri Brothers v. Peru, Series C No. 110.

recent and is still very sporadic. Consequently, matters related to transnational inquiries have not yet been dealt with.

The only instances where these matters have been addressed involve extradition in the Goiburú Case where the IACtHR mentioned that part of the duty to investigate, prosecute and punish human rights violations includes requesting the extradition of the suspects.[4] It also implied that the requested State also has a duty to extradite.[5]

The Inter-American Commission has only dealt with international inquiries one time. In its 2009 Report, the Commission expressed concern over the impact that the extradition of several leaders of the paramilitary forces from Colombia to the United States would have in the peace process in Colombia. The problem was that the extradition caused several delays in the judicial proceedings in Colombia dealing with international crimes and other human rights violations.[6] The United States argued that Colombia was free to seek the testimony of the paramilitary leaders through the treaties on mutual legal assistance.[7] Despite the fact that Colombia claimed that the cooperation with the United States was very good,[8] the Inter-American Commission noted that the prison authorities in the United States posed several obstacles which made virtually impossible to gain unimpaired access to the paramilitary leaders[9] and from the 40 requests for mutual assistance regarding Human Rights and International Humanitarian Law violations, only one had been answered.[10]

The main concern of the Inter-American Commission was that the victims were not represented during the testimony of the paramilitary leaders,[11] which may affect their rights to the truth, justice, and reparations.[12] In other words, these obstacles hamper the ability of Colombia to comply with the duty to investigate human rights violations thoroughly.[13]

The limited number of cases before the IACtHR and the Commission leaves ample room for speculation. However, it is interesting to note that in both cases the problem has been framed within the context of the duty to prosecute human rights violations. Although in the Goiburú Case the question dealt with extradition, it may be safely assumed that international inquires will also form part of the actions that a State must carry out in order to comply with the American Convention. This assumption can be made by extending the application of extradition to the duty to

[4] IACtHR, 22 September 2006, Goiburú et al. v. Paraguay, Series C No. 153, §§ 127, 130 ff.
[5] *Ibid*., § 132.
[6] IACoHR, Annual Inform of the Inter-American Commission of Human Rights, § 37.
[7] *Ibid*., § 38.
[8] *Ibid*., § 44.
[9] *Ibid*., § 40.
[10] *Ibid*., § 42.
[11] *Ibid*., § 40.
[12] *Ibid*., § 36.
[13] *Ibid*., § 37.

prosecute and to other forms of transnational cooperation such as evidence gathering. Moreover, the Court has a track record of being very stiff on matters of impunity,[14] allowing it for practically no exceptions,[15] so then there is no reason to believe that they would divert on matters of transnational cooperation. The findings of the Inter-American Commission regarding victim's rights seem consistent with the case-law of the IACtHR, insofar as states are required to do everything in their power to ensure that criminal investigations are successful.[16] This would certainly include obtaining evidence from abroad when necessary.

In conclusion, it can safely be assumed that requesting transnational cooperation in the investigation of human rights abuses is part of the duty to prosecute. Conversely, there is no indication in the case law of the extent to which human rights, including due process standards, can be applicable in international cooperation.

3 The Inter-American Convention on Mutual Assistance in Criminal Matters and Fundamental Rights

One way to ascertain the extent to which fundamental rights are applicable to cases of international cooperation is to look at the provisions of the Mutual Assistance Convention. There are two possibilities to look at this. Firstly, the IACtHR has routinely looked beyond the American Convention for guidance regarding the extent of the rights it contains; it has considered the case-law of the European Court of Human Rights,[17] General Assembly resolutions,[18] and most importantly, other treaties.[19] This last body of law may be relevant to the case in point, because the Court may look at the Mutual Assistance Treaty to determine in what extent fundamental rights apply. Secondly and closely linked to the first point, the IACtHR has also considered that due process rights are not limited to the American Convention; it has found that these may be included in other treaties as it did with the Vienna Convention on Consular Relations. It might be looked at the reasoning of the Court in that case to determine if the same arguments could apply to the Mutual Assistance Convention.

[14] Dondé (2010), pp. 263 ff.

[15] *Ibid*.

[16] IACtHR, 30 January 1996, Castillo-Páez v. Peru, Series C No. 24, § 90.

[17] IACtHR, 30 May 1999, Castillo-Petruzzi et al. v. Peru, Series C No. 52, § 154; 31 January 2001, Case of the Constitutional Court v. Peru, Series C No. 71, § 83; 2 February 2001, Baena-Ricardo et al. v. Panama, Series C No. 72, § 106.

[18] IACtHR, 6 February 2001, Ivcher-Bronstein v. Peru, Series C No. 74, § 112; 2 September 2004, Case of the Juvenile Reeducation Institute v. Paraguay, Series C No. 112, § 230; 30 October 2008, Bayarri v. Argentina, Series C No. 187, § 61.

[19] IACtHR, Case of the Juvenile Reeducation Institute v. Paraguay (footnote 18), § 230.

This line of reasoning is important because unlike must treaties dealing with transnational inquiries, the Mutual Assistance Convention contains several rights that States must comply with and which would then become part of the list of fundamental rights within the Inter-American System on Human Rights. Particularly, Article 5 contains a double criminality prohibition; Article 6 prohibits States from assisting each other when the crime in question is punishable by less than 1 year imprisonment; Article 8 prohibits the assistance in relation to military crimes.

In particular, Article 8 is important because it includes the refusal to assist in matters related to fundamental rights:

> The requested state may refuse assistance when it determines that:
>
> a. The request for assistance is being used in order to prosecute a person on a charge with respect to which that person has already been sentenced or acquitted in a trial in the requesting or requested state;
> b. The investigation has been initiated for the purpose of prosecuting, punishing, or discriminating in any way against an individual or group of persons for reason of sex, race, social status, nationality, religion, or ideology;
> c. The request refers to a crime that is political or related to a political crime, or to a common crime prosecuted for political reasons;
> d. The request has been issued at the request of a special or ad hoc tribunal;
> [. . .].

Hence, it is important to determine if any of these could be construed as human rights violations by the IACtHR based on its own case-law.

The IACtHR has routinely looked at treaties beyond the American Convention to define the scope of a particular right. For instance, in the Street Children Case the United Nations Convention on the Rights of the Child was used to determine the meaning of Article 19 which states: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state." Therefore, it was necessary to determine what this protection entails.[20]

The IACtHR based its argument on the progressive interpretation of human rights treaties, meaning that their content can change and expand in accordance with the needs of a particular place and time.[21] Additionally, treaties are not isolated legal instruments; they form part of the corpus of international law, which regulates different topics when it is taken as a whole. Consequently, the American Convention and the Convention on the Rights of the Child, taken together, protect the rights of the child.[22]

Taking this argument to the field of transnational cooperation, it could be argued that the different prohibitions contained in the Mutual Assistance Treaty complement the right to due process contained in Article 8 of the American Convention,

[20] IACtHR, 19 November 1999, Villagrán-Morales et al.v. Guatemala, Series C No. 63, § 195.
[21] *Ibid*., § 192 ff.
[22] *Ibid*., § 194.

since they are designed to give a fair trial to the person being prosecuted by limiting the actions of the state, from its evidence gathering powers to instances where these actions may be unfair.

This reasoning is actually complemented by the second way in which other treaties may be applied by the IACtHR. In the Consular Assistance Opinion the IACtHR stated that human rights can be found in other treaties besides the American Convention. In particular, it concluded that the Vienna Convention on Consular Relations includes a due process right to consular assistance for all persons detained abroad. In reaching this conclusion, the Court established that some treaties may have clauses that are related to human rights, although this may not be the treaties' primary objective.[23]

Once this was established, the IACtHR provided the characteristics of due process rights in order to determine if consular assistance could fall within this category. It stated that

> [f]or 'the due process of law' a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end.[24]

It further stated that

> To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.[25]

The prohibitions contained in the Mutual Assistance Convention are designed to provide the person accused in the requesting State with a fair opportunity, free of discrimination, to defend oneself. For this reason it would seem congruent with the position of the IACtHR to accept these provisions within the context of the due process rights.

Again, the IACtHR seems to have clear parameters for determining the inclusion of the relevant Mutual Assistance Convention provisions as part of the due process rights of the American Convention, as an extension of Article 8 or as a complement, based on the reasoning of the Consular Assistance Opinion. This would be one way

[23] See IACtHR, 1 October 1999, Advisory Opinion OC 16/99, The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law, Series A No. 16, § 76.

[24] *Ibid*., § 117.

[25] *Ibid*., § 119 (citations omitted).

to consider the relationship between fundamental rights and the standards provided in the American Convention on the one hand, and the parameters for transnational inquiries on the other.

4 Due Process and Transnational Inquiries

The discussion in the previous section was of the incorporation of the Mutual Assistance Convention, which is a standard for transnational inquiries in the Organization of American States within the framework of the Inter-American Human Rights System, as part of the group of rights which make up its due process standards. In this section, transnational inquiries will be weighed against the already firmly established due process standards of the American Convention and the accompanying case law. While not all rights can be considered, those which may be more commonly threatened by the sometimes cumbersome procedures will be discussed.

The IACtHR has ample case-law regarding certain due process rights. One of the most-discussed right is the presumption of innocence; however, the material facts of these cases deal with pre-trial measures dealing with the liberty of the individual.[26] Similarly the discussions on the ne bis in idem principle[27] and the development of the fraudulent res judicata doctrine[28] are important to the progress of international human rights law but do not involve mutual legal assistance. Likewise, there is abundant case law regarding the right to be judged by a competent, independent, and impartial tribunal, but these instances usually deal with military courts.[29] Consequently, the case law regarding these issues is not relevant to the present discussion.

However, the jurisprudential evolution of other rights is more relevant to transnational cooperation; this is the case with the right to an adequate defense. This is a very complex right, since it involves matters such as sufficient time to prepare for trial,[30] the right to a defense attorney of one's own choosing,[31] and right

[26] IACtHR, 7 September 2004, Tibi v. Ecuador, Series C No. 114, § 111–115, 180; 22 November, 2005, Palamara-Iribarne v. Chile, Series C No. 135, §197, §§ 208–214.

[27] IACtHR, 17 September 1999, Loayza-Tamayo v. Peru, Series C No. 33, §§ 66–77; 25 November 2004, Lori Berenson-Mejía v. Peru, Series C No. 119, §§ 201–209.

[28] IACtHR, 22 November 2004 Carpio-Nicolle et al. v. Guatemala, Series C No. 117, §§ 130–135; 12 September 2005, Gutiérrez-Soler v. Colombia, Series C No. 132, §§ 98–99; 26 September 2006, Almonacid-Arellano et al. v. Chile, Series C No. 154, §§ 154 ff.

[29] IACtHR, 16 August 2000, Durand and Ugarte v. Perú, Series C No. 68, §§ 116 ff.; 18 August 2000, Cantoral-Benavides v. Perú, Series C No. 69, § 114; 6 December 2001, Las Palmeras v. Colombia, Series C No. 90, § 50; 5 July 2004, Tradesmen v. Colombia, Series C No. 109, § 174; 23 November 2009, Radilla-Pacheco v. Mexico, Series C No. 209, §§ 271 ff.

[30] IACtHR, Castillo-Petruzzi et al. v. Peru (footnote 17), § 141; Lori Berenson-Mejía v. Peru (footnote 27), § 167.

[31] IACtHR, Castillo-Petruzzi et al. v. Peru (footnote 17), § 147.

to appeal the sentence.[32] There is one interesting issue: the IACtHR has emphasized the right to confront the witnesses for the prosecution. The scope of the case-law has dealt with situations where military tribunals have prohibited the defense attorneys from questioning police agents and military personnel in cases related to terrorist activity or internal turmoil.[33] In these cases, the ICtHR has made the sweeping statement that the accused has the right to challenge all evidence presented by the prosecution and with an attorney present to aid in this procedure.[34] Additionally, the IACtHR has stated that the accused may also present any witness on his/her behalf.[35]

While it may seem reasonable to think that these opinions may also apply to evidence obtained abroad, such evidence would also be subject to the same scrutiny. On the one hand, this would mean that any accused should be able to challenge witness testimony obtained from abroad. However, this would contravene the text of the American Convention which states:

> the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; [. . .].[36]

Since the resolutions of the IACtHR have dealt with the narrow issue of whether the state can arbitrarily restrict the cross-examination of witnesses such as police officers and military personnel, it would seem logical that the response would be sweeping. The letter of the American Convention suggests that those witnesses not present, such as those who are abroad, are not subject to cross-examination. This would make the application of the previous case law questionable. However, it should be noted that the Court has on occasions expanded rights beyond the text of the American Convention in cases involving the choosing of defense council[37] and the principle of legality.[38]

On the other hand, the American Convention seems to limit the scope of cross-examination of prosecutorial witness. It is very open to the prospect of letting the accused obtain witness testimony from abroad. However, the text of Article 8(2)(f) refers only to witnesses. This would mean that states must acquire exculpatory witnesses even from abroad, by mutual assistance treaties or other means such as reciprocity. This is an important matter, since many of these treaties expressly

[32] *Ibid*., § 161.

[33] *Ibid*., § 153.

[34] IACtHR, Lori Berenson-Mejía v. Peru (footnote 27), § 184.

[35] *Ibid*., § 185.

[36] Art. 8(2)(f) ACHR (emphasis added).

[37] IACtHR, Castillo-Petruzzi et al. v. Peru (footnote 17), § 143 ff. Where the Court insisted that an attorney need to be present from the time of detention, despite the fact that the American Convention allows persons accused of a crime to be their own council.

[38] IACtHR, 20 June 2005, Fermín Ramírez v. Guatemala, Series C No. 126, §§ 92 ff.

forbid the accused from using them to obtain exculpatory evidence from abroad.[39] Thus, hypothetically, these clauses would be human rights breaches.

The last part of the clause analyzed apparently has a different effect; it allows for the accused to request from the state only witness testimony, excluding the possibility of asking for any other type of assistance. However, this literal interpretation of the clause would probably not be upheld by the IACtHR, since its tendency is to increase human rights[40] in accordance with the Article 29 of the American Convention, which orders an expansive interpretation of all rights and freedoms. On these grounds, the Court would likely include other types of evidence within the meaning of this provision, making it possible for defendants to solicit any form of exculpatory evidence.

One of the aspects of due process which has been developed more fully by the ICtHR is the right to be tried in a reasonable time. The case-law has established four parameters to determine when a criminal investigation or trial is excessively long that results in a breach of the American Convention. Firstly, the Court will look at the cause of the delay, analyzing the complexity of the trial, the actions of the defendant and counsel, and, finally, the actions of the judiciary. Obviously, the idea is that the state is ultimately responsible for the lack of speed. Secondly, in more recent cases, it has also considered the magnitude of the harm caused.[41]

From these criteria it could be safely assumed that a case where it is necessary to obtain evidence from abroad could be considered complex. Hence, certain latitude could be afforded to the state in these cases. The IACtHR has not dealt with this particular issue. Normally it will consider whether the criminal investigation involves several suspects or victims,[42] whether the crime scene is in a remote location,[43] or whether an international crime such as forced disappearance is being investigated.[44] The only indication as to what the Court may do in these instances comes from the dictum of some cases where it has stated that the case was not complex since evidence was readily available from the beginning of the criminal investigation.[45] Therefore it could be concluded that, when the evidence needs to be brought in from abroad, the complexity of the case is assumed and the state will be given some latitude.

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[39] See *Tratado de Cooperación entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre asistencia jurídica mutua* (1990), Art. 1(5); *Acuerdo de Cooperación en materia de asistencia jurídica entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de la República de Colombia*, Art. 4(2). See Bontekas and Nash (2007), p. 387.

[40] IACtHR, 8 September 1983, Advisory Opinion OC 3/83, Restrictions to the Death Penalty [Arts. 4(2) and 4(4) ACHR], Series A No. 3, § 56.

[41] IACtHR, 27 November 2008, Valle-Jaramillo et al. v. Colombia, Series C No. 192, § 155.

[42] IACtHR, 24 June 2005, Acosta-Calderón v. Ecuador, Series C No. 129, § 106.

[43] IACtHR, 15 June 2005, Moiwana Community v. Suriname, Series C No. 124, § 162.

[44] IACtHR, 22 September 2009, Anzualdo-Castro v. Peru, Series C No. 202, § 157.

[45] IACtHR, Tradesmen v. Colombia (footnote 29), § 203; 3 April 2009, Kawas-Fernández v. Honduras, Series C No. 196, § 113.

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Judicial Cooperation and Multilevel Protection of the Right to Liberty and Security in Criminal Proceedings. The Influence of European Courts' Case-Law on the Modern Constitutionalism in Europe

Oreste Pollicino and Giancarlo Rando

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Abstract This study deals with the multilevel protection of the right to liberty and security in criminal proceedings, investigating in particular the influence of the European Court of Justice and the European Court of Human Rights on the modern European constitutionalism.

The aim of the study is to clarify the decree of the influence of the case law of the two European Courts, with particular reference to the reactions of some European constitutional courts regarding the protection afforded of individual's freedom and security in criminal proceedings.

Through the use of two case studies the work examines in the first part whether the Italian Constitutional Court in its decisions has taken into account the principles set by Strasbourg Court or has limited itself to the usual domestic constitutional parameters.

The second part of the work is dedicated to the saga of European Arrest Warrant and will serve to illustrate the positions of some European constitutional courts in matters relating to criminal proceedings in light of European Union law and the decisions of the Luxembourg judges. This comparison will provide an opportunity to outline the latest trends in multilevel protection of fundamental rights.

Abbreviations

CCP	Code of Criminal Procedure
CEE	Central and Eastern European
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FD EAW	Framework Decision on the European Arrest Warrant
ICCPR	International Covenant on Civil and Political Rights
JHA	Justice and Home Affairs
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

The theme of the impact of the decisions of the European courts, namely the ECtHR, the "living" part of the ECHR, and the ECJ on the constitutional case law of the constitutional courts of members of the Council of Europe and of European Union, respectively, has engaged the field of constitutional doctrine for some years now. The purpose of this study is to clarify the degree of the influence of the case law of the two Courts at the time of writing, in 2011, with particular

reference to the reactions of some European constitutional courts regarding the protection afforded in Strasbourg and in Luxembourg of the freedom and security of the individual in criminal proceedings.

The study will be divided in two parts and will make use of two case studies. In the first part we will examine references in the Italian constitutional case law of the last ten years to Article 5 ECHR, which protects the right to liberty and security. The analysis of constitutional case law pertaining to the limitations of personal freedom in criminal proceedings is intended to clarify whether the Italian Constitutional Court, in its interpretations, has taken into account the principles set by the Strasbourg Court or has limited itself to the usual domestic constitutional parameters. The second part is dedicated to the saga of the European Arrest Warrant, which will serve to illustrate the positions of some European constitutional courts in matters relating to criminal proceedings in light of European Union law and, of course, of the case law of the Luxembourg judges. The comparison of some important decisions of European constitutional courts on this issue will provide an opportunity to outline the latest trends in multilevel protection of fundamental rights, with particular reference to the right of security in criminal proceedings.

2 Protection of the Rights of Freedom and Security in Criminal Proceedings by the European Court of Human Rights and Its Influence on the Italian Constitutional Court

2.1 Changes in the Italian Legal Order and the European Court of Human Rights

Criminal procedure is one area that has proved to be most favourable for what has been termed the "*effect incitatif*" and "*correcteur*" of the case law of the ECtHR on the legal orders of member countries. In 2001, Alessandro Pace[1] spoke of the "limited impact" of the Convention on civil and political freedom in Italy. Today, 10 years later, what has changed? Can one still speak, in general, of the limited influence of the ECHR and the case law of the Strasbourg Court on Italian constitutional case law and, consequently, on the protection of fundamental rights? The answer is no. Much has happened both in the structure of the Italian legal system and in the attitude of the ECtHR.

First, with the constitutional reform brought about by amendment of Title V of the Italian Constitution in 2001, the framework of sources of law with reference to

[1] See Pace (2001), p. 1.

the Convention has seen momentous change. Article 117(1) of the Italian Constitution, as amended by Constitutional Law 3/2001,[2] provides that legislative power is vested in the State and the Regions in compliance not only with the Constitution but also with the constraints deriving from European Union law and international obligations. According to this reform, the Constitution was fitted not only with an explicit reference to the process of European integration, but also to the ECHR, and more generally, a power greater than the primary sources of law was given to any international treaty law. Prior to this reform, neither the majority of scholarly opinion nor the Constitutional Court, except for the judgment 10/1993, which remained an *unicum*, had ever claimed that the ECHR might have a different position from primary sources of law.

In 2007, with the scene so radically changed, the Constitutional Court ruled on the question of the position of the ECHR for the Italian system of legal sources, through the two historic "twin" judgments 348 and 349 of 2007. In these decisions, the Constitutional Court ruled that, on the basis of the new Article 117(1) of the Constitution, the provisions of the ECHR must be regarded as *interposed* parameters for the constitutionality of national laws. A national law that violates a provision of the ECHR must be regarded, therefore, as unconstitutional, being in violation of Article 117(1). After this first intervention of the Court came the decisions No. 311 and 317 of 2009, which clarified some positions of the Court and, according to some scholars, introduced some important innovations.

Over the last decade, in addition to changes in the Italian legal system, we have seen a steep change in the ECtHR, which has become the protagonist of an attitude of aggressiveness toward other legal orders (*aggressività interordinamentale*), manifested through its case law.[3] It is possible to say, according to the literature, that the ECtHR in recent years has moved away from characteristics typical of international jurisdictions and toward a supranational position, like the ECJ, and, therefore toward amplification of the impact of its rulings on the legal systems of the Member States.[4]

2.2 *The Voices of the European Court of Human Rights and the Italian Constitutional Court Compared*

The ECtHR has developed a rich case law with regard to the protection of the right to personal liberty guaranteed by Article 5 ECHR (Right to liberty and security) and for our purposes it seems useful to proceed to a brief survey of it.

[2] "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations."

[3] See Pollicino (2010a, b), pp. 65–111.

[4] See Pollicino and Sciarabba (2010), pp. 136–157.

The ECtHR in this area has provided a "decalogue" of conditions that justify, in the enforcement of national laws, the limitation of individuals' freedom, in the sense of physical freedom, not freedom of movement.[5]

Under Article 5(1) ECHR, no one may be deprived of his or her liberty except in cases provided by subsequent subsections of the article and in the manner provided by law. The ECtHR, in providing an interpretation of Article 5(1)(a) of the ECHR (which refers to lawful detention after conviction by a competent court), explained that there must be a causal and not merely a chronological relation between the sentence and the detention. The sentence may be contained in a ruling delivered abroad, which the State undertakes to execute, or in a decision not yet final, like that in a judgment at first instance. Therefore the cases of restriction of liberty that occur before sentence, which are based on the need to bring the person before the appropriate authority, do not fall under the protection provided by paragraph 1: in this case the protection is under Article 5(3).

Under Article 5(1)(b) the restriction of personal freedom is justified against those who are under arrest or detention for the violation of an order issued by a court to secure the fulfilment of any obligation prescribed by law. The ECtHR has clarified that the obligation prescribed by law may not be general; it must be specific and concrete. Paragraph 1(c) was instead interpreted only with respect to restrictions of liberty occurring during criminal proceedings. For example, with reference to the danger of flight to which this provision refers, the ECtHR has clarified that the danger of escape should not be determined with reference only to the severity of the penalty that may be imposed, but according to specific factors from which it is possible to infer the existence of such danger. In line with this case law which requires verification of the anticipated danger, the ECtHR has decided that the rule in Article 275(3) of the Italian CCP, which provides a presumption of danger concerning persons suspected of Mafia crimes, does not conflict with Article 5 ECHR, provided that this norm is interpreted in a way that allows the court to adapt to the particularities of each case. Moreover, for the Strasbourg Court the limitation of liberty as a precautionary measure is not lawful if it exceeds the maximum period set by law for the custody, a principle already set in an Italian case.

Under Article 5(1)(d) the detention of a minor is lawful if it is intended to supervise his or her education or to present him or her before the competent authority. In this regard, the ECtHR has held that a regulation that assigned a child to an institution in isolation and without the assistance of qualified personnel violated this norm of the Convention.

Article 5(1)(f) refers to cases of arrest and detention of a person to prevent his or her unauthorized entry into the country, or against whom extradition or expulsion proceedings are pending. In this regard, the ECtHR has stressed that the detention of those who seek to enter the territory of the State illegally should not be too long,

[5] See, for further details, the study by Aprile and Spiezia (2009), pp. 117 ff.

and the authorities should take into account that the escape from the country of origin may have been determined by the need to defend the detainee's own life.

This short account of the protection of the right to liberty and security under Article 5 ECHR leads us to wonder whether and to what extent this detailed case law has had an influence on the ICC. From conducting a survey of ICC case law, with particular reference to the 10 years from 2000 to 2011, on the rules of the CPP that restrict the liberty of the suspect or accused person, we can certainly say that there is at least an increase in references to the case law of the ECtHR. However, the overall impression is that, except for the last two years of the decade, the Constitutional Court has not taken into account Strasbourg case law, at least not explicitly.

The diachronic analysis of constitutional case law, looking in particular for references in judgments and ordinances of the Constitutional Court to Article 5 ECHR, gives us the first result in 2002, with Ordinance No. 191. However, we must note immediately that this is not a reference made by the Constitutional Court. It is the State Attorney who refers to Article 5 ECHR. The case concerned a question raised by the Court of Appeal of Brescia of the constitutionality of Articles 314 and 315 of the Italian CCP, relating to reparation for wrongful imprisonment.

The State Attorney invoked Article 5 ECHR, together with Article 24(4) of the Constitution, as the foundation of the institution of compensation for wrongful imprisonment, and on this basis argued that the claim should be regarded as unfounded because these articles pose the need to set certain and immediate remedies. The Constitutional Court, however, in its decision, did not consider the claim of the State Attorney and declared the question inadmissible because of an error of form, even though the questions raised were not unknown to the Constitutional Court.

Article 314 of the Italian CPP provided the opportunity for the next reference to Article 5 ECHR, in the judgment 230/2004. Again it is not the Constitutional Court that raised it, but the judge *a quo*. The Court of Appeal of Palermo held that Article 314 is unconstitutional because it does not allow the fair compensation of those who have suffered a period of custody for a charge of which they were subsequently acquitted in accordance with Article 649 of the Italian CPP (Prohibition of second trial). The judge *a quo*, in addition to Articles 2, 3 and 13 of the Constitution, referred to Article 76 as a parameter, in relation to Article 2 of Italian Law 81/1987 and to Article 5 ECHR, since one of the principles and guidelines of the delegated power to approve the new code of criminal procedure was adaptation to international conventions and, among these, precisely to the ECHR, whose Article 5 establishes the right to compensation for victims of arrest or wrongful detention.

The Italian Constitutional Court once again did not accept the presentation of the judge *a quo*, holding the question unfounded due to an erroneous interpretation of Article 314(2) of the Italian CCP by the same judge. It is not impossible—the Court held—for the Court of Appeal of Palermo to bring the case forward between those for whom Article 314(1) of the Italian CCP constitutes the possibility of redress for unjust detention.

The next judgment where Article 5 ECHR is mentioned is Ordinance 230/2005. The Court of Turin, in reference to Articles 3 and 24(2) of the Constitution, raised a

question on the constitutionality of Article 294(1) (Interrogation of the person subject to precautionary measures) and Article 302 (Termination of custody because of failure to interrogate the person in custody) of the Italian CCP. The judge *a quo* referred to Article 5 ECHR in order to emphasize that the requirements for guarantees established by certain rulings of the Constitutional Court also remain in the hearing stage. Where the implementation of the precautionary measure occurs at a time when the hearing is pending, the court argued, there is no chance for the judge of that phase to promptly check the legality of the measure. It would therefore be an unjustified impairment of the right of defence that led the Constitutional Court to take the decisions 77/1997 and 32/1999. Article 5 ECHR is used *ad adiuvandum*, where the judge *a quo* asks the Court to consider "even" the obligation to make the Italian trial system conform to the principles of Article 5 ECHR and Article 9 ICCPR, the latter adopted in New York in 1966. The Constitutional Court, however, did not accept the argument of the judge *a quo* and, considering the special features that characterize the hearing stage of the trial and the adequacy of the level of guarantees to the right of freedom in the system, found the question clearly unfounded.

We next find important references to Article 5 ECHR in ordinance 109/2008, in which the Constitutional Court decided on the question of the constitutionality of Article 18(1)(e) of Italian Law 69/2005, which was enacted to comply with the FD EAW. The Court of Appeal of Venice raised the question of constitutionality of the aforementioned Article 18, in reference to Articles 3, 11[6] and 117(1) of the Constitution, where it provides that the absence of a legal provision in the system of the issuing Member State on maximum limit for custody is an impediment to the delivery of the person for whom an EAW was issued.

The judge *a quo* referred to Article 5 ECHR and its interpretation by the ECtHR, pointing out that it would not be possible to apply to the Article in question the ECtHR case law which says that those procedural systems based on "periodic and close control," even in the absence of time limits, comply with Article 5(3) ECHR. This is because Article 18(1)(e) requires the refusal of delivery if the requesting State does not provide a maximum term for custody, and it would not be possible, according to the judge *a quo*, to overcome this obstacle through an interpretation consistent with EU law, even through non-application. This provision of Italian Law 69/2005, in addition, is in conformity with the last paragraph of Article 13 of the Constitution, which refers to the limits of preventive detention.

According to the judge *a quo*, the Article in question, while making a literal reference to Article 13 of the Constitution, would be contrary to Articles 3, 11 and 117(1) of the Constitution, particularly because the legislator has incorporated as an impediment to delivery a condition not provided for in the Framework Decision.

[6] "Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends."

This condition, in fact, would result, according to the judge *a quo*, in an insurmountable obstacle to delivery requests from most of the States, frustrating the operation of the EAW system. The Article would be in breach of Article 3 of the Constitution, because such a legislative provision would be unreasonable, and of Articles 11 and 117(1) of the Constitution because it would prevent the implementation of EU law.

The Constitutional Court stated that the question was clearly unacceptable, since the judge *a quo* completely failed to pronounce on the issue, preliminary to the assessment of the grounding of the question, of whether the contested provision, adapted from the final paragraph of Article 13 of the Constitution, is required to surrender to obligations derived from EU and international law, ex Article 117 paragraph 1 of the Constitution.

A recent case in which the Constitutional Court seems to be driven by the Strasbourg Court, relating to the publicity of hearings for prevention measures, is an example of the strength of the latest ECtHR case law in relation to the Italian Constitutional Court. It is necessary to note, however, that the provision of the Convention invoked here, still related to restrictions on personal freedom, is not Article 5 but Article 6 ECHR, the provision that requires states party to ensure a fair trial. This is the case of Italian Constitutional Court No. 93 of 2010, prompted in some ways by decisions against Italy by the ECtHR.[7] The Court of Santa Maria Capua Vetere raised the question of the constitutionality of Article 4 of Law 1423/1956 (Prevention measures against people dangerous to security and public morality) and Article 2ter of Law 575/1965 (Provisions against the Mafia), where they "do not allow that the procedure to implement preventive measures to take place, at the request of interested parties, in the form of a public hearing." According to the judge *a quo*, the rules in question—which require that procedures for the implementation of preventive measures against persons and property be held, without exception, in private—violate Article 117(1) of the Constitution since they violate the rule established by Article 6(1) ECHR, which provides for the principle of publicity in legal processes. In the three cases mentioned above, the ECtHR had held that, although there may be requirements of secrecy for the technical nature of the subject or the protection of the privacy of third parties, in order to respect fully the rights of the people, a necessary condition is public control over the exercise of jurisdiction. As a consequence, those involved in the application of preventive measures (in this case the seizure of assets) should at least be given the opportunity to request a public hearing "before the sections of the courts and the competent courts of appeal." According to the judge *a quo*, the contested provisions also violate Article 111(1) of the Constitution, since the impossibility of requesting a public hearing for the application of preventive measures would prevent one speaking of a "fair trial."

[7] ECtHR, 13 November 2007, Bocellari and Rizza v. Italy, Application No. 399/02; 8 July 2008, Perre and others v. Italy, Application No. 1905/05; 5 January 2010, Bongiorno and others v. Italy, Application No. 4514/07.

The Constitutional Court took up the second parameter of constitutional legitimacy (Art. 111 of the Constitution) and began to examine the question, which it considered grounded. The Court recalled the well-established jurisprudence of the ECtHR on the issue, which affects criminal proceedings involving Italian citizens. The ECtHR has recognized the violation of Article 6(1) of the Convention, and considered "essential" for the fulfilment of the law of the Convention that persons involved in the process of implementing a preventive measure should have the opportunity to request a public hearing before the sections of the courts and courts of appeal.

The ECtHR has in fact repeatedly stressed the importance of the publicity of the administration of justice in order to achieve the aim pursued by Article 6(1) ECHR, namely the fair trial. This principle, as demonstrated by the exceptions in the second part of Article 6 paragraph 1 of the ECHR, is not absolute. Exceptions are made on the grounds of special needs, but they must be strictly required by the circumstances of the case. It is not possible—the Constitutional Court held, citing the ECtHR—for proceedings such as the application of preventive measures to be conducted in closed session pursuant to a general and absolute rule, with no possibility for stakeholders to ask for a public hearing. The Constitutional Court, based on the Strasbourg case law, stated that the contested provisions do not respect Article 6(1) ECHR, in violation of Article 117(1) of the Constitution. It further held that the publicity of proceedings, especially criminal ones, is a principle inherent to a democratic order, recalling numerous precedents. However, it is on the case law of the ECtHR that the Court bases its reasoning, noting that the comments of the Strasbourg Court seize the peculiarities of the process of prevention proceedings, in which the judge is called upon to express an opinion on goods constitutionally protected: personal freedom, property and the freedom of economic initiative. In the opinion of the Court, the judge *a quo* correctly found that the Italian law could not be made compliant with the ECHR (and therefore the Constitution) through interpretation. In particular, it is not possible to arrive at a consistent interpretation through the use of analogy, by applying to the procedure of application of the "*giudizio abbreviato*" pursuant to Article 441(3) of the Italian CCP. The Constitutional Court concluded by finding the unconstitutionality of the contested provisions and specified that, in accordance with the provisions of the ECHR, a court retains the power to order that proceedings will continue without the presence of the public, but in relation "to the particularities of the case."

Another recent case of acceptance of the question of constitutional legitimacy in the field of application of precautionary measures in which the Constitutional Court refers to the jurisprudence of the ECtHR is Decision 265/2010. Here the judge *a quo* questioned the constitutional legitimacy of Article 275(3) of the Italian CCP, as amended by Article 2 of Decree Law 11/2009 (Urgent measures concerning public security and combating sexual violence and on persecutory actions), converted with amendments by Law 38/2009. These concern defendants remanded in custody, and in particular require judges to apply measures no less severe than imprisonment in dealing with a person who is the subject of serious indications of guilt in relation to crimes of sexual violence, sexual acts with a child, or the inducement or

exploitation of child prostitution. The judge *a quo* raised different profiles of possible unconstitutionality involving violation of Articles 3, 13, and 27(2). Just one court (Turin) has previously considered the violation of Article 117(1) of the Constitution, by contrasting the article in question with Article 5(1)(c) and Article 4 ECHR.

The Constitutional Court considered the question grounded in reference to Articles 3, 13 and 27(2), and considered the complaint concerning Article 117(1) absorbed. Although the Court considered absorbed the question of the possible violation of Article 117, it has in many parts of the decision referred to the case law of the ECtHR, often supporting its argumentation with references to ECtHR case law. The first passage in which the Constitutional Court refers to the Strasbourg case law is in point 5 of the reasons for decision. The reference is to the cases of *Vafiadis v. Greece*[8] and *Lelièvre v. Belgium*,[9] in which the ECtHR clearly stated the principle that, in accordance with Article 5(3) ECHR, pre-trial detention should be ordered as a last resort, which is justified only when all other options are insufficient. The Constitutional Court refers to the case law of the ECtHR in support of its previous rulings, which affirmed the same principle (No. 299 of 2005), then used the case law of the ECtHR to strengthen or clarify a position already expressed.

The second passage in which there is a reference to ECtHR case law is at point 7 of the reasons for decision. The second and third sentences of Article 275(3) of the Italian CCP provide that in proceedings for certain crimes explicitly mentioned, when a certain threshold of gravity of circumstantial evidence is met, the court should apply the precautionary measure of prison custody, "unless factors are present from which it is clear that no precautionary measures are necessary." This model, according to the Constitutional Court, means in practice a marked attenuation of the obligation to give reasons for the application of pre-trial detention. This deviation from the ordinary regime of the measure of the maximum custodial sentence had induced the legislator, as the Constitutional Court recalled, to limit the scope of that derogation, since 1995, only to proceedings for Mafia crimes *stricto sensu*. Here the Constitutional Court refers to the ECHR, noting that the rule, as provided by Law 332 of 1995, had passed both its own control and that of the Strasbourg Court, because it was enhanced by the specificity of Mafia crimes (as associative crimes), which make "reasonable" in particular custody in prison as the sole measure, because it was believed to be the most appropriate measure to neutralize the contacts between the accused person and the criminal association. The Constitutional Court referred to the decision in *Pantano v. Italy,*[10] when the ECtHR, while acknowledging that the provisions of Article 275(3) of the Italian CPP might seem too rigid because it did not adapt the application of the precautionary measure to the needs of the case, justified such a rule because of the specific nature of the phenomenon of organized crime and in particular of the Mafia.

[8] ECtHR, 2 July 2009, Vafiadis v. Grece, Application No. 24981/07.

[9] ECtHR, 8 November 2007, Lelievre v. Belgium, Application No. 11287/03.

[10] ECtHR, 6 November 2003, Pantano v. Italy, Application No. 60851/00.

It is the amendment of Decree Law 11/2009, implemented by Law 38/2009, which gives rise to questions of constitutionality, since it re-expands the scope of a special discipline to many other crimes, among which there are those considered by the judge *a quo*. The provision is therefore suspected of violating the Constitution, because it would harm, according to the judges *a quo*, the principle of the "lesser sacrifice," when it considers pre-trial detention as also being necessary for other crimes than Mafia-related ones.

According to the Court, such injury is actually found. In the reasons for its decision, the Constitutional Court now cites the ECtHR, taking up the argument started a few pages before. It is impossible to extend to the crimes in question the *ratio* deemed appropriate by the ECtHR (and by the Constitutional Court) to justify the derogation from the ordinary rules in the proceedings relating to Mafia crimes. The sexual offences considered by the judge *a quo* do not postulate the same conclusion. In these cases, the need for custody can be satisfied, as experience shows (*id quod plerumque accidit*) with measures other than detention in prison. The Constitutional Court, in conclusion, therefore states that Article 275(3), second and third sentences, of the CCP should be declared null where, with regard to the crimes mentioned in the ordinance of the judge *a quo*, it does not provide for the situation where specific elements are acquired, showing that the need for custody can be satisfied by measures other than detention.

On the same theme, the Constitutional Court has intervened, most recently, with two decisions. In ordinance 146/2011 the question is once again raised of the constitutionality of Article 275(3) of the Italian CCP, as amended by Decree Law 11/2009, converted with amendments into Law 38/2009, where it does not allow the replacement of pre-trial detention with house arrest in relation to the crime under Article 600bis, first paragraph of the Criminal Code (child prostitution). With reference to the reasonableness ("*non manifesta infondatezza*"), the Criminal Code cites, among other provisions, Article 5(1)(c) and 4 ECHR, with which the Code of Criminal Procedure is required to comply. The provision in question would violate Article 117(1) of the Constitution, because it would violate the interposed parameter of Article 5 ECHR, as interpreted by the ECtHR.

The Constitutional Court held that the judge *a quo* did not consider the change in the regulatory framework, with the cited judgment 265/2010, as we have seen, decided on the same provision, declaring it unconstitutional where it provides for an absolute presumption of adequacy of the length of pre-trial detention for certain offences, including the exploitation of child prostitution. The Constitutional Court therefore decided to send the documents back to the judge *a quo* in order to reconsider the relevance and the reasonableness of the question of constitutionality in the light of the change of normative framework.

Finally, in the recent decision 164/2011 the question is raised of the constitutionality of Article 275(3) of the CCP, which provides that when there are serious indications of guilt in relation to the crime of murder, custody in prison is mandatory, without providing for the possible existence of specific elements in connection with the case showing that the need for custody can be met with other measures. The Constitutional Court recalls the principles contained in the above-mentioned

judgment 265/2010, where it ruled on the same Article, but with reference to certain crimes of a sexual nature, and considers the principles set in that decision, with appropriate adaptations, should be extended even to dealing with persons charged with murder. Even in voluntary manslaughter, generally, there is not a criminal connection with other people, as in the case of Mafia crimes, where the best way to break the connection is by pre-trial detention. Accordingly, the Court held unconstitutional Article 275(3) of the CCP, where it provides for an absolute presumption that, in the event of serious indications of guilt of the offense under Article 575 of the Criminal Code, the need for custody should be met with protective custody in prison.

3 The Issue of *Res Iudicata*

In a study that tries to reconstruct the influence of the ECHR and the case law of the ECtHR on the work of the Italian Constitutional Court, it is certainly worth, at least, a nod to the "problem" of the treatment of domestic *res iudicata* as a result of decisions of the ECtHR. It is a troubled affair, to which most recently the Italian Constitutional Court gave an important response in decision 113/2011.

As Sciarabba has clearly pointed out,[11] the fate of *res iudicata* in relation to the judgments of the ECtHR is a "problem" because it is a matter of opposite instances: those arising from the necessity of judicial verification, with the judge who puts the words "the end" to the trial, and those arising from protective instances of means of appeal, in the light of ECHR protection. Italy, like other members of the Council of Europe, had to resolve the issue of questioning of the untouchability of *res iudicata* as a dogma of national law in cases where the decision was vitiated by a violation of the Convention as determined by the ECtHR.

In the Italian legal system, the absence of a remedy that would implement the obligation to comply with decisions of the ECtHR through the re-opening of the case and retrial has given rise to the first decision by the Constitutional Court on the issue, i.e. decision 129/2008, in which the Court, while rejecting the question of constitutional legitimacy, made some points later incorporated in its decision 113/2011.

In its decision 129/2008, the Constitutional Court rejected the question of the constitutionality of Article 630 (1)(a) of the Italian CPP (Cases for revision), which had been raised by the Court of Appeal of Bologna in reference to Articles 3, 10[12] and 27 of the Constitution. While rejecting the issue, the Court mentioned a number of additional considerations, in a sense opposite to the decision, that were then taken up by the Court in the decision 113/2011. In this decision the Court has

[11] See, for a study of issues of domestic law, the contribution of Sciarabba (2009), pp. 513 ff.

[12] Article 10(1) states "The Italian legal system conforms to the generally recognised principles of international law."

instead accepted the question of the constitutionality of the same Article 630, having placed the issue on the right interpretative track.

What one could rightly call the "saga of Paolo Dorigo" has reached an interesting point with the decision in no. 113 of 2011. The Court of Appeal of Bologna raised the question of the constitutionality of Article 630 of the CCP, but this time in reference to Article 117(1) of the Constitution and to Article 46 ECHR, where it does not provide for re-opening of the trial if the decision is in conflict with a final ruling of the ECtHR, that had established the unfairness of the trial, pursuant to Article 6 ECHR. Since the case in question, namely the reopening of the trial following a decision of the ECtHR cannot be attributed to any of the cases foreseen by Article 630 of the CCP, the judge *a quo* considers that, for this reason, the provision in question is not consistent with the requirements of Article 46 ECHR and thus, indirectly, with Article 117(1) of the Constitution, which requires compliance with international obligations.

The Constitutional Court emphasizes the importance of Article 46 ECHR in the system of protection of fundamental rights in the ECHR and puts it in "systematic combination" with Article 41 ECHR. The Constitutional Court adopts the reading of this combination when it underlines, quoting the ECtHR, that when the ECtHR finds a violation, the State has a legal obligation not only to pay to the claimant the amounts agreed by way of just satisfaction, but also to take general measures and, where appropriate, the necessary individual ones.[13] The individual measures that the State must put in place under the Convention are, as the ECtHR has consistently highlighted, the *restitutio in integrum* in favour of the individual. Just satisfaction as provided by Article 41 ECHR is, in accordance with the Constitutional Court, a measure to be used to compensate a result of violation of the ECHR, which is impossible to set aside, but the State has an obligation to do everything possible to put the person in the situation in which he or she would have been if not for the violation of the Convention. "Do everything possible" also means that the State must remove barriers, even at the level of national law, preventing this *restitutio in integrum*. When a State ratifies the ECHR, it commits itself to making its systems compatible with the Convention and, therefore, also to "eliminate, in its legislation, any obstacle to adequate restoration of the situation of the applicant."[14]

With particular reference to criminal proceedings, the Constitutional Court points out that the Strasbourg Court has identified the reopening of the trial as the best way to restore the legal position in case of violation of the rules relating to fair trial (Art. 6 ECHR). The Constitutional Court, in paragraph 8 of its reasons for decision, makes it clear that the question of the constitutionality of Article 630 of the CCP must be accepted, since it was raised in regard to the proper parameters of

[13] See the decisions of the ECtHR cited by the Italian Constitutional Court: Grand Chamber, 17 September 2009, Scoppola v. Italy, Application No. 10249/03, § 147; Grand Chamber, 1 March 2006, Sejdovic v. Italy, Application No. 56581/00, § 119; Grand Chamber, 8 April 2004, Assanidzé v. Georgia, Application No. 71503/01, § 198.

[14] See ECtHR, Grand Chamber, 17 September 2009, Scoppola v. Italy, § 152.

Article 117(1) of the Constitution, referring as interposed parameters to Article 46 ECHR. The Court reaffirms, as it did on several previous decisions, that if through all the interpretative tools at its disposal it cannot interpret the national law in accordance with the European Convention, it should raise the question of constitutional legitimacy, in reference to Article 117(1) of the Constitution. The Constitutional Court, since the Convention is still placed "at a sub-constitutional level," must check for conflicts with other provisions of the Constitution, in which case the Court must deny the eligibility of the Convention rule to integrate the constitutional parameter. Here, the Constitutional Court held that the ECtHR's interpretation of Article 41 of the Convention, cannot be considered contrary to the protections afforded by the Constitution. In particular, the Court continues, although the values of certainty and stability are certainly worthy of consideration, it cannot be considered contrary to the Constitution to go beyond the *res iudicata* in case of violations of fundamental rights like those protected by Article 6 ECHR, also protected in Article 111 of the Italian Constitution.

The Court states that when there is a fundamental "constitutional *vulnus*," particularly when pertaining to fundamental rights, it must remedy, regardless of what is the rule or what it fails to predict. The Court cannot consider an obstacle to acceptance of the question nor the fact that it could lead to some lack of discipline: on the one hand, it will be up to the judges, under their powers of interpretation, to decide the case taking into account the decision of the Court; on the other, it will be for the legislator to regulate, in the most prompt and appropriate way, issues that appear worthy of regulation.

The Court concluded by allowing the appeal. Article 630 of the CCP must be declared unconstitutional where it does not include a case of review different from the other ones provided, that allow the reopening of the trial when necessary pursuant to Article 46(1) ECHR, to meet a final decision of the ECtHR. Finally, the Court is careful to emphasize that a declaration of unconstitutionality of Article 630 does not imply an option of the Court in favour of the review of final judgments (*revisione*), but it is justified by the fact that there is not, for now, a more suitable place for the intervention of the Court. The legislator is, therefore, free to provide a different and specific discipline and also to regulate questions of detail that the Court cannot predict because they involve discretionary policy choices.

4 The European Arrest Warrant Saga as Case Study in the Attempt to Identify the New Emerging Dynamics of the Relationship Between the European Constitutional Courts and the European Court of Justice After the Enlargement of European Union to the East

The last section of our paper, as it has been mentioned in the introduction, focuses on the European Arrest Warrant saga as a case study in order to consider how the Constitutional Courts in Europe are actually settling EU legal disputes in the field of

criminal matters, and, more generally, question whether certain general trends might be identified and injected into the current "season" of European cooperative constitutionalism. In this context, the EAW saga seems to be the most suitable example, not only because it implied a confrontation between "Western and Eastern" constitutional courts, but also because it appears a paradigmatic case for studying the reactions to lack of coordination and, consequently, the conflicts arising between the European and national legal systems in relation to multilevel protection of fundamental rights, with particular regard to the right to liberty and security in criminal proceedings.

There are few doubts that the potential grounds for such lack of coordination and the consequent arising of conflicts were inherent in the CEE legal orders at the time of their accession and the reasons for such are too obvious to be further analysed here.

One reason for such unexpected result, which it will be confirmed by the below case based analysis, might be that, as it has been argued,[15] those Courts, part of the third generation of constitutional courts, are distinguished by the fact that they were born into the global constitutional movement, which has determined their rapid reception of international standards and legal solutions and strong mutual cooperation. In particular the post-communist constitutional courts developed in a favourable international environment where, as opposed to the times of the "ancient" European constitutional courts, there already was (and is) a common European language of constitutionality and fundamental rights.[16]

Before embarking on the comparison between the judicial reasoning of the constitutional courts concerned in the EAW Saga, it is perhaps appropriate to provide an overview of the evolution of European integration in criminal matters.

4.1 The Evolution of European Integration in Criminal Matters: From Nothing to the Lisbon Treaty

If the creation of an autonomous pillar (the third) aimed at Member State cooperation in matters of justice and home affairs (JHA) occurred in 1992 with the Maastricht Treaty, it was only in 1997 with the Amsterdam Treaty that this pillar, which was renamed "police and judicial cooperation in criminal matters," acquired a proper legal dimension. The amendment to former Article 29 EU (currently Art. 67 TFEU), aims, in fact, at the adoption of common measures even in the field of "judicial cooperation in criminal matters" through closer and mutual assistance among police forces, customs and judicial authorities. Furthermore—and wherever necessary—*Member States' criminal laws* could be harmonised in order to "ensure the citizens a higher level of safety in an area of freedom and justice." The latter

[15] Sólyom (2003a).

[16] Sólyom (2003b), pp. 133 ff.

objective is officially listed among the aims of the European Union, as set out in Article 2 EU (currently Art. 3 TFEU).

In other words, the Amsterdam Treaty is extremely innovative, as compared to the Maastricht Treaty, firstly for adding to the scope of Member States' intergovernmental cooperation the mutual assistance in civil and criminal matters. Secondly, and more importantly, it is innovative since it expresses, for the sake of "high level of safety within an area of freedom, security and justice"[17] an unprecedented will to "approximation, where necessary, of rules on criminal matters in the Member States".[18] According to former Article 31(e) TEU, this alignment could lead to the progressive adoption of "measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking."

The Amsterdam Treaty, as compared to Maastricht, opens a new scenario also in terms of the sources available to European institutions as regards the third pillar. The generalised and weaker resolutions of the Maastricht Treaty are replaced, in fact, by a wide range of viable instruments, among which figures the framework decisions provided for by former Article 34(b) TEU, with the precise goal of harmonising Member States' regulatory and legislative laws and regulations in criminal matters as well.

The third remarkable novelty brought about by the Amsterdam Treaty was to confer, for the first time, the ECJ with interpretative powers in the field of cooperation *in criminal matters* also.

It is therefore evident how the new competence, whose function is to foster dialogue between European and national Courts, also relating to sensitive matters of constitutional relevance such as security, freedom and justice, is aimed at conferring on the ECJ the power, optional for the Member States,[19] to make preliminary rulings on the validity and interpretation of the framework decisions adopted as per former Article 34 TEU.

The Lisbon Treaty, after the failure of the European Constitution, provide for the overcoming of the distinction between the pillars, by entrusting the matter of judicial and police cooperation in criminal matters to the concurrent competence of Member States and European Union. This competence will be exercised under a communitarian model, both in reference to the type of acts and the proceedings for their adoption in relation to the mechanisms of judicial protection.

[17] Art. 29 TEU.

[18] Art. 29 TEU.

[19] Currently, to our knowledge, only Spain, Hungary, Austria, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Slovenia and Sweden have subscribed to the declaration provided for under Art. 35 EU, conferring the power to rule over preliminary questions to the ECJ. This means that the other Member States, although willing, could not address the ECJ for a preliminary question concerning any third pillar-related issue. For an in-depth study, see Fletcher (2007). See also Tridimas (2003), pp. 9 ff.

It is no wonder that the EAW continues to represent one of the most useful instruments of cooperation between judicial authorities of Member States. As a result, the FD EAW appears as a root of constitutional issues, which—at least partially—remain unanswered.

Moreover, it seems very plausible that the debate on the EAW will not cease either after the innovations set in motion by the Lisbon Treaty. The Lisbon Treaty opens new perspectives on the enforcement of judicial cooperation in criminal matters throughout the EU, since the elimination of the "pillar" structure sweeps away most of the procedural objections pointed out by legal scholars regarding the EAW. From this point of view, the extension is noteworthy of the ordinary legislative procedure—only with regard to the acts adopted after the entry in force of the Treaty of Lisbon, as expressly prescribed by Article 10 of the Protocol 36—to some sectors of justice and home affairs originally subject to the unanimity rule (Arts. 82–87, consolidated version of the TFEU).

Furthermore, the ECJ, due to the repeal of Article 35 EU, acquires general jurisdiction to give preliminary rulings in the area of freedom, security and justice; this added competency—which will be applicable to the third pillar *acquis* 5 years after the entering in force of the Lisbon Treaty—will clear away the most relevant concern moved to the FD EAW, that is to be substantially outside the reach of the review of the judges in Luxembourg.

4.2 *Rules, Regulations and Aims of the European Arrest Warrant Framework Decision*

As provided for by Article 1 FD EAW, the EAW is a judicial decision issued by a Member State based on the arrest or surrender by another Member State, of a requested person for the purposes of conducting a criminal prosecution or the carrying put of a custodial sentence or detention order.

It is, therefore, a cooperation mechanism of a strictly judicial nature, which permits practical-administrative assistance among Member State[20] executive bodies, thus leading to the free circulation of criminal decisions grounded on a system of *mutual trust* among the Member States' legal systems.[21]

The legal translation for such *mutual trust* is the principle of mutual recognition of judicial decisions—as provided for by Article 1(2) FD EAW—on the obligation binding on all Member States to carry out European Arrest Warrant issued by another EU Member State.

In effect, the EAW may be issued by any Member State for an act punishable under its legislation which involves a custodial sentence or a detention order for a

[20] See point 9 of the *Consideranda* and Art. 7 FD EAW.

[21] See, for comparison, points 5, 6 and 10 of the *Consideranda*, as well as Art. 1(2) FD EAW.

period of at least 12 months, or where a sentence has been passed or a detention order has been made for sentences of at least 4 months.

The implementing State may set, as a condition for the surrender, a requirement that the facts pursuant to which the warrant was issued represent an offence under its legal system as well. This power to enforce the double criminality rule, however, does not apply—and this is one of the most innovative and complex aspects of the instrument being discussed here—in respect of a *numerus clausus* of 32 offences listed under Article 2(2) of the Framework Decision. It is enough, in fact, that the said crimes be provided for by the criminal law of the State issuing the EAW, on condition that they are punishable with a maximum detention period of at least 3 years.[22]

Another relevant innovation which has drawn a number of constitutional complaints from the Member States is the permissibility of an EAW being issued for a citizen of the requested Member State, against the general practise explicitly codified by many EU Members' Constitutions according to which State sovereignty does not permit the extradition of nationals.[23]

Within the Framework Decision, on the contrary, the faculty awarding the executing Member State with the power to hinder the surrender of a citizen (or resident), is considered a mere exception, and namely provided for by Article 4(6), according to which:

> if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

A number of Member States have wanted to avoid the application of such a measure to their own citizens. In fact, before the Framework Decision's adoption, 13 of the (then) 25 Member States provided for constitutional dispositions forbidding[24] or limiting[25] the extradition of nationals.

No wonder, then, that the innovations of the EAW provisions caused, at the time of their adoption[26] in Member States, unavoidable "constitutional disturbance."

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[22] For this and the other outlines concerning the discipline of the decision on the EAW, see the broad study by Tracogna (2007), pp. 288 ff.

[23] Plachta (1999), pp. 77 ff.

[24] In the pre-amendment version of the constitutional texts, the inadmissibility of nationals' extradition was ratified by the German [Art. 16(2)], Austrian [Art. 12(1)], Latvian (Art. 98), Slovak [Art. 23(4)], Polish (Art. 55), Slovenian (Art. 47), Finnish [Art. 9(3)], Cypriot [Art. 11 (2)] and to a lesser extent, by the Czech (Art. 14 of the Fundamental liberties and rights' Charter) and Portuguese Constitutions.

[25] Other constitutional texts provide, as sole exception to the extradition ban, that a different measure be imposed by an international Treaty. See Art. 36(2) of the Estonian Constitution; Art. 26(1) of the Italian Constitution; Art. 13 of the Lithuanian Constitution.

[26] Italy was the last European country to transpose the Framework decision through its adoption, on 22 April 2005, of the Law 69/2005. See Impalà (2005), pp. 56 ff. It is worth noting how some very authoritative doctrine had already highlighted, before the adoption of the Framework Decision's final version, its incompatibility with the constitutional principle, among others, of the peremptory nature of crime. See Caianello and Vassalli (2002), pp. 462 ff.

Some countries, such as Portugal,[27] Slovakia,[28] Latvia[29] and Slovenia[30] revised their respective Constitutions before the respective Constitutional Courts had a chance to rule on the alleged unconstitutionality of the implementing act, as occurred in Poland, the Czech Republic and Cyprus.

Germany, instead, faced quite an unusual scenario: the constitutional[31] amendment, in fact, was carried out shortly before the adoption of the FD EAW to allow, under certain circumstances, the previously forbidden[32] extradition of a citizen, but it did not avoid the intervention of the Karlsruhe Federal Constitutional Court over the national regulation for the adoption of the Framework Decision.[33]

[27] Under Article 33(3) of the Portuguese Constitution, which followed the review: "the extradition of Portuguese citizens from Portuguese territory shall only be permissible where an international agreement has established reciprocal extradition arrangements, or in cases of terrorism or international organised crime, and on condition that the applicant State's legal system enshrines guarantees of a just and fair trial."

[28] Before the revision of 2001, Article 23(4) provided the right for the Slovak citizens "not to leave their homeland, be expelled or extradited to another State." The said revision brought to the elimination of the reference to the right not to be extradited.

[29] In Latvia, as Balbo was among the first ones to point out, two acts promulgated respectively on June 16th 2004—and in force as of 30 June 2004—and on 17 June 2004—in force as of 21 October 2004—introduced the necessary amendments to implement the constitutional modifications to Article 98 and the other relevant parts of the code of criminal law, in order to execute the EAW of Lithuanian citizens. See Balbo (2011).

[30] In the original version, Article 47 of the Slovenian Constitution, provided the extradition ban of its citizens. Following its review, occurred with the *Constitutional Act* 24—899/2003, the notion of surrender was added, as autonomous constitutional concept, compared to extradition. Today, Article 47 of the Slovenian Constitution states verbatim that: "no Slovenian citizen may be extradited or surrendered (in execution of a EAW), unless the said extradition or surrender order stems from an international Treaty, through which Slovenia has granted part of its sovereign powers to an international organisation."

[31] The German Constitution, in its original wording, utterly banned the extradition of a German citizen. The 47th review to the Basic Law of 29 November 2000, added to the unconditional ban provided for by Article 16(2), the disposition according to which: "no German may be extradited to a foreign country. The law can provide otherwise for extraditions to a Member State of the European Union or to an international Court of justice, as long *as the rule of law is upheld*."

[32] Prior to the 2000 revision, Article 16 of the Basic Law was rather strict: "no German citizen may be extradited abroad."

[33] Federal Constitutional Court, 18 July 2005, BVerfGE 113, pp. 237 ff. = NJW 2005, pp. 2289 ff. For interesting comments on the commented decision, see: Palermo (2005), pp. 897 ff. See also Tomuschat (2006), pp. 209 ff.; Pierini (2006), pp. 237 ff.; Woelk (2006), pp. 160 ff.; Molders (2006), pp. 45 ff.; Nohlen (2008), pp. 153 ff.

4.3 The German Case

As previously mentioned, shortly before the implementation of the Framework Decision on the EAW, Article 16(2) of the German Constitution had, "thanks to a prophetic intuition," already been revised.

The new provision permits derogation to the ban on extraditing a German citizen to allow his surrender to a European Union Member State or international Court, on condition that the fundamental principle of the *rule of law* be respected.

In 2003, the German Minister of Justice had rejected the request of extradition to Spain submitted by the Spanish police authority against a German and Syrian national accused by the Spanish authorities of participation in a criminal association and terrorism which were committed in Spanish territory. The reason for the decision was that at that point, the legislation for the implementation of the new provision under Article 16(2) of the Constitution had not yet been issued, and therefore, the application of the Article's previous version, unconditionally forbidding the extradition of a German citizen, could not be questioned.

Following Germany's adoption of FD EAW through the *Europäisches Haftbefehlsgestz* of 21 July 2004, Hamburg's jurisdictional authorities granted the request for surrender of the individual to Spanish authorities on the basis of the new European regulation which, as anticipated, does not exempt other Member States' citizens.

After appealing against this decision before the competent national Courts in vain, the German citizen subject to the arrest warrant appealed to the Constitutional Court asserting, *inter alia*, the alleged violation of provisions as per Article 16(2) of the Basic Law.

The appellant claimed that the statute implementing the EAW lacked in democratic legitimacy for having introduced into national legislation a provision potentially depriving one's personal liberty and the principle of legal certainty.

The federal Government intervened, stating that the constitutional complaint was to be considered groundless, above all due to the binding nature of the framework decisions pursuant to the EU Treaty which, surprising though this assertion is coming from the German government, "must have unconditional supremacy over national law, including constitutional principles".

The German constitutional judges must have been of a very different opinion, if, after having deemed the constitutional parameter pursuant to Article 16(2) perfectly applicable to the implementing national law, declared it unconstitutional since the German legislator did not conform to the provision pursuant to which the extradition of a German national was only admissible as long as the rule of law is upheld.

In the Court's opinion, the right to be tried in the country of origin, interwoven with the protection of citizens, has its foundations in Germany's tragic modern history when, after the 1933 *coup*, all citizens of Jewish origin and religion were denied, by the National Socialist dictatorship, their citizen status and protection was granted instead to German citizens through a provision in compliance with the regulation in force.

Further, the Court added, the 2000 revision of Article 16(2) allowing extradition of a German citizen proved necessary to conform the national regulation to recent developments in the third pillar's integration process within the European Union, and to the harmonization requests coming from the United Nations' International Criminal Court.

Despite these overtures, the German judges made it clear that the third pillar's intergovernmental dynamic may not under any circumstances fall within the EC *acquis* of the first pillar, thus recalling how the EU Treaty's express provisions on the framework decision's absence of direct effect, is due to the Member States' precise willingness to avoid the ECJ conferring direct effect on these legal acts as well, as it had governed the interpretation of EC directives.

Accordingly, from a constitutional point of view and directly pursuant to Article 16(2) of the Basic Law, a concrete review on a case-by-case basis should be made to ascertain that the prosecuted individual is not deprived of the guarantees or fundamental rights he would have been granted in Germany, and that except for obvious language problems and a lack of familiarity with the criminal law of the destination country, this may in no event lead to the worsening of the individual's situation.

Apparently, according to the German constitutional judges, the legislator did not fully use the discretion allowed by the Framework Decision which permitted, in fact, judicial authorities to refuse execution where the EAW relates to offences which

> are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.[34]

In such circumstances, according to the Federal Constitutional Court, a significant *domestic connecting factor* is established and "the trust of German citizens in their own legal order shall be protected" (para. 86–87).

By reading the ruling from a different perspective, it is rather evident how, behind the attempt to verify the responsibility of the German legislator in the transposition activity, the Federal Constitutional Court's aim was to halt the acceleration process, which followed the EAW Framework Decision's adoption, of European integration concerning the third pillar which, according to the same Court, "cannot overrule, given its mainly intergovernmental character, the institutional dynamic peculiar to a system of international public law."

It was opinion of the Karlsruhe judges that in light of the safeguards of the subsidiarity principle,

> the cooperation in criminal matters established within the third pillar on the basis of a *limited* mutual recognition of criminal decisions, does not presuppose general harmonization of criminal laws of the Member States; conversely, it is a way to preserve national identity and statehood within the uniform European legal space (para. 77).

[34] Art. 4(7) FD EAW.

It has been correctly pointed out[35] that the key word in this crucial part of the reasoning is the adjective "limited" through which the Constitutional Court has precisely set a limit to the "optimism" of European judges who, in the first ruling[36] dealing directly with the third pillar's integration scope, expressly stated how

> the *ne bis in idem* principle necessarily implies a high level of confidence between Member States and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied (para. 33).

Although the majority of the Constitutional Committee[37] made no mention of the ECJ ruling of 16 June 2005, the output of the decision seems to be a direct response to the "acceleration," by way of the third pillar, which *Pupino* embarked on 30 days before.[38]

4.4 A Comparison Between the Polish and the Czech Cases

To fully understand the implications related to the relationship between the European and the constitutional legal systems by the adoption of the FD EAW in Poland and the Czech Republic, as well as the reactions of the Warsaw and Brno Constitutional Courts to the risk of collision between the constitutional and European dimensions, it is necessary to take a step back to the process which led to the adoption of the Czech and Polish Constitutions in 1992 and 1997, respectively. Both Constitutions are characterized by a number of clauses aimed at the protection of long-sought sovereignty, attained after decades of subjugation to communist regimes, which make a distinction, as is the case for the constituent documents of most Central-Eastern Countries, between internal and external sovereignty.[39]

Further, the next aspect to be taken into account is the "low profile approach" typical of all Central-Eastern countries to the constitutional amendments leading to accession to the European Union.

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[35] Komarek (2007), pp. 9 ff., p. 24.

[36] ECJ, 11 February 2003, joint cases C-187/01 and C-385/01, *Hüseyin Gözütok* and *Klaus Brügge*.

[37] Judge Gebhardt issued a dissenting opinion on the innovations brought about by the *Pupino* ruling asserting that the Court's decision contradicts the ECJ ruling of 16 June 2005, where it is emphasised that the principle of Member States' loyal cooperation in the area of police and judicial cooperation in criminal matters must also be respected by the Member State when implementing framework decisions within the third pillar. See Tomuschat (2006), p. 222.

[38] ECJ, 16 June 2005, C-105/03, in ECR I-5285, among which see at least: Mazzocchi (2005), pp. 884 ff.; Spaventa (2007), pp. 5 ff.

[39] For a cross-reference to independence see the preamble to the Czech Constitution and Arts. 26 and 130 of the Polish Constitution; for the emphasis on State sovereignty, see Art. 1 of the Czech Constitution, the preamble and Arts. 104(2) and 126(2) of the Polish Constitution. For further reference see also Stein (1994), p. 427.

As to the specific question relating to the alleged constitutional invalidity of the FD EAW's implementing act, the constitutional Courts of Warsaw and Brno made direct judgements.

Within the two legal systems, the implementing regulations did not bear notable differences, and the relevant constitutional parameters on the extradition ban for nationals were very similar.

The Polish Constitution is lapidary: Article 55 states, in fact, that "the extradition of a Polish citizen shall be forbidden."

Article 14(4), of the Charter of Fundamental Rights and Liberties, which encompasses all rights and liberties protected by the Constitution of the Czech Republic, states more generally that: "no Czech citizen shall be removed from his/her homeland."

It would be interesting to draw a parallel of the actual *reasoning* of the Constitutional Courts of Warsaw and Brno which, while starting from similar constitutional parameters, and a practically equivalent object of the matter, reached opposite outcomes. The first judgement, in fact, annulled the national regulation; the second did not detect any constitutional illegitimacy.

The Polish judges[40] had to establish whether surrender, the substantive issue of the EAW, could be regarded as a subset of extradition, the latter being expressly forbidden by Article 55 of the Constitution if the person concerned is a Polish national.

The Constitutional Tribunal, answering in the affirmative, held that the constitutional concept of extradition was so far-reaching as to encompass the surrender of a Polish citizen, a necessary provision to implement the EAW, whose purpose, at least at the Framework Decision's level, is to replace within the European legal space, the bilateral, intergovernmental dynamic typical of current extradition mechanisms.

After grouping under the same legal notion the two concepts of extradition and surrender, the second argument of the Polish Constitutional Tribunal was to point out how the admissibility of a national's surrender, provided for by the Framework Decision, undermined the rationale behind the ban as per Article 55 of the Polish Constitution, pursuant to which the essence of the right not to be extradited is that a Polish citizen be prosecuted before a Polish court.

According to the Warsaw Constitutional Tribunal, on the one hand, Poland's accession to the European Union brought about a radical change. Its accession not only accounts for, but also necessarily implies a constitutional revision of Article 55 to conform constitutional requirements to EU provisions. The said constitutional revision, however, according to the Polish judges, could not be carried out using a manipulative and dynamic interpretation of the relevant constitutional principle but needs *explicit* constitutional action by the legislator.

[40] One of the first studies on the decision is by Sileoni (2005), p. 894; More recently, Nußberger (2008), pp. 162 ff.

The *Pupino* judgement, which reasserts the obligation for national Courts to a consistent interpretation of the Framework Decisions pursuant to Article 34 (b) EU, was yet to be adopted by the ECJ.

Nevertheless, AG Kokott's opinion regarding the judgement had already been published.[41] The Polish constitutional judges, without directly mentioning it, considered the possibility of an obligation of consistent interpretation. However, they did not find it relevant in the current situation since, according to the Warsaw Tribunal, the obligation was limited by the ECJ itself, and may not worsen an individual's position, especially as regards the sphere of criminal liability.[42]

As it has been recently noted,[43] the Polish judges did not refer to specific judgements to show on what basis they had construed such an argument.

The relevant ruling to which the Polish Tribunal should have deferred, the *Arcaro* case from 1996,[44] did not perfectly apply to the EAW procedure, the implementation of which is conditional on the surrender of an individual whose question of criminal liability is pending before the Member State issuing the EAW. This liability remains untouched: it cannot be expanded or diminished whether the person requested is ultimately surrendered or not.

According to the constitutional judges, on the other hand, while national legislation is bound under Article 9 of the Constitution to implement secondary EU legislation, a presumption of the implementing act's compliance with constitutional norms cannot be inferred *sic et simpliciter*.

The Constitutional Tribunal easily concluded that, by permitting the prosecution of a Polish citizen before a foreign criminal Court, the national regulation implementing the EAW Framework Decision would have prejudiced the constitutional rights granted to Polish citizens, and therefore, it could only be found to be unconstitutional.

In spite of the unconstitutionality of the regulation, the Tribunal found that the mere annulment of the provision would have led to breach of Article 9 of the Constitution, according to which "Poland shall respect international law binding upon it" and whose application, according to the constitutional judges, also encompasses Poland's obligations stemming from accession to the European Union.

Therefore, in order to fully comply with such obligation, a change of Article 55 was considered necessary to provide for the possibility, departing from the general extradition ban of nationals, of enabling such persons' surrender to other Member States in execution of a EAW.

Meanwhile, the Tribunal, by enforcing Article 190(3) of the Constitution, set a deadline for the decision's effects—18 months—to give the legislator time to adopt the necessary amendments while the provision remained temporarily in force, and

[41] AG Kokott's opinion to case C-105/03, *Pupino*, in ECR, I-5285.

[42] Polish Constitutional Tribunal, dec. 27-4-2005 (P 1/05).

[43] Komarek (2007), p. 16.

[44] C-168/95, 26 September 1996, *Arcaro*, in ECR, I-4705, § 42.

for the constitutional revision to be in line with the Framework Decision on the European Arrest Warrant.[45]

One year later, the Czech constitutional judges founded their reasoning on a completely different set of grounds.

After recalling the decision issued barely 2 months earlier (judgment of 8 March 2006), where they had carried out an express *revirement* of their own jurisprudence in order to meet the interpretation criteria required by the application of the equality principle as interpreted by the ECJ,[46] the judges were faced with the sensitive issue of the binding nature of and related discretional margin left to the legislator regarding cooperation in criminal justice matters, which were to be attributed within the scope of the framework decisions pursuant to former Article 34 EU.

Showing a further degree of openness to (and extensive knowledge of) Community law, the Czech constitutional judges broadly touched upon the *Pupino* judgement, and although perhaps underestimating its added value, they pointed out how the obligation of national judges to interpret national law *as far as possible* in conformity with framework decisions adopted under the third pillar—and pursuant to such jurisprudence—would leave unprejudiced the issue relating to the enforcement of the principle of primacy of the EU law over (all) national legislation.[47]

The Court of Brno, taking into account the doubts concerning the interpretation of the Framework Decision's nature and its scope, seriously considered the possibility of proposing, evidencing once again[48] its enthusiasm for dialogue with the EC's supreme judicial body, a preliminary reference in Luxembourg, though it later ruled out the option due to the fact that the Belgian *Cour d'Arbitrage*, as anticipated,[49] had already addressed the ECJ regarding the same issue.

The Czech constitutional judges were thus faced with the dilemma of whether they should suspend judgement concerning constitutionality while "awaiting" the ECJ's answer, or instead rule on the matter. They chose the second option, attempting to, and this is the most interesting aspect, find amongst all the potential interpretations of the relevant constitutional norm—Article 14(4) of the Czech Charter of Constitutional Rights—the one not which did not clash with Community law principles the secondary legislation.

In particular, the judges highlighted how, without the support of an interpretation effort, the provision's wording of Article 14(4) according to which no Czech citizen

[45] Amendments to Article 55 of Constitution were made within the deadline provided for in the decision, and as of 7 November 2006, Poland has agreed to the execution of EAW against its nationals, subject to two conditions, which do not appear to be in line with the EU regulation: the fact that the crime has been committed outside Polish territory and that it is recognised under and also capable of being prosecuted under Polish criminal law.

[46] See Pollicino (2006), pp. 819 ff.

[47] See Piqani (2007) and Herrmann (2007).

[48] They have already shown the same attitude with decision PI US 50/04, 8-3-2006. See Pollicino (2006).

[49] Preliminary reference by the *Cour d'Arbitrage* dated 29 October 2005.

shall be removed from his homeland, does not fully account for[50] the actual existence of a constitutional ban on the surrender of a Czech citizen to a foreign State, in execution of an arrest warrant, for a set period of time.

In the view of the Czech constitutional Court, two plausible interpretations exist.

The first and literal one, even though it might lead to the ban's provision within the constitutional norm, would have at least two disadvantages.

Firstly, it would not take into account the "historical impetus" underlying the adoption of the Fundamental Rights Charter, and especially of Article 14(4). The Constitutional Court stressed, in fact, how a historical interpretation of the criterion under discussion clearly explained that, based on the wording of the Charter between the end of 1990 and the beginning of 1991, the authors who drafted the ban on removing Czech citizens from their homeland, far from considering the effects of the implementation of extradition procedures, had in mind "the recent experience of communist crimes" and especially of the "demolition operation" that the regime had perpetrated in order to remove from the country whoever represented an obstacle to the hegemony of the regime itself.

Secondly, an interpretation of that sort would lead to a violation of the principle, clearly expressed for the first time by the constitutional judges, according to which all domestic law sources, including the Constitution, must be interpreted as far as possible in conformity with the legislation implementing the European integration evolution process.

An obligation that the constitutional provisions be consistently interpreted in light of EC law, which the constitutional judges derived from the combined provisions of Article 1(2) of the Constitution, added in light of the accession to the European Union and pursuant to which "the Czech Republic is compelled to fulfil obligations originating under international law", and former Article 10 EC on the principle of loyal cooperation between Member States and the European Union.

On the basis of a teleological approach, the Czech constitutional judges went on to identify the constitutional norm's most consistent interpretation of the implementing act, as well as of FD EAW, to the Czech Constitution.

It is not surprising then, that the Court managed to find constitutional grounds supporting almost all of the problematic Framework Decision dispositions.

Noteworthy in this respect was the legislative omission which had induced the Federal Constitutional Court to declare the framework decision's implementing law unconstitutional and void, that is to say, the non-acceptance under national regulation of the possibility, pursuant to Article 4(7), to enhance the domestic connecting factor and allow a legitimate rejection of an EAW request by the implementing judiciary authority. Actually, the provision had not been taken into account by the Czech legislator either in the implementation of the Framework Decision. Nevertheless, according to the Czech Constitutional Court, the obstacle could be

[50] As it did, instead, according to the Czech judges, the provision of the corresponding Article 23 (4) of the Slovak Constitution which, prior to the constitutional revision of 2001, made express reference of the extradition ban of Slovak citizens.

surmounted through the (extreme) application of the principle of consistent interpretation. It held, in fact, that notwithstanding the legislative omission, the Czech system could not afford to lose the citizens' trust in their own legal order, therefore, coming close to a *contra legem* interpretation of the relating provision, the constitutional judges concluded that any offence carried out within the national borders would continue to be prosecuted under domestic criminal law. In other words, under the same circumstances, the Czech constitutional authorities would most likely reject the request to execute a EAW.

Accordingly, it is plausible to infer that the Czech constitutional Court, in its firm intent to reach greater consistency between Article 14(3) of the Constitution and the European Framework Decision, strained the verbatim content of both the constitutional dispositions and the domestic law under discussion. Unavoidably, this led to the acceptance by the Czech Judges of the principle of mutual trust, rejected by their German judicial colleagues, in the criminal legislation of other Member States' legal systems, through the direct reference to *Gözütok and Brügge*[51] by the ECJ, whose findings have been questioned by the "sceptical" approach of the Karlsruhe judges.

5 Conclusive Remarks

5.1 *Models of Conflict Settlement Between Interacting Legal Systems*

In the attempt to provide a conclusive conceptual framework connecting the different approaches of the German, Polish and Czech constitutional judges, the three decisions appear to be the expressions of the respective Courts' different ways of tackling the delicate issue concerning the relationship between EU law and Member States' constitutional legal systems.

With the ruling on the EAW, the Federal Constitutional Court proved that it advocates a certain "democratic statism," as defined by Mattias Kumm. This is, to state more clearly, "a normative conception of a political order establishing a link between three concepts: statehood, sovereignty and democratic self-government."[52]

Statehood and sovereignty[53] constitute, indeed, the *leitmotif* of the entire argument underlying the German judgment.

[51] ECJ, 11 February 2003, joint cases C-187/01 and C-385/01, *Hüseyin Gözütok* and *Klaus Brügge*.

[52] Kumm (1999), pp. 351 ff., p. 366.

[53] For a recent contribution on the primary role that sovereignty plays within the European scenario which is characterized, more and more, by conflicts arising within legal orders, see Jakab (2006), pp. 375 ff.

A decision based on such cornerstones could not but lead to the annulment of the national implementation of the FD EAW, as well as, more generally, as it as has emerged from the decision's analysis, to the refusal of any attempt to "communitize" the European area which mainly reflects statehood and sovereignty among Member States: the cooperation in criminal matters entailed by the Union's third pillar.

On the opposite side, upon a closer look, the Polish Constitutional Tribunal did exactly what the most extremist "pro-Community activist" would ask for in case of an irreconcilable conflict between the Constitution and EU law. Does the Framework Decision clash with the constitutional norm of a Member State? Fine, we thus amend the Constitution and, meanwhile, the annulled provision remains temporarily in force.

It is not by chance that the Polish doctrine observed how the legislator's request to review the Constitution and the temporal limitation of effects of the decision proves that

> the Constitutional Tribunal in fact recognized the supremacy of EU law. . . . It thus accepted that the Constitution itself was no longer an absolute framework for control – if it hinders the correct implementation of EU law, it should be changed [. . .]. It seemed that in this judgment the Tribunal went further than the existing practice, it implicitly accepted the supremacy of EU law over constitutional norms.[54]

Upon a closer look, the two approaches considered herein (the German and Polish ones), while so different in their identification of which is the supreme law source of reference (in the former, the Constitution, in the latter, EU legislation), have something in common: the fact that both of them focus on identifying a supreme source of law.

In other words, in both decisions, the game is played out on the field of the sources of law-based theory delimitated by the identification of hierarchical, predetermined and unassailable relations among the norms involved.

In this respect, it is worth noticing how both the Polish and German judgements, (1) did not recall relevant ECJ jurisprudence, (2) did not refer to decisions adopted by other European constitutional Courts attempting to solve similar conflicts, and (3) never considered the possibility of a dialogue with the ECJ through a preliminary reference.

Conversely, the three elements do converge in the Czech decision and represent specific and concurring clues to demonstrate that the Brno court opted to play the game of conflict settlement between domestic and EU law in a field characterised by an interpretation-based theory,[55] rather than a theory based on hierarchy among

[54] See Kowalik-Banczyk (2005), pp. 1360–1361. Along the same lines, Angelika Nußberger, the judgment might seem to suggest that the tribunal denies the supremacy of EU law and is adopting an euro-skeptical position, in fact, the opposite is true: see Nußberger (2008), pp. 162 ff., p. 166.

[55] In Italy, one of the most extensive studies of this issue was done by Antonio Ruggeri. Amongst his numerous papers dealing with this subject, see at least the following, Ruggeri (2002), pp. 63 ff.; Ruggeri (2003), pp. 102 ff. Such an axiologically-oriented view seems to share the reconstructive bases of MacCormick and of those supporting the constitutional pluralism rule in the framework of the relationship between the constitutional and supranational legal orders. See MacCormick (1993), at p. 1; MacCormick (1999); Maduro (2003); Walker (2002), pp. 317 ff.

the sources of law, as it seems has been favoured by their colleagues in Karlsruhe and Warsaw. The field chosen by the Czech Constitutional Court is one characterised instead from a substantive point of view by the acceptance of the idea of constitutional pluralism as paramount parameter for the settlement of constitutional conflicts and methodologically and procedurally by the application of a dialogic and communicative theory of inter-constitutional law.

From a substantive point of view, the Czech constitutional Court, although never fully giving up the focus of its reasoning on the classical concepts of sovereignty, limited transfer to the supranational system attempted to convey on an axiological basis, and without any idea of hierarchy between interacting legal systems, the ultimate rationale behind the EAW implementing national law on the one hand, and the constitutionally protected values on the other. Czech judges found that the fact that the Framework Decision does not always apply the double criminality requirement does not infringe the constitutional principle of legality in criminal law, as the absence of the latter rule does not affect the principle

> with regard to the Member States of the EU, which have a sufficient level of values convergence and mutual confidence that they are all states having democratic regimes which adhere to the rule of law and are bound by the application to observe this principle.[56]

A second consideration relates to the fact that, in the framework of the relationship between interacting legal systems, a growing distance is emerging between the (low) degree of openness towards EU law in the CEE Constitutions and the more generous tendency to accept the mechanisms of European law into domestic law which central and eastern European Constitutional Courts are currently showing.

In an attempt to be less obscure, let us apply this consideration to the EAW saga. Upon an initial, "static" reading of the relevant constitutional norms, it has often been pointed out in this paper how an ex-ante evaluation of the FD EAW provisions, as regards the binding obligation on the executing State, except for the cases strictly provided for, to surrender a national to the requesting Member State appeared more in line with the German Basic Law regulating extradition, than it appeared to be capable of complying with the corresponding provision of the Czech Fundamental Rights' Charter.

More generally, while always maintaining the relevant constitutional norm's perspective, it is evident that the "sovereignist" nature of the CEE national Constitutions, and specifically the Polish and Czech ones, left little room for their Constitutional Courts' pro-European "enthusiasm" when compared with the flexibility theoretically allowed the German Constitutional Court under the Basic Law's relevant provisions, which was never noted for having a marked "sovereignty-focused" character (also in light of the historical context in which it took shape). Moreover, one should bear in mind that the "European clause" introduced into the provision of Article 23 of the Basic Law upon the ratification of the Maastricht

[56] Kumm (2005), pp. 262 ff., p. 286.

Treaty in 1993, further acquired the already existing predisposition of the German Constitution to be influenced by the European and international law.

Notwithstanding the advantage of the German legal system as to the interpretation of the relevant constitutional parameters as compared with the CEE legal systems, and especially the Polish and Czech ones, the "leap" of the Warsaw and Brno Constitutional Courts, which has just been examined above, not only cancelled out this advantage, but it enabled Polish and Czech constitutional jurisprudence, despite a constitutional parameter pointing the opposite way, to accept the penetration of European law in domestic legal systems to a much greater extent than the German Federal Constitutional Court allowed with its decision. In other words, this new season of European constitutionalism seems to be marked by a sense of "exploration" in terms of new argumentative techniques and original judicial interaction between national and European courts, which follows novel "off-piste" routes from those outlined by the interpretative routes suggested by applicable constitutional parameters. To simplify even more, what is emerging seems to be a constantly growing bifurcation between the static reading of the constitutional clauses in the interconnecting legal systems and their dynamic judicial interpretation by Constitutional Courts.

5.2 Final Remarks on the Constitutional Case Law on Res Iudicata and Limitations of Liberty: A New Attention of Italian Constitutional Court Toward Strasbourg?

As we have tried to show in paragraph 2, with reference to the subject of the limitations of liberty, the Italian Constitutional Court has not shown a particular tendency to invoke the ECtHR. However, with respect to certain rights of the accused person, the Italian Constitutional Court has taken into account the relevant case law of the Strasbourg court and, as in judgment 265/2010, has given a decision of unconstitutionality as a result of certain decisions (three on the same issue) of the ECtHR against Italy. That is said with particular reference to the issue of restriction of liberty. In other areas of criminal procedural law, however, the influence of the Strasbourg Court on the jurisprudence of Italian Constitutional Court has been critical. We are witnessing, today, as we have said many times in this work, an increase of the consideration by the Italian Constitutional Court of the ECtHR case law and of the rules of the ECHR, partly as a result of the "new deal" of the ECtHR which, as we said at the beginning, in recent years has increasingly shown a willingness to play the role of a real European Constitutional Court, raising the tone and the "shot" of its case law. The latest example of the increasing openness of the Italian Constitutional Court to the reasons of international law, with particular reference to the ECHR, is mentioned in the decision 113/2011 just cited, where the Court has even gone beyond the dogma of the inviolability of the *res iudicata* in the name of better implementation of the protection of individual rights.

As most commentators have noticed,[57] the decision 113/2011 represents from this point of view a "turning point" in relations between Italian perception of constitutional law and the ECHR, as interpreted by the Italian Constitutional Court. According to this doctrine, this decision gives a sudden acceleration to the process of "Europeanization" of Italian constitutional law, through a decision that in some passages lays the groundwork for an overtaking of more cautious positions on the relationship between the Constitution and the ECHR, most recently reaffirmed in the decision 80/2011, a true *summa*[58] of the thought of the Italian Constitutional Court on this issue.

In its decision 80/2011 the Court has made or reaffirmed some points with reference to the duties of the judges, the interpretation of national law in the light of the ECHR, and with regard to its own interpretation. With regard to the tasks of judges, the Court reaffirms, as it had done it before and as it would do in decision 113/2011, that the judges must interpret the law in a way consistent with the Convention, using every hermeneutic tool at their disposal. If they fail, ordinary courts must apply to the Constitutional Court: the Court resolutely denies, as some scholars have proposed and some judges tried to do, that it a direct application of the ECHR is possible.

The Court reiterates that it is impossible both for itself and for the ordinary courts to make interpretations of the ECHR even marginally different from those made by the Strasbourg Court without distinguishing between consolidated principles and cases where the ECtHR's orientation is still oscillating and hence open to adjustments. The Constitutional Court has clarified in a precise manner, with many examples, its opinion on the position of the ECHR in the system of Italian sources of law. It is, too much according to some, from a formal perspective rather than an axiological/substantial one, oriented to the solution of issues concerning the protection of fundamental rights with regard to the substance of protection, namely the content of protection, and not to the form of the source giving such protection. The ECHR is a source subject to the Constitution, which receives constitutional foundation in Article 117(1) and not, as also suggested by some judges and scholars, Article 11, which the Italian Constitutional Court continues to reserve only to European Union law. There is no place in the decision even for those signs of openness towards the raising of the constitutional level for certain provisions of the Convention. If these provisions coincide with the generally recognized principles of international law, the possible constitutional base will be in Article 10 of the Italian Constitution, if they coincide with European Union law, the constitutional base will be Article 11.

With the decision 113/2011, the Constitutional Court, as we have seen, did not change this belief. Yet, an eminent scholar[59] have not failed to ask what reason might be that prompted the Constitutional Court in this decision to overcome the

[57] See Ruggeri (2011b).
[58] See Ruggeri (2011a).
[59] Ruggeri (2011b).

principle of *res iudicata* for the benefit of the reopening of the trial for violation of ECHR rules. In paragraph 8 of the reasons for decision, the Court held that, although the values of legal certainty and stability of *res iudicata* are noteworthy, it is possible to attenuate the *res iudicata* "in the presence of impairments of particular significance [...] to the guarantees relating to fundamental human rights." In particular, fundamental rights considered by the Court are those of the rights of fair trial as provided for in Article 6 ECHR, but also, says the Court, in Article 111 of the Italian Constitution. According to Antonio Ruggeri,[60] this passage, where it generally refers to the fundamental rights of the person, could pave the way to a change in the Court's position on the position of the ECHR in the system of sources of law. If we replace the abstract/formal perspective of the position of sources of law with a substantial one, which seeks to ensure the best possible protection of fundamental human rights, then the hermeneutic task of the Constitutional Court could also move toward that of retaining provisions of the Convention prevailing even over those of the Constitution itself, if one could demonstrate that those rules provide greater protection to a fundamental right. Those, as Antonio Ruggeri, who call for such a transformation of the relationship between the ECHR and the Constitution believe that any withdrawal, in the case now under consideration, of the Constitution is not to be considered as a decrease of its value but on the contrary, as implementation "at best, as system"[61] of the constitutional document itself. If on balance we give greater voice to the ECHR (and of course the same argument can be used with reference to the Charter of Nice-Strasbourg) over the national Constitution, we do not have a *diminutio* of the Constitution, but the best implementation of what is the essence of the Constitution, namely the protection of fundamental rights. When fundamental rights come into play to an "arrangement of sources of law according to form" should, according to this perspective, replace a "system of legal sources according to values." It would be a choice of deep impact and scope.

This solution is undoubtedly fascinating, but important questions arise if one wants to adopt it. If the perspective changes and thus becomes oriented to *norms* rather than to the *sources of law*, to whom do we entrust the delicate task of assessing what is, on the basis of content of protection and not the form, the rule protecting a fundamental right to a greater extent? Does it remain in the hands of the Constitutional Court, or could it be extended to ordinary judges? Once we agree to base an ECHR rule on Article 11 of the Italian Constitution, and thus make laws conflicting with the ECHR ineligible for application by ordinary judges, is there a risk that uncertainties will occur in the delicate field of the protection of fundamental rights? These seem to us to be the questions which scholars and the Italian Constitutional Court will be required to answer. What seems undeniable, however, is that the Court has shown even more openness to

[60] *Ibid.*

[61] For this and the subsequent quotations, unless otherwise specified, see Ruggeri (2011b).

international law, with special reference to the growing incisiveness of the ECtHR. The decision 113/2011, despite the confirmation of some key positions in terms of hierarchy of sources, seems, as mentioned, to prove this approach.

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The Role of the Proportionality Principle in Cross-Border Investigations Involving Fundamental Rights

Lorena Bachmaier Winter

Contents

Abstract In the context of European judicial cooperation it is relevant to check what is the role the proportionality principle plays, or should play, in the evidence gathering in cross-border criminal proceedings. This paper will first highlight some of the difficulties in defining the principle of proportionality with regard to coercive investigative measures and in finding a common concept of proportionality in Europe. Finally, we will discuss what is the role of the principle of proportionality in the regulation of the EU legal instruments on the evidence gathering, precisely in the proposal for a directive on a European Investigation Order (version June 2011).

The chapter contributions from the three first parts of this book are quoted with the only reference to the Author's surname, either above or below, and the number of the paragraph concerned.

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Abbreviations

EAW	European Arrest Warrant
ECBA	European Criminal Bar Association
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIO	European Investigation Order
EU FRA	European Union's Agency for Fundamental Rights
EU FRCh	Charter of Fundamental Rights of the European Union
FD EEW	Framework Decision on the European Evidence Warrant
SC	Spanish Constitution

1 Introduction

Among the various topics on judicial cooperation in criminal matters in Europe, the issue of collecting evidence in another member state has raised numerous debates and studies. Questions as to the scope of the principle of mutual recognition, the admissibility of evidence collected abroad, or even the aim of reaching the free circulation of evidence are not easy to answer and scholars as well as practitioners have shown their concern with regard to the protection of human rights of the defendants and the principle of equality of arms. The aim of this paper is not to recall all these interesting debates on the free movement of evidence in the criminal proceedings throughout Europe,[1] but instead to focus on the proportionality principle in cross-border criminal investigations and its impact on the admissibility of evidence in Europe. The role of the proportionality principle in judicial cooperation in European transnational criminal proceedings has already been specifically addressed with regard to the compliance of the European Arrest Warrant (EAW).[2] Whether the requested member state has the power to refuse to execute the arrest warrant if, according to the principles of the executing state, such a detention and surrender would not be in compliance with the principle of proportionality is still a highly controversial issue. According the report on the evaluation on the practical application of the EAW of 2009, the Council states that the issue of proportionality should be addressed as a matter of priority.[3]

[1] See Gless (2006). See also Gless (2003), pp. 131–150; Gless (2004), pp. 679–683; Spencer (2005), pp. 28–40; Ijzerman (2005), pp. 5–16; Vogel (2004); Bachmaier (2006a), pp. 53–77; Bachmaier (2006b), pp. 131–178; Allegrezza (2007), pp. 691–719; Gascon Inchausti (2007), pp. 371–417; Rodríguez Bahamonde (2009), pp. 1–22; Bachmaier (2010), pp. 580–589. In that same special issue see also Ambos (2010), pp. 557–566; Allegrezza (2010), pp. 569–579; Lelieur (2010), pp. 590–601; Spencer (2010), pp. 602–605.

[2] Sotto Maior (2009), pp. 213 ff.

[3] Recommendation No. 9 of the final report on the fourth round of mutual evaluations—The practical application of the European Arrest Warrant and corresponding surrender procedures between member states, Brussels 28 May 2009, 8302/4/09, REV 4, CRIMORG 55, COPEN 68, EJN 24, EUROJUST 20.

Practice has shown that some member states issue an EAW in cases where other member states would never do so, because such detention would be deemed disproportionate.[4] In the ambit of the EAW some member states have already started to check the proportionality of the EAW requested, before deciding on the detention or initiating the surrender procedure. In this sense, it is interesting to have a look at the decision of the German *Oberlandesgericht* of Stuttgart of 25 February 2010. This decision, while checking the legislation and conditions for the extradition of an individual residing in Germany, goes into a deep assessment of the proportionality of the EAW: in order to decide on the surrender of the defendant, the German court evaluates the penalty imposed by Spanish laws on a minor offence of drug trafficking and thus introduces the proportionality principle as a pre-requisite before attending to the Spanish request of extradition of the defendant to the Spanish Courts.[5]

The high number of EAW issued by member states such as Poland as a consequence of a strict application of the mandatory prosecution system combined with a different understanding of the proportionality principle, has triggered a hot debate around the proportionality principle and the possibility to refuse the execution of an EAW, even if the FD does not provide explicitly for this ground of refusal.

The debates that have arisen with regard to the application of the EAW show some similarities with the issues that are discussed with regard to the free movement of evidence in European cross-border criminal proceedings. With regard to the EIO similar questions can be posed. Should the requested member state be able to refuse a European Evidence Warrant (EEW) or a future European Investigation Order (EIO) on the basis that the investigative measure does not comply with the proportionality principle? Can the defendant invoke the inadmissibility of evidence if the investigative measure does not meet the proportionality standards of the executing State?

The draft for a PD EIO of June 2011 introduces the possibility to refuse the execution of an EIO if the investigative measure requested does not meet the proportionality requirements according to the rules and principles of the execution state. Does this mean that each member states still wants to be able to check the adequacy and proportionality of the measure requested before accepting the obligation to carry out the measure requested? In other words, is it too early to apply the principle of mutual recognition with regard to the cross-border evidence?

In the context of European judicial cooperation it is relevant to check which is the role the proportionality principle plays or should play in the field of transnational evidence gathering. To this aim, this paper will first highlight some of the difficulties in defining the principle proportionality with regard to coercive investigative measures. Second, I will analyse the case-law of the ECtHR in this field in order to establish if there is a common European concept of the proportionality principle in the use of criminal investigative measures, specifically with regard to coercive measures. Third, I will discuss what role the principle of proportionality should

[4] Jimeno Bulnes (2011b), pp. 109–200, 190 ff.

[5] For the text of this decision and interesting comments on the issue of proportionality with regard to the EAW see Vogel and Spencer (2010), pp. 474–482.

play in the regulation of the EU legal instruments on the evidence gathering—precisely in the EEW and the PD EIO—as well as the difficulties in assessing the proportionality of an investigative measure restrictive of fundamental rights.

It is clear that, even if this paper is focused on transnational evidence gathering in Europe, the issues that will be discussed here have a direct impact on the significance and implementation of the principle of mutual recognition and the protection of fundamental rights.

2 The Principle of Proportionality: A Broad Concept

In the French tradition the proportionality test has been widely applied in the area of administrative law, as a principle based on the fair assessment and balancing different interests in the field of discretionary policy decisions as a safeguard against unlimited legislative or administrative powers. The origins of the concept of proportionality with regard to fundamental rights as a prohibition of abuse can be found in the evolution of administrative law at the end of the eighteenth century, a notion that developed throughout the nineteenth century with the growing awareness of fundamental rights.[6] It is also established as a principle of Community law, together with the principle of subsidiarity—"any action by the community shall not go beyond what is necessary to achieve the objectives of this Treaty" (Art. 3 Amsterdam Treaty 1999, and Art. 5 of the EC Treaty inserted under the Maastricht Agreement),[7] and also in Article 1 of the Treaty of Lisbon. The proportionality principle is also anchored in the international law, having been incorporated, among others to the International Covenant on Civil and Political Rights and the American Convention on Human Rights.

Proportionality is also a well-established principle in the field of criminal law, where it has been applied since long to assess the reasonableness of the penalties and the need to avoid excessive punishments in relation to the aim pursued, which is expressly recognized in Article 49(3) EU FRCh (proportionality of criminal offences and penalties).

The principle of proportionality is regarded as a constitutional principle in some Constitutions such as the German Constitution, whose case law on the meaning and elements of the proportionality principle has clearly influenced the jurisprudence of the EU Court of Justice and of the ECtHR.[8] It is considered a principle that is

[6] López González (1988), pp. 17 ff.; Degener (1985), p. 43; González-Cuéllar (1990); Barnes Vázquez (1994), pp. 531 ff. See Perello Domenech (1997), pp. 69–75.

[7] See Jimeno Bulnes (1988), pp. 137–149. More recently Takis Tridimas (1999), pp. 76 ff.

[8] The principle of proportionality is not expressly mentioned in the Spanish Constitution of 1978, but Article 106(1) recognizes it as a guiding principle of administrative law by stating: "1. The Courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action, as well as to ensure that the latter is subordinated to the ends which justify it." On the constitutional doctrine regarding the principle of proportionality, see, among others, González Beilfuss (2003); Bernal Pulido (2005); Pedraz Penalva and Ortega Benito (1990), pp. 69–100; Barnes Vázquez (1994), pp. 531 ff.; Vidal Fueyo (2005), pp. 427–447.

implied in the idea of human rights and the rule of law or *Rechtstaatsprinzip*.[9] The Spanish Constitution does not explicitly mention the principle of proportionality, but it is implied as a guiding principle of administrative law in Article 106(1) of the Spanish Constitution.[10]

The principle of proportionality implies the need to balance conflicting interests in each particular case, with the aim, normally, of limiting possible excesses of power by public authorities. Therefore, when the application of the sanctioning administrative law, criminal law or investigative measures in the context of a criminal process interferes with citizens' fundamental rights, it will be necessary to determine whether that interference is reasonable and justified by the aims pursued. A possible template of questions to review the proportionality of any measure could be the following[11]: (1) does the measure adopted pursue a legitimate aim? (legitimacy); (2) can it serve to further that aim? (adequacy); (3) is it the least restrictive measure to achieve that aim? (necessity); and (4) viewed overall, do the ends justify the means? (proportionality in a strict sense).

Naturally, it is not my intention to provide here a complete and detailed study on the application of the proportionality principle in the area of criminal law. I will merely endeavour to underline which are the existing difficulties to define and, above all, to apply the proportionality principle in transnational criminal investigation.

In the area of criminal procedure, it is the legislator who ordinarily evaluates the adequacy of the relationship between ends and means. However, since proportionality requires an empirical analysis of the circumstances of each particular case, the legislator leaves a margin of appreciation to judicial authorities.[12] Therefore, the judge is competent to review if, in the application of a legal rule that legitimizes an invasion of the sphere of the individual's fundamental rights, such interference is reasonable *in concreto* taking into account the aims pursued.

In the field of criminal investigation, this means that every measure adopted by a public authority that may affect the human rights of an individual must be appropriate, necessary and reasonable.[13] These terms, as stated above, indicate an adequacy of the means to the aim, which in turn implies assessing, first, whether the aim is legitimate; second, whether the same aim can be reached through less restrictive alternative means, and third, whether the damage caused to the

[9] See Degener (1985), p. 46; González-Cuéllar (1990), pp. 53 ff.; Pedraz Penalva and Ortega Benito (1990), pp. 69–100; Barnes Vázquez (1994), pp. 531 ff.

[10] On the doctrine of the Spanish Constitutional court on the proportionality principle, see González Beilfuss (2003), Bernal Pulido (2005), and Vidal Fueyo (2005), pp. 427–447.

[11] Fordham and De La Mare (2001), pp. 27–89, 28.

[12] On this already the *Wednesbury* doctrine, mentioned earlier. The proportionality test can review the logic and reasoning of the judicial decision adopting an investigative measure, but there is still a margin of appreciation within the decision maker decides what is the weight to be given to each of the considerations and what role should they play in the reasoning process. See Fordham and De La Mare (2001), p. 31.

[13] We follow here Degener (1985), pp. 31 ff., although this author studies more deeply the preventive detention and remand in custody; see also González-Cuéllar (1990), pp. 29 ff.

individual's rights can be justified by the aim pursued or, on the contrary, would be excessive. These three elements have been called adequacy, necessity and proportionality *stricto sensu*.

Among them, it is precisely the notion of proportionality *stricto sensu* that offers a more blurred profile. To assess whether this criterion has been met, it is customary to refer to undetermined concepts such as the *reasonable proportion* between the gravity of the interference with fundamental rights and the aim pursued. It has also been affirmed that the proportionality principle is a sort of *rule of common sense*. And here we face the main problem when trying to address the issue of the proportionality: What is "common sense" in this context? What shall be considered "reasonable?" We are in front of a broad legal concept comparable with the classical notions of "the good paterfamilias" or "due diligence," i.e., notions whose precise content can be defined only in the particular case, taking into account the social circumstances and values at the time in which the rule has to be applied. As they are broad and not immutable notions, the legislator avoids defining them and trusts the judge's *ad hoc* evaluation. This does not mean that judges have the power to establish the principle of proportionality, but rather that they are in better condition to assess, in each particular case, if a certain measure adopted by the public authorities has met the criteria of reasonability. Judges are competent, in each state, to control those investigative measures interfering with fundamental rights which are foreseen by the law, and ensure that they are not excessive in the light of the conflicting interests at stake[14]: the society's interest in the persecution of crime, and on the other hand the protection of fundamental rights of citizens.

Consequently, determining which investigative measures are disproportionate—i.e., unreasonable or excessive—is only possible in the light of the contextual assessment made by judges within the legislative framework more or less defined by each legal system. Only the analysis and evaluation of each particular case allows reaching a more precise notion of the proportionality principle, which in any event will be circumscribed to that particular social and legal environment.

In sum, it is a *petitio principii* or circular reasoning to define the notion of proportionality in the area of interferences with fundamental rights by making use of equally broad or undetermined terms such as "adequate balance," "reasonability," "common sense" or "prohibition of excess," because these expressions need also to be defined in each particular case attending to the aims pursued, the prevailing values in that legal system and the sensitivity of each society towards the protection of fundamental rights.

If it is not possible to provide a general and precise notion of proportionality and we can only aspire to an approximation of it in the light of each particular measure of criminal investigation, it seems obvious that is impossible, or at least extremely difficult, to identify a single European notion of proportionality in the area of criminal investigation. We must then ask ourselves: do the different EU Member states share the same notion of reasonableness? Do we have the same concept of

[14] González-Cuéllar (1990), pp. 153 ff.

common sense in all EU member states? If not, does this hamper the establishment of a European space of justice? How does the principle of proportionality affect the application of the principle of mutual recognition?

In order to find an answer to these questions it might be useful to have a look at the principles set out by the ECtHR when dealing with coercive investigative measures that restrict fundamental rights.

3 The Proportionality Principle in the Case Law of the ECtHR on Criminal Investigation and the Right to Privacy

The ECtHR has since long defined the conditions that an investigative measure interfering with the right to privacy must meet to be in conformity with the Convention. Naturally, a criminal investigation can impose limitations on other fundamental rights and freedoms as the criminal prosecution is defined in the Convention as a legitimate aim in Article 8 ECtHR. We have chosen to focus on the measures that restrict the right guaranteed by Article 8 ECHR mainly for three reasons: because this is the most frequent right affected by coercive investigative measures, and because these measures play an essential role in cross border organised criminality.

The ECtHR has constantly reminded that Article 8 requires that the relevant coercive investigative measure be in accordance with the law and that its adoption be necessary in a democratic society and proportionate.[15] In the Court's words, it must respond to a *pressing social need*.[16] Only under these circumstances can a state's interferences with the right to privacy be justified. In general, the judicial authority is competent to assess whether in a certain case there is a pressing social need that allows the restriction of a fundamental right according to the legitimate interest of the criminal investigation and the prosecution of the criminal offence.

There are no fixed rules for determining the existence of a pressing social need. Only on a case by case basis, looking at the particular circumstances of a case, is it possible to draw conclusions about the existence of a legitimate aim or a pressing social need that may justify the interference the with fundamental rights of citizens. In particular, the ECtHR has recognized that:

- The prosecution of a crime is a legitimate aim according to Article 8 ECHR (indeed only in very rare occasions has the Court found the investigation of a criminal act to be in violation of Article 8 for lack of a legitimate aim);
- The investigative measures have been deemed strictly necessary when there were no less intrusive means to reach the same results or the measure is adequate

[15] See Reid (2008), pp. 424–430. Bachmaier (2009), pp. 9–29.

[16] ECtHR, 25 March 1983, Silver v. United Kingdom, Application No. 5947/72; 16 December 1997, Camenzind v. Switzerland, Application No. 21353/93.

> to the aim pursued. In the Court's view, the measure does not have to be absolutely indispensable to fulfil this requirement; it is enough that it be reasonably necessary and convenient.

In addition, the ECtHR requires that, no matter which restrictive measure is adopted, there must be adequate and effective guarantees against abuse: there must be adequate procedures for supervising the ordering and implementation of the restrictive measures and an effective remedy against possible infringements.[17] if the domestic law does not provide an adequate remedy, the interference turns out to be illicit and in contravention of Article 8 ECHR.

Finally, the measure in question must respect the proportionality principle. As proportionality is an abstract notion it needs to be defined according to the circumstances of the case within the context of the aims, principles and values of the society where the crime was committed. The Strasbourg court has consistently held that the principle of proportionality is inherent in balancing the right of an individual person against the general public interests in society.[18] This means that a fair or reasonable balance between those competing interests must be attained. Among the elements to evaluate the proportionality principle in the criminal investigation we can mention the seriousness of the crime, the intensity of the suspicions, the perspective of success of the measure, and the prejudice caused to the individual person vis-à-vis the usefulness of the results.[19] The scrutiny of these elements should help in assessing if the ends justify the means and be used to review the reasoning test of the ordering of the investigative measure.

The unavoidable ambiguities that are present in the evaluation of the necessity and proportionality of the measure in a democratic society in the ECtHR case-law respond to the search of an adjustment between the supranational protection of human rights and the respect for the features and principles of the national legal systems. The Court's efforts to achieve a right balance between the sovereignty of the states and the values envisaged in the Convention have materialized in the well-known doctrine of the state margin of appreciation. The Court has pointed out that, being closer to the circumstances of the case, national authorities must be recognized a margin of appreciation in assessing whether there is a pressing social need.

In sum, the doctrine of the margin of appreciation allows national authorities a certain discretionary power to assess the necessity and proportionality of investigative measures that interfere with fundamental rights. This is usually explained by saying that national authorities are in a better position to evaluate the necessity of

[17] ECtHR, 24 August 1998, Lambert v. France, Application No. 23618/94. More recently see also, for example, ECtHR, 7 June 2007, Smirnov v. Russia, Application No. 71362/01. On this issue see McBride (1999), p. 29 ff.

[18] Arai-Takahashi (2002), pp. 190 ff.

[19] These are the elements of the so-called "test of proportionality" which are already found in the common law in England of Wales and are expressly stated and the *Wednesbury* case of 1948. On this see Fordham and De La Mare (2001), pp. 30 ff. All these criteria are thoroughly analysed by Degener (1985), pp. 224 ff. In the same sense González-Cuéllar (1990), pp. 252 ff.

the measures and thus to find the right balance between the protection of the individual and the objectives of the public interest, and states must have therefore a margin of discretionary power in order to comply with the standards of the Convention.[20]

What is the scope of this margin of appreciation? Too broad a discretionary power would be contrary to the essence of the fundamental rights, but trying to reduce it excessively would imply that a supranational court should decide, in each and every single case, on the necessity of investigative measures, thus risking becoming a sort of fourth extraordinary instance. The following cases show some examples of how the Court has evaluated the proportionality requirement in the criminal investigation[21]:

Within the entry and search measure:

1) In the case *Niemietz v. Germany*,[22] the Court dealt with a criminal case for menaces and insults to a judge, where a judicial order of entry and search of a lawyer's office was granted. Once the warrant was issued, the police searched a number of files in the firm. The ECtHR held that the measure was not proportionate as the judicial warrant was too broad and allow searching all documents, and not just certain documents. In this case, to assess the lack of proportionality, the Court took into account the special confidentiality of the lawyer–client relationship, and finally found there had been a violation of Article 8 ECHR.
2) In *Miailhe v. France*,[23] during the investigation of a tax fraud offence and infringements against the customs rules, a search and entry of Mr. Miailhe's premises was granted and more than 15,000 documents were seized. The Court decided that there was a sufficient legal basis and the necessity of the entry and search was justified, but the indiscriminate seizure of so many documents was disproportionate. Furthermore, this huge seizure lacked sufficient control. All those circumstances led the Court to find a violation of Article 8 ECHR.
3) *Z. v. Finland*[24] dealt with the investigation of a sex offence and possible infection of the victim with AIDS. The search of medical archives was granted and was lawful under domestic laws. In order to evaluate the proportionality, the Court attended to the seriousness of the crime, the way in which the search of documents was done and the measures provided by the Finnish law to preserve confidentiality. It concluded that the measure was not disproportionate but the time limit established in the statutory provisions to guarantee the confidentiality of the medical data—10 years—was considered to violate Article 8 ECHR.

[20] Which should be the margin of appreciation and if this should be reduced in cases where the fundamental right to privacy is at stake is a debated question. On the doctrine of the margin of appreciation see Arai-Takahashi (2002), pp. 60 ff.

[21] See Bachmaier (2009), pp. 12–19.

[22] ECtHR, 16 December 1996, Niemietz v. Germany, Application No. 13710/88.

[23] ECtHR, 25 February 1993, Miailhe v. France, Application No. 12661/87.

[24] ECtHR, 25 February 1997, Z. v. Finland, Application No. 22009/93.

4) In *Smirnov v. Russia*,[25] the Court found a violation of Article 8 ECHR based on the insufficient grounds for the warrant authorizing the entry and search. The warrant did not specify the existence of indications that documents relevant for the investigation might be found in the office of Mr. Smirnov. In this case the Court, recalling the doctrine set out in the case of Niemietz, considered the fact that the search took place in the lawyer's professional office, and thus, the confidentiality of the client-attorney relationship could be affected. Finally, the facts that the police took away documents not related to the case and that the notebook of the lawyer owner of the office was confiscated and searched, were all considered to be in breach of Article 8 of the Convention.

With regard to the respect for privacy in relation to postal correspondence there are several decisions, but all of them in the context of communications of imprisoned persons, and thus not within a criminal investigation. These decisions are interesting in order to evaluate the proportionality principle of the interference, especially when this affects the privileged relationship between client and lawyer.[26] We will not mention these cases here, as they are only indirectly related to the topic of this paper.

With regard to telephone tapping, all judgments that we have found focus on the question of the sufficient legal basis, as the leading cases *Malone v. United Kingdom* and *Kruslin* and *Huvig*, already cited.[27] There are other decisions, as *Amann v. Switzerland*, where the Court draws attention to the insufficient protection of the rights of third persons affected by the interception of a telephone conversation.[28] But even in this latter case, the Court only deals with the issue of the sufficient legal provision. As far as we know, there is no case law that explains how the proportionality principle has to be assessed with regard to wire-tapping or electronic surveillance of communications.

The ECtHR's case law has definitely contributed to the creation of common standards on the understanding of human rights in Europe but this harmonization has important limits, as it probably unavoidably must. When weighing the existence of a pressing social need and, more precisely, applying the proportionality principle, the Court has recognized a broad margin of appreciation to the state authorities

[25] ECtHR, Smirnov v. Russia (footnote17).

[26] On this issue see ECtHR, 21 February 1975, Golder v. United Kingdom, Application No. 4451/70; Silver v. United Kingdom (footnote 16); 27 April 1988, Boyle and Rice v. United Kingdom, Application No. 9658/82; 9659/82; 20 June 1988, Schönenberger and Durmaz v. Switzerland, Application No. 11368/85; 30 August 1990, McCallum v. United Kingdom, Application No. 9511/81; 25 March 1992, Campbell v. United Kingdom, Application No. 13590/88; 26 February 1993, Messina v. Italy, Application No. 1383/88, and 24 October 2002, Application No. 33993/96; 15 November 1996, Calogero Diana v. Italy, Application No. 15211/89; 26 July 2001, Di Giovine v. Italy, Application No. 39920/98; 14 March 2002, Puzinas v. Lithuania, Application No. 44800/98; 29 June 2002, A.B.. v. Netherlands, Application No. 37328/97; 2 June 2009, Szuluk v. United Kingdom, Application No. 36936/05.

[27] See also, ECtHR, 3 April 2007, Copland v. United Kingdom, Application No. 62617/00; 26 April 2007, Dumitru Popescu v. Romania (No. 2), Application No. 71525/01; 1 February 2008, Liberty and Others v. United Kingdom, Application No. 58243/00.

[28] ECtHR, 16 February 2000, Amann v. Switzerland, Application No. 27798/95.

in most cases. There are only a few judgements in which the ECtHR directly addresses the issue of the proportionality of an investigative measure. These few cases, however, do not allow building a complete theory or a common European standard on the proportionality principle with respect to the lawfulness of coercive investigative measures nor on the fairness or admissibility of evidence.[29]

Despite the significant contributions of the ECtHR,[30] we have to point out that in the field of criminal investigative measures and right to privacy we are still very far from reaching a common standard or a uniform understanding on the limits of these measures: proportionality is still a notion not harmonised at the European level.[31] The Court has focused primarily and almost exclusively on the legality requirement, skipping the issue of the content and limits of the right to privacy. There are not yet any specific guidelines for establishing the right balance between the interests of a criminal investigation and the protection of the right to privacy.[32] This is an issue that the Court repeatedly has left to the assessment of the national authorities and courts within the doctrine of the margin of application. This is certainly not ideal for the harmonization of European standards with regard to the proportionality of coercive investigative measures. Still this might be the most sensible policy of the Court, not only because we lack of universally accepted standards to measure the necessity of limitations on human rights and especially on privacy, but also in order not to stress too much its own existence.[33] Finally, privacy has a multitude of meanings and dimensions, all depending on the context, including not only those activities that connote freedom from intrusion, but also data protection.[34]

Questions like what should be defined as a serious offence that justifies the adoption of an investigative measure restrictive of the fundamental right to privacy, cannot be answered in a clear and common way. On the other hand, issues such as the minimum necessary indications or the suspicions that have to be present in a case in order to allow telephone tapping also can only be answered on a national basis.[35]

These questions tend to be kept within the national discretionary power through the doctrine of the state margin of appreciation and only in very rare cases does the Court set up guidelines to interpret the principle of proportionality of the investigative measures. Thus the states have considerable leeway in determining the proportionality of the inroads in fundamental rights. As a result, we do not find common guidelines in the case law of the ECtHR in defining the limits of the state interference in the sphere of our private life. It is easy to require a measure to be in conformity with the proportionality principle, and at the same time leaving each state the task to assess what is to be considered proportional.

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[29] In the same sense Gless (2004), p. 173.

[30] Vid. Sieber (1998), p. 26.

[31] In the same sense, Allegrezza (2010), p. 575.

[32] Critic on this policy of the ECtHR, see De Hert and Gutwirth (2006), pp. 86–87.

[33] As Verbruggen (2006), p. 125, states, the Strasbourg Court is not technically a Constitutional Court and "giving the national lawmakers of different states some leeway in ascertaining the necessity of intrusive measures is sound court policy."

[34] Sobel et al. (2008), p. 55.

[35] See also Kühne (1998), pp. 61 and 65.

4 Proportionality Principle and Evidence Gathering: The Proposal of a Directive on the European Investigation Order

4.1 The Need for a Single Comprehensive Instrument in the Gathering of Evidence

Overcoming the fragmentary regime in the obtaining of evidence and providing an efficient instrument to facilitate the cooperation is the aim of the proposal of the EIO.[36] The objective of the EIO, as exposed in its *Consideranda*, is to facilitate quick and easy judicial cooperation between the different member states in the obtaining of evidence in criminal matters. The existence of different cooperation instruments—some of them based on the mutual legal assistance, others based on mutual recognition and limited to certain pieces of evidence, like the European Evidence Warrant—entails an undesirable complexity in the gathering and transferring of evidence in another member state.[37] The initiative for a directive on an EIO is based on the conclusion that this complexity has to be overcome and therefore the system of mutual legal assistance has to be replaced completely with a single European instrument for the obtaining of all kind of evidence.

Apart from the fact that this conclusion—that the mutual legal assistance system is insufficient and needs to be replaced—might not be correct and that the question could also be asked whether the application of the principle of mutual recognition in the evidence gathering will cause a significant improvement of the judicial cooperation in criminal matters, the fact is that such principle has been chosen as the "cornerstone" to develop the judicial cooperation within Europe, as it was agreed by the member states in the so often mentioned conclusions of the Council of Tampere and as it has been stated in the Treaty of Lisbon, which entered into force in December 2009.[38]

After long discussions and great efforts, the area of criminal evidence finally saw the passage of the EEW.[39] Even before this instrument has been fully

[36] We do not want to mention here again all the previous actions and steps taken by the European legislator towards the free movement of evidence in Europe that have led to the approval of the European Evidence Warrant. See Bachmaier Winter (2010), pp. 580–583.

[37] Bachmaier Winter (2010), p. 583.

[38] On the provisions of the Lisbon Treaty regarding the free movement of evidence in criminal matters see specifically Allegrezza (2009), pp. 160–174.

[39] On 14 November 2003 the Commission presented the Proposal for a Framework Decision on the European Evidence Warrant [COM (2003) 688 final, 2003], to improve the judicial cooperation in the obtaining of pre-existing evidentiary elements. The discussions regarding the implementation of the principle of mutual recognition and the particular problems that it poses with regard to the gathering of evidence in another member state, caused that the Framework Decision on the European Evidence Warrant (hereinafter FD EEW) was not approved until December 2008 in the European Council of 4 and 5 November 2004 (DOC 53, 3.3.2005). The FD EEW has a limited scope as it only applies to obtain pieces of evidence that already exist, as documents, objects or data.

implemented,[40] the initiative of seven member states on the proposal of a directive of an EIO had been already launched. Following the objectives set out in the previous programmes, action plans and in the FD EEW, the Stockholm Programme of 11.12.2009 also includes among its priorities the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension.[41]

Some scholars have stressed that, before starting to work on an EIO, it would have been preferable to wait until for the experience with the application of the EEW. This is also the conclusion of the EU FRA, which considers that the EIO "is neither based on a proper impact assessment nor on an extensive gathering of evidence in the 27 EU member states."[42] In my opinion however there is no need to wait until the full implementation of the EEW for an EIO to be adopted. To my mind, due to the limited scope of the EEW, it will probably not represent a significant simplification of the judicial cooperation system in the colleting of evidence as the authorities of the different member states will still have to use besides the EEW the instruments of mutual legal assistance. I think the impact of the EEW will not be significant. The Spanish experience shows that because in complex transnational cases the authorities usually request from other member states more elements of evidence then those covered by the EEW (pre-existing elements).[43]

In sum, the EEW is another piece of a fragmented system, and this piecemeal approach does not help simplify the judicial cooperation between member states. The replacement of this instrument by a single one that should cover all kind of evidence undoubtedly would facilitate the cooperation in the obtaining of evidence. This is something out of question and from the point of view of simplification it has to be agreed that this would be a good step forward.

However there are still some issues in the obtaining and transfer of evidence that are not so easy to answer and cannot be simply disregarded by invoking the need to implement the principle of mutual recognition. The European institutions are fully aware of these difficulties: in the *Consideranda* of the revised text on the initiative for a directive of an EIO,[44] it expressly states:

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[40] As it was stated in point 39 of the *Consideranda* of the Proposal for a FD on EEW, the EEW should constitute the first step towards a single mutual recognition instrument that would in due course replace the entire existing mutual assistance regime.

[41] The Stockholm Programme, Brussels 23 November 2009, 16484/09, JAI 866, point 3.1.1.

[42] Opinion of the European Union's Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order, done in Vienna on 14 February 2011, http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm, p. 14.

[43] As we already stated, in those cases were different investigative measures are requested, it can be advanced that practitioners will opt to request all the evidence through one channel, the mutual legal assistance system, which covers all of them, instead of sending several requests through different means. See Bachmaier Winter (2010), p. 583.

[44] For this paper we are using the text done in Brussels the 17 June 2011, after reaching a partial general approach in the Council meeting on 9/10 June 2011, Document 11735/11, COPEN 158, EUROJUST 99, EJN 80, CODEC 1047. A general approach was reached by the Council in December 2011.

> The European Council indicated that the existing instruments in this area constitute a fragmentary regime and that a new approach is needed, based on the principle of mutual recognition, *but also taking into account the flexibility of the traditional system of mutual legal assistance*.[45]

One of these issues relates to the principle of proportionality of the investigative measures. Therefore, without entering into a full analysis of the whole regulation of the PD EIO, we will focus on the proportionality review in the collecting and transfer of evidence in cross border criminal proceedings in the PD EIO.

4.2 The Proportionality Principle in the EIO

4.2.1 The Express Reference of the Proportionality Principle in Article 5(1) PD EIO

Article 7 FD EEW regulates the conditions that should be met before issuing a EEW and expressly requires the issuing authority to check: (1) that the evidence requested is "necessary and proportionate" for the purpose of Article 5 FD EEW; and (2) that the elements of evidence requested could be obtained under the law of the issuing state in a similar case, if they were available in its territory.[46] Thus the EEW requires the previous control of the proportionality of the evidence requested before the issuing of the warrant.

When we analysed the first text on the PD EIO of April 2010,[47] we already stated that the PD EIO, differently from the FD EEW, did not mention the principles of necessity and proportionality as conditions for the issuing of the EIO.[48] At that moment we affirmed that this should not necessarily be viewed as a problematic issue, as we considered that as a matter of fact every public prosecutor or investigating judge in charge of a criminal investigation, before requesting any kind of evidence restrictive of fundamental rights, should check if such evidentiary measure is necessary and proportionate for the purpose of the investigation.

According to the case law of the ECtHR, the compliance with the proportionality principle is a condition of the lawfulness of every coercive investigative measure. Therefore we concluded that even if the PD EIO did not mention this condition expressly, the condition was to be met in any case by any issuing authority. We just took for granted that every judge or public prosecutor normally cannot issue a request for coercive measures if he or she does not consider it necessary and proportionate for the purpose of the investigation of the relevant case. If these

[45] See point 6 of the *Consideranda*.

[46] The conditions laid down in Article 7 FD EEW shall be assessed only in the issuing State in each case.

[47] The first text on the initiative for a PD EIO was published on the 29 April 2010 (COPEN 15, CODEC 363, EUROJUST 47, EJN 12).

[48] Bachmaier Winter (2010), p. 583.

conditions are not met, according to the case law of the ECtHR, there will be a violation of the Convention and according to most European legal systems the exclusionary rules of evidence would apply.[49]

This is why we stated that the absence of an express reference to the proportionality principle did not mean that this condition was not required for issuing an EIO: with regard to coercive investigative measures, it was obvious that this condition should be met, even if this condition was not expressly required for issuing the PD EIO.[50]

Having said this, it goes without saying that it is preferable for the PD EIO to expressly mention the need and proportionality of the investigative measure as a condition for issuing the EIO. Even if the lack of reference to the proportionality principle could not be seen as a grave omission, the express reference in the last version of the PD EIO of June 2011, is very welcome in order to avoid misinterpretations. The new draft of the PD EIO introduces a new paragraph 10(a) in the *Consideranda* that refers to the proportionality principle,[51] and adds a new paragraph to Article 5, which is very similar to Article 7 FD EEW. Precisely, the new Article 5a(1)(a) PD EIO says:

> An EIO may be issued only when the issuing authority is satisfied that the following conditions have been met: (a) the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4; and (b) the investigative measure(s) mentioned in the EIO could have been ordered under the same conditions in a similar national case.

In sum, apart from the fact that the actual wording of Article 5a(1)(a) PD EIO could be improved,[52] it is highly positive that the text of the PD EIO reminds that

[49] To assume that the European prosecutors and judges do not act generally in such a way—check of the need and proportionality of a measure before ordering or requesting it—amounts to assume that the European prosecutors and judges deliberately do not comply with the European standards on human rights as set out in the case law of the ECtHR, and this assumption does not correspond with the real practice and thus is not correct.

[50] Bachmaier Winter (2010), p. 584. In this same volume, see the interesting paper of Ruggeri, below, para. 5.1.2.2, in which the author claims the strengthening of the proportionality check in the field of investigative means having consequences on human rights.

[51] According to the point 10a of the *Consideranda*, "The EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. The issuing authority should therefore ascertain whether the evidence sought is necessary and proportionate for the purpose of proceedings, whether the measure chosen in necessary and proportionate for the gathering of this evidence, and whether, by means of issuing the EIO, another member states should be involved in the gathering of this evidence (...)."

[52] I do not understand why Article 5a(1)(b) PD EIO refers to the possibility of ordering such a measure in the issuing state in a "similar national case." The crime which is investigated in the issuing state, even if it has a transnational dimension or needs foreign judicial cooperation to gather evidence, is still a national case, in the sense that the rules applicable to that proceeding are the domestic rules of the issuing state. Consequently, the measure requested to a foreign authority has to be valid, necessary and proportionate not for a "similar national case," but for "that precise case," for the criminal investigation that is being carried out. The reference here to a "similar national case" is not appropriate, as the assessment of the necessity and proportionality principle is made in the context of the relevant investigation and referring to a similar case does not make any sense. In any event this is a tiny issue which is not important, although it would be good if it were reviewed.

every EIO should only be issued once the issuing authority has checked that such measure is necessary and proportionate. With this express reference it becomes clear that this previous check has to be done by the issuing authority in any case, and not only with regard to coercive investigative measures. Not checking the proportionality principle when requesting for example pre-existing evidentiary material that does not affect fundamental rights, would not be in violation of the ECHR, but could cause an undesirable and costly—or even unbearable—workload. In order to avoid excessive or unnecessary evidence requests, the issuing state shall limit the EIO only to those measures which are strictly needed and proportionate.

This applies to the judicial cooperation at the national level as well as at the European level. In my opinion, we only can welcome the express reference in Article 5 to the PD EIO of the necessity and proportionality principles.

4.2.2 The Proportionality Principle and the Grounds for Non-recognition or Non-execution of an EIO

If the requirement to check the proportionality principle as a condition to issue an EIO does not merit further discussion, the question regarding the role of this principle in the executing state raises several questions. May the executing authority review the proportionality assessment done by the requesting authority before executing the measure requested? Must the requesting authority explain in the EIO the reasons why the measure requested is considered necessary and proportionate? Moreover, should the executing authority review the proportionality of a request according to the criteria of the executing state? What should be the decision if the measure requested is not considered proportionate in view of the requested authority?

Article 9(1)(b) and (3) PD EIO—which will be analysed later under paragraph 3—permit the refusal of the execution of the measure requested in the EIO if such measure would not be admissible for a similar case in the executing state, and the measure requested in the EIO could not be substituted by an equivalent one that would serve for the same aim. To my mind, this provision allows for refusal of the EIO if such a measure is not considered proportionate according to the rules and principles of the executing state.

However, in my opinion, it would be clearly contrary to the principles of mutual recognition—and even against the functioning of the mutual legal assistance instruments—if the executing authority could review the reasons given by the requesting authority for the issuing of the EIO, or control whether those reasons really apply and are valid in the requesting state. This kind of review would not only be in blatant opposition to the principle of mutual recognition, but it would be not feasible in practice, as the executing authority lacks the necessary data and knowledge to make that assessment.

With the foregoing observations I only intend to show that although it is positive to subject the issuing of an EIO to the previous check of the proportionality of the measure requested, in practice it will be difficult to review, beyond a mere formal control, if the issuing authority has effectively done so.[53]

In conformity with Article 9 PD EIO, the requested authority may only control if the measure requested would be admissible for a similar case in the executing state and if not, if there is an equivalent admissible one. Only if there is no possibility of executing the request using recourse to another measure would the requested authority be allowed to refuse the execution of the EIO.

In sum, Article 9(3) PD EIO provides for the possibility of refusing the execution of an EIO in those cases where the requested investigative measure exists in the executing state but is not considered proportionate.

This provision, which was not included in the first draft of the PD EIO not only establishes a safeguard for the protection of fundamental rights as understood in the executing state, but it also serves to prevent the member states from being obliged to allocate in some cases more resources to prosecute a crime committed in another member state than if it had been committed in its own national territory. The practice nowadays shows that the states that apply the principle of opportunity as a rule refuse to execute those requests issued by another member state regarding the investigation of minor offences. Therefore, as we already pointed out it was contradictory and somehow not realistic to impose in the PD EIO, the obligation to carry out measures not held proportionate in the executing state.[54]

4.2.3 The Grounds for Refusal of an EIO: The Requirement of Double Criminality and the Proportionality Principle

When we studied the first draft of the PD EIO we already pointed out some of the most relevant differences between the FD EEW and the PD EIO: the PD EIO not only has a wider scope of application, but the initial text represented a more

[53] Furthermore, Ruggeri, below, para. 5.1.2.2, draws also attention, albeit from a different perspective, to the difficulties that such proportionality check involve, especially in those cases where the executing authority might not be a judicial authority.

[54] Bachmaier Winter (2010), p. 585. In that study we stressed the problems of the obligation to fulfil the EIO if the involved states do not share the same criterion of proportionality. We then put following example: "In practice it has often occurred that a Spanish investigating judge sends to the Dutch authorities a request for collecting evidence that is needed to investigate a minor drug offence. Such an offence, if only a little quantity of drugs is involved, won't be prosecuted in The Netherlands as a result of applying the principle of opportunity. This means that the Dutch State has decided not to allocate resources for the investigation of these minor offences if they occur in their territory. Would it be sensible to oblige that State to change that policy and allocate resources to investigate those facts when requested by a foreign authority?" In consequence, we can only welcome the amendments introduced in Article 9 of the version of PD EIO analysed in this paper, which are in conformity with the opinion we expressed in 2010 with regard to the first text of the PD EIO.

decisive stance towards the implementation of the principle of mutual recognition by restricting considerably the grounds for refusal of the requests for evidence. At the same time, the first draft of the PD EIO eliminated also some of the requirements for the issuing of the EIO which apply to the EEW.

In particular, the FD EEW requires that the offence that leads to the issuing of the warrant is punishable in both states, where the collection of evidence requires carrying out a search and seizure in the requested state and for those cases where the offence is not included in the list of Article 14 FD EEW. If the offence is listed in Article 14 FD EEW, the double criminality will only be required if the offence for which the EEW has been issued is punished with less then 3 years imprisonment in the issuing State.

In contrast to the EEW, the PD EIO of 29 April 2010 went further in the limitation of the grounds for refusal of an EIO by suppressing the double criminality requirement for all cases and by eliminating the *ordre public* as a possible ground to refuse the recognition and execution of the EIO. This meant that according to that first text, the requested state was obliged to accomplish the requested investigative measure even if the aim of the EIO was to prosecute an offence which was not punishable under the laws of the executing state.

The absence of the double criminality requirement does not pose, to my mind, major problems in cases of non-coercive investigative measures, for example the collecting of those objects covered by the FD EEW. But, if the execution of the investigative measure causes a restriction of the fundamental rights of the individual, the executing authority would be obliged to execute a measure that is against the principle of proportionality that applies in the executing state.

If the offence for which, for example, a telephone tapping is requested through an EIO is not punishable under the laws of both states, the state of origin and the state of execution, it is clear that these two states do not share the same notion of necessity and proportionality on the measure requested. If they do not share the conception on the need to punish a certain conduct, they cannot consider appropriate and proportionate a coercive investigative measure to investigate such an act. In other words, if a Spanish judge has to order a telephone tapping to investigate a behaviour which is not punishable in Spain, this judge will not only have difficulties in justifying the proportionality of the measure, but even more, he/she would act against the case law of the Spanish Constitutional Court as well as against the case-law of the ECtHR.[55]

In the absence of the double criminality requirement the principles on which the mutual recognition should be based are manifestly absent. At this point we find one of the most controversial points with regard to the implementation of the mutual recognition principle. On the one hand the position of the European institutions is

[55] As I already stated in my previous study on the first draft of the PD EIO: "Necessity and proportionality are essential conditions to allow the adoption of any investigative coercive measure which entails a restriction of the fundamental rights of a person and lacking these conditions according to the executing state, it should be possible to refuse the enforcement of the EIO." See Bachmaier Winter (2010), p. 584.

clear: the requirement of double criminality is contrary to the principle of mutual recognition and therefore the purpose is to gradually eliminate it from the European instruments of judicial cooperation in criminal matters. This is why the double criminality requirement was directly dropped in the first version of the PD EIO.

However, if the double criminality is absent, this means that both countries involved in the judicial cooperation do not share the same essential values and under these circumstances it is not coherent to take for granted that there is a mutual trust between those two states. I would even say it simply cannot be assumed that the conditions for mutual trust are met, because the criminal law manifestly shows that both societies do not share the same values. In such cases, the assessment of the necessity and proportionality principles is not coincident. If the requested state should not be allowed to refuse the execution in such cases, this would mean that the execution state should ignore the principle of proportionality in order to blindly carry out the EIO, with clearly negative consequences to the coherence of its own criminal justice system. Even more, if there is no legal provision that allows a coercive measure in such a case in the executing state, its execution would be contrary to the requirement of foreseeability established by the case-law of the ECtHR and thus violate a well established doctrine of the ECtHR.

On the other hand, empirical data show that the member states are not willing to execute special investigative measures if the double criminality requirement is not complied with.[56] Thus it was easy to conclude that the EIO, as it was drafted in the first version, would not be accepted by the member states.

As we stated earlier,[57] only if the evidence can be collected without resorting to the restriction of fundamental rights, the dual criminality requirement could be completely disregarded without affecting the coherence of the standards applicable in the executing state.[58] Certainly the initial PD EIO allowed to refuse the execution of an EIO alleging that its execution was contrary to its constitutional principles,[59] but this provision, to my mind, was too broad in order to guarantee the protection of the fundamental rights of the individuals against unlawful coercive investigative measures: most Constitutions of the member states do not expressly recognize the principle of proportionality. Only some of them contemplate the proportionality requirement in their statutory provisions when regulating the coercive investigative measures within the criminal proceedings. In the majority of member states the principle of proportionality is to be found in the jurisprudence, in most cases

[56] See Vermeulen et al. (2010), p. 115, partly available on-line. On the huge debate that has arisen with regard to the abolition of the double criminality in the FD EAW, see also Jimeno Bulnes (2008), pp. 113–122.

[57] Bachmaier Winter (2010), p. 585.

[58] On the dual criminality requirement see also Schünemann (2010). Peers (2010), expressed also his concerns with regard to the abolition of the dual criminality requirement and says it "represents a fundamental threat to the rule of law."

[59] Such solution would be coherent with the provision of Article 9(1)(b) PD EIO in the text of 29 April 2010.

following the doctrine of the ECtHR, but it might be difficult to consider it a "constitutional principle" and allege it as a ground to refuse the execution of an EIO.

Fortunately, the first text of the PD EIO, which we strongly criticized, has been revised as a result of the meetings held by the working parties. During 2011 there have been several follow-up documents introducing several amendments to the initial text of the PD EIO.[60] In my opinion, the text of 17 June 2011 introduces positive changes. Article 10 PD EIO, which regulates the grounds for refusal of a EIO, has introduced a distinction between investigative coercive measures and those measures that do not entail a restriction of fundamental rights. This distinction undoubtedly merits a positive appraisal: the new Article 10(1)(1a) PD EIO reduces in a very logical way the grounds for refusal of the execution of an EIO in cases where the requested measure does not restrict fundamental rights.[61]

Sensu contrario, the measure requested can be refused if it would not be admissible in a similar case in the executing state. This rule introduces enough flexibility for the executing state to refuse the execution of a coercive measure if it is not deemed proportionate or where there is no double criminality.[62]

In addition to this provision, Article 10(1)(b) PD EIO expressly contains the absence of double criminality as a possible ground for refusal:

> Without prejudice to paragraph (1), where the investigative measure indicated by the issuing authority in the EIO concerns a measure other than those referred to in paragraph 1(a), the recognition or execution of the measure may also be refused: (a) *if the conduct for which the EIO has been issued does not constitute an offence under the law of the executing*

[60] About how these discussions have progressed and the results achieved during those meetings, see generally the Follow-up document 8474/11 COPEN 67, EUROJUST 47, EJN 36, CODEC 550.

[61] Article 10(1)(1a) PD EIO: "Where the investigative measures indicated in the EIO concerns one of the following measures, Article 9(1) is not applicable and the recognition and execution of the EIO can only be refused in cases referred to in paragraph 1: a) the hearing of witness, victim, suspect or third party in the territory of the executing state; or b) any non-coercive investigative measure; c) the obtaining of information or evidence which is already in the possession of the executing authority and, this information or evidence could have been obtained, in accordance with the law of the executing state, in the framework of criminal proceedings or for the purposes of the EIO; d) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings; e) the identification of persons holding a subscription of a specified phone number or IP address; f) search and seizure where it has been requested in relation to the categories of offences set out in the Annex X (list of 32 offences), as indicated by the issuing authority in the EIO, if they are punishable in the issuing state by custodial sentence or a detention order for a maximum period of at least three years."

[62] I am fully aware that only in a very few number of cases where the cooperation of the judicial authorities of another member states is sought, the double criminality requirement is not present. We could affirm that in practice, from a quantitative point of view, the requirement of the double criminality is not relevant. However, I think that the inclusion of this exceptional ground for refusal on the one hand should not constitute a hindrance for the swift judicial cooperation in criminal matters among the member states whilst, on the other hand, it may contribute to reduce the opposition of some member states towards the adoption of the PD EIO: giving the executing state some leeway in assessing the proportionality of the requested measure, might probably make them less reluctant towards the PD EIO.

state, unless it concerns an offence listed within the categories of offences set out in the Annex X (list of 32 offences), as indicated by the issuing authority in the EIO, it is punishable in the issuing state by a custodial sentence or a detention order for a maximum period of at least three years (...).

To sum up, the grounds to refuse the execution of an EIO that we are considering,[63] can be outlined as follows:

1) Non-coercive investigative measures cannot be refused on the ground that such a measure is not admissible for a similar case in the estate of execution, nor because the double criminality requirement is not met. In this case the proportionality assessment lies only with the issuing authority, but cannot be invoked as a ground for refusal by the executing authority.
2) The requested coercive measure can be refused on the basis of the double criminality requirement, except when the request concerns an offence listed within the categories of the 32 offences set out in the Annex to the PD EIO and it is punishable with a maximum custodial penalty of at least 3 years.
3) The requested coercive measure can be refused if such a measure is not permitted for a similar national case in the execution state.

As it may be seen, the drafts of June and December 2011 on the PD EIO has extended the grounds for refusal to execute of a coercive investigative measure if it is considered contrary to the principle of proportionality in the executing state. From the point of view of the protection of human rights and legal certainty, the present draft represents a positive advance from the first draft of the PD EIO.

4.2.4 The PD EIO and the Principle of Mutual Recognition

Once we have seen the regulation of the EEW and the EIO, and once we have stated that there is not a common understanding on the proportionality principle in the different European member states regarding investigative measures, and that we do not have the same understanding of the right to privacy, we come to the essential question that clearly surpasses the problems on the implementation of the EEW or the EIO. If there is no common European idea on when a coercive investigative measure is proportional to the aim sought, we should perhaps review the concept of mutual recognition.[64] Does the absence of a single notion of the principle of proportionality undermine the whole concept of mutual recognition in the field of criminal evidence obtained abroad? Or on the contrary, should each member state

[63] It should be recalled that Article 10 PD EIO includes as grounds for non-recognition or non-execution of an EIO certain cases of immunity, national security interest, protection of classified information or specific intelligence activities as well as the *ne bis in idem* and questions of jurisdiction. Furthermore, the execution of the measure may be refused if the measure requested does not exist under the law of the executing State and there is no other investigative measure which would have the same result as the measure requested.

[64] Allegrezza (2009), p. 576.

be compelled to disregard the proportionality principle in those cases when the coercive investigative measure is requested by another member state? In this last case, in order to implement the principle of mutual recognition, should the doctrine of the ECtHR regarding to telephone tapping or search of domicile be reviewed and allow the states to adopt those measures without checking the proportionality principle?

These are only some of the questions that are still to be discussed. However, the PD EIO shows that in certain more sensitive areas the member states still show some reluctance towards the implementation of the principle of mutual recognition principle, precisely when this means the obligation to blindly execute coercive measures ordered by the authorities of another member state. The discussions around the PD EIO prove that the member states still want to retain the possibility to reject an order if the requested authority considers the adoption of such a measure is disproportionate according to the values and principles that apply in the executing state. It is true that the double criminality is no longer regulated as a positive condition for granting the execution of the EIO, but the member states have shown their willingness to retain this requirement as a possible ground for refusal.

The mutual recognition principle is a mechanism for overcoming the lack of harmonization of the criminal law and procedure in the different member states. But it is logical that such differences may undermine the mutual trust, which on the other hand is essential for the acceptance of the mutual recognition principle. If the legal harmonization is an unrealistic objective, perhaps it should be advanced towards a legal approximation, and at the same time towards a cultural approach, in the sense of working on the underpinning of a real European identity that allows surpassing the technical differences in the different legal orders.[65]

At present it does not seem possible to apply the principle of mutual recognition to every single measure that requires judicial cooperation in criminal matters.[66] As long as this is true, no one will recognize that there might have been a failure or too advanced an approach in the steps taken towards the establishment of a single area of justice in Europe, precisely in the gathering and transfer of evidence in criminal matters. Instead of this, the PD EIO expresses that it is necessary to introduce *some flexibility* in the application of the principle of mutual recognition when coercive investigative measures are at stake. With regard to coercive investigative measures, the rules relating the grounds not to execute an EIO according to the two Drafts PD EIO of 2011 resemble very much to those contained in the mutual legal assistance instruments, precisely in the Convention of 29 May 2000.

At the end, all these exceptions to the automatic recognition and execution of the EIO—which we consider sensible and essential to reach an agreement among the

[65] In this sense Illuminati (2009), pp. 9–15, p. 15.

[66] There is already consensus that it is necessary to work in parallel on the approximation of substantive and procedural law, although the precise model to be adopted in the development of European criminal law and procedure is still under discussion. On the models and systems of European criminal law see Sieber (2009), pp. 1–67, pp. 16 ff. See also Jimeno Bulnes (2011a), pp. 93 ff.

member states with regard to the adoption of the EIO—, make it difficult to distinguish between the mechanisms of mutual legal assistance and those based on the principle of mutual recognition.[67] But, on the other hand it is illusory to think that the mutual recognition principle can be established by just eliminating grounds for refusal of the recognition and execution of a cooperation request.[68]

5 Concluding Remarks

Some may see in the PD EIO a failure in the advancement towards the implementation of the principle of mutual recognition; others may consider it the victory of pragmatism over idealistic concepts; finally others may say that the PD EIO reflects the need for a deeper harmonization of the criminal law in Europe to enhance the mutual trust and so create a more solid basis for the implementation of the mutual recognition system. The member states are not willing to be obliged to blindly accept an order regarding the search of domicile or the telephone communications. In these sensitive areas that directly affect the individual rights of the citizens, the member states still want to retain the power to check possible abuses, not only out of a question of retaining sovereign power, but perhaps because the desired mutual trust does not yet exist.

However, in my opinion, the new text of the PD EIO cannot be viewed as a step backwards in the implementation of the mutual recognition principle, but rather as an advance in the field of judicial cooperation in the obtaining of evidence. At this point I think it is more important that the member states show their willingness to facilitate judicial cooperation with full respect of the fundamental rights of the citizens, rather than discussing in how far the PD EIO represents a real progress in the development of the mutual recognition principle.

Perhaps it is too early to eliminate the possibility for the states to refuse requests for cooperation that they consider not in accordance with their conception of human rights.[69] On the other hand, when confronted with the conflicting interests present in the criminal investigation, we are facing the difficulty of finding the right balance between the public interest and the protection of individuals' rights. The outcome depends on the significance of the public interest at stake, the assessment on the existence of a pressing social need, and how a given society values human rights.

[67] When explaining the differences between instruments of mutual legal assistance and mutual recognition, Spencer (2010), p. 602, says: "in practice the contrast is not quite as stark as this, because the line between MLA and MR can be blurred: particular MLA instruments may allow the requesting State to specify how it wants the task carried out, and particular MR instruments always list grounds of possible refusal. But in principle the line is clear."

[68] Allegrezza (2009), p. 572.

[69] Of the same opinion, Ambos (2010), p. 564, on the need of more approximation and the approval of common minimum standards with regard to evidence, before the states are willing to renounce to the *ordre public* clause as a ground to refuse cooperation.

The right balance between conflicting interests differs from one society to another and is also subject to significant variations depending, for example, on the notion of privacy or on the perception of security within the society.[70] The content of the right for privacy is to a certain extent flexible and its meaning and limits are not understood equally in every state. Up to now this balancing test is not harmonized in Europe and thus the assessment of the proportionality of an investigative measure that affects the right to privacy varies also from state to state.[71] Considerations of criminal policies and costs allocation might also play a role when invoking the application of the proportionality principle. A serious public debate on the content of fundamental rights and particularly of the right to privacy is needed if we want to take the correct steps towards the establishment of a safe and free Europe.

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[70] Ashworth (2002), p. 43; Diffie and Landau (2007), pp. 170–171.

[71] Bachmaier Winter (2010), pp. 18–19.

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Models of Judicial Cooperation with *Ad Hoc* Tribunals and with the Permanent International Criminal Court in Europe

Michele Caianiello

Contents

Abstract This contribution deals with the legal problems (and dilemmas) arising in the field of judicial cooperation between States and international criminal justice systems (especially the *ad hoc* Tribunals and the International Criminal Court). Fundamental rights are easily in danger when judicial cooperation in criminal matters is involved, regardless of the model of cooperation adopted.

The problem of fundamental rights violation is especially evident at international level. It can be summarized as follows. On the one side, any international justice system needs the active help from States and international organizations in order to effectively enforce its own criminal system. On the other side, States and international institutions, whose cooperation is crucial, are out of control of the issuing jurisdiction. In short, the nub of the problem is to decide what value must prevail, in case of conflict between the need of cooperation and the need to grant a fair trial. Accepting the "fruit of the poisonous tree" could put the international institutions at the risk of being perceived as co-responsible of grave violations.

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However, excluding the product of cooperation on the basis of fundamental rights' violation might lead to an ineffective international criminal system.

The practice shows how often judges are reluctant to relinquish their main objective—that is, bringing the persons responsible of grave international crimes to justice—solely because some breaches of relevant procedural safeguards have occurred during the cooperation phase. In any criminal justice system, as was once asserted, respecting the rules governing hunting is more important than the actual capture of the prey itself. However, when the pray is on the verge to escape, a faithful observance of such an approach often turns out to be impossible.

Abbreviations

EU FRCh	Charter of Fundamental Rights of the European Union
FD EAW	Framework Decision on the European Arrest Warrant
FD EEW	Framework Decision on the European Evidence Warrant
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
TEU	Treaty on the European Union
USSC	United States Supreme Court

1 Introduction. Effectiveness vs. Fairness

Cooperation is probably the area in which the protection of fundamental rights appears most in danger in the realm of international criminal justice. At the same time, cooperation is crucial to the effective functioning of any criminal justice institution. On the one hand, any international justice system needs the active help from States and international organizations in order to effectively enforce its own system. In fact, without cooperation of the States and other international institutions, any international criminal jurisdiction would never be able to work effectively. On the other, States and international institutions, whose cooperation is crucial, are beyond the control of the issuing jurisdiction.[1] Therefore, the required institutions maintain, at least *de facto*, a broad discretion in enforcing the requests of cooperation.

The root of the problem is—from the international tribunals' perspective—deciding what values must prevail in case of conflict between the need for efficiency and the need to grant a fair trial: Should the fruits of a fundamental right's violation perpetrated by the requested authority be excluded from the proceeding held before the international tribunals, or should they be admitted despite the violation? Both the options present pros and cons.[2] Excluding the

[1] Sluiter (2009), p. 187.

[2] Cryer (2009), p. 201.

product of cooperation on the basis of fundamental rights violations might lead the system to be ineffective. But accepting the "fruit of the poisonous tree" could put the international institutions at the risk of being perceived as responsible for grave human rights violations. In other words, the application of the doctrine of *male captus, bene detentus* could endanger the fairness of the system as a whole, making it impossible for the international institution to achieve justice.

2 A Plurality of Judicial Institutions Established to Enforce International Criminal Justice

International criminal justice institutions have been increasing in number and species in the last decades. From the first experiences of the post-war Tribunals, at the end of the First and the Second World War, to the fall of the Soviet Union, international criminal justice enforcement relied mostly on national States rather than on international institutions. Apart from Nuremberg and Tokyo, the efforts to establish international criminal tribunals did not lead to any effective result. After the end of the cold war, a new age of International institutions began, in which various forms of international judicial bodies were born.[3]

After the two *ad hoc* tribunals—namely the ICTY and ICTR—and the creation of the ICC, which is perhaps the peak of the entire movement toward a more institutionalized and coherent system of international criminal justice, new forms of mixed panels, chambers or tribunals were created between the end of the last century and the first decade of the current one. Nowadays, therefore, we have two international *ad hoc* tribunals—ICTY and ICTR—created with Resolutions of the Security Council between 1993 and 1994[4]; the ICC, which was established by Treaty—the Rome Statute—in 1998[5]; and a variety of mixed judicial institutions, established with SC Resolutions and composed of both national and international personnel: The Hybrid Courts in Kosovo (1999), East Timor and Indonesia (2000); the Special Court for Sierra Leone (2002); the War Crimes Section, State Court, Bosnia and Herzegovina (2005); the Extraordinary Chambers in the Courts of Cambodia (2006); the Special Tribunal for Lebanon (2007).[6]

In sum, a panoply of international institutions are at the present time at work to enforce international criminal law in various parts of the globe. Each of them is facing the same fundamental problem: How to be effective—how to obtain efficient cooperation from the States and other international institutions (such as NATO, UN, EU)—while respecting the fundamental rights and safeguards of those involved in the criminal proceedings. An analogous problem arises at the European

[3] Caianiello and Illuminati (2001), p. 411.

[4] See the SC Resolution 827 (1993), establishing the ICTY, and the SC Resolution 955 (1994), establishing the ICTR.

[5] Caianiello and Illuminati (2001), p. 433.

[6] See Linton (2001), p. 185.

level with regard to mutual recognition, the "cornerstone" on which cooperation is nowadays based in EU.[7] When a judicial order is issued—such as the European Arrest Warrant, or the European Evidence Warrant, etc.—it must be free to circulate among the 27 Member States of the Union. It means that all the Member States must enforce that order in the same manner in which they would if their own judicial authorities had issued it.[8] The problem EU faces is the same as that depicted above: must the issuing State be considered responsible for the violations committed in the requested State during the course of the cooperation?

In my considerations, I will focus exclusively on cooperation with the *ad hoc* tribunals and ICC, trying to elaborate—at the end of the work—some proposals for the EU States when required to cooperate with those international institutions.

3 Models of Judicial Cooperation. Vertical Cooperation vs. Horizontal Cooperation

Scholars traditionally distinguish between two models of cooperation. When the requested entities are on the same level as the issuing international body, the system is defined as horizontal.[9] With this term, we distinguish the traditional way the cooperation takes place, for example in the field of gathering evidence through the instrument of the rogatories and in the surrender of persons via extradition. Horizontal cooperation is usually characterized by conventional sources adopted by sovereign States, and by a mixed system of judicial and intergovernmental acts. Traditionally, judiciary is called first to validate the request for cooperation, and then to hand it off to the government, which decides whether to grant it or not.

A cooperation system is defined as vertical when the requested State does not have discretion in deciding whether to cooperate or not. In other words, in a vertical model, the required entity must comply with the request of cooperation—which actually resembles much more to an order that a simple request. Verticality is typical of federal States, where States are bound by the orders coming from the federal institution, with few, if any, power to refuse to fulfill the given cooperation order.

The vertical model was introduced at international—and transnational—level in recent years, together with the creation of the new international judicial institutions—such as ICTY, ICTR, and the ICC. At the same time, it can be said that a special form of vertical cooperation—or at list a form of cooperation with very similar effects to those produced by the vertical model—is applied in EU in cooperation in criminal matters through the principle of mutual recognition.[10]

[7] Klip (2012), p. 20.
[8] *Ibid*.
[9] Sluiter (2009), p. 188.
[10] Klip (2012), p. 20.

Focusing on *ad Hoc* Tribunals and the ICC, we can say that provisions concerning cooperation are both inspired by the vertical model. However, some systems appear more vertical than others. Besides, the implementation of a vertical model in international criminal law gave rise to a *sui generis* system, presenting many specific features which distinguish it from the cooperation within a federal State. As said before, at international level the required entities maintain a broad discretion in complying with the orders of the issuing institution, no matter the label attached to the model.

3.1 Ad Hoc *Tribunals System*

If both *ad hoc* tribunals and ICC operate in a *sui generis* vertical system,[11] the former seem to enjoy much more efficient cooperation instruments than does the ICC.

First of all, UN tribunals' jurisdiction is characterized by primacy,[12] whereas the ICC must respect the complementarity principle.[13] The ICTR–ICTY can obtain the deferral of a case from the States, no matter how effective the State judicial system could be. If the ICTR–ICTY Prosecutor considers that "what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal," she may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal. The opposite is true for the ICC, which must defer its jurisdiction and declare the case inadmissible if a State, either party to the Treaty or not, claims its willingness and ability to try the case (unless the Court considers that in practice the State is unwilling or unable to do that).

Secondly, non-compliance with the *ad hoc* tribunals' orders may give rise to political consequences, since the tribunals have been established as auxiliary organs by the Security Council under Chapter VII of the Charter of the United Nations. Article 29 of the ICTY Statute, for example, provides that States must comply without undue delay with the requests for assistance or the orders of the tribunals, while both the Resolutions establishing ICTY and ICTR require a full cooperation with the Tribunals by the States. In case of non-compliance, the Tribunal may refer the problem to the Security Council, which could adopt some measures to sanction the non-compliance by the State. During the years, the *ad hoc* tribunals' jurisprudence came to apply the duty to cooperate to other international institutions. In particular, it was decided that vertical cooperation applies also to non-State entities

[11] Sluiter (2009), p. 190.

[12] Wise et al. (2009), p. 689.

[13] See for example Burke-White (2008), p. 59.

(Krstic Decision, 1999)[14] and to transnational and international organizations such NATO and the EU (Simić Decision, 2000).[15] It must not be forgotten, moreover, that since 1997 the Tribunals have considered their vertical power directly enforceable against the states as laid out in the Blaskic Subpoena Appeal Decision[16] (even though, in that case, the Appeal Chamber established that the ICTY "is not vested with any enforcement or punitive power *vis-à-vis* states").[17]

3.2 The ICC System

If we look at the provisions concerning the ICC, we must admit that this institution can make use of much less efficient means to obtain cooperation by the States—even assuming that this system too might be defined as vertical. Despite the various provisions requiring the States to cooperate with the Court,[18] in case of non-compliance the only body to which the problem can be referred is the Assembly of the States Parties, an organ composed of the representatives of all the States which ratified the Treaty. It means, at the present time, an Assembly with 119 representatives, in which hardly any enforcing resolution will ever be adopted to sanction non-compliance, because of the overly large number of components. We must remember that, up to now, the Security Council, an organ composed of roughly one tenth of the members of the ICC's Assembly of the States Parties, never intervened with formal acts to sanction a non-complying State.[19] These considerations led some commentators to call the ICC an Armless Giant,[20] a characterization originally used by Antonio Cassese commenting on the cooperation system of the ICTY,[21] which actually seems far less inefficient that the ICC one because of the absence of the Security Council and the manner in which complementarity was applied in the first cases. One could argue that the situation should be

[14] See ICTY, T. Ch. I, IT-98-33-PT, Prosecutor v. Radislav Krstić, Binding Order to the Republika Srspka for the Production of Documents, 12 March 1999.

[15] See ICTY, T. Ch. III, IT-95-9-T, Prosecutor v. Simić and others, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000.

[16] See ICTY, App. Ch., IT-95-14-T, Prosecutor v. Blaskić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.

[17] ICTY, Prosecutor v. Blaskić (footnote 16), § 33.

[18] See Rome Statute of the ICC, Arts. 54, 86, 87.

[19] This is why the *ad hoc* tribunals opted to consider that the mere assertion, in a formal Tribunal's decision, that a State is not complying, constitutes a sanction in itself, even if more symbolic than effective, if we look at its practical consequences. See Sluiter (2009), p. 198. See ICTY, Prosecutor v. Blaskić (footnote 16), § 37.

[20] Demirdjian (2010), p. 181.

[21] Cassese (1998), p. 13.

considered different when the trigger mechanism is enhanced by the Security Council, according to Article 16 of the ICC Statute. In those cases, the ICC should operate *mutatis mutandis* as an *ad hoc* Tribunal. However, everything depends on the resolution with which the case is referred to the Court. For example, the wording characterizing the Resolution for the Darfur situation sounds much less stringent than those establishing the ICTY and ICTR. While in the latter, as previously mentioned, the States are called to fully cooperate with the Tribunals, in the former they are only "urged" to do so[22] (even though the Libya Resolution sounds rather more stringent on this point).[23] This more ambiguous wording leaves more room for debate, and of course can be interpreted as implying a less stringent form of verticality in the relationship between the Court and the States (and other regional and international organizations).

Emblematic of the ICC's weakness in the field of cooperation is the policy of self-referral, adopted since the first cases by the Office of the Prosecutor. Following the self-referral policy, the Prosecutor negotiated with the States the referral of cases to the ICC. In referring the case, the States claimed their inability and unwillingness to conduct the processes and asked for the ICC's intervention. The practice was presented by the Prosecutor as a "consensual division of labour," arising out of the problem of cooperation from the States. As stated in the 2003 unofficial draft discussed at the beginning of the work of the Office of the Prosecutor, "given that, under the Statute, the Prosecutor relies on Cooperation to carry out his investigations, the Prosecutor will in general seek as much as possible to make this support explicit through a referral."[24] The practice of self-referral was strongly criticized by some prominent scholars, who observed, in various terms, that, because of it, the ICC could run the risk of being perceived as less than impartial, especially when its intervention could be seen as an interfering in a local or civil conflict. Quoting George Fletcher:

> The danger of this approach is that ICC will become embroiled in civil strife and deploy the powers of the criminal law to strengthen one party against the other.[25]

Again, the problem emerges that was outlined in my first considerations. On the one hand, if the ICC aims to be effective, it must be ready to accept compromises to obtain cooperation by the States. However, these compromises could undermine ICC integrity, or at least endanger the perception of this institution as impartial and fair. At the same time, if too keen to maintain its integrity, the ICC will risk criticism because of the lack of practical results: not enough cases begun, and even fewer convictions obtained.

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[22] See the SC Resolution 1593 (2005), deferring the Darfur Situation to the ICC.

[23] See Resolution 1970 (2011), deferring the Libya Situation to the ICC.

[24] See Statement by the Prosecutor (16 June 2003). See Burke-White (2008), p. 59; Schabas (2008), p. 741.

[25] Fletcher (2007), p. 189.

4 Judicial Cooperation and the Protection of Fundamental Rights. Some Relevant Aspects

There are two main aspects of cooperation, both at the national and international level: first, the arrest and surrender of persons; second, the gathering of evidence. No international justice institution, as previously observed, has its own police force for enforcing the attendance of the accused, or conduct with its own personnel investigations in the places where the criminal acts were committed. As a consequence, they must necessarily rely on the cooperation of the States.

The problem concerning the protection and the respect of fundamental rights is the same in both the fields: What happens when, because of the cooperation, some fundamental right is violated? What value should prevail? Should the international tribunal opt for the more efficient solution, or should it refrain from using the fruits of a grave violation?

Two are the theoretical models in principle applicable to the problem. A system could opt for the criterion defined with the Latin phrase *male captum, bene detentum.* According to this model, the requiring institution cannot be considered responsible for the violations occurred during cooperation. First, the international tribunal does not have a proper vertical control over the enforcing agencies operating within a State. It can be said to have, at most, a vertical power to issue cooperation orders, but it is out of its powers to interfere with the way in which cooperation is carried on. In other words, vertical cooperation concerns the *an* of cooperation, not the *quomodo*. That is why violations concerning the way in which cooperation was conducted should not constitute an admissible basis for a procedural exception before the international tribunal. Besides, some could observe, there is not a legal link between the violation committed during cooperation and the fruit of cooperation. For example, even if a search was conducted in violation of the rights of the accused, it does not derive that—if the *corpus delicti* was discovered thanks to the illegal search—it should not be admitted at trial because of the violation occurred. The violations committed by local institutions during the gathering of evidence phase will be sanctioned, if ever, before the local judicial institutions. However, nothing prevents the international tribunal from admitting the evidence obtained, if it is relevant and seems to have probative value.

This consideration can be used also with regard to the violations committed by local authorities during the arrest of the suspect. All other factors aside, if, at the moment of his surrender, the accused should be arrested according to the laws of the international tribunal, the arrest must be upheld.

On the opposite side, another model could be invoked in the cases under scrutiny, expressed with the Latin words *ex iniuria non oritur ius*. The principle was developed by the US Supreme Court jurisprudence in the field of the law of evidence, and labeled with the famous definition "fruit of the poisonous tree."[26] The

[26] See USSC, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

same approach can be however maintained *mutatis mutandis* with regard to the arrest. According to it, the court should not validate the results of operations committed violating human rights. This holds true both at national and at international level. As for the previous model, there are numerous reasons in favor of this option too. First, in validating the fruits of illegalities committed by national authorities, the international institution would end up acting as an accessory to the violation, at least morally. It was often said, in light of this, that the most deterrent instrument for investigative bodies and enforcing agencies is the inadmissibility of the evidence illegally obtained. The sanctions at a disciplinary or substantial criminal level are far from being sufficient. They are in fact rarely applied, and, when they are, are applied with rather lenient punishments. The only deterrent instrument with some efficacy is the sanction adopted at procedural level when the judges declare inadmissible the results of the violation committed. Moreover, the vertical relation between the international tribunal and the State cannot be regarded as irrelevant in the resolution of the issue at stake. The acts are usually committed by State authority following a cooperation order of the international institution. The State is under a legal obligation to comply with the order, and non-compliance brings with it the risk of sanctions, even if the nature and the practice of these potential sanctions vary in reality. Finally, an international institution, because of its nature, cannot accept "poisoned fruits." If it were to do so, the tribunal would fail in its objective to represent an example for the States and as an instrument for enhancing and improving the protection of human rights—the very reasons such institutions are created.

5 Law and Practice Before *Ad Hoc* Tribunals and ICC

Neither the statutes of the ICC nor the resolutions establishing the *ad hoc* tribunals are clear in this area. In other words, they do no take a clear position regarding the option between the need for efficiency (*male captum, bene detentum*) on the one side and the respect for the individual rights (*ex iniuria non oritur ius*) on the other. The ambiguity starts in the statutory sources. On arrest, for example, there is not any clear provision dealing expressly with violations of the accused's rights at the arrest phase. It is true, however, that a slight difference emerges between ICTY and ICTR, on the one side and the ICC on the other. In general terms, Article 21 par. 4 ICC St. provides that the application and interpretation of law before the ICC must be consistent with internationally recognized human rights. Article 59 ICC St. states that, when arrest takes place, the custodial State must determine if the person was arrested accordance with the proper process; and her/his rights were respected. As I said, these provisions do not give a clear answer to the level of protection of the individual's rights in the cooperation phase. For example, Article 59 requires that the *custodial State* should control the legality of the arrest and the respect of the accused's rights. However, it does not say anything about what the ICC should do, if an exception regarding the invalidity of he arrest was raised by the accused, after

the surrender to the Court. We can conclude that ICC system seems to have a certain regard for the individual rights protection at the arrest phase. Therefore, it could probably appear more consistent with the general inspiration of the Statute to opt for the nullification of the arrest, in cases such a those exemplified, as Paulussen pointed out in his outstanding work.[27] At least, according to others, the accused should be entitled to a reduction of the sentence in case of conviction.

Regarding the law of evidence, the statutory provisions of the *ad hoc* tribunals and ICC permit the admission of any kind of evidence if it is relevant and deems to have probative value.[28] Besides, the provisions concerning the exclusion of evidence because of the accused's rights violations leave broad discretion to the judges. In fact, evidence simply may—not must—be excluded if the violation infringes upon the reliability of the evidence or if the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.[29] Finally, in various terms it is provided in both the systems that, when deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.[30]

The ambiguity of the statutory sources is reflected in the case law of both the systems considered here. There are many cases in which the defendant raised the issue of the illegality of the arrest, but such exception was sustained only once, in the Barayagwiza case.[31] And in that case, the Appeal Court overruled the decision issued by the Trial Chamber, mostly, if not only, for political reasons (the Rwandan State reacted to the Barayagwiza Trial Chamber decision as threatening to interrupt any cooperation with ICTR).[32]

Nor has a clear line yet emerged in the field of evidence. For example, in the Thomas Lubanga Dyilo decision on the confirmation of the charges, the Pre-trial Chamber affirmed that

> The Chamber recalls that in the fight against impunity, it must ensure an **appropriate balance** between the rights of the accused and the need to respond to victims' and the international community's expectations. [. . .]. Regarding the rules applicable before the international criminal tribunals and their jurisprudence, the generally accepted solution 'is

[27] See Paulussen (2010), pp. 965 ff.

[28] See Rome Statute of the ICC, Art. 69(1-3); Rules of Procedure and Evidence of the ICTY, Rule 89 (C). See Caianiello (2011), p. 399.

[29] See Rome Statute of the ICC, article 69 par. 7; Rules of Procedure and Evidence of the ICTY, Rule 95. See Caianiello (2011), 398–401.

[30] See Rome Statute of the ICC, article 69; Rules of Procedure and Evidence of the ICTY, Rule (A).

[31] ICTR, App. Ch., ICTR-97-19-AR72, Prosecutor v. Jean-Bosco Barayagwiza, Decision, 3 November 1999. See Currie (2007), p. 364.

[32] ICTR, App. Ch., ICTR-97-19-AR72, Prosecutor v. Jean-Bosco Barayagwiza, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000. See Schabas (2000), p. 563.

> to provide for the exclusion of evidence by judges **only in cases in which very serious breaches have occurred**, leading to substantial unreability of the evidence presented.'[33]

In other words, despite the ascertained violation of fundamental rights, the Pre-Trial Chamber declared the evidence obtained admissible, thus refraining from sanctioning the violation occurred during the searches and seizure performed by the Ugandan police.

6 Extending the Principle of Mutual Recognition to the Cooperation Between International Tribunal and EU Member States?

The sources and the practice of the international tribunals lead us to our starting point. The crucial issue is—from the international justice institution's perspective—to decide what values must prevail in case of conflict between the need for cooperation and the need to grant a fair trial.

The international justice systems' role, as the most advanced model combining different national traditions in the field of criminal process, demands extreme attention to fairness, especially with regard to the accused's position. In this sense, we ought to remember that a system in which the judges relinquish their chance to reach a final decision on the merits in the name of higher values would be more constructive than one in which they had to compromise on the fundamental rights of the accused in order to obtain a conviction. However, the practice shows how often judges are reluctant to renounce to their main objective—that is, bringing the persons responsible of grave international crimes to justice—solely because some relevant procedural safeguards have been illegally denied during the cooperation phase. In any criminal justice system, as was once asserted, respecting the rules governing hunting is more important than the actual capture of the prey itself.[34] Nevertheless, when the prey is on the verge of escape, a faithful observance of such an approach often turns out to be impossible, and another rule seems to be applied: the color of the cat does not matter, as long as it catches the mice.

A possible compromise between efficiency and fairness, from a European perspective, could consist in extending the principle of mutual recognition to the cooperation between EU States and international institutions, first and foremost to the ICC. We must not forget that the crimes within the jurisdiction of international institutions, and in particular those over which the ICC has jurisdiction, are included in the list for which double criminality is not required in the EU area. For example, Article 2(2) FD EAW explicitly mentions the crimes falling within

[33] ICC, T. Ch. I, ICC-01/04-01/06-1418-02-07-2008, Prosecutor v. Thomas Lubanga-Dyilo, *Décision sur la confirmation des charges*, 29 January 2007. See Caianiello (2011), p. 400–401; Caianiello (2008), p. 26; Miraglia (2008), p. 489.

[34] Cordero (1966), p. 220; Caianiello (2010), p. 42.

the ICC's jurisdiction in the list of crimes for which double criminality is not requested. The same is true for all the other Framework Decision in the field of the former "Third Pillar," such as the 2003 Framework Decision on execution in the European Union of orders freezing property or evidence, the 2006 Framework Decision on the mutual recognition on confiscation orders, the 2008 FD EEW. Surprisingly, while mutual recognition applies in cooperation among EU States, it does not necessarily govern the cooperation between EU States and the ICC. Even though an *argumentum a fortiori* should be invoked, it may happen that an EU State, while being efficient in applying mutual recognition rules in the relation with other EU States, does not provide anything of the sort in the field of cooperation with ICC: this is, for example, the case of Italy, which, while having ratified the Statute in very short times, did not introduce any provision concerning cooperation with the ICC.

The adoption of the mutual recognition method in the cooperation between European States and international institutions could also provide an acceptable solution in the area of the protection of fundamental rights. As is well known, none of the mutual recognition instruments may be used to violate or reduce fundamental rights; on the contrary, all the provisions contained in mutual recognition legislation must be interpreted in a way consistent with the principles recognized by Article 6 TEU and reflected by the EU FRCh (notably Chapter VI thereof). This should make it easier for the accused to invoke remedies before the international tribunal, in case of a violation of her or his rights in the cooperation phase. Recalling and combining the metaphor previously mentioned, the prey could be hunted—and sometimes caught—even by playing by the rules.

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Transnational Investigation in Criminal Procedure and the Protection of Victims of Serious Human Rights Violations in Latin American Constitutional Jurisprudence

Alexei Julio-Estrada

Contents

Abstract Based on (1) the analysis of two recent cases in Colombia, (2) changes affecting criminal procedure dogmatism and (3) a synthesis of international treaties, local jurisprudence and Latin American jurisprudence, the author wish to point out the existence of complex legal problems for the effective protection of victims' rights within justice international cooperation processes, although some progress has recently been made. The goal is to suggest rules and regulations that make it possible to achieve a balance between the accused and the victim's rights, and therefore boost the legitimacy of both domestic and international criminal systems.

Abbreviations

ACHR	American Convention on Human Rights
CCP	Code of Criminal Procedure

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IACoHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
SCJ	Supreme Court of Justice

1 Introduction

Legal cooperation and assistance on criminal issues is an indisputably useful tool for fighting against impunity and for effective trial of alleged perpetrators or accessories to punishable conduct, especially in cases of transnational crime; nevertheless, in the past few decades, it has gained more and more relevance in the pursuit of the so-called international crimes and the need to take effective action in order to protect the victims of and witnesses to such crimes.

It is not enough to just make a list of goals achieved, present difficulties, and possible lack of the existing regulations on cooperation; we need to position this issue within a wider context of ongoing discussions and intense debate—particularly, at least in the case of Colombia—with regard to the delicate equilibrium we seek to achieve between the exercise of *ius puniendi* by the state, commitments that we take on when protecting human rights and, last but not least, substantial guarantees that have to be respected within criminal procedure in order to facilitate correct exercise of rights, both of the alleged perpetrator and the victim. In this article, I will refer to the implications of this issue in Colombia and Latin America in order to later attempt to come to some conclusions and suggestions.

2 Context in the Colombian Case: The Two Scenarios

Two emblematic cases represent the current situation in Colombia as to the protection of the victims of serious human rights violations: (1) on one hand, the increasing number of cases in which Colombian justice has taken on its duty to investigate facts that, despite being grave violations of human rights (specifically genocide conduct), were committed before such conducts were classified as crimes[1]; and (2) on the other hand, procedures carried out under Act 975 of 2005 and the extradition of paramilitary leaders.

[1] Cfr. SCJ, Criminal Appeal, Judgment of 13 May 2010, File No. 33118, by means of which it assumes the investigation against former Congressman César Pérez García for the Segovia massacre, where he allegedly acted as determiner.

2.1 Issues on the Protection of Genocide Victims

Genocide became a crime in Colombian domestic law under Act 589 of 2000. Nevertheless, with the goal of investigating and passing judgment on grave human rights violations that occurred before the Act, law courts have maintained that some international tools can be enforced directly without violating the principle of legality, such as the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The first one was approved in Colombia by means of Law 28 of 1959, and in signing it, Colombia committed to classifying genocide as a crime under international law, to prevent it, and to punish it; nevertheless, amendment of its domestic legislation only occurred in the year 2000. Colombia has not yet joined the latter treaty.

This raises the question of whether the protection of victims of grave human rights violations justifies the retrospective enforcement of an unfavorable criminal law (since conduct that occurred in the early 1980s would be judged according to a law enforced almost 20 years later). This issue has been widely debated recently and there is no agreement on the answer to the apparent collision of rights of the alleged perpetrators and the victims. However, the issue has already been discussed by other Latin American countries, based on their need to pass judgment on similar cases. The Supreme Court of Argentina's take on the matter is discussed later on.

2.2 Victims' Rights and the Extradition of Paramilitary Leaders in Colombia

The second scenario of analysis concerns investigations under Act 975 of 2005, issued (1) to grant effective protection of the right to truth, justice, and reparation of victims of war crimes and crimes against humanity perpetrated by paramilitary groups and (2) to facilitate individual or collective return to civil life by members of any armed group on the fringes of the law.[2] The members of paramilitary groups agreeing to demobilize, to enter a national reconciliation process, to commit to reveal the truth of what happened, and to accept the victims' rights to truth, justice and reparation would receive a lesser punishment in exchange: just 8 years' imprisonment.

In practice, demobilization was partially successful with most "self-defense" groups. Criminal prosecution started, under the so-called Justice and Peace Law; within these proceedings, innumerable free statements were received, and perpetrators related facts and confessed their crimes, answering to victims'

[2] Cfr. Law 975 of 2005, Art. 1.

questions regarding their next of kin and committing to turn in all their assets in order to indemnify people affected.

Despite the on-going process, in May 2008, 14 of the main paramilitary commanders were suddenly extradited to the United States. The Colombian Government argued that it had been proved that they had continued to commit criminal offenses, had lied to the Colombian justice system, and had not turned all their assets for victims' compensation. But regardless of the justification given, it is questionable to have pursued extradition for drug trafficking crimes, instead of keeping up the criminal investigation in Colombia to elucidate facts, impose the corresponding criminal punishment and re-establish the victims' rights.

At the time, this conduct was initially permitted by the Supreme Court of Justice,[3] but due to wide and strong criticism, the Court modified its posture on the issue in 2009 and started rendering negative opinions on extradition requests sent by the US Government relating to other *desmovilizados* also involved in the on-going procedure of Justice and Peace. In its last favorable opinion, issued in 2008[4] on an extradition request for a person being investigated under Law 975 of 2005, the Supreme Court of Justice asked the Government—specifically, the President of Colombia—to review the international tools subscribed by Colombia that give preferential status to victims' rights, reminding him of his responsibility to make the decision most fitting national interests. On that occasion, in order to justify extradition, it was held that (1) the effectiveness of the victims' right to truth did not depend unequivocally on the cooperation of the *desmovilizados* within the procedure of Justice and Peace; and (2) in exchange for the absence of an alleged perpetrator, the state had to order a thorough, impartial investigation, according to national and international rules, aiming to establish and disclose the causes and circumstances in which such grave punishable conduct was perpetrated, with the intent of reestablishing the victims' rights.[5]

Since 2009,[6] the Supreme Court has changed its posture, because it considered that warnings sent to the Government had not been effective. It determined that in order to accept a request for the extradition of a paramilitary leader, the fundamental rights of the extradited and of the victims had to be guaranteed. The Court concluded that an extradition request relating to drug-trafficking crimes has to give way to the constitutional and legal obligation to investigate and punish heinous crimes such as genocide, homicide of protected people, disappearance, forced displacement, or torture.

[3] The extradition procedure in Colombia is a mixed procedure, since both the Supreme Court of Justice and the President of the Republic are involved. First, there is a legal procedure by which the Court makes a statement, complying with the requirements of the Criminal Procedure Code referred to international cooperation; such statement could be positive for extradition, allowing the Government to adopt the final decision on the convenience to grant it, or it could be negative, in which case it is mandatory for the Government.

[4] Cfr. SCJ, Criminal Appeal, Judgment of 23 September 2008, File No. 29298.

[5] Cfr. SCJ, Criminal Appeal, Judgment of 2 April 2008, File No. 28643.

[6] SCJ, Criminal Appeal, Opinion of 19 August 2009, File No. 30451.

Although this change in judicial temperament has only affected the extradition of people currently subject to Justice and Peace procedures and those in which a crime against humanity is suspected, it constitutes a more favorable take on the rights of the victims of these crimes, which turn out to be better guaranteed within the procedures enforced by Colombian Courts.

All this points out the need to make serious and objective considerations in each individual case, given the many legal assets possibly in conflict; as a matter of fact, although a strengthened protection for victims of grave human rights violation could be at times obvious, in some cases it seems at least open to discussion to sacrifice principles—i.e., the principle of legality in criminal issues—that closely relate to the very same concept of democracy.

3 International Cooperation Tools and the Protection of Rights for Victims of Serious Human Rights Violations

The two aforementioned examples share a common quality: the increased importance of the victim's role within procedures relating to serious violations of human rights. This issue raises several questions, especially whenever the protection of his or her rights collides with state obligations on international cooperation or with the alleged perpetrator's rights—it should not be forgotten that the principle of legality was conceived as a basic guarantee for due process. Thus, does the legal protection of victims of crimes against humanity, war crimes, or genocide justify sacrificing one of the main innovations of modern criminal law, such as the principle of legality? Why is it questionable for a state policy to favor prosecution of certain crimes—drug trafficking or money laundering, whose impact on society is undisputed—over victims' rights? Should the tools for international cooperation and judicial assistance be adjusted to the new challenges born from this new victimology context? Far from being a recent phenomenon, the new paradigm focusing on the legal protection of victims of serious human rights violations developed from a number of sources, such as the interest that the victim's role awakened in international forums in the 1980s,[7] the explicit acknowledgement of victims' rights by international instruments such as the UN Declaration of basic principles of justice for victims of crime and abuse of power, issued in 1985,[8] the crisis that critical criminology faced by lacking a convincing explanation for its category of victimless crimes[9] and—last but not

[7] A noticeable example is the First International Symposium on Victimology held in Jerusalem in 1973. Cfr. Beristain (2010), p. 86.

[8] *Ibid*.

[9] Cfr. Larrauri (1992), p. 231.

least—the emergence of feminist groups that made us understand that women were invisible victims also adding up to the obscure figure of crime.[10]

The victim has also been the centre of major debates of dogmatism and criminology, such as the debate on the effectiveness of criminal procedure and law to protect the victim.[11] On this matter, some defend the need to abolish the criminal system, since the victim is not interested in initiating a procedure, but only in solving his or her conflict[12]; on the contrary, others defend its existence, arguing that it shows the victim the seriousness of the crime and the importance of strengthening police forces' ability to fight against it and to effectively respond to the citizens' needs.[13]

Whichever is true, victims currently play a leading role in criminal procedures, and that might impose a radical change in dogmatism, as some authors suggest: to go from *in dubio pro reo* to *in dubio pro victima* principle, thus modeling a *victim* dogmatism that claims victims as main characters of something *superior*, a *new* justice—*restorative justice*—that takes them as the alpha and the omega of law, as the centre of criminal policy, the imprisonment system, sociology, philosophy, anthropology, theology; subsequently overcoming the traditional criminal dogmatism that gives the alleged perpetrator the benefit of the doubt.

Such a posture might be criticized, since it is equally questionable to set the victim aside from the crime investigation, treatment and punishment, as it is to treat her as the only focus, at the risk of ignoring the basic principles of criminal procedure or the least fundamental guarantees of the accused. On the other hand, the thesis of a restorative justice determining unbalance or inequality also has to be turned down and substituted by the adoption of effective mechanisms for the prosecution of crime and protection of victims in order to prevent the opening of a gap that could undermine the legitimacy of the criminal system even while appearing to serve highly commendable purposes.

Such theoretical discussions allow us to understand the huge difficulties and challenges faced when putting these positions into practice. For example, a country must comply with the commitments it makes, especially when they concern the prevention and punishment of grave human rights violations. At the same time, is it really possible for the judiciary to overcome such grave and reproachable state omission and to focus on the citizen as direct beneficiary of international

[10] *Ibid*., p. 232.

[11] *Ibid*., p. 234.

[12] The criminal system activates, with no major concern towards the victim's wishes or needs, in Christie's words, it "steals the conflict away from the victim." Such researches showed the existence of serious problems and, at the same time, the ineffectiveness of criminal procedure to face them. See Larrauri (1992), p. 232.

[13] *Ibid*., p. 233.

commitments taken on by the very same state within a domestic criminal procedure? In other words, should a citizen's right be encumbered by the adverse consequences that spring from the failure of a Government that does not adjust its domestic rules and regulations to international standards?

This entire discussion points toward a need for a basic level of coherence in the conception, nature and purposes of the criminal procedure by the three branches of public power; because, regardless of each one's duty, inarticulate pursuit of common purposes leads to great legal uncertainty that only affects citizens as victims or possible perpetrators of criminal behaviors.

3.1 International Cooperation Tools and Victims' Rights: The Colombian Case

The protection of victims' rights has been taken on not only by ordinary courts, but also by constitutional judges, especially the Constitutional Court of Colombia. Precisely on the matter, its Judgment C-228 of 2002 draws the attention to the constitutional relevance of the right to truth, justice and reparation; it added them permanently to the legal language and has finally positively influenced the interpretation of constitutional and legal rules.

With that ruling, the Constitutional Court declared unconstitutional some extracts of the Criminal Procedure Code that limited the victim to be a civil party within a criminal procedure in order to claim a compensation for the illicit conduct. To come to this conclusion, the Court stated that the rights of victims of any kind could not be limited to material compensation; domestic Colombian legislation should adapt to the progress made by international human rights and international criminal law in order to assure compensation of victims and the effective protection of their right to truth, justice and compensation.

Nevertheless, Colombian law has taken a long time to adjust to the new reality and it was the Constitutional Court that finally had to adjust criminal procedure to international standards on the protection of victims of grave human rights violations, on a case-to-case basis, by means of explanatory rulings to lawsuits against Justice and Peace Law and against the Criminal Procedure Code of 2004. Despite all that, there are still major gaps on this issue that have not been filled yet by statue or judicial precedent.

In this context, Judgment C-370 of 2006 is particularly relevant. In this case, the Colombian Constitutional Court reviewed the constitutionality of Law 975 of 2005 discussed at length above, using as control tool the many international instruments that established the rights of victims of grave human rights violations, such as the ICCPR, the ACHR, the updated set of principles for the protection and promotion of human rights through action to combat impunity proclaimed by the UN Human

Rights Commission in 1998 and the jurisprudence of the IACtHR. In this decision, the constitutional court pointed out that domestic legislation should adapt to international standards on protection of rights of victims of grave human rights violations, and it declared unconstitutional those legal rules that did not effectively guarantee such rights.

Rules and regulations on the issue have recently grown. Laws have been passed to approve agreements such as "Procedural rules and test" and "elements of crime at the International Criminal Court", approved by the Assembly of States Parties of the ICC, at New York, [Law 1268 of 2008] and the "Agreement on Privileges and Immunities of the International Criminal Court," signed at New York in 2002 [Law 1180 of 2007]. Despite all this, no effective application of these rules exists and in some cases their explicit recognition is not acknowledged by new international commitments on specific matters that erode their power and effectiveness.

As a matter of fact, although Colombia has signed, approved, and ratified the Rome Statute, it later subscribed an agreement on the surrender of persons of the United States of America to the ICC that leaves with no effect Article 89 of the Statute, according to which

> State Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

Although Article 98 of the Rome Statute enables not to proceed with a request of surrender or assistance requiring the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person, it has been understood that if the obligation of cooperation incurred by signing the Rome Statute is prior to the immunity commitment, then such a bilateral agreement

> would be illegal, since it would go against the State obligation and thus it would defeat the object and purpose of the Rome Statute [Article 18 of the Vienna Convention on the Law of Treaties, 1969]. Subsequently, consent must be obtained from the sending State only if an international agreement prior to the Rome Statute requests such consent. This opinion has been confirmed by a ruling of the European Union Commission[14] and a Resolution of the European Parliament.[15]

Another grave omission is the lack of internal regulations on the general obligation to cooperate with the ICC, a situation that also ignores Article 88 of the Statute establishing for State Parties the duty to count on procedures applicable to any form of cooperation. Though this gap would appear to be filled by a general disposition of the CCP, Act 906 of 2004, on international cooperation, its

[14] Internal ruling of 13 August 2002. Human Rights Law Journal 23 (2002), p. 15.

[15] Resolution of 26 September 2002, which criticizes, at letter D, "the political pressure at world level currently exercised by the Government of the United States [. . .] improperly" and expresses, at letter F, deception "for the decision of the Rumanian Government to sign an agreement against the spirit of the International Criminal Court Statute". See Doc. P5_TA-PROV[2002]09-26. www.europarl.eu.int/omk/omnsapir.so/calendar?APP=PV2&LANGUE=ES Cf. Ambos (2003), pp. 29–30.

materialization is hindered by the absence of clear obligations, defined competence and operators to comply with it.

Moreover, as we will point out later on, there are no bilateral or multilateral treaties to establish positive measures of protection of victims' rights when investigations and judgment take place abroad. This lack of protection recently became evident with the extradition of 14 paramilitary leaders to the USA, which in practical terms brought an end to the domestic investigations taking place in Colombia. In the face of such a lack of effective instruments of cooperation, the victim's rights are left at the good will of the US authorities and depend upon the possibility that people being judged abroad still want to cooperate with the Colombian justice.

Judicial assistance requests should have been made through diplomatic or administrative mechanisms, such as orders, letters rogatory and plea petitions, which have demonstrated their ineffectiveness and also have led to unjustified delays for the probative activity in criminal procedures taking place in Colombia.

As said before, the Colombian Constitutional Court has tried to adapt domestic rules to international standards as to the protection of victims of grave human rights violations, particularly those standards established by the IACtHR. Therefore, in the following chapter I will give an overview of the interesting regional status of the subject, especially because of the existence of significant rulings within the Inter American System of protection of human rights and some national Courts.

3.2 The Protection of Victims' Rights in Latin America

The analysis on how the rights of victims of grave human rights violation have evolved in Latin America should be done at three levels: (1) treaties and international agreements that have been ratified by States and in particular Colombia[16]; (2) reports, consultations and jurisprudence of regional bodies dedicated to human rights, such as the IACoHR and the IACtHR; and (3) some decisions of local constitutional courts that have implemented or developed victims' protection in domestic legal systems.

[16] We leave out analysis of other international instruments related to the rights of victims of grave human rights violations, such as Basic principles of justice for victims of crime and abuse of power, adopted by the General Assembly of the United Nations by means of Resolution 40/34 of 29 November 1985; the Set of principles for the protection and promotion of human rights through action to combat impunity, attached to the report Diane Orentlicher of 8 February 2005; and the Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, adopted by the general Assembly of the United Nations by means of Resolution 60/147 of 16 December 2005.

At the Latin American level, it is worth pointing out the existence of the following international rights dispositions:

- The ACHR, establishing the right to judicial protection (Art. 25).
- The Inter-American Convention to prevent and punish torture (Arts. 11, 12, 13 and 14) and the Inter-American Convention on forced disappearance of persons (Arts. 4, 5, 6 and 7), establishing mechanisms of international cooperation to guarantee access to justice of victims of such crimes.
- The Inter-American Convention on the prevention, punishment and eradication of violence against women, which includes the obligation of State Parties to create legal and administrative mechanisms to ensure that women subjected to violence have "effective access to restitution, reparations or other just and effective remedies"[17] and the possibility to submit individual petitions to the IACoHR for violations of Article 7 of the same Convention.[18]
- The Inter-American Convention on mutual assistance in criminal matters, stating the possibility to refuse legal assistance whenever, according to the requested State opinion, basic public interests are prejudiced [Art. 9(e)].
- The Inter-American Convention on international traffic in minors, establishing at Article 10 that States shall include international traffic of minors among extraditable offenses and, if it hasn't been done yet or if there is no extradition treaty between Parties, the Convention itself might be used as legal grounds needed to grant extradition, in order to grant justice for such grave crime.

On its side, the Colombian State has subscribed 14 bilateral treaties on legal cooperation and assistance in criminal matters, 13 bilateral treaties with criminal clauses and 21 multilateral treaties which establish mechanisms for legal cooperation with regard to other matters. Of these instruments, the following are particularly relevant:

Bilateral treaties are drafted from a model text in which the interests of criminal investigations and prosecutors prevail; as a result, there are no specific dispositions on the victims' rights and the duty of their guarantee, in the framework of legal cooperation.[19]

[17] Inter-American Convention on the prevention, punishment and eradication of violence against women. Adopted at Belém do Para on 9 June 1994, Art. 7(g).

[18] According to the interpretation of the IACtHR, the possibility to submit petitions to the IACoHR entails taking the case before the same Court once finished the conventional procedure, at the request of the IACtHR. Cfr. IACtHR, 16 November 2009, González et AA ("Campo Algodonero") v. Mexico, Preliminary exception, Merits, Reparations and Costs, Series C No. 205.

[19] This is the case of treaties and international agreements subscribed by Colombia between 1993 and 2002 with Argentina, Brazil, Cuba, Ecuador, Spain, France, Panama, Paraguay, Peru, United Kingdom, Venezuela, Mexico and China.

- The purpose of cooperation does not necessarily entail guaranteeing the victim's right.
- Cooperation treaties do not establish, as grounds for refusing legal cooperation, any clause whose purpose or goal is the guarantee of the victim's rights.
- Clauses on conditioned assistance are exceptional; they establish the competence of the requested Party authority to determine when granting a request stands in the way of some on-going criminal investigation or procedure in its territory, in which case compliance with the request might be postponed or conditioned as necessary.[20]

On the other hand, both the IACoHR and the IACtHR have often made statements on the rights of victims within domestic investigations and, recently, within the framework of international cooperation, particularly on the rights to truth,[21] justice[22] and reparation.[23]

In this context, in its resolutions on monitoring compliance to Judgments of *Ituango Masacre and Mapiripán Masacre v. Colombia*, the IACtHR acknowledged the importance of extradition as an instrument of criminal prosecution in cases of grave human rights violations; at the same time, it also established that application of such tools should not "become a means to favor, endeavor to or assure impunity;"[24] thus, it ordered the Colombian State to set out a mechanism to guarantee victims' rights and the judgment of paramilitary leaders extradited to the USA.[25]

Last but not least, some decisions of domestic courts are relevant to the analysis of victims' rights within legal investigations and cooperation in Latin America. In addition to rulings of the Constitutional Court and the Supreme Court of Justice of Colombia, we have, for example, the Judgment of the Supreme Court of Justice of Argentina of 24 August 2004, establishing non-prescription of crimes against humanity, through the direct application of the Statute of the ICC and the International Convention on the Prevention and Punishment of the Crime of Genocide. Although Argentina ratified the Convention after the facts submitted to the Supreme Court, this court considered that even before said Convention, the international community had created a *ius cogens* customary rule on the non-prescription of such crimes.

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[20] An example of this clause can be found in the Treaty Agreement on legal cooperation as to legal assistance, subscribed between the Republic of Colombia and Mexico on 7 December 1998, ratified by Law 569 of 2000.

[21] IACtHR, 5 November 2000, Bámaca Velásquez v. Guatemala, Merits, Series C No. 70; 26 January 2000, Trujillo Oroza v. Bolivia, Merits, Series C No. 64.

[22] IACtHR, 20 January 1989, Godínez Cruz v. Honduras, Merits, Series C No. 5; 14 March 2001, Barrios Altos v. Peru, Merits, Series C No. 75.

[23] IACtHR, 15 September 2005, Ituango Masacre and Mapiripán Masacre v. Colombia, Merits, Reparations and Costs, Series C No. 134.

[24] IACtHR, Resolution of 8 July 2009, Ituango Massacre and Mapiripán Massacre v. Colombia, Supervision of Compliance with the Judgment, § 40.

[25] *Ibid*., § 41.

4 Proposals and Perspectives

With the aforementioned elements of analysis, it is possible to state that the fight against impunity, specifically in cases of transnational crimes, requires on the one hand to strengthening domestic legal systems to grant effective access to justice and respect for fundamental rights of people involved in the criminal procedure; on the other, it also requires effective mechanisms of cooperation and legal assistance.

However, adjusting domestic rules and regulations to these international standards has been a slow process, still claiming for tools well-aimed for the protection of victims and for an international cooperation and legal assistance complying with international commitments on the issue of human rights.

Currently, such instruments of cooperation are enforced by diplomatic means such as orders, letters rogatory, and plea requests; despite being the only channels existing to request legal assistance, they have demonstrated their ineffectiveness and have also led to unjustified delays of the probative activity in criminal procedures

These shortcomings should definitely not characterize the regulation of instruments of cooperation with the ICC, especially given that difficulty for requesting state of complying with internal legal requirements of the requested state should not be a problem in this case, since state sovereignty has been partially relinquished in favor of the creation of an international jurisdiction.

As for Colombia, due to the nature of its internal armed conflict, the state might subscribe to numerous treaties on the prevention, control, and repression illicit drug-trafficking; however, such a legal framework is clearly insufficient to duly comply with international commitments both on protection of human rights and on prosecution of most heinous crimes affecting society; therefore, it is a matter of urgency to define positive rules on cooperation and legal assistance in regards to the ICC, as well as to the protection and repression of grave crimes against human rights, in order to prevent events like those mentioned in this paper from happening again.

5 Final Considerations

The road to protecting the rights of victims of grave human rights violations, both at domestic and international level, has been slow and bumpy, although in recent years we have managed significant achievements; many of them relate to the construction of important international standards on the subject. In turn, the creation of an international criminal jurisdiction corrects the grave deficiencies that, in terms of protection of rights of the accused, were set out when installing an *ad hoc* court, due to the lack of a natural judge or to the non compliance of the principle *nulla poena sine lege*. Thus, we must make the most of the existing gap and set forth a balance between the rights of the accused and the victims in order to guarantee the utmost legitimacy of our domestic criminal system as well as the international one, which currently finds itself in its most decisive formative years.

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Judicial Cooperation and Protection of Fundamental Rights in the Prevention and Prosecution of Terrorism

Víctor Moreno Catena

Contents

Abstract This chapter explores the change of paradigm in the fight against terrorism, from the national perspectives to the International or European perspective; and the necessary international legal cooperation. Terrorism seeks to provoke collective insecurity, so it demands effective responses from public powers, since it is their responsibility to return security and peace to citizens and to alleviate the effects of brutal criminal acts. However, anti-terrorist measures must neither forget the essential democratic principles that our constitutional rules impose, nor abdicating our determination to constitute a group of countries that govern themselves by the fundamental principles of a social and democratic state governed by

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law and that seek to serve as a reference of liberty and respect for human rights. Whatever decision or action in this context should start from a premise: it has to respect the dictates of liberty without compromise, not even to combat the scourge of terror. War on terror does not permit personal suspicion or even the conviction of a specific political leader to serve as sufficient reason in itself in order to adopt any type of decision and even less to set aside the rule of law, erasing the social convention that legal rules represent. This attitude not only delegitimizes those who make such decisions, but also poses a serious risk civil co-existence and places society in the waiting room of authoritarianism.

Abbreviations

CC	Criminal Code
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
LECrim	Criminal Procedural Act (*Ley de enjuiciamiento criminal*)
STC	Constitutional Court Judgement
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
USSC	United States Supreme Court

1 The Current Political Framework for the Prosecution of Terrorism

In recent times, we have witnessed moments of enormous upheaval of social life, which, to some degree, may be deemed to arise from a phenomenon that manifests itself directly in opposition to civil society: terrorism. Although the Continent has been suffering this scourge for too long—the IRA in the United Kingdom; the Red Brigades and the Armed Proletariat Cells (NAP) in Italy, the Baader–Meinhof band in Germany, and ETA in Spain—it has appeared in the twenty-first century with a dimension and some drastically distinct objectives that have managed to transform the international political scene. Radical Islamic terrorism delivered a brutal blow on 11 September 2001, to the world's leading power, and followed by other attacks in Asia, Africa and Oceania, it caused the death of 192 persons in the Madrid attacks on 11 March 2004, the undoubtedly bloodiest attack in our history. Once more, it made an appearance in London in 2005. International terrorism now transcends known groups with their own structure and organization and with some explicit political demands and has become terrorist cells not always guided by a specific action plan.

Terrorism consists, according to the definition of Article 1(1) of the Council Framework Decision 2002/475/JHA of 13 June 2002 on the fight against terrorism, of the commission of serious crimes by members of a group or an organization, that due to its nature or by the context in which it is performed, may seriously injure a

country or an international organization when its perpetrator commits it with the purpose of seriously intimidating a population, obligating unduly the public powers or an international organization to perform an act or refrain from performing it or seriously destabilizing or destroying fundamental political, constitutional, economic and social structures of a country or an international organization. Nevertheless, it is precisely the definition of terrorism itself about which the international community has been unable to agree, given that there is a cohabitation of groups and organizations, which in a historical moment are deemed terrorists and a moment later occupy a place in the concert of nations.

Terrorism seeks to provoke collective insecurity, and for that reason, it demands effective responses from public powers, since it is their responsibility to return security and peace to citizens and to alleviate the effects of brutal criminal acts. With the 11 September attacks in the United States, it was shown that all public mechanisms for civil protection at that moment had been absolutely and completely ineffective. It was stated that the advances and breakthroughs introduced by information security, in particular in communication and information technology, have made complex knowledge and novel techniques, yesterday reserved for a select group of scientists, available today to terrorist organizations, making possible the organization and perpetration of attacks capable of shaking world peace.

It is evident that terrorism must be considered an unacceptable phenomena in a democratic society because, ignoring popular will, it seeks to impose by force solutions and measures that the citizenry would not accept any other way using the coercion and fear that arise from the threat of committing terrible acts of violence. Therefore Public powers have to adopt the necessary measures in order to face this phenomenon trying to tackle, together with the consequences of the actions of terrorist groups, the prevention and the sanctioning of attacks; particularly the causes thereof, which means the reasons that have caused the birth, growth and the precipitation of the terrorist phenomenon.

Anti-terrorist measures must advance in a dual direction—both politically and judicially, without forgetting the democratic principles that our constitutional rules impose, nor abdicating our determination to constitute a group of countries that govern themselves by the fundamental principles of a social and democratic state governed by law and that seek to serve as a reference of liberty and respect for human rights. Therefore, any measure that is adopted in order to fight terrorism has to respect the dictates of liberty without compromise, not even to combat the scourge of terror.

Attention must be called especially to some responses formulated by certain responsible politicians that seem to offer a high degree of effectiveness in the repression of terrorism, but that are adopted without respecting the basic rules of international coexistence or that end up even more reprehensible with a clear detriment or negation of individual liberties within a nation. It does not make any sense to discuss this question more extensively; however, it is evident that notorious examples have occurred in recent times:

Ignoring established international law to the extent of invading and occupying a country as has occurred in Iraq, with the excuse that it possessed weapons of mass destruction capable of causing havoc in the territory of the invader, when in reality

said weapons did not exist; justifying a "preventive war," invading another country such as Afghanistan, because the Taliban political regime sustained Al-Qaeda terrorism and in order to persecute Osama Bin Laden; or opting later for that which has been called more euphemistically "anticipatory actions" or asking the ECHR to lighten its jurisprudence in order to permit a more efficient repression of terrorism, as the British Ministry of Home Affairs did, is to return to a past which is even more deplorable—burying the building of the complex structure both of the legal framework of international relations and the protection of human rights—in the most brutal and unjustifiable manner.

Undoubtedly, we must provide political measures against terrorism which, departing from unwavering principles of representative democracy set forth a more effective protection of all citizens—even minorities—and permit an adequate and ordered development of the autonomy of people, thereby correcting possible social injustices.

The use of violence on the part of the terrorist organizations seeks and of course on many occasions manages to achieve recognition as a strategic actor, which reinforces their international political impact. However, whether or not it is desired, force itself is neither the aim nor the basis of these groups; rather, they seek geopolitical or religious ends, and rely for their continued existence on popular support or the support of some governments.

However, all that does not permit personal suspicion or even the conviction of a specific political leader to serve as sufficient reason in itself in order to adopt any type of decision and even less to set aside the rule of law, erasing the social convention that legal rules represent. This attitude not only delegitimizes those who make such decisions, but also poses a serious risk civil co-existence and places society in the waiting room of authoritarianism. Even if, as a last resort, military force must be used, from the political standpoint the outlook must be raised from the immediate present and discern with clarity the future horizon—it does not seem that the analysis performed in the two military interventions following 11 September may be deemed a paradigm of certain foresight. And from a legal point a view, one has to have respect for national and international rules in effect without inventing and improvising emergency rules where they are not strictly necessary, even less when they are adopted with the purpose of concealing errors of prevention.

2 Legal Measures for Combating Terrorism

Regardless of political measures, which have to do with preventive actions and police conduct, it is advisable to take note of some ideas concerning the legal responses with which a democratic state governed by laws must face the phenomenon of terrorism. In order to not lose direction, it must be emphasized that the framework of any judicial response must be understood to entail meticulous respect for fundamental rights because the essence of a state of laws is precisely the submission to these legal rules under any circumstances in which they have to be applied. The rule of law

differentiates itself from other political regimes, even when applying rules against those who reject them and fight the system with weapons and terror.

Legal measures against terrorism cover two broad areas: *prevention* within the appropriate legal framework that involves administrative conduct, especially with regard to the control of persons, including the conduct of police devices; and *repression*, which involves the adoption of legal responses with the criminal system.

a) Special emphasis must be placed on foreign policy for its effect on administrative action, especially in the financial control of organizations and in the security of what has come to be called "critical infrastructure."

It seems clear that the flows of persons who seek to enter a country require, in addition to the organization of the needs of the population and the capacity that the society has to integrate the foreigners, a permanent coordination with information services about the individuals who make up criminal organizations, especially terrorists, without losing sight of the fact that the status of a foreigner who seeks entrance into a state does not normally do so to install bombs. It is true that xenophobia is producing perverse effects on civil society, and that in not a few cases, the foreigner seen as an enemy when what they seek is to escape political, ideological, or religious persecution or simply to escape the misery in which they are submerged in their country of origin. Human rights must be respected at the entry control points for foreigners, and it is necessary to completely reject vetting actions as those that frequently are experienced at the borders of some countries where unfortunately respect for dignity is lost and degrading treatment is not infrequent.

Spain has probably been the country in the EU environment that has on more occasions dealt with the need to develop common policies in the area of terrorism and immigration, probably due to its geographical situation and because for years, it has endured acts of terrorism. On its initiative, Council Regulation 2007/2004 was approved, creating the European Agency for the Management of Operational Cooperation at External Borders of the Member States of the European Union.[1]

The policy on financial control of terrorist organizations, thereby pursuing its sources and financial channels, represents, without a doubt, a major element in the fight against terrorism. UN Security Council understood it as such when approving in its 4385th session, Resolution 1373 (2001) of 28 September, thereby accepting a series of measures in order to prevent and suppress the financing of terrorist acts. The Security Council Committee was created in order to check their application.

In the EU, the first attacks against the United States unleashed the development of a European security agenda that was set forth in the Action Plan on the subject

[1] DO L 349 of 25 November 2004, p. 1.

of fighting terrorism and financial matters with the approval of Regulation (EC) No. 2580/2001 of the Council of 27 December 2001,[2] in which a series of restrictive measures were adopted on the freezing of assets and other financial resources directed at certain persons and entities with the aim of fighting terrorism, subsequently modified by Regulation (EC) No. 1207/2005 of the Council of 27 July 2005[3]; and in Regulation (EC) No. 881/2002 of the Council of 27 May 2002[4] and this time directed specifically at the Al-Qaeda network, modified likewise by Regulation (EC) No. 561/2003 of the Council of 27 March 2003.[5]

Lastly, the magnitude of the attacks of the past decade has emphasized that the technological revolutions that have brought about the "global village" have as a downside the vulnerability of certain infrastructures and networks which depend more and more on information technologies such as the Internet, radio navigation, and satellite communication. Accordingly, the creation of entities such as the European Network and Information Security Agency (ENISA) and the development of legislative measures that provide minimum rules on the protection of infrastructures within the framework of its policies on transportation communication, energy, medicine, labor safety and public health. It deals with "critical infrastructures" in the fight again terrorism as they have been called by the EU Commission Communication (2004) 702 final of 20 October 2004, to Council and to Parliament.

b) However, in addition to preventive actions of an administrative nature, measures of a repressive nature must be adopted which affect the criminal justice systems, provisions that on one side design prohibitions on actions, establishing as such the conduct that merits a punitive reproach due to effect legal interests of supreme importance, and on the other, regulate the manner and standards for judging that conduct in the criminal procedural law, all measures that on occasion manage to deter, since when it deals with offenders who sacrifice themselves as martyrs for a cause, criminal law obviously serves no purpose. In terms of the effect of punishments or the threat of punishments on crime and terrorist acts, to which I now turn, there is no doubt that actions which try to achieve feelings of terror or collective danger through indiscriminate attacks on the population have to be categorized as criminal actions and for that, there exist three possible solutions that are relatively different from the point of view of criminal law and criminal policy.

In the first place, a *special law* should be approved in order to fight terrorism, a single text in which, on the fringes of the Criminal Code and Criminal Procedural Law, a criminal system itself is articulated for the persecution of these crimes. This solution would permit having an overall vision of the phenomenon of terrorism at the cost of a design of maximum punishment and

[2] DO L 344, of 28 December 2001, p. 70.

[3] DO L 197, of 28 July 2005, p. 17.

[4] DO L 139, of 29 May 2002, p. 9.

[5] DO L 82, of 29 March 2003, p. 1.

minimum guarantees in order for a greater defense of public security intending in this manner to pursue these crimes more effectively that disturb civil society. This is precisely what occurred with the British Anti-Terrorism Crime and Security Act of 2001 that modified the Terrorism Act of 2000 and with the notorious USA PATRIOT Act of 26 October 2001.[6] In both cases, we undoubtedly face emergency legislation that nevertheless is framed by a period of social normalcy despite the shock of a certain terrorist act and despite the fact that said normalcy is disturbed periodically by actions of these radical and extremist groups. Therefore, the aforementioned emergency legislation may only be understood in truly limiting situations and with a meaning and specific concrete temporal effectiveness because the state does not have the courage to admit to its citizens that it is converting to a rule that which is an exception for two essential reasons: on one side because that could be interpreted as a demonstration of impotence when facing the terrorism phenomenon, and on the other side, because as such, one may contaminate the entire criminal system and end up converting a Democratic State of Law into an authoritarian State. Although the United States tried to justify this emergency legislative option, taking refuge in "legitimate defense" by virtue of Article 52 of the United Nations Charter, in conformity with this text the imminent recognition of the law to legitimate defense requires an aggression to be underway. It excludes all responses to actions which have already occurred, and in any case, it could not be understood that the attack was ongoing, given that the Security Council had already adopted measures by virtue of Article 41 in order to maintain peace and security and had even reserved recourse to the use of force in the case it were necessary on the basis of that provided in Article 42 of the United Nations Charter.

Secondly, it is necessary to deem these crimes as *aggravated forms* of certain conduct that due to their nature or context may seriously damage a country or an international organization when they are committed with a threatening or destabilizing intent. This is an option of legislative policy that arises once the idea of a special criminal and procedural legislation in order to combat terrorism is discarded, because in addition to relying on notable opposition from civil rights associations the results obtained with the emergency rules in effect have been wanting. And it is precisely this response that was given by the European Union to this phenomenon in the aforementioned FD 2002/475/JHA. The unfolding of events not only achieved a consensus definition of terrorism within the EU, but also encouraged and favored the development of cooperation in police and judicial affairs. Unequivocal evidence of this was the approval of the Council Framework Decision of 13 June 2002 on to the legal rules on the arrest warrant and delivery procedures in Member States (2002/584/JHA).[7] Thirdly, it

[6] The acronym of which stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" and that of course constitutes an exaltation of the patriotic sentiment against terrorism.

[7] DO L 190, of 18 July 2002.

is necessary to address the phenomenon from the point of view of common criminal law, categorizing as independent and autonomous crimes those conducts related to terrorism. This is what Spanish legislation does, possibly because the terrorist scourge has been and continues to be present in our country since not only have we endured almost 40 years of terrorism of the armed ban ETA, but also during out history, we have also witnessed other examples such as GRAPO, *Terra Lliure* and the *Exército Guerrilheiro do Povo Galego Ceive*.

Therefore, the Spanish Criminal Code not only classifies as autonomous crimes conduct constituting terrorism (Art. 571), but also other related offenses, including any type of action that is executed with that aim (Art. 576). To these types of conduct the crime of apology was added by the Organic Law 7/2000, which implements the Criminal Code and the Law of Minors. The offense consists of praising or justifying by any means of public expression or dissemination the crimes making up Articles 571 and 577 or dissemination of crimes included in Articles 571 to 577 or those who have participated in their execution as well as the performance of acts that tend to discredit, diminish or humiliate victims or their relatives (Art. 578 CC). Nevertheless it is necessary to indicate that the apology for terrorism does not constitute a crime of terrorism, as the Supreme Court, in its decisions of 23 May and 14 June 2002, has held. Its classification responds to consolidated cultural and doctrinal criteria by which one distinguishes between truly terrorist crimes and those which belong to this category, that is to say that without being terrorist acts, they express in some manner moral support or solidarity with terrorism and its authors, demonstrated in a public manner.

3 The Criminal Process and the Protection of Fundamental Rights

Despite its essential and previous nature, criminal law is not sufficient to make the repression of criminal conduct effective and therefore, nor is it against terrorist crimes either, regardless of the form in which they are characterized, because at times not even a sanction may be levied, due to the death of the perpetrator of the attack. For that reason, it is necessary to set out the appropriate instrument to achieve the sanctioning of these acts, that is to say, a process that permits the due application of criminal law since the state cannot exercise the *ius puniendi* without resorting to a trial, at least not legitimately.

The criminal process probably represents the principal field of tension between public security and fundament rights of those who are subjected to it, beginning with their right to freedom, which appears seriously threatened due to both precautionary measures that may be adopted during the substantiation of the process as well as by the definitive imposition of a sentence in an eventual conviction. At present, alarming signs are beginning to appear on the horizon regarding procedural

guarantees, making the values of public security and the repression of certain criminal behavior prevail. With these dynamics, the so-called effectiveness of the fight against crime—particularly against Islamic terrorism after the attack on 11 September 2001—may end up justifying the reduction of some individual rights, the guarantees of which have been being conquered arduously and have been gaining strength over many decades when a majority of citizens, we believe, definitively acquired them due to western civilization. The tragic evolution of recent events has made it evident that the risk of regression, insofar as the protection of fundamental rights, is always latent.

In this regard, the impassive international community has witnessed the most authoritarian exercise of *ius puniendi* in recent times in cases where there is not even a poor imitation of a process, thereby overlooking any procedural guarantee and with its single plan, reminiscent of the tradition, which is repeated so many times in North American westerns, of "wanted, dead or alive."

Evidence of this has been the explicit negation, without any reservation, of the fundamental guarantees of the prisoners from the Afghanistan invasion, who are found imprisoned in Guantánamo[8] with the support of the Attorney-General of the Bush Administration. As it dealt with politically unconnected minorities subjected to vague accusations over a long period of time, no one was concerned that they were not going to be deported to their country and that it was certain that the *status* of prisoners of war nor the resulting Geneva Convention would not apply to them. It has been shown that they have been subject to inhuman and degrading treatment, at least according to the ECHR doctrine, it was determined that they were not entitled to the maximum period of detention for being presented before a judge and it was said that they were not entitled to a lawyer, among many other aberrations of justice. It is ironic since these measures come from the United States, but above all because they are a response on the fringes of -national or international law, permitted or assumed by the international community because they originate from the world's leading power in response to some terrorist attacks that undoubtedly are unjustified and must be condemned.

Today it can happily be said that the first reactions have begun to occur, not only on the part of the international community, but also within the United States itself. The initial strategy of transferring Taliban war criminals to Guantánamo Naval Base, as well as those suspected of belonging to the Al-Qaeda network, allowed justifying, at least formally, the deprivation of rights and guarantees of the detainees, given that dealing with a territory, the sovereignty of which belongs to Cuba, constitutional rights could not be recognized, since it is not located within the territory of the United States. Moreover, among the actions taken by the President under the prerogative of the Authorization for the Use of Military Force (AUFM), the *status* of unlawful combatants or enemy combatants has been created that permits it to not recognize the rights provided in the Geneva Convention for the treatment of war prisoners, in the case of Taliban war prisoners as well as those

[8] For further detail on this matter, see Thaman, Report on USA.

suspected of belonging to the Al-Qaeda network, since said category is not provided for in Article 4 of the Convention.

These abuses ceased as soon as the *habeas corpus* processes—raised by virtue of Article 1(9)(2) of the United States Constitution began to be decided by the Federal District Judges and the Federal Appeals Courts (the first of the decisions was the case *Rasul v. Bush*[9] which was followed by *Hamdi v. Rumsfeld*[10] and *Rumsfeld v. Padilla*[11]) which did not hesitate to recognize that the United States exercised full and exclusive jurisdiction, though not sovereignty, over Guantanamo and that the persons there detained enjoy the *status* of prisoner of war, thereby obligating them to recognize the rights and guarantees of the Geneva Convention. Likewise, it was declared that the created *ad hoc* military tribunals were not legal and therefore could not judge them.

The United States strategy has highlighted the fragile foundations of fundamental rights when the national security of the leading western world power comes into play As opposed to the EU policy that directed its actions at the development of cooperation policies in order to fight terrorism, approaching the problem as a question of internal security, the United States developed a policy based on the "right of defense" and carried out in military strategies that sought to end terrorism, but which in reality have led to the aberration of the guarantees of a state of laws and the negation of fundamental rights. With the arrival of the Bush administration, that country has undertaken a policy of the repression of terrorism based on its own forces and internal channels, clearly departing from the course of international action upon abandoning on 7 May 2002 the decision of President Clinton, who on 31 December 2000 had signed the Statute of the International Criminal Court. Moreover, the rejection of universal jurisdiction is even more evident in its law on the protection of American service members (American Service Members' Protection Act[12]). Even though the United States on 10 January 2000 signed the New York Convention of 9 December 1999 of the United Nations on the repression of terrorism, in reality it has never come to ratifying it.

4 International Legal Cooperation as an Essential Element in the Fight Against Terrorism

Probably one of the most serious problems that arises in the persecution and effective sanctioning of terrorist crimes is that with great frequency its authors are located outside the reach of the authorities of the location where the crime was committed; the terrorists usually try to find refuge in a foreign country in which they

[9] USSC, Rasul v. Bush (03-334), 542 U.S. 466 (2004).

[10] USSC, Hamdi v. Rumsfeld (03-6696), 542 U.S. 507 (2004).

[11] USSC, Rumsfeld v. Padilla (03-1027), 542 U.S. 426 (2004).

[12] Acronym ASPA.

know that their surrender would end up being denied or the request for cooperation would be tied up in intricate and prolonged procedures that would permit them to continue enjoying freedom after having committed a crime. For this reason, international legal cooperation is fundamental in the fight against terrorism, since one of the first requirements in order to sanction this delinquency is to achieve the surrender of the person implicated when they are found sheltered abroad. This occurs because in the countries where the right to defense and a fair hearing is respected more strictly at the time of the trial, such a trial cannot be held without the physical presence of the suspect in the chamber or without them being at the immediate disposal of the tribunal. The availability of the person of the convict is essential for the fulfillment of the sentences since without the surrender of the convict who is found abroad, outside the reach of the authorities of the state which has convicted him, the effectiveness of criminal justice evaporates.

International legal cooperation plays a primary role in the fight against terrorism, not only in the surrender of persons by the mechanism of extradition, but also by other means of international assistance, particularly in the investigation of terrorist crimes and in the execution of decisions of criminal sentences that have an effect in the area of state sovereignty. The development of policies and cooperation actions in the area of Justice has traditionally responded to the rule of the good understanding and good will of States that have placed at the disposal of foreign authorities their own means and efforts for the purpose of facilitating the jurisdictional activity of the State that requested the assistance.

For a long time, this idea of aid or assistance in fulfilling the judicial functions of each of the States has been functioning in the area of international legal cooperation in a manner that both the request, as well as the rendering of assistance, was based on the affirmation of the sovereignty of the State that dispensed the assistance and that sprung from the reciprocity of the requesting State that was already committed in an international convention or treaty or the application of which in practice was known or expected by the application of the principle of reciprocity.

The initial advance occurs when the actions of pure assistance are exceeded in order for the requiring State to be able to exercise in its own territory its sovereign jurisdictional powers (subpoenas or citations, obtaining evidence etc.) upon the recognition and execution in a state of a foreign resolution in a manner such that the resolution becomes an instrument absolutely equivalent to the judicial resolutions emanating from the tribunals of the country that decides to grant the *exequatur*.

It overcame the idea of permitting that within its own borders, a state could exercise jurisdiction relying on the help of the other, and it advanced the idea of fulfilling the judicial resolutions that have been issued in another State as an act of sovereignty of another foreign state. That is to say, it does not deal with rendering specific assistance to the other state that asks for it, but instead with transferring to a certain degree its own power over the matter, permitting that a resolution of a foreign authority unfurl all its effects in the other state. In this manner, a waiver of sovereignty occurs to the degree in which it assumes as its own a foreign resolution and without permitting the exercise of jurisdiction by national bodies. Nevertheless, the underlying idea continues anchored to the behavior of the exercise of state

power which explains that foreign decisions could be exercised not only because they themselves have this force and that consideration but rather because the ability to execute it is granted to it by the internal decision of recognition.

Therefore, it was the judicial *exequatur* resolution, issued in the requested state that transformed the judicial decision, outside the legal system of the State in which its effects were sought, into its own resolution. From another perspective, the foreign judicial decision lacked all effectiveness in itself if it were not followed by an act of sovereignty that granted it the ability to be executed in a manner that in reality could be said to have the effect of an internal order sine the State executed its own decision in making the foreign resolution effective.

These activities of international legal cooperation in order for both foreign judicial authorities to be able to effectively carry out their own jurisdictional *potestas,* facilitating it by means of the realization of actions in the territory of the required state as well as being able to fulfill and make judicial resolutions issued abroad effective, have traditionally had as a legal source the national provisions of the state that renders international cooperation. Gradually, conventional sources have been emerging to the degree that internationalization processes of legal relations have been advancing.

4.1 Legal Cooperation in Europe

In Europe, a process of integration and economic cooperation began in the middle of the twentieth century. Later, surpassing this framework of relations, an increase of political relations emerged among a growing number of states, and currently it is leading to a peaceful process of political integration that is unprecedented in the history of humanity. Accordingly, this situation has also required modification of the instruments and sources of legal systems and cooperation in Europe surpassing successively old Conventions approved at the heart of the European Council.

The special course of political and economic relations in the European Union has permitted police and judicial cooperation to continue increasing to the point of transforming itself into a community subject. After the Treaties of Maastricht (1992) and Amsterdam (1997) and the conclusions of the Tampere European Council in 1999 and the Hague Program in 2004, a difficult road has begun to be travelled towards a common area of freedom, security, and justice, taking into consideration that far from constituting an end itself, judicial cooperation is a true case to reach Justice, since when it deals with cross border litigation or with a foreign element, the judicial protection of citizens may only be dispensed effectively relying on the action or intervention of the authorities of all the States involved.

On the other side, specifically in the area of criminal law, the common space of liberty, security and justice makes some demands that are more and more urgent since the increase of freedoms, including the freedom of movement for European

citizens, has to run in parallel with the guarantee of citizen security in a manner that crossing a border does not represent an advantage for the one responsible for a crime. If it were as such, not only would it place in danger the individual liberties, but also justice itself because criminal persecution cannot be limited to the borders of a country and this view has to be substituted by a more global view since many forms of delinquency that are present in our society, and specifically the terrorist phenomena, are global.

At the present time, once the so-called Lisbon Treaty has come into force, that maintains the TEU and approves the TFEU, the "third pillar" vanishes, which does not mean that criminal cooperation disappears, but rather that it becomes a community subject, that is to say, it becomes a part of the third part of the TFEU "Internal Policies and Actions of the Union" (in the same manner as the internal market, agriculture and fishing or free circulation). Judicial cooperation in the criminal area proceeds to be included in Chapter 4 of Title IV, entitled "Space for liberty, security and justice" and includes Articles 82 to 86 of the TFEU and is governed by legal instruments such as regulations, directives, decisions, recommendations and rulings (Art. 288 TFEU).

Judicial cooperation on criminal subjects in the Union, according to the TFEU, is based on the principal of mutual recognition of judicial decisions and resolutions and include the approximation of legal provisions and regulations of the Member States, adopting measures in order to establish rules and procedures that guarantee recognition throughout the Union of the judicial decisions and rulings in all forms that prevent and resolve jurisdictional conflicts: that support the training of magistrates and personnel in the service of the administration of justice and that facilitate judicial cooperation in criminal procedures and in the execution [Art. 82 (1) TFEU].

Likewise, by means of directives adopted in accordance with ordinary legislative procedures, *minimum rules in criminal procedures* may be established on the mutual admissibility of evidence, the rights of persons during procedures, the rights of victims and other specific elements of the criminal process and also provide for the approval of the *rules of Criminal Law subjects* relative to the *definition of criminal infractions and sanctions* in the criminal areas that are of special seriousness and have a *trans-border dimension*, with the Treaty specifically referring to terrorism, the treatment of human beings and the sexual exploitation of women and children, illicit drug trafficking, arms trafficking, money laundering, corruption, falsification of payment means, computer crimes and organized crimes [Art. 83(1) TFEU].

In accordance with a decision of the ECJ of 13 September 2005,[13] the TFEU established that they may approach the legal and regulatory provisions of the State in the criminal matters, establishing minimum rules relative to the *definition of criminal infractions and sanctions* when it results necessary in order *to guarantee the effective execution of a policy of the Union* in an area that has been object of harmonization measures [Art. 83(2) TFEU].

[13] ECJ, 13 September 2005, Commission against the Council (C-176/03).

4.2 *Universal International Treaties in the Fight Against Terrorism*

This progress on the subject of legal criminal cooperation in the European territory that, of course, comprises the persecution of terrorism crimes, has not been similarly successful in relations with other countries. Slowly overcoming a multitude of obstacles that depart, above all, from the idea of preserving the sovereignty of each state, it has been advancing in improving criminal justice, making the response to criminal conduct more effective when foreign elements, which may make the prosecution fail, are present.

Cooperation continues to proceed from the general reference point of conventional provisions, the Treaties or bilateral or multilateral Conventions where the requests and the procedures are established to render it both from the position of the objecting party as well as the State providing the diligence action, requested by a foreign State.

However, since the regime of general criminal assistance or extradition is usually approved between two States there are certain frameworks for legal cooperation whose own etiology has managed to design universal instruments open to the ratification of all states and normally approved at the heart of the United Nations. This is the situation in the area of terrorism, where for the persecution of this crime 18 (14 + 4) international instruments have been approved at the present time. Within the same UN framework, a general convention on international terrorism is being negotiated that would supplement the framework in effect and depart from the principles that already govern in the conventions on terrorism that regulate sectorial aspects.

The 14 conventions on terrorism and the four Amendments or additional Protocols according to the Counter Terrorism Committee of the United Nations Security Council and the UNODC are as follows.

A) Convention on aircraft. Convention on the violations and certain other acts committed aboard aircraft ("Tokyo Convention") signed in September 1963 and in effect since 4 December 1969 on aviation security. It applies to acts that effect security during flight; the Convention authorizes the commander of the aircraft to impose reasonable means of a coercive nature against all persons who give him reason to believe that they have committed or are going to commit an act of this nature, provided that it is necessary to protect the security of the aircraft and demand that the contracting parties assume custody of the violators and return control of the aircraft to its legitimate commander.

B) Convention on unlawful seizure. Convention for the suppression of unlawful seizure of aircraft ("Hague Convention") signed in December 1970 and in effect from 14 October 1971 on air hijacking. It is deemed a crime that a person who is aboard an aircraft in flight "unlawfully, by means of force or the threat of force or any other type of intimidation seize the craft or exercise control over it" or tries to do so. It requires that seizures of aircraft be met with "severe

punishment" and that those who have detained the violators extradite the violator or make them appear before justice and that they render mutual assistance in the criminal procedures initiated in accordance with the convention.

B1) Supplementary Protocol of the Convention for the suppression of illegal seizure of aircraft signed in Beijing in September 2010 that still has not entered into effect.

C) Convention on civil aviation. Convention on the suppression of unlawful acts against the security of civil aviation ("Montreal Convention") signed in September 1971 and in effect from 23 January 1973 relative to the acts of aerial sabotage such as explosions of bombs aboard aircraft in flight. It provides that defines that who commits a crime is one who unlawfully and intentionally perpetrates an act of violence against a person aboard an aircraft in flight if that act could place in danger the security of the aircraft, places an explosive device on an aircraft or tries to commit those acts or is an accomplice of a person who perpetrates or tries to perpetrate such acts. The Convention requires that the parties punish these crimes with "severe sentences" and those who have detained the violators to extradite the violator or make them appear before justice.

D) Convention on diplomatic agents. Convention on the prevention and punishment of crimes against internationally protected persons including diplomatic agents, signed in New York in December 1973 and in effect since 20 February 1970 relative to attacks against high government officials and diplomats. It defines an "internationally protected person" as a "Head of State, Ministry of Foreign Relations, representative or civil servant of a State or an international organization that is entitled to special protection in a foreign State and their relatives." It requires classifying as a crime "the commission of a homicide, kidnapping or other attack against the physical integrity or freedom of an internationally protected person, the commission of a violent attack against official places, a private residence or the means of transport of such a person, the threat to commit such attack" and they be punished with adequate sentences in which their serious nature is taken into account; also all acts that "constitute participation as an accomplice".

E) Convention on hostage taking. International Convention on hostage taking signed in New York in December 1979 and in effect since 3 June 1983. It provides that "all persons who seize others and detain them and threaten to kill, injure or keep them hostage for purposes of forcing a third party, for example a State, an international intergovernmental organization, a natural or legal person or a group of persons to an action or omission as an explicit or implicit condition for the liberation of a hostage commits the crime of hostage taking within the meaning of this convention."

F) Convention on nuclear material. Convention on the physical protection of nuclear material, signed in Vienna in October 1979 and in effect since 8 February 1987 relative to the appropriate and unlawful utilization of nuclear materials. It lists illegal possession, the utilization, the transfer and the theft of

nuclear materials and the threat of using the nuclear materials in order to cause the death or serious injuries to a person or substantial material damages.

F1) Convention on the physical protection of nuclear material. Amendments to the Convention on the physical protection of nuclear materials signed in Vienna on 8 July 2005; it has not entered into effect. They establish the legally-binding obligation of the Party States to protect installations and nuclear material of national use for peaceful purposes as well as its storage and transport and provide for greater cooperation among the States with respect to the application of rapid measures in order to find and recover stolen or contraband nuclear material, mitigate any radiological consequences of the sabotage and prevent and combat related crimes.

G) Convention on airports. Protocol for the suppression of unlawful violent acts at airports with provide services to international civil aviation, supplementing the Convention for the suppression of unlawful acts against the safety of civil aviation, signed in Montreal in February 1988 and in effect from 6 August 1989. It expands the provisions of the Convention of Montreal in order to include terrorist acts committed at airports that provide services to international civil aviation.

H) Convention on maritime navigation. Convention for the suppression of unlawful acts against the security of maritime navigation signed in Rome in March 1988 and that entered into effect from 1 March 1992 relative to terrorist activities on vessels. It establishes a legal regime applicable to acts committed against international maritime navigation similar to the regimes established with respect to international aviation. It provides that the person who commits a crime is one who unlawfully or intentionally seizes a vessel or exercises control over it by means of force, threat or intimidation or commits an act of violence against a person on board of a vessel if said act places in danger the safety of the navigation of the vessel or who places a device or destructive substance on board a vessel or perpetrates other acts against the security of vessels.

H1) Protocol of 2005 of the Convention for the suppression of unlawful acts against the security of maritime navigation, signed in London in October 2005 that has not entered into effect. It defines the utilization of a vessel as an instrument to encourage the commission of an act of terrorism; it lists the transport on board of a vessel of various materials with the knowledge that it is sought to use them in order to cause or threaten to cause deaths, serious injuries or damages for purposes of encouraging the commission of an act of terrorism. It also lists transport on board of a vessel of persons who have committed acts of terrorism and introduces procedures in order to regulate the embarking on a suspicious boat of having committed a crime provided by the convention. There is a reformed text of the Convention of 1988 and the Protocol of 2005 signed in London in October 2005.

I) Protocol on fixed platforms. Protocol for the suppression of unlawful acts against the security of fixed platforms placed on the continental shelf, signed in Rome on March 1988 and in effect from 1 March 1992 relative to the terrorist activities performed in fixed platforms on the coasts. It establishes a legal regime applicable to acts performed against fixed platforms placed on the continental shelf similar to regimes established with respect to international aviation.

I1) Protocol of the Protocol on fixed platforms. Protocol of 2005 of the Protocol for the suppression of unlawful acts against the security of fixed platforms placed on the continental shelf, signed in London in October 2005 that has not entered into effect. It adapts the changes in the Convention for the suppression of unlawful acts against the security of maritime navigation to the context of fixed platforms located on the continental shelf.

J) Convention on the marking of plastic explosives for purposes of detection. International Convention on the marking of plastic explosives for purposes of detection signed in Montreal in March 1991 and in effect since June 1998 that provides for chemical marking in order to facilitate the detection of plastic explosives, for example in order to fight against aerial sabotage.
Negotiated due to the explosion of a bomb on Pan Am Flight 103 in 1988, its objective is to control and limit the use of unmarked and undetectable plastic explosives. The parties are bound to ensure in their respective territories an effective control of unmarked explosives, that is to say, those that do not contain one of the detection agents set forth in the technical annex to the Treaty. In general terms, the parties should among other things: adopt necessary and effective measures in order to prohibit and impede the manufacturing of unmarked plastic explosives, impede the entry or exit from their territories of unmarked explosives, exercise a strict and effective control on the holding and transfer of unmarked explosives that have been manufactured or introduced in their territory before the entry into effect of the Convention; assure that all the supplies of those unmarked explosives that are not in the power of military or police authorities are destroyed or consumed, marked or permanently transformed into harmless substances within a period of 3 years; adopt the necessary measures in order to assure that the unmarked plastic explosives are in the power of military or police authorities are destroyed or consumed, marked or transformed permanently into harmless substances within a period of 15 years; and assure the destruction as soon as possible of all unmarked explosives manufactured after the entry into effect of the Convention for that state.

K) Convention on terrorist attacks committed with bombs. International Convention for the Suppression of Terrorist Attacks Committed with Bombs signed in New York in December 1997 and in effect from 23 May 2001. It creates a universal jurisdictional regime with respect to the unlawful and intentional utilization of explosives and other deadly devices in, within or against different places of public use defined with the intention to kill or cause serious physical injuries or with the intention to cause significant destruction to that place.

L) Convention on the financing of terrorism. International Convention for the Suppression of Financing of Terrorism signed in New York in 1999 and in effect from 10 April 2002. It obligates the parties to adopt measures in order to prevent and counteract the financing of terrorism, whether directly or indirectly, by means of groups that state charitable, social or cultural intentions or that are also dedicated to unlawful activities such as drug trafficking or the arms contraband. It commits the state to imposing criminal or civil liability for these acts on those who finance terrorism, provide the identification, freezing and confiscation of the funds assigned for terrorist activities as well as the distribution of these funds among the effected States in function of each case. Bank secrecy shall cease to be a justification for refusing to cooperate.

M) Convention on International Nuclear Terrorism. Convention for the Suppression of Nuclear Terrorism signed in New York in April 2005 and in effect from 7 July 2007. It contemplates a wide array of acts and possible objectives including nuclear power plants and reactors as well as contemplating the threat and the attention to commit said crimes or participating in them as an accomplice. It establishes that those responsible shall be judged or extradited, and it encourages the State to cooperate in the prevention of terrorist attacks, exchanging information and providing mutual assistance in criminal investigations and extradition proceedings and contemplates both crisis situation (the provision of assistance to States in order to resolve the situation) as well as situations after the crisis (disposal of the nuclear material by the conduct of the International Atomic Energy Organization for purposes of guaranteeing safety).

N) Convention for the Suppression of Unlawful Acts Related to International Civil Aviation, produced in Beijing in September 2010 that has still not entered into effect.

4.3 Regional Treaties Against Terrorism

Together with this collection of universal regulations on fighting terrorism, strengthening the legal cooperation between States throughout the world, different regional political initiatives have arisen that muddle through this phenomenon and streamline the coordinated response to this type of delinquency.

a) On the African Continent, the African Union has approved the Convention for the Prevention and Fighting Terrorism of 1999 and the Protocol of this Convention of 2004.
Likewise, the Western Africa Economic and Monetary Union,[14] approved in 2002 the Regulation No. 14/2002/CM/WAEMU on the freezing of funds and other financial resources within the framework of the fight against terrorism,

[14] Hereinafter WAEMU, which comprises of the States of Benin, Burkina Faso, Bissau Guinea, Ivory Coast, Mali, Nigeria, Senegal and Togo.

the Decision of 2008 No. 09/2008/CM/WAEMU on the list of persons, entities and bodies effected by the freezing of funds and other financial resources within the framework of the fight against terrorism and in the 2007 Directive No. 04/2007/CM/WAEMU on the fight against the financing of terrorism in the Member States of the WAEMU was approved. The Central Africa Economic and Monetary Community[15] approved in 2003 Regulation No. 01/03-CAEMU-UMAC on the prevention and suppression of money laundering and the financing of terrorism in Central Africa and in 2005 the Regulation No. 08/05-CAEMU-057-CM-13, thereby adopting the Convention on the fight against terrorism in Central Africa.

b) In different organizations in Asia, regional instruments have also been approved in order to fight terrorism; the Association of South East Asia Nations[16] approved in 2007 a Convention against terrorism.
The Community of Independent States[17] approved in 1999 a Treaty on Cooperation between member States in the fight against terrorism. The Cooperation Council for the Arab States of the Gulf[18] approved in 2004 a Convention against terrorism.
The Shanghai Cooperation Organization[19] approved in 2001 the Convention of Shanghai in order to fight terrorism, separatism and extremism. The South Asian Association for Regional Cooperation[20] approved in 1987 a Regional Convention for the suppression of terrorism and in January 2004 an additional Protocol to that Convention.

c) On the American continent, acting under the auspices of the Organization of the American States, under the very close protection of the United States in 1971, the Convention to prevent and sanction Terrorist Acts conceived as crimes against persons and the related extortion when these have an international significance was approved. Subsequently, in 2002 the Inter-American Convention against Terrorism was approved[21] and entered into effect on October 7, 2003.

d) Other organizations such as the League of Arab States[22] approved in 1998 an Arab Convention on the repression of terrorism.

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[15] This one is made up of Cameroon, the Central African Republic, Chad, Congo, Equatorial Guinea and Gabon.

[16] Hereinafter ASEAN, that comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

[17] The majority of the old republics that made up the Soviet Union form CIS.

[18] It is known as CCASG and it comprises Bahrain, Kuwait, Oman, Qatar Saudi Arabia and the United Arab Emirates.

[19] Called OSC and includes China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan.

[20] SAARC comprises Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

[21] However Bolivia, Haiti and various Caribbean countries like Bahamas, Barbados, Belize, Jamaica, Saint Kitts and Nevis, Santa Lucia, San Vicente and Grenadines, Surinam has not ratified it.

[22] The LAS includes Algeria, Bahrain, Comoro, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen.

Likewise, the Organization of Islamic Cooperation[23] approved in 1999 the Convention for fighting international terrorism.

4.4 The European Response in the Fight Against Terrorism

Europe has been, of course, sensitive to the scourge of terrorism and very aware that only a cooperative approach can effectively prevent these crimes. With the unquestionable advantage of organizations of certain political integration, it has been advancing during the second half of the twentieth century in this field with important achievements.

From the European Council and community institutions,[24] international provisions have been being approved that have finally permitted, with the approval of the Treaty of Lisbon, the "communitization" of legal cooperation in the criminal area.

a) At an early point, in the heart of the European Council in 1977, the European Convention on the Suppression of Terrorism was approved, to which an additional protocol was added in 2003 that seeks to update that Convention, departing from a principle of realism and pragmatics, as the European Council itself explains, and setting aside the subjects over which a consensus could not be achieved and preserving the role of the Convention as an instrument that facilitates the extradition of terrorists by the "de-politization" of terrorist crimes. The Convention does not require that States criminalize terrorist violations, but rather only sets forth that those crimes cannot be deemed political crimes for purposes of extradition. The Protocol expands the list of crimes, encompassing all the violations described in the conventions and protocol of the UN on terrorism and that have been being updated in accordance with the ultimate initiatives of the United Nations. Likewise, simplified procedures have been instituted in order to include new crimes without the need to approve a new Protocol. The Convention has been opened to States that appear as observers in the European Council, and permits the Committee of Ministers to invite other states to adhere to the Convention. The Convention has also extended the non-discrimination clause, authorizing the denial of extradition to a country in which the accused may be sentenced to death, submitted to torture, or be sentenced to life in prison without parole. In order to avoid undermining its own effectiveness

[23] It comprises 57 member states: Afghanistan, Algiers, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei, Burkina Faso, Cameroon, Chad, Comoro, Djibouti, Egypt, Gabon, Gambia, Guyana, Guinea, Guinea Bissau, Indonesia, Iraq, Iran, Ivory Coast, Jordan, Kazakhstan, Kyrgyzstan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Syria, Sierra Leon, Somalia, Sudan, Surinam, Tajik, Togo, Tunisia, Turkey, Turkmenistan, Uganda, the United Arab Emirates, Uzbekistan and Yemen.

[24] Of the European Community and then the European Union.

by going too far in creating reservations for political crimes, four measures are set forth: (1) The possibility of making reservations on political crimes is limited to the current states party who have to indicate the crimes to which the reservation applies; (2) The reservation shall be valid for a period of 3 years, upon the termination of which they may be renewed for the same period of time with prior notice by the state; (3) the obligation of "*aut dedere aut iudicare*" is re-enforced, thereby establishing that in the case of a denial of extradition founded on a reserve the case shall be submitted to the authorities of criminal persecution and the Council of Europe informed of the result.; (4) The possibility of active monitoring is established on the part of the state whose request for extradition has been denied, which may request a statement from the Committee of Ministers on the matter in order to find out if the denial is in conformity with the Convention.

In 2005 in Warsaw, the Convention for the Prevention of Terrorism was approved and which entered into effect on 1 June 2007. Its aim is to increase the effectiveness of international instruments in effect in the fight against terrorism, intensifying the efforts of the Member States in the prevention of terrorism. For that, two measures are used: on one side, qualifying as criminal violations some acts that may lead to the commission of terrorist crimes, such as public provocation (apology), the recruitment and the training of terrorists; and on the other side, reinforcing cooperation for prevention both in the national as well as international sphere with the modification of extradition agreements and judicial assistance. In addition, this Convention contains a provision relative to the protection in indemnification of victims of terrorism.

Also in Warsaw in 2005, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crimes and Financing of Terrorism was approved and entered into effect on 1 May 2008, representing the updating and extension of the Convention of 1990 on terrorist crimes. According to the Council of Europe, it is the first international instrument that simultaneously attempts preventive action and the fight against money laundering and the financing of terrorism and responds to the acknowledgment that the speed of access to financial information or to those referring to the assets of criminal organizations, including terrorist groups, is essential for the success of preventive and repressive measures and lastly it is the best way to destabilize the activities of these organizations.

b) In the European Union, terrorism has been extensively debated and specific measures have been approved that without a doubt have had an impact on the persecution of these crimes.

Perhaps, the first provisions have been the Common Position of the Council 2001/931/PESC of 27 December 2001 on the application of specific measures in the fight against terrorism and the Regulation (EC) No. 2580/2001 of the Council of the same date on specific restrictive measures aimed at certain persons and entities for the purpose of fighting terrorism. In the Common Position, terrorist crimes are set forth, terrorist groups defined, and a list of persons, groups, and entities that have

participated in terrorist acts are defined to which it is necessary to apply the measure of freezing of funds and financial assets or economic resources within the framework of the fight against financing terrorism, preventing that those economic means are directly or indirectly placed at their disposal. This list may be produced and reviewed every six months and has been increased in successive Common Positions.

Likewise, in this Common Position, mutual assistance is included among States for the prevention and fight against terrorist acts which was developed in the Decision 2003/48/JHA of the Council on 19 December 2002 relative to the application of specific measures of police and judicial cooperation in the fight against terrorism in accordance with Article 4 of the Common Positions 2001/931/CFSP. The Council Framework Decision 2002/475/JHA on the fight against terrorism sets forth in terms very similar to the Common Position of 2001 the crimes of terrorism (Article 1) and requires all member states to include in their legislation these offences. Specifically, it states that terrorism crimes are deemed:

> intentional acts to which refer letters a) through h) classified as crimes according to respective national laws that due to their nature or context may seriously injure a country or an international organization when its author commits it for purposes of:
> – Seriously intimidating a population.
> – Unduly obligating public power or an international organization to perform an act or refrain from performing it.
> – Seriously destabilizing or destroying the fundamental political, constitutional economic or social structures of a country or of an international organization.
>
> a) Attacks against the life of a person that may result in death.
> b) Serious attacks against the physical integrity of a person;
> c) Kidnapping or hostage-taking;
> d) Massive destruction of governmental or public installations, transport systems, infrastructure, including computer systems, fixed platforms located on the continental shelf, public places or private property that may place human lives in danger or cause great economic damage;
> e) Seizing aircraft or vessels or other means of collective or merchandise transport;
> f) Manufacturing, holding, acquisition, transport, supply or utilization of fire arms, explosives, nuclear, biological or chemical weapons and the research and development of biological and chemical weapons.
> g) Liberation of dangerous substances or the setting of fires, floods or explosions the effect of which is to place human lives in danger;
> h) Disturbance or interruption in the supply of water, electricity and other fundamental natural resource the effect of which is to place human lives in danger.
> i) Threatening to perform any of the conduct set forth in letters a) through h).

In Article 2 of this Framework Decision, "terrorist group" is defined as "any organization with a structure of more than two persons, established during a certain period of time and who act in agreement with the aim of committing terrorist crimes." "Structured organization" shall be understood as "an organization not formed haphazardly, for the immediate commission of a crime and in which functions have not been assigned to its members formally nor is there continuity in the status of member or a developed structure."

In addition, Member States must adopt the measures necessary in order to categorize as crimes the intentional acts of "the leadership of a terrorist group"

and "participation in the activities of a terrorist group, including the supply of information or material means or any other form of financing of their activities with the knowledge that that participation will contribute to the criminal activities of the terrorist group" [Art. 2(2)]. With the coming into force of the modification performed to Article 3 of this Council Framework Decision by FD 2008/919/JHA of 28 November 2008, Member States have to adopt the necessary means in order to classify the following reckless acts as crimes linked to terrorist activities:

a) Provocation to commit a terrorist crime;
b) Recruitment of terrorists;
c) Training terrorists;
d) Aggravated theft or robbery committed with the aim to commit any of the crimes set forth in Article 1, section 1.
e) Blackmail with the purpose of committing any of the crimes set forth in Article 1, section 1;
f) Delivery of false administrative documents with the aim of committing any of the crimes set forth in Article 1(1)(a) through (h) and in Article 2(2)(b).

Finally, complicity and encouragement of committing terrorist acts as well as the attempt must be classified as crimes (Art. 4, modified by Council FD 2008/919/JHA).

The Framework Decision commits the states to ensuring that terrorist crimes "are sanctioned with effective proportional and deterrent sentences; that may have extradition as a consequence" [Art. 5(1)]. Likewise, it requires that these crimes are punished with prison sentences greater than those provided in National Law for that same conduct [Art. 5(2)]. More specifically, for the crimes of leadership of a terrorist group, the Framework Decision demands that they are sanctioned with prison sentences the maximum sentence of which shall not be able to be less than 15 years nor 8 if it deals with participation in its activities [Art. 5(3)].

On the other side, it permits considering measures to reduce sentences when the delinquent gives up terrorism or supplies relevant information, collaborating with the authorities (Art. 6).

It also requires categorizing the responsibility of legal persons in terrorist crimes (Art. 7), indicating the sanctions that may be imposed on them (Art. 8).

5 The Legal Procedural Regime Against Terrorism in Spain. The Exceptions to the Rules Guaranteeing Certain Fundamental Rights

In the Spanish legal system, precisely because of the special sensitivity for terrorism acts in our society, which has suffered these hardships for decades, the currents of repression easily arise in the criminal system. Recourse to the Criminal Code, to the classification of conduct or to the aggravation of the provided punishments, have become a simple, less costly political resource than addressing the root causes

of terrorism and cheaper than providing greater resources and better measures to the preventive bodies and the repression of crimes.

The other front on which terrorism is usually fought legally is in the area of the criminal process, that is to say, introducing unique mechanisms with which it seeks to provide a greater response in law, a more effective solution against these offences. Nevertheless, such legal measures are not exempt from difficulties since the special rules in the process in reality introduce discrimination in the treatment of the subjects that is difficult to sustain.

In effect, a sufficient basis must be demanded from the state for dealing in the same manner with all those who the state subject to the criminal process. In addition, one must include the necessary resources in order to balance the procedural opportunities of the state with the means that the defendant has, thereby making up for the situations of inequality that in some cases, powerful criminal organizations may introduce in the process with their own resources. However all this must be accomplished without resorting to the special provisions, those on occasions are justified only due to the limited arsenal of measures in the state system.

In the criminal process, the protection of guarantees for all has to be fundamental. Nevertheless, that equality is not always respected. There appear in the regulatory horizon differences in treatment, above all when the repression of terrorism crimes it dealt with. And they are not always supported by sufficient justification. Again, justification and the legality of the punishment, of the exercise of *ius puniendi* must be done within a criminal process that respects the rights, above all, of the defendant, no matter what the crime being prosecuted. Otherwise, authoritarianism, arbitrariness and barbarianism will take root in the criminal system.

In the Spanish legal system, the treatment of the phenomenon of terrorism has also had an effect on the criminal process in which measures are inserted that exempt the normal development of the procedure when it deals with the judging of these crimes.

The enshrining of fundamental rights with a procedural content in the constitution has been sufficiently extensive in Spain and spans from the law of liberty to the safeguarding of guarantees (the right to a process with all guarantees). The legislator was conscious of the problems arising from the persecution of the crimes of terrorism and as an express exception (an implicit restrictive provision would not have sufficed) has provided in the first paragraph of Article 55.2 that:

> a fundamental law shall be able to determine the form and the cases in which, individually and with the necessary legal intervention and adequate parliamentary control the rights recognized in Article 17(2) and Article 18(2) and (3) may be suspended for certain persons in relation with the investigation corresponding to the action of armed bands or terrorist elements.

The constitutional exception reaches this point; therefore, only three fundamental rights may be suspended: the right that the detention not last longer than the time necessary for the performance of inquiries tending to the clarify the facts and the maximum period of 72 h in order to free the detainee or place them at the disposal

of a legal authority, the right to the invulnerability of one's home, and the right to the secrecy of communications. It follows logically that no other exceptions to the protection of any other fundamental right be established, not even for the investigation and prosecution of terrorism.

However, the foresight of our Fundamental Law also means that to exempt the regime of the constitutional protection of such rights and permit the valid interference with them, five requirements must be met:

- Firstly, it has to occur with the **authorization of a prior Law on fundamental rights** (literally *"Organic Law"*) in a manner that if said Law has not managed to pronounce the limitation of fundamental rights, such limitation is not constitutional. However, it must be noted that not only is it required that limitations appear in a Law of Fundamental Rights, generically considered, since that already emerges from Article 81 of the Spanish Constitution (hereinafter CE), but rather there must exist a specific Fundamental rights law on the development of Article 55(2) of the Spanish Constitution:
- Secondly, the Constitution demands that this Law set forth "***form and cases***" in which the limitation of the fundamental law shall be legal. Therefore, it is essential that its application be established in a manner such that if the investigation of crimes committed by armed bands or terrorist elements were not be compatible with the constitutional requirements, valid authorization requires making reference to terrorism without adding some specification, without setting forth the "cases and forms" in which the exceptions are permitted. It must be noted that this requirement seems absent in the Organic Law 4/1988 on the reform of the Law of Criminal Trials in which the procedural specialties are contemplated in the cases of terrorism since it does not concretely establish in what form and in what case these means of limitations of fundamental rights are to be agreed upon.
- Thirdly, it is only necessary to apply the rule of Article 55(2) of the Spanish Constitution in an ***individual manner and to certain persons***. Therefore, the exception to the constitutional guarantees, established for those three fundamental rights with respect to all persons who directly or indirectly become involved in a criminal process due to terrorism crimes cannot be understood to be generically authorized. On the contrary, that individual application to which the Constitution makes reference demands that the law establish some specific parameter for the validity of the exception that addresses individualized or individualizable demands and that at least respects the principle of proportionality, making the measure adequate for the person to whom it refers. Nevertheless, this demand does not appear clearly established in our Organic Law 4/1988, and to that extent, the provision in effect would not fulfill the case that our *carta magna* establishes for the limitation of the mentioned fundamental rights.
- Fourthly, ***judicial intervention*** is needed for the legality of the interference in a manner that the unique and specific legal reasoning cannot be substituted for any decision or action of another authority or power of the State. That does not mean that judicial authorization in these cases must be always prior to the intrusion in

the sphere of fundamental rights, however it is clear that it must be either *a priori* or subsequently a judge has to order or co-validate the aforementioned interference. In any case and as is natural, the judicial authorization must appear in the form of a decision with appropriate and sufficient support that justifies the fulfillment of the different requirements demanded by the Constitution.

– Lastly, the constitutional rule demands ***parliamentary control***, which in reality does not appear defined in a fundamental law nor is it specifically recognized in the Regulations of the Congress or the Senate. Parliamentary practice has understood that the control in question is performed through appearances of the Ministry of the Interior in the Congress of Deputies in order to inform the Parliamentary Groups on the development of the fight against terrorism and have not had until now a parliamentary initiative that demands another type of control. Therefore, it results evidently unfulfilled in practice that which is set forth in constitutional law, without any criticism having been raised in regard to the present situation.

Actually, the implementation of Article 55(2) of the Spanish Constitution is Organic Law 4/1988 of 25 May, since in the Additional Provision of said law, it is understood that facts must be understood as "the reference to the statute concretizing Article 55(2) of the Spanish Constitution." In any case, it is advisable to indicate that it dealt with a provision that together with Organic Law 3/1988 of the same day they sought to include in the ordinary legislation (modifying the Criminal Code and the LECrim) the prior anti-terrorist Law, that is to say, the Organic Law 8/1984 of 26 December, against the action of armed bands and terrorist elements and that was the development law of Article 55(2) of the Spanish Constitution until it was expressly repealed by the aforementioned Organic Law 3/1988. It dealt with a rather rough measure that responded to the political plan of making a specific law to fight terrorism disappear, resorting to the simple measure of diluting its rules in ordinary provisions, in short a type of legislative "makeup" that did not achieve all the objectives pursued. Up to this point, the exceptions to the guarantees of fundamental rights that our constitutional text authorized for the prosecution of terrorism crimes must be interpreted restrictively (*odiosa sunt restringenda*). It is necessary to be belligerent in the defense of liberties and not permit the arguments to be twisted and the meaning of the rules in order to allow limitations on rights to escape the constitutionally assessed cases.

In effect, if the development of the processes for terrorism crimes is reviewed, a different procedural regime appears, with specific measures that not only concern the distribution of the competences of the tribunals, but also rather may affect the protection of fundamental rights of the defendant and the exercise of the right of defense. For that, the procedural points must be analyzed to see whether the restriction of fundamental rights is in line with the constitutional framework.

Without any constitutional support for restricting the fundamental right to a defense of Article 24(2) of the Spanish Constitution and the right to the assistance of counsel Articles 17(3) and 24(2) of the Spanish Constitution, which are not

exempted in the cases of terrorism, due to Article 55(2) of the Spanish Constitution, the procedural laws effectively limit them.

The right to the assistance of counsel has to consist primarily in the power of *choosing a trustworthy attorney* in the legal profession whom the defendant considers the most appropriate[25] in order to carry out defensive functions in accordance with the situation at any time.

This power has been exempted from our LECrim for all those cases in which the solitary custody of the detained or prisoner has been decreed (Art. 527a LECrim). The exigency of the designation of a court appointed lawyer in these cases responds to the fact that on occasion the defender has been used as an element of control or dissemination of order and information to the members of the organization or the band in which the person denied liberty belonged to. This solution was initially approved in Germany for purposes of the persecution of member of the Baader–Meinhof group and has spread to other countries, among them, Spain, with the concern of Amnesty International and the Human Rights Watch.

Initially it is difficult to accept the distinction that the Spanish Constitutional Court makes between the right to the assistance of lawyer during the detention in both the police as well as judicial interrogations [Art. 17(3) of the Spanish Constitution] that would operate as one of the guarantees of the right to liberty and the right to the assistance of counsel of Article 24(2) which would be framed within the right to effective judicial protection within the meaning of the guarantee of due process,[26] especially of criminal due process,[27] and therefore in relation with the "the accused" or "defendant."

Because what is certain is that the constitutional formulation does not differentiate in both cases (assistance of counsel to the detained, legal assistance) and the essence of the fundamental right arises of the legal defense of the person against whom an allegation has been made and against the maker of it, be that the police during police interrogation or a judge if it concerns judicial detention or provisional imprisonment. One cannot try to justify a different role of a lawyer by distinguishing between the mere guarantee of liberty in police interrogations for which a court appointed lawyer could serve and the need of developing a "defense strategy" that would only arise once the investigational interrogation has been "consolidated" or the trial has begun, because acts or omissions of the defendant during their detention will undoubtedly be determining factors of their strategy, influencing it many times in an irreversible manner.

[25] STC 18/1995, of 24 April.

[26] STC 197/1987, of 11 December and 7/2004, of 9 February.

[27] STC 21/1981, of 15 June and 48/1982, of 12 July.

Extradition, Political Offence and the Discrimination Clause

Benedetta Galgani

Contents

Abstract Inspired by the recent "Battisti case," the present paper provides a review of some of the main issues concerning extradition. Since the Italian legislation on *in absentia* proceeding has played an important role in this field, the contribution focuses mainly on the relationship between extradition and political offence. And although the evolution of international sources shows a clear, mature awareness of the part of the international community, which still refuses to qualify as "political crimes" particularly serious acts threatening primary assets such as life, personal safety and freedom, many aspects are still controversial, not least that underlying the "non-discrimination clause," often accompanied and, to some extent, overlapped with the rules governing the relations between extradition and "political nature" of the offence.

Abbreviations

AGU	General Advocacy of the Union (*Advocacia Geral da União*)
CCP	Code of Criminal Procedure

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CoEx	European Convention on Extradition
CONARE	National Committee for Refugees (*Comité Nacional para os Refugiados*)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FD EAW	Framework Decision on the European Arrest Warrant
ICCPR	International Covenant on Civil and Political Rights
ItBrTR	Italy–Brazil Treaty on Extradition
STF	Federal Supreme Tribunal (*Supremo Tribunal Federal*)

1 Foreword

It has already been established that in the context of extradition procedures political concerns have always played an important and sometimes predominant role. We are referring generally to a series of elements that have represented the most characteristic feature of the procedure in question since its inception and that, despite having assumed many different forms over the centuries, continue to highlight a worrying reality: that of the perhaps unavoidable discrepancy between guarantees provided in the criminal process and those provided in the course of extradition proceedings.

For the most part, and rightly, emphasis has been on the lack of protection which arises or may arise as a result of this discrepancy for the subject whose extradition is sought.[1] But there are situations in which the predominantly "political" nature of the procedure in question, left at the mercy of opportunistic considerations in the broad sense on the part of the state housing the extraditee, instead restricts the applicant state's interests in a way that is not always justifiable. This is despite the acknowledged conventional nature of the extradition mechanism, that on one hand "rules out any obligation to extradite in the absence of an agreement," while on the other, conversely "requires [. . .] respect of this obligation when there is a convention provision."[2] In other words, states are required to observe certain rules in a situation that falls within the scope of the agreement of which they are signatories[3]; and—we may add—despite increased sensitivity (at least in principle) to the requirements of a supranational justice that increasingly seeks to free itself from "other" interests alien to it. Sometimes, then, the two perspectives—one focusing

[1] For a clear, comprehensive examination of the suspected difference in the treatment of a "normal" defendant and an extraditee, particularly with respect to the fundamental right of personal liberty, see Marzaduri (1993).

[2] De Francesco (1982), p. 9.

[3] Quadri (1967), para. 3; Del Tufo (1989), p. 2.

on the rights of the extraditee and one that considers the expectations of the applicant state—may in a certain sense intersect. This is what happens when one turns upside down the reasoning behind the purpose of guarantee that underlies the limitations traditionally imposed on the duty to extradite, namely the protection of fundamental human rights. This reasoning clearly risks being compromised by the co-operation which may have been provided by unfairly handing over a person to the requesting state, but that may also be artificially enforced—and, therefore, distorted—to frustrate the legitimate expectations that the latter may have with regards to a person legally and duly convicted.

2 The "Battisti Case." A Long Path Towards Non-extradition

An example and confirmation of these initial, cursory reflections is an extradition story that started with a request for assistance and has dragged on for many years, involving several countries, variously bound by bi- or multilateral agreements.

I am referring to the so-called "Battisti case."

Here, without indulging in biographical details worthy of treatment elsewhere, we will merely summarize the essential phases of a procedural process which has been anything but linear, and, subsequently, try to provide a strictly technical assessment and reconsider the difficult issue of the extradition process, above all in light of the latest trends in supranational and international criminal policy.

A former militant of the Armed Proletarians for Communism (PAC), Cesare Battisti was sentenced to life imprisonment for four murders, with sentences handed down *in absentia* in Italy, which became final during the 1990s.[4] Since the early 1980s, however, he had avoided the Italian judicial system by escaping from prison in Frosinone and fleeing first to Mexico (where he stayed until 1990), and then France (until 2004).

And it was precisely to the French authorities that Italy—under the European Convention on Extradition (CoEx) signed in Paris on 13 December 1957,[5] and binding on both States—addressed the first extradition request for Battisti.

In rejecting it,[6] the *Chambre d'accusation de Paris* above all availed itself of the so-called "Mitterrand doctrine," usually intended as an artificial elaboration of a statement made by the then President of the French Republic on 1 February 1985. In essence, relying on the presumed qualitative superiority of French legislation (also and especially compared to Italian so-called "anti-terrorism" legislation), as well as on its supposed greater compliance with European standards on human rights, the doctrine recognized a sort of "informal" right of asylum to foreigners

[4] For a recent, detailed reconstruction of cases involving the PAC, based on the study of the 53 folders stored at the State Archives of Milan, see Turone (2011).

[5] For the text of the convention, refer to http://www.giustizia.it/giustizia/it/mg_1_3.wpI.

[6] *Chambre d'accusation de Paris*, Decision No. 28796/1991.

convicted of politically-inspired acts of a violent nature who had renounced all forms of violence.[7]

Battisti as well as many others in fact benefited from this political practice, which was never formally translated into legislation, until the accession of President Chirac.

A sure sign, however, that the wind was changing, was the signing in 2002 of the so-called Castelli-Perben pact (named after the two ministers of justice who signed it), under which France would also allow extradition for crimes *per se* falling under the so-called Mitterand doctrine, provided that they constituted "cases of exceptional gravity."

It was not surprising, therefore, that the new extradition request made by Italy on 3 January 2003, was accepted both by the *Chambre de l'instruction de la Cour d'appel de Paris*[8] and the *Cour de cassation*.[9]

To give the final seal of approval to the possibility of extradition, there was a ruling by the highest French administrative court,[10] against which the extraditee Battisti, although he had long since fled to Brazil, had brought a further appeal. It was on that occasion that the Mitterrand doctrine was finally rejected and the statements by the former President of the Republic were recognized as lacking any legal value. Additionally, the *Conseil d'Etat* asserted that the procedure against Battisti *in absentia* also fully complied with the parameters of due process. Although the lawyers had complained that their client had not been properly informed of the reasons for prosecution and that, therefore, could not effectively organize a defence strategy, the *Conseil d'Etat* ruled that Battisti had enjoyed the assistance of lawyers he himself had appointed and had received direct and comprehensive knowledge of the proceedings pending against him, their developments and the various dates set for hearings, as was amply demonstrated by the letters written by him.[11] Also, in definitively rejecting the appeal, the supreme administrative court concluded that the very decision to flee and the long period in hiding were a clear expression of his conscious decision to waive his right to appear at his own trial.[12]

But, as was earlier anticipated, Battisti had in the meantime covered his tracks, and it was not until 18 March 2007—by virtue of an application for provisional arrest issued by the Italian embassy, which would be followed by a formal application for extradition—that he was captured in Copacabana.

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[7] For much of the documentation relative to the "Mitterrand doctrine," refer to http://www.mitterrand.org.

[8] *Chambre de l'instruction de la Cour d'appel de Paris*, Decision of 30 June 2004.

[9] *Cour de cassation*, Decision of 13 October 2004.

[10] *Conseil d'Etat*, *Lecture* of 18 March 2005 No. 273714—M.B., available at http://www.conseil-etat.fr.

[11] Cf., in more detail, below, § 3.

[12] Cf. Pisani (2007), p. 26. In more detail, see below, § 3.

Here, starting with Italy's latest in a long line of requests for extradition, by virtue this time of the Extradition Treaty with the Federative Republic of Brazil (ItBrTR),[13] we can essentially set the beginning of the second and, as things stand, last act of this troubled story of non-cooperation.

It was 13 January 2009 when the Brazilian government's (first) rejection arrived, which, almost exclusively on the basis of references to the Convention on the Status of Refugees[14] and on the relative Brazilian law implementing it,[15] granted Battisti political refugee status.[16] In defiance of the decision, just 2 months earlier, of the *Comitè Nacional para os Refugiados* (CONARE), i.e. the body with the specific task of assessing requests for political asylum,[17] the Minister of Justice at the time, Tarso Genro, cited in support of his decision the *political* nature of the crimes for which Battisti had been tried in Italy, doubts about the proper conduct of the criminal proceedings at issue, and the *possibility* that the former PAC militant, once handed over to the Italian courts, would be subjected to persecutory treatment.

It is at this point that the *Supremo Tribunal Federal* (STF), i.e. the highest Brazilian court, entered the fray.[18] Having described as "ordinary crimes" the offences covered by the final sentence to be carried out in Italy[19]; having excluded *per tabulas* the violation of the right of defence and, more generally, the right to due process in the criminal proceedings ending in the conviction[20]; and finally, having destroyed all speculation about the political persecution of which the extraditee was allegedly the target, the supreme court declared the status of political refugee granted to Battisti to be illegitimate and ruled in favour of extradition, while referring to the President of the Republic the final decision on its actual implementation.[21]

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[13] Under Article 1 of the Treaty, each of the Parties is obliged to extradite, in accordance with the conditions laid down in the Treaty, people in its territory sought by the judicial authority of the other party for the completion of criminal proceedings initiated against them or to enforce a custodial sentence of more than 9 months. Having affirmed the so-called principle of "double jeopardy" under Articles 2, 3 and 5 there are, as we will see in more detail, exceptions to the obligation to extradite.

For the complete text of the treaty, signed in Rome on 17 October 1989 and in force since 1 August 1993, refer to http://www.giustizia.it/giustizia/it/mg_1_3.wp.

[14] For the text of the Convention, done at Geneva on 28.7.1951, refer to http://conventions.coe.int/treaty.

[15] Brazilian Law 9.474/1997, available at http://www.planalto.gov.br.

[16] For the full text of the decision, refer to *Referência: Processo nº. 08000.011373/2008-83*, available at http://veja.abril.com.br. In more detail, see also below, § 4.

[17] See Article 11 Brazilian Law 9.474/1997.

[18] Under Article 102 of the Brazilian Constitution, in fact, "*compete ao Supremo Tribunal Federal, precipuamente, a guarda da Constituição, cabendo-lhe: [...] g) a extradição solicitada por Estado estrangeiro*.".

[19] Cf., in more detail, below, § 4.

[20] See also, in more detail, below, § 3.

[21] STF, *Ext. 1.085/Repùblica italiana, rel. Cezar Peluso*, 16 December 2009, the full text of which is available at http://www.giurcost.org/casi_scelti.

On the last day of his term of office, 31 December 2010, the former Brazilian President Luis Inácio Lula rejected the extradition of Battisti, approving the opinion submitted to him shortly before by the *Advocacia Geral da União* (AGU).[22] The opinion, in brief, advanced the argument that, if he was extradited to Italy, Battisti would have an uncertain and dangerous future, given the hostile attitude that the entire political class had expressed, even and especially after the granting of asylum by the Brazilian authorities. There was an appeal, ultimately under Article 3(f) ItBrTR of 1989, under which extradition is not granted

> if the requested Party has substantial grounds for believing that the person sought will be subjected to persecution or discrimination because of race, religion, sex, nationality, language, political opinions or personal or social conditions, or that the situation of the person risks being aggravated by any of the above.[23]

Thus, armed with this negative opinion, the non-binding nature of the judgment passed by the STF[24] and the leading role attributed to him in the field of international relations by the Constitution,[25] President Lula refused to hand over the convict. As can be seen in the *Nota do governo brasileiro sobre o cidadão italiano Cesare Battisti*,[26] the President's veto cited Article 3(f) of the Treaty, insisting in particular on the "*condição pessoal do extraditando*," i.e. on a unspecified fear that the extraditee's situation might worsen precisely as a result *of his personal condition*.[27]

And so we moved towards the conclusion of an "odyssey" of words, complaints, legal documents and appeals.

In January of this year, the Italian government appealed to the STF to invalidate the decision of the former Brazilian head of state[28] and finally give the green light for the extradition of Battisti.

A few months later, on 8 June 2011, the STF however reversed its previous position, denied extradition and released Battisti.

After declaring the Italian appeal inadmissible—since the decision taken by President Lula was "a matter of national sovereignty" which, as such, was unchallengeable in court—the judges of the Brazilian Court went on to assess whether this presidential decision constituted a breach of the international obligations taken on

[22] Cf. Opinion No. AGU/AG-17/2010 at http://www.agu.gov.br.

[23] Cf. below, § 5.

[24] The Court itself, although divided internally, felt it needed to specify that "*a decisão de deferimento da extradição não vincula o Presidente da República*.". See STF, *Ext. 1.085/ República italiana, rel. Cezar Peluso* (footnote 21).

[25] Cf. Art. 84 of the Constitution: "*Compete privativamente ao Presidente da República: [. . .] VII. manter relações com Estados estrangeiros*".

[26] See at http://www.imprensa.planalto.gov.br.

[27] Cf., in more detail, below, § 5.

[28] President Lula in the meantime had been succeeded by Dilma Rouseff.

under the bilateral treaty of 1989. And once again, with a majority of six votes to three, it was decreed that Italy "is not a country for Battisti."[29]

We have thus seen a summary of the factual details of the court case on which this paper is based. However, before addressing its technical aspects, we should provide some further methodological clarification.

For each of the selected topics of interest, our analysis will be conducted on two levels, distinct yet continually intersecting: the former regarding the failure to hand over Cesare Battisti to Italy, with all the peculiar nuances and aspects of the legal systems coming into contact with each other; and the latter, wider but certainly no less complex, involving a panoramic view of more or less recent international treaties.

3 Critical Issues. In Particular: Judgment *In Absentia*

It is nothing new that the issue of extradition often goes hand in hand with that of "trial without the defendant" and that the viability, in a particular jurisdiction, of a trial *in absentia* may, for that same legal system, seriously limit the success of its legal cooperation with other legal systems.[30]

Without prejudice to the view accepted by international sources in human rights [Article 14(3)(d) ICCPR and, implicitly, Article 6 ECHR], that the defendant has a right to participate in his own trial, both the Human Rights Committee of the UN and the ECtHR have also ruled that this does not imply that any form of trial without the defendant is absolutely forbidden.[31] This thus legitimizes, in principle, the extreme variety of legislative solutions adopted by States to regulate the phenomenon in question and a whole series of episodes of mistrust towards certain legislative systems judged unable to provide "adequate guarantees." Such episodes have, not infrequently, extended the scope of state discretion in the granting of extradition.

Moreover, already at the signing of the CoEx—which, surprisingly, ignored the problem—one could sense an atmosphere of karstic "mistrust," so much so that countries such as the Netherlands and Luxembourg had expressed reservations aimed at ensuring them the right to refuse extradition if the request was based on a default judgment against which an appeal was no longer allowed.[32]

It was with the adoption of Additional Protocol II to the Convention, in 1978, that the governments of the Council of Europe specifically dealt with the issue of handing over a person convicted *in absentia*. Article 3, in fact, introduced the option

[29] For the arguments given by the individual judges, see the Court's own documents: *STF concede libertate a Cesare Battisti*, *Quarta-feira, 08 de junho de 2011*, http://www.stf.jus.br.

[30] See Vigoni (1992), pp. 5 ff.

[31] See Quattrocolo (2008a), pp. 102 ff.; Siracusano (2010), pp. 119–120.

[32] Catelani (1995), pp. 230–231.

of denying the consignment of the absentee whenever the proceedings against him appeared to be tainted by violations of "*minimum*" rights of defence. Nevertheless, such an impediment could be overcome if the requesting State had provided "sufficient assurances" of the extraditee's right to a new trial in which his "rights of defence" were protected.[33]

Thus, the "Achilles heel" of the Italian procedural system, in terms of the international validity of its convictions, was to be found precisely in the structure of its default proceedings, which—in view of the 1930 legislation still in force—could not ensure the effects of rendition required by Protocol II. This was demonstrated by the reservations that Italy itself had expressed in relation to Title III, which were withdrawn only later when, with the introduction of the 1988 Code, the system of the extension of the time limit was regulated from scratch, explicitly establishing that it could be used also to appeal against a default conviction *in absentia*, when the defendant had not voluntarily waived knowledge of the trial documents (Art. 175 of the Italian CCP).

It is in such a volatile environment, made even more "problematic" by the already numerous convictions of the ECtHR against Italy,[34] that France's refusal of the first request to extradite Battisti found fertile ground.[35]

But, in hindsight, the fact that the arguments advanced in support of that refusal in this case were not reasonable is amply demonstrated both by the aforementioned ruling of the *Conseil d'Etat*,[36] and by the ruling of the European Court to which the same extraditee, having tried all the domestic French remedies, had appealed.

In fact, despite the criticisms that the Italian *in absentia* proceeding rightly continued to attract even after the introduction of the new Code,[37] in the decision *Battisti v. France*, once it had been stressed that "*ni la lettre ni l'esprit de l'article 6 de la Convention n'empêchent une personne de renoncer de son plein gré aux garanties d'un procès équitable de manière expresse ou tacite*", the ECtHR observed that "*au vu des circonstances de l'espèce* [. . .] *le requérant était manifestement informé de l'accusation portée contre lui, ainsi que du déroulement de la procédure devant les juridictions italiennes et ce, nonobstant sa fuite*;" that he had been "*effectivement assisté de plusieurs avocats spécialement désignés par lui durant la procédure*," therefore, entirely legitimately, both the Italian and French

[33] For the full text of Protocol II, see http://www.coe.int.

[34] The first, historic case is ECtHR, 12 February 1985, Colozza v. Italy, Application No. 9024/80. For a perspicuous overview of "European" judgments relating to Italian trial by default, see Quattrocolo (2008b), para. 12.

[35] Cf. *Chambre d'accusation de Paris* Decision No. 28796/1991.

[36] Cf. above, § 2.

[37] Moreover, the fact that not even the rendition mechanism introduced by the 1988 Italian CPP satisfied the guarantees required by Article 3 Protocol II was soon clear. Thus, after two severe convictions by the European Court (ECtHR, 18 May 2004, Somogyi v. Italy, Application No. 67972/01; 10 November 2004, Sejdovic v. Italy, Application No. 56581/00) and a total ban on extraditions to Italy, of persons convicted *in absentia*, introduced by Spain, the legislator was forced to intervene with Law Decree 17/2005, subsequently converted into Law 60/2005.

judiciary had deemed that he had unequivocally waived his right to appear personally and be judged in his own presence.[38]

On the basis of these observations, the exceptions rehearsed by some of the Brazilian authorities, however indirectly, turn out to be even more unfounded.[39]

It is true, one could argue, that Brazil is not legally bound by the judgments of the ECtHR. But can the authority of the Court, whose case law has acquired privileged status in assessing the reliability of States in matters of criminal procedure, be seriously questioned?[40] And while it is undeniable that Article 5(a) ItBrTR excludes the granting of extradition when "the person sought has been or will be subjected to proceedings which do not ensure compliance with the minimum rights of defence," the note that follows does not fail to point out that "the fact that the proceedings have been conducted in the absence of the person sought does not in itself constitute grounds to refuse extradition." This is obviously a reminder to pay attention to the concrete procedural dynamics, i.e. to those dynamics that, in the Battisti case, the European Court had carefully assessed and approved. It is also a reminder not to be influenced by prejudice, to the benefit of an effective protection of the rights of the accused/convict whose physical liberty is under discussion.[41] This is a call, lastly, that could not go unheeded.

Yet, what the case as a whole has left us with is a further demonstration of how, in the field of criminal judicial cooperation, the issue of the trial *in absentia* remains a veritable minefield, perpetually in limbo between the desire by the individual legal systems to achieve a reasonable balance between the fundamental rights of the

[38] ECtHR, 12 December 2006, Battisti v. France, Application No. 28796/05.

[39] In the Brazilian developments of the case, in fact, only on two occasions has the conviction "*à revelia*" been adopted as an argument supporting the "*potencial impossibilidade de ampla defesa*" of which Battisti was allegedly the victim. The first was in the words of the Minister of Justice, Tarso Genro, in the decision to grant the status of refugee to the Italian fugitive [cf. the *Referência*: *Processo nº. 08000.011373/2008-83*, § 43]. The other, by the AGU, emphasized, in a clearly polemical stance, that the Italian Court of Cassation "*entendeu que o pleno exercício do contraditório exigido pelo Estado estrangeiro como condição para entrega do extraditando encontra-se perfeitamente realizado con a possibilidade que se daria ao extraditando de requerer revisão do julgado ou desconsideraçao da preclusão*." [Cf. the Opinion AGU/AG-17/2010, para 104].

[40] "The fair trial outlined by the judgments of Strasbourg has become a universal model of criminal procedure, attentive to the rights of the defendant, which should be imported into all the national jurisdictions of the member states of the Council of Europe, but also exported to international jurisdictions, such as the Tribunals for the former Yugoslavia and on Rwanda or the International Criminal Court." Such are the effective observations of Mazza (2011), p. 33 and, in a very similar perspective, Maratea (2010), pp. 8–9.

[41] See, along these lines, the STF ruling, *Ext. 678/ Governo da Itália* v. *Silvano Bertucelli Brandi, rel. Min. Celso de Mello, DJ 06/09/1996*, where it is stated that "*a circunstância de haver sido decretada a revelia do acusado por órgão competente do Estado requerente não constitui, por si só, motivo bastante para justificar a recusa de extradição*."

accused/convict and the state's demand for a regular and speedy judicial assessment on the one hand, and the risk (more or less hidden) of exploitation on the other.[42]

4 The "Political Nature" of the Crime

The recurring claim that the treatment of the political nature of the offence, as an objective limit to extradition, is one of the most complex issues in the entire field of collaboration in criminal justice between Member States[43] seems to be as relevant as ever.

It is worth mentioning that the prohibition against extraditing those accused of a "political" crime, almost a constant in conventions,[44] has its origins in the first half of the nineteenth century,[45] i.e. in that liberal tradition that had cloaked in "a positive aura the figure of the political crime (and criminal), assigning it a sort of 'positive' prejudice".[46] Aware that the protection of political interests in criminal law is extremely "sensitive" to institutional frameworks and their changes,[47] the national state thus avoided "becoming the 'armed hand,' albeit indirect, of a different state agency"[48] whose political assessments might differ from their own and at the same time, respected the rule of non-interference in the internal affairs of others.

The concept of "political crime" that was taking shape at this stage therefore embraced offences against political assets and interests (objectively political crime), offences for political motives (subjectively political crime) and, also, offences committed with the aim of performing, concealing or carrying out a political crime. Such wide-ranging scope was obviously dictated by the protective value attributed to the ban on extradition.

But, given the emergence of highly aggressive crime of an anarchic nature, the tide soon turned, and there was a progressive easing of the stiffness of the ban,

[42] It is, moreover, fairly symptomatic that, also within the "common area of justice" that should be represented by the European Union, the lack of a basic unity between the approaches taken by different national legal systems and, above all, the lack of clear definitions and transparent information about the possible grounds for refusing to oppose the request for an arrest warrant, have greatly reduced the effectiveness of the new instrument of rendition, so much so that the EU has adopted Framework Decision 2009/299/JHA to reduce the range of discretion available to the courts to which application is made.

[43] Cf., albeit with some distinctions, Chiavario (1986), p. 4; De Francesco (1987), p. 897; Di Chiara (1998), para. 4.

[44] The French Constitution of 1830 inaugurated the tradition.

Some authors conceive this exception as a "general rule of international law." Cf. for example Parisi (1993), 65, and the abundant references provided there.

[45] On the history of extradition in the field of political crimes, there are important studies: see for example Van de Wijngaert (1980), pp. 4 ff.; Chiavario (1980), pp. 81 ff.

[46] Padovani (2007), p. 77.

[47] Of great interest are the recent reflections of Pellissero (2011), pp. 453 ff.

[48] Padovani (2007), p. 77.

through the introduction in international conventions of so-called "depoliticization clauses," expressed in the forms of the *Belgian clause* and the *Swiss clause*, from the names of the states into whose legislation they were first introduced.

Very briefly, these clauses of post-liberal inspiration committed states not to consider certain criminal acts as political or, rather, to consider the ban in question inapplicable whenever—in the opinion of the court—the *actus reus* and *mens rea* of the offence were prevailingly "ordinary" in nature.[49] Having acknowledged, basically, the difficulty of finding a commonly accepted definition of "political nature," there were steps to reduce its scope of application. This meant excluding from the classic area of protection for political crimes acts of aggression against the primary goods of an individual that, even when committed to affirm democratic freedoms, collided with those same freedoms due to the manner of their execution.

This trend has found new and added impetus in recent times, for example in Articles 1 and 2 of the European Convention for the Suppression of Terrorism,[50] in Article 11 of the International Convention for the Suppression of Terrorist bombings[51] and, in a purely bilateral dimension, in Article V(2) of the Extradition Treaty between the Government of the Italian Republic and the US Government[52] and Article III(a) of the Extradition Treaty between the Government of the Italian Republic and the Government of Canada.[53]

Thus, despite the variability of individual choices made from time to time,[54] the "basso continuo" of the latest developments in international cooperation represents a significant erosion of the scope of political crime,[55] reserving preferential treatment only for the perpetrators (presumed or otherwise) of criminal acts that do not constitute the total denial of the primary and inalienable rights of the individual.[56] That is not to say that, in a regional geopolitical context, characterized by what

[49] By way of example see, in more detail, Chiavario (1980), pp. 83 ff.

[50] Done at Strasbourg on 27 January 1977 and entered into force on 1 June 1986. For the full text, refer to Barberini and Bellelli (2003), pp. 369 ff.

[51] Adopted by the UN General Assembly on 15 December 1997 and entered into force on 23 May 2001. For the full text, refer once again to Barberini and Bellelli (2003), pp. 209 ff.

[52] Incidentally, this provision reproduces without modification, and even with the same numbering, that of the previous bilateral agreement of 1983. For the full text of the Treaty currently in force, with effect from 1 February 2010, see http://www.giustizia.it/giustizia/it/mg_1_3.wp.

[53] For the full text, refer once more to http://www.giustizia.it/giustizia/it/mg_1_3.wp Replacing the text previously in force between the Parties dating back to 1981, the treaty in question—which has not yet entered into force—remodulates the grounds for "obligatory" refusal and with specific regard to the provision concerning political offences, significantly increases the number of exceptions.

[54] See criticisms in Onorato (1988), p. 456, who speaks rather of inconsistency.

[55] Marchetti (2010), para. 1.

[56] *Mutatis mutandis*, the interpretative path taken at the level of international law is similar to that outlined by some Italian authorities on the age-old controversy regarding the definition of a constitutional concept of political crime and the usefulness or otherwise, for this purpose, of the definition set forth in Article 8 of the Italian Criminal Code. See, for example, De Francesco (1987), p. 904 and, more recently, Ciancio (2001), pp. 279–292.

should be a strong basic homogeneity of the legal systems of reference, the exception of the political offence as a reason for refusal to hand over an individual has actually been abolished.[57]

Ultimately, what emerges is a clear, mature awareness on the part of the international community, which is now unwilling to qualify as "political crimes" particularly serious acts that threaten primary assets such as life, personal safety and freedom.[58]

In the light of such a legal framework, with variations but according to uniform trends, the persistence in state legislation of rules that protect political offences without distinction of any kind (or at least within very broad limits)[59] has contributed to situations in which it has been difficult to satisfyingly reconcile conflicting interests. Moreover, it has, at times, allowed governments of countries harbouring fugitives to exploit the ambiguity that has always existed in the aims of this limit on extradition, in order to transform its very use into "an instrument of political struggle".[60] This suspicion turns out to be not entirely unfounded if we look at the argument underlying the original French veto on the extradition of Battisti.[61]

[57] Cf. the rule made explicit in Article 5(1) of the Dublin Convention of 1996 relating to extradition between EU Member States, whereby "For the purposes of applying this Convention, no offence may be regarded by the requested Member State as a political offence, as an offence connected with a political offence or an offence inspired by political motives." There are, however, potential exceptions, since the Member States still have the opportunity of expressing reservations (see §§ 2, 3 and 4 of the same Article). For the text of this Convention, which has never come into force, see Official Journal C 313, 23 October 1996, 0012-0023. See also the failure to consider the issue in the FD EAW: the absence, in this European text, of the political nature of the offence as grounds for refusing rendition, falls within the "tendency of continental international law to progressively reduce the resistance of political offences to the extradition of their (alleged) perpetrators." On this topic see Perduca (2006), p. 322.

At least partially different is the reasoning of the irrelevance of the political element in the Statute of the International Criminal Court: the fact that States Parties should provide all assistance that the Court requests, including the rendition of the person sought, without being able to oppose any kind of refusal (Articles 86 and 89 St.), is explained in the logic of complementarity that inspires the jurisdiction of the Court with regard to national criminal jurisdictions. For a wider-ranging discussion, see Ciavola (2005), pp. 436–437 and Gioia (2007), pp. 392 ff.

[58] See, amongst others, Dell'Anno (2009), p. 572.

[59] This finding, in itself, also involves the Italian Constitution, where the wording of Articles 10 and 26 has forced interpreters to perform a difficult task of downsizing, made more difficult by the persistence, in the Criminal Code (Art. 8), of an all-encompassing subjective definition of political crime. For a broad overview of the various solutions proposed see De Francesco (1982), pp. 902–906; Del Tufo (1988), pp. 6–7; Di Chiara (1998), para. 4. On the desirability of amending the aforementioned Articles, that would allow the introduction of the constraints imposed by international conventions, see Chiavario (1980), pp. 95 ff.

[60] See, in this regard, the detailed surveys of Chiavario (1980), pp. 83 and 93.

[61] Actually, not even this ambiguity can help explain how a concept historically built around a clearly "noble" purpose can be twisted to cover the murders of an officer of the prison service, a jeweller, a butcher and a police officer, which, although committed "as part of a mad subversive plan," had nothing to do with any "acts of rebellion against civil liberty and totalitarian regimes." See Grevi (2009), p. 26, and in similar terms, Pocar (2009), p. 16.

Indeed, it is true that Article 3(1) CoEx—in fact cited by France—provides an extremely nebulous formulation of the ban on extradition for political crimes[62] that, as such, leaves plenty of leeway for governments, not least regarding the significance of more or less vague "political reasons." It is also undeniable that the appreciation of the "political nature" of the offence for which extradition is requested rests solely with the State harbouring the fugitive in accordance with the parameters laid down by its own regulatory system.[63] Nevertheless, those statements should never be made in an arbitrary fashion or *a priori*, i.e. regardless of a legal and factual analysis of the case as, instead, the very invocation of the "Mitterrand doctrine" implied. That this first refusal was, indeed, only a cover for France's ambition "to be a land of asylum protecting not only the victims of authoritarian regimes, but also of fugitives already convicted of serious crimes of terrorism following due process," seems to have been confirmed, even recently, by the choice of President Sarkozy not to extradite the terrorist Marina Petrella to Italy.[64] Indeed, this choice seems pedantically based on a reservation in the CoEx demanded by France, whereby extradition "may be refused if rendition is likely to have consequences of exceptional gravity for the person to be extradited, especially due to age or state of health".

Turning to the overseas side of the Battisti affair, remembering that in order to justify the final (for now) refusal to extradite, reference was made to the limit set forth in Article 3(f). There have also been pronouncements by the Brazilian authorities on the alleged political nature of the offences with which the extraditee is charged.

In particular, this occurred when they granted the Italian fugitive political refugee status.

As already mentioned, in fact, following the rejection by the CONARE of his request for asylum, Battisti had appealed to the Minister of Justice under Article 29 of the Brazilian Law No 9.474/1997.

However, before proceeding to ascertain whether there actually existed one or more of the circumstances described under Article 1 of Law No. 9.474/1997 which

[62] "Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence."

[63] Di Chiara (1998), para. 4; Del Tufo (1989), p. 5; Ubertis (1987), p. 258. French legislation doesn't provide an express definition of *infranction politique*. Everything has always been left to case law that, clinging to strictly objective criteria when the interests at stake are only, so to speak, of national law, shows quite a different willingness to consider subjective criteria if the interests regard international law. But, if we look closer, the awareness of the inappropriateness of exclusively adopting a subjective criterion, even in the face of extradition requests from abroad, already emerged in some previous judgments: paradigmatic is *Conseil d'État, arrêt du 7 juillet 1978 Croissant*, where it was stated that the fact that the crimes alleged in the case were aimed at overthrowing the established order in Germany, was not enough—given the gravity—to qualify them as being political in nature.

[64] See Grevi (2008), p. 42, who provides an effective summary of the case.

could legitimize the designation of "refugee,"[65] the Minister should have checked to ascertain that there were not any of the impediments provided for under Article 3 of the same Law.[66] In this case, it should have been ruled out that the applicant seeking refuge in a country different from that whose protection was requested had committed common crimes of a serious nature [Art. 3(III)]; otherwise, he would not have been able to enjoy such a privilege, having shown himself, so to speak, as being "unworthy of it."

Furthermore, the fact that the stakes were high is evident from Article 33 of the Brazilian Law, which, by establishing that the recognition of refugee status is a condition that in itself precludes the acceptance of any requests for rendition based on the same facts assessed for the purposes of granting asylum,[67] would have allowed a rapid and immediate conclusion to the already excessively long quarrel between Battisti and the Italian authorities.

Confirming the close relationship[68] between extradition and asylum, the ruling on the possibility of granting refugee status was therefore conditioned by the preliminary assessment of the nature of the crimes for which the person was

[65] *Art. 1º Será reconhecido como refugiado todo indivíduo que:*

I – devido a fundados temores de perseguição por motivos de raça, religião, nacionalidade, grupo social ou opiniões políticas encontre-se fora de seu país de nacionalidade e não possa ou não queira acolher-se à proteção de tal país;
II – não tendo nacionalidade e estando fora do país onde antes teve sua residência habitual, não possa ou não queira regressar a ele, em função das circunstâncias descritas no inciso anterior;
III – devido a grave e generalizada violação de direitos humanos, é obrigado a deixar seu país de nacionalidade para buscar refúgio em outro país.

This provision reproduces the wording of Article 1A of the 1951 Convention.

[66] *Art. 3º Não se beneficiarão da condição de refugiado os indivíduos que:*

I – já desfrutem de proteção ou assistência por parte de organismo ou instituição das Nações Unidas que não o Alto Comissariado das Nações Unidas para os Refugiados – ACNUR;
II – sejam residentes no território nacional e tenham direitos e obrigações relacionados com a condição de nacional brasileiro;
III – tenham cometido crime contra a paz, crime de guerra, crime contra a humanidade, crime hediondo, participado de atos terroristas ou tráfico de drogas;
IV – sejam considerados culpados de atos contrários aos fins e princípios das Nações Unidas.

This provision reproduces, with some additions and some "stylistic" changes, the wording of Art. 1F of the 1951 Convention.

[67] *Art. 33. O reconhecimento da condição de refugiado obstará o seguimento de qualquer pedido de extradição baseado nos fatos que fundamentaram a concessão de refúgio.*

[68] Already at the time of absolute States, "extradition was an [. . .] exception, of covenantal origin, to right to asylum." See Onorato (1988), p. 449.

convicted, as would happen in the case of an appeal to the ban on extradition for political crimes.[69]

And in this close relationship between the two institutions—without prejudice, however, to the undoubted specificities that distinguish the objectives and principles of the political offence exception and of the exclusion clause for serious non-political offences under Article 1F(b) of the 1951 Convention[70]—the representative of the Brazilian executive should not have been unaware of the influence that the development of international doctrine and case law on the former has inevitably exerted over the years over the latter.

Yet, within the framework of a legal system which, while referring to the political crime both in the Constitution [Arts. 5(LII), 102(II) and 109][71] and in the so-called *Estatuto do Estrangeiro* [Arts. 76(VII) and 3],[72] does not provide any definition of it, and leaves the clarification of its essence to scholars,[73] it was possible that the killing of four ordinary people, perpetrated in a country that had certainly not lost its liberal-democratic structure, was qualified as a "political crime"[74] rather than, as it objectively deserved, a *crime hediondo* or "despicable" crime, precisely because it expressed contempt towards the fundamental rights of civil society.[75]

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[69] The provision for which is couched in absolute terms, as we shall see, in the Treaty of 1989, Article 3(1)(e).

[70] See Kapferer (2003), pp. 103 ff.

[71] For the full text of the Constitution, see http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm.

[72] This is Law 6.815/1980, the text of which is available at https://www.planalto.gov.br.

[73] Of little consolation for a less vague and emotional configuration of the notion of "political crime" has been the frequent use that scholarship has made to the contents of the Law 7.170/1983 concerning "*os crimes contra a segurança nacional, a ordem política e social*" and, in particular, in Article 2 thereof, which states that "*Quando o fato estiver também previsto como crime no Código Penal, no Código Penal Militar ou em leis especiais, levar-se-ão em conta, para a aplicação desta Lei:*

I – a motivação e os objetivos do agente;

II – a lesão real ou potencial aos bens jurídicos mencionados no artigo anterior".

Cf., in more detail, Tesseroli Filho (2010) and Souza Botelho (2010).

[74] As expressed in *Decisão* No. 1 of the Ministry of Justice, published in the *Diário Oficial da União* of 15 January 2009.

[75] The STF had opportunely adopted this line. Cf. See STF, *Ext. 1.085/República italiana, rel. Cezar Peluso* (footnote 21) and, in particular, point 3.

But the same case law of the *Tribunal Supremo* exhibits no lack of "negative" precedents: called to rule on the extradition of other former Italian militants of extra-parliamentary political formations, guilty of heinous crimes, it labelled such acts as political, and assured them that they would not be extradited under Article 3(e) of the Treaty with Italy. See, for example, STF, *Ext. 994/Governo da Itàlia* v. *Pietro Mancini*, *rel. Min. Marco Aurélio Mello, DJ 04/08/2006;* STF, *Ext. 694/ Governo da Itàlia* v. *Luciano Pessina, rel. Min. Sydney Sanches, DJ 13/02/1997.*

5 The Non-discrimination Clause

It has been aptly said that "the emergence of discrimination clauses in the context of the historical developments of extradition marks the most advanced stage of the conventional practices."[76]

Although the historical root is usually sought in the provision of Article 5 of the French Law on extradition of 1927—according to which extradition is denied "*lorsque il résulte des circonstances que l'extradition est demandée dans un but politique*"[77]—they fell under the spotlight of international attention with Article 3 CoEx, which, after reiterating in principle the ban against extradition if the crime is political (§ 1), adds that

> The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons (§ 2).

Along the lines of Article 33(1) of the 1951 Convention,[78] the discrimination clause was thus an acknowledgement of the many ways in which, in the name of international cooperation in the fight against crime, undue restrictions of individual rights could occur. In fact, the human rights and, more generally, the dignity of the person to be extradited could have been harmed in various ways: on the one hand, by cooperating with a state authority which, because of the "intrinsic" characteristics of the offence that it wished to assess or punish, did not ensure sufficient objectivity in the performance of its functions; on the other, by hypothetically allowing an extradition request which, regardless of the nature of the offence alleged against a person, was deliberately submitted in order to subject the person to discriminatory treatment, i.e. to a biased trial or unfair punishment.

In other words, there was a growing awareness that it was no longer appropriate to use as a smoke screen the political nature (objective and/or subjective) of the crime to hide the risks of conditioning that could affect the requesting State's regular performance of judicial activity. Instead, states explicitly began to acknowledge that such fears find are probably rooted in the social, ethnic, racial, political or other prejudices affecting the person whose extradition is requested. Hence the need to establish a new limit on the obligation to extradite, a further and different limit to that hinging on the ideological motivations and/or material characteristics of the offence committed, which, in the presence of a well-founded risk of persecutory

[76] Di Chiara (1998), para. 5.

[77] Chiavario (1980), p. 98; Parisi (1993), p. 3; Onorato (1988), p. 460.

[78] "No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." See, in more detail, Van de Wijngaert (1980), pp. 80 ff.

treatment, should have been applied for all crimes, including ordinary or depoliticized crimes.[79]

Despite the fact that its progressive success is in clear correlation precisely with the progressive increase in the conventional practices of operations of de-politicization and the desire to avoid, in these de-politicized cases, acts of discrimination or persecution at the expense of the extradite,[80] the original meaning of the discrimination clause has not been compromised. What I mean to say is that, while inspired by a common rationale of protection, the ban on extraditing political offenders and the ban on extraditing in the event of a "political trial" (or, rather, the "political use of a trial") in fact perform complementary and largely convergent tasks, albeit ones which are still distinct and different.[81]

The latter, in fact, unlike the former, also aims, if not primarily, to ensure that the demands for punishment from the requesting State are always expressed in ways that respect the due process of law, i.e. the model of criminal judgment universally accepted by the international system.

Moreover, precisely because it involves a highly critical opinion of the procedural conduct in the case and the internal dynamics of the state making the request, states receiving requests have always shown a certain reluctance to apply the discrimination clause,[82] a reluctance more the result of the fear of diplomatic incidents that could be caused by recourse to it than of the difficulty of achieving the standard of proof of *fumus persecutionis*.[83]

On the contrary, this tendency to be diverted from its original purpose of guaranteeing civil rights and to be transformed, perhaps even more easily than in

[79] On the importance and complexity of interests drawn from the discrimination clause also in the field of judicial assistance which does not aim for rendition of the individual, see Valentini (1998), pp. 135 ff., who effectively states that in any case, "it should not be the individual guarantees and the protection of the basic values of the system that are sacrificed to the needs of international collaboration underlying the application."

[80] Del Tufo (1989), p. 5; Parisi (1993), p. 11; Di Chiara (1998), para. 5; Kapferer (2003), p. 38; Marchetti (2010), para. 1. For examples of a discrimination clause see, in addition to the references given by Van de Wijngaert (1980), p. 82 footnote 450, see Article 5 European Convention for the Suppression of Terrorism; Article 4(4) and (5) of the Inter-American Convention on Extradition (concluded in Caracas on 25 February 1981, which came into force on 28 March 1992); Article 3 (b) of the aforementioned Italy–Canada Treaty of 2005 and, at the level of Italian law, Article 698 of the Italian CCP. The texts of the conventions cited are available, respectively, at http://www.oas.org and http://www.giustizia.it/giustizia/it/mg_1_3.wpI.

[81] For a particular emphasis in this sense, see De Francesco (1982), pp. 906 ff.

[82] This was predicted by Chiavario (1980), p. 99 and Van de Wijngaert (1980), p. 214 ("authorities may hesitate to apply the clause *vis-à-vis* friendly states or with respect to states upon which they are politically, militarily or economically dependent"). It was confirmed, on the basis of recent international practice, by Kapferer (2003), p. 38.

[83] Sometimes this "resistance" results in the complete omission, in regulatory terms, of the clause in question, as if to underline the belief, shared by the signatory countries, that in none of their respective territories may a discriminatory trial ever take place: in this light we should read, for example, Articles 3 and 4 of the EAW Framework Decision and the above-mentioned treaty of extradition between Italy and the USA. In similar terms, Chiavario (2009), p. 758.

the case of the refusal based on the political nature of the criminal act, into a hypothetical "bargaining chip" of other, unrelated interests between states not yet free from the logic of a cooperation *more antiquo* is accentuated by the inherent ambiguity of the assessment requested and its substantial reference to the political rather than judicial authority of the country of refuge.[84]

A clear representation of all the potential for distortion inherent in the clause in question was offered, in the scope of the Battisti case, by what happened between Italy and Brazil.

To begin at the end: the last judgment of the STF endorsed the decision of former President Lula to deny the extradition of Battisti to Italy, believing that this decision was fully and completely explained by the bilateral treaty of 1989.

In accordance with the classic structure of agreements in the field, the treaty in question firstly sets forth the conditions that, if arising, impose the obligation to extradite (Art. 2), then, adopting various degrees of stringency, lists the conditions that justify rejection (Articles 3–6). Among these, and to be precise, in Article 3(f), we find a sufficiently vague discrimination clause on which, as mentioned, the presidential denial focused.

In detail, according to the Brazilian head of state,[85] once handed over to the Italian authorities, the "personal circumstances" of the extraditee Battisti would have worsened due to his "political, social, and personal condition." Such wording, although legitimized in the wording of Article 3, is the most obscure and vaguest of those available. What truly bewilders is the fact that the "prognosis in fact,"[86] which should demonstrate the randomness of the prejudice imposed on Battisti, is based exclusively on the reactions of astonishment and regret expressed by the Italian political class and civil society at the time of the granting of asylum.[87] This sufficed, in short, to suspect a state such as Italy of having persecutory attitudes: a state that not only had managed to deal with the phenomenon of terrorism without resorting to special laws and preserving all the features of a state of law[88] but, to date, whose legal procedures in general, and prison system in particular, provide

[84] Chiavario (1980), pp. 98–99 and Onorato (1988), pp. 460–461.

[85] . . .and, previously, according to the aforementioned opinion AGU/AG-17/2010 (cf. §153: "*A condição pessoal do extraditando, agitador político que teria agido nos em anos difícesi da história italiana, ainda que condenado pro crime comun, poderia, salvo engano, provocar reação que poderia, em tese, provocar no extraditando, algum tipo de aggravamento de sua situação pessoal. Há ponderáveis razões para se supor que o extraditando poderia, em princípio, sofre alguma forma de aggravamento de sua situação*").

[86] Cordero (2006), p. 1268.

[87] Not even the European Parliament, to tell the truth, had remained insensitive to the matter: see European Parliament resolution of 5 February 2009 on the refusal to extradite Cesare Battisti from Brazil and, with regard to the subsequent decision of refusal made by the former President of Brazil, European Parliament resolution of 20 January 2011. Both measures can be found at http://www.europarl.europa.eu.

[88] See, among many, Laffaille (2010), pp. 340 ff. and da Cunha Guimarães and Stagni Guimarães (2009), pp. 11–12.

extensive guarantees, and which certainly does not discriminate against any convict for political reasons.[89]

The argument used thus turns out to be far too weak to amount to a prediction of probability (not possibility) alluded to by the "serious reasons" clause of Article 3 (f) ItBrTR[90] and too weak to satisfy the motivation that Article 14 ItBrTR requires of the country that refuses extradition.

Merely reciting a suspicion that Battisti may have been the victim of undefined situations of prejudice because of his personal history, in short, seems to betray a desire to find a reason not to hand him over at all costs.

6 Possible and Desirable Future Developments

At the end of this (necessarily) fragmentary analysis, all we can do is attempt to draw conclusions, distinguishing, once again, between the various levels of assessment.

On the practical side, there is little to add to what I have already observed.

With specific attention to the decisions made by the Brazilian authorities, one may wonder how far the instability of the relations between political-administrative authorities in the strict sense and courts[91]—with a succession of tensions and rapprochements (both probably due to factors entirely unrelated to the case in question)—has conditioned not only the procedural course of events but also the final outcome, in the radicalization of the positions around a unique and absorbing question, as it were, of national law: can the judiciary overturn a decision made by the executive?

Having verified that the extradition procedure provided for in Brazilian law constitutes, in principle, a so-called "mixed" system that, in the same way as, for example, in Italy, subjects a final decision by the representative of the Executive to a judicial review on whether the conditions prescribed by law or by the Treaty from time to time have been taken into consideration,[92] this is clearly not the place to try

[89] Grevi (2009), p. 26.

[90] In line with this is Piccichè (2011), pp. 250–251, albeit with specific attention to the opinion of the AGU.

[91] The distinction may seem obvious if it did not regard the peculiarities of the Brazilian legal system where, along with administrative bodies of a clearly administrative-governmental nature, such as the AGU, the Minister of Justice or the President of the Republic, who is Head of the executive pursuant to Article 76 of the Constitution, we find bodies such as the STF, which, while representing the apex of the judicial power with functions in part similar to Italy's Constitutional Court, has a political connotation due, among other things, to its very composition. See Art. 101 Parágrafo único: "*Os Ministros do Supremo Tribunal Federal serão nomeados pelo Presidente da República, depois de aprovada a escolha pela maioria absoluta do Senado Federal*."

[92] See, in this regard, the above-mentioned Articles 84 and 102 of the Constitution, the already mentioned Law 6.815/1980 and the comments of Pocar (2009), p. 15.

and provide a comprehensive framework of the issue (which is moreover not even directly functional to our investigation, or at least not in the terms in which it has been addressed by Brazilian scholarship).[93] What emerges, if anything, is a general desire to strengthen further, within each extradition proceeding, judicial guarantees, so as not to frustrate legitimate efforts to correctly carry out a process which, although not concerned with assessing guilt, impinges on the real and fundamental interests both of the individual and of the State.[94]

Even less is this the place to assess—and even less qualified am I to take on the task of assessing—the possible developments in the near future. We need merely remember that, almost unanimously, it has been proposed that Italy—once the path of diplomacy failed (and we may, as things stand, state that it has failed)—use the options described in the Convention on Conciliation and Judicial Settlement signed with Brazil in 1954.[95] This is, in short, a process organized into stages which consist of a conciliation procedure and a judicial settlement before the International Court of Justice. But, as has also been pointed out, even if we were to reach the second stage, and this Court should find a breach of its international obligations on the part of Brazil, this could turn out to be of little use, to the extent that the decision of the STF in June was considered irrevocable according to Brazilian constitutional law, or, however, to the extent that the Court itself judged this finding of violation an appropriate and sufficient form of satisfaction for the injured State.[96] In either case, in fact, Battisti could remain in Brazil. This, nevertheless, should not lead us to underestimate the value of an authoritative warning such as that given by the judges of the Hague, also and especially in order to reaffirm the central role that the principle of good faith plays in international law.[97] Considering the importance assumed by the story, the recognition of Brazil's infringement of that *bona fides* one of whose essential features is each State's duty to properly motivate its conduct *vis-à-vis* its obligations undertaken in pacts and conventions,[98] would certainly be a significant signal to the international community.

More directly relevant to the issue addressed in these pages are two final considerations.

[93] See, among many, da Nóbrega (2009).

[94] Moreover, there is always in this perspective the criticism of a practice, unfortunately fairly consolidated, whereby Italy hands over extraditees to the US authorities even when the sentences inflicted on them clearly violate the dictates of Article 3 ECHR. On this issue, which deserves detailed discussion impossible here, see Fonseca (2011), pp. 502 ff.

[95] Signed at Rio de Janeiro, on 24 November 1954, and available at http://www.sidi.isil.org.

[96] Cf., with different emphasis, Cassese (2011), p. 11; Castellaneta (2011), pp. 7–8; Ciampi (2011), pp. 4–5; De Luca (2010), pp. 6–7; Pocar (2011), p. 11; Ronzitti (2011), pp. 1–2.

[97] See, obviously, the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, which entered into force on 27 January 1980. For the full text, refer to http://www.untreaty.un.org.

[98] See Ziccardi Capaldo (2010), pp. 1 ff. and the rich bibliography therein. Among other things, in his wide-ranging reflections, the author criticizes the position taken by France, describing it as a clear example of *mala fides*.

The first is suggested by something that occurred during an intermediate phase of the Battisti case. Among the many arguments submitted in support of the non-extraditability of Battisti, the AGU had also played the card of Article 5(b) of the Extradition Treaty between Italy and Brazil, according to which extradition is also denied when "there is good reason to believe that the person sought will be subjected to punishment or treatment that in any case constitutes violations of fundamental rights." In this regard, it was in fact argued that even the sentence of life imprisonment in function of which extradition was sought constituted a clear violation of fundamental human rights. The assumption then was dropped. In fact, it is true that the Brazilian Constitution prohibits "*penas de caráter perpétuo*" [Art. 5 (XLVII) and (II)], but besides the fact that such impediments should perhaps have been expressly mentioned in the Treaty, it is indisputable that the Italian prison system, by providing mechanisms of early release for all offenders, is at the antipodes of those systems that exclusively consider the inevitability of expiation and neglect the rights of individuals.

We may rather ask whether, in relation to clauses like the one just mentioned (and regardless of the question of its applicability in this case), there is something else in the "experience" of the Italian prison system, which, in addition to provoking intolerable consequences for the rights and dignity of detained persons, also threatens to jeopardize the extradition to Italy of those deserving severe punishment.

As is known, in the recent case law of the ECtHR, there emerges the conviction whereby inhuman or degrading treatment prohibited by Article 3 ECHR could also be constituted by the conditions of detention, not consisting of intentionally inflicted physical or mental abuse, but which, however, are equally damaging to the human dignity of prisoners. The most common of these is prison overcrowding, a serious problem that also afflicts Italian prisons.[99] Indeed, it is significant that precisely regarding a conviction by the Italian State,[100] a line of interpretation was adopted whereby, in order to estimate whether overcrowding in fact constitutes a violation of the convention, it considers the amount of physical space reserved for each inmate as sufficient.[101] Of course, we are not yet (thankfully) in the presence of a systemic violation of Article 3 ECHR, but the statistics are not heartening. If a refusal to extradite—or at least a doubt about it—were to be based on these findings, could one really be scandalized? Would we not have rather been faced with a further pressing stimulus to correct, finally, a real situation—albeit, perhaps, not as widespread and capillary as we are sometimes led to believe—so as to avoid its perpetuation in violation of the international standards of human rights?

[99] See, in this regard, especially the perceptive comments of Gargani (2011), pp. 1259 ff.

[100] ECtHR, 16 July 2009, Sulejmanovic v. Italy, Application No. 22635/03, available at http://www.echr.coe.it.

[101] See Colella (2011), pp. 20–21.

Finally, to return to the central issues addressed in these notes, and aiming to adopt a theoretical and constructive approach, one quickly realizes that the will to overcome the situations of unreasonable deadlock and/or abuse to which, as we have seen, both the political offence exception and the discrimination clause can lead, necessarily comes up against remedies and alternatives for some time hypothesized.

As to the first exception, it does not seem (or does not yet seem) that the time has come to implement the more radical thesis that advocates its complete abolition for the benefit of an exclusive operability of the discrimination clause[102]: such reservations seem suggested precisely by the repercussions that recourse to the latter may provoke and that, if in the Battisti case were perhaps underestimated by the Brazilian authorities,[103] may in other situations have led (and may lead in the future) to overly cautious use of that clause. There remains however a more flexible option and, as such, one more respectful of the genetically different characters of the two limits, which suggests that it is also possible to maintain the political exception, whilst limiting it to those acts which are "objectively" political in nature[104] and always keeping in mind the possibility of a real balance between the "common" and "political" nature of the offence according to the guidelines expressed by well-circumscribed clauses.[105]

As for the discrimination clause, however, once the peculiarity of its scope has been reaffirmed in relation to what have been defined as real "borderline situations,"[106] the difficult task of ascertaining whether the legal system of the requesting State is "unfair" may be made easier by the assistance of authoritative international, governmental or other institutions, whose assessments, investigations and *ad hoc* inspections would at least allow the state authority receiving the request to decide in a climate of greater objectivity and serenity.[107]

We could of course argue that their historical nature betrays, *per se*, the high degree of utopia contained in each of the views just presented.

Conversely, it is clear that—in the face of challenges such as those brought to the table by direct international judicial cooperation aimed at fighting terrorism and organized crime—we cannot resign ourselves to accepting as a monolithic and

[102] Cf. for example Catelani (1995), pp. 137 and 237.

[103] Which, however, were self-righteously quick to point out that "*esse tipo de juízo não constitui afronta de um Estado ao outro, uma vez que situações particulares ao indivíduo podem gerar riscos, a despeito do caráter democrático de ambos os Estados*," as set forth in the previously cited *Nota do governo brasileiro sobre o cidadão italiano Cesare Battisti*.

[104] With all the difficulties, however persistent, arising from the perennial "hermeneutic elusiveness of the primary political event" and, therefore, from the identification of an "event that, in itself, assumes no other dimension than the political," as comments Padovani (2007), p. 78.

[105] Cf. in more detail Chiavario (1980), p. 109.

[106] Chiavario (1986), p. 14.

[107] See, for further details, Van de Wijngaert (1980), pp. 214 ff. who does not rule out the possibility of these organisms, as third parties, conferring upon themselves a real decision-making function.

unchanging truth Benjamin Disraeli's observation that "Nations never have permanent friends or permanent enemies, only permanent interests." Unless it is those very interests that bring to the fore the common goal of defining the status of a person subject to extradition proceedings or already extradited which effectively focuses on respect for the dignity of the person, but is not for this reason less functional to achieving the aims of justice.

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

Paola Maggio

Contents

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

Abbreviations

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

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

1 Introduction

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

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

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

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

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

2 Strategies for Counteraction and Harmonization

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 The Application of Outcomes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[16] Council Decision 2009/426/JHA.

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

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

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

4 Human Rights and Criminal Responses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[22] ICCt, Decision 113/2011.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Part III
Cross-border Cooperation and Fundamental Rights in the European Union

The Protection of EU Financial Interests: The Tip of the Iceberg of the Europeanization of the Criminal System

Luigi Foffani

Contents

Abstract The article analyses the protection of EU financial interests and the legal basis for harmonizing domestic penal provisions after the entry into force of the Lisbon Treaty. In this framework, this paper focuses on the problems arising the interpretation of Article 325 TFEU.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
TEC	Treaty establishing the European Community
TFEU	Treaty on the Functioning of the European Union

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1 The Protection of the Financial Interests as Prototype of the "EU Legal Goods"

The protection of the financial interests of the European Community first—and then of the European Union—has always been the primary need and fundamental motive of the process of Europeanization of criminal law and procedure: since the first steps in the fight against fraud in public subsidies to the detriment of the Community, through the evolution of the European jurisprudence with the leading decision about Greek corn (1989), the entrance into force of the Amsterdam Treaty and of article 280 of the Treaty Establishing the European Community, to the *Corpus Juris* project for the protection of financial interests of the Community (1997/2000)[1] and the subsequent Green Paper presented by the Commission and moving in the same direction, there have been several initiatives and projects aiming at progressively and largely involving the criminal matter in the construction of Europe with the primary purpose of incrementing, harmonizing and—as ultimate perspective—unifying the protection of financial interests of the European Union. With regard to such legal good, which is seen as the archetype and paradigm of supranational and EU legal goods and has—rightly or not—been considered neglected by national legislators for years, the goal of harmonization or unification of the crimes and of the institutional and procedural instruments designed to enforce them is still far ahead, although the awareness of national legislators in this field has noticeably increased and spread in almost all the systems, due to the assimilation of the EU financial interests to the national financial—or more generally public—interests.

It is no surprise that with the Lisbon Treaty and the historic acknowledgement of a EU competence in criminal matters, extended to several subjects much broader than just the early pioneering initiatives, the necessity of protecting the financial interests of the European Union is not only expressly mentioned, but also granted a privileged status among the EU criminal competences, with a specific and more advanced legal basis.

Even in the present context of European criminal policy, which—starting from the third pillar and the establishment of the AFSJ—has become wider and broader—with regard to policy areas, protection purposes, protected interests, criminal phenomena to contrast, etc.—the protection of the financial interests of the Union represents the spearhead of the historical process of Europeanization of European criminal law and procedure.

[1] Delmas-Marty and Vervaele (2000).

2 The Lisbon Treaty and the New Framework of EU Competences in Criminal Matters

2.1 Article 83 TFEU

The prescriptive framework of the new EU competences in criminal matters—in which the protection of the financial interests is inserted—is drawn—with some kind of lexical and political ambiguity—from Articles 82–86 (entitled, without any reference to the breadth of its content, "judicial cooperation in criminal matters") and Article 325 (in the paragraph regarding combating fraud) of the new Treaty on the Functioning of the European Union (TFEU). In this prescriptive framework it is possible to find the *three different legal bases for harmonization of criminal law*.

The first is the one regarding the "*the areas of particularly serious crime with a cross-border dimension* resulting from the nature or impact of such offences or from a special need to combat them on a common basis" [Art. 83(1) TFEU]. These "areas of particularly serious crimes" are identified in a limited (but very generically defined) number of macro-areas of criminal phenomena, which do not correspond to specific crimes, but to generic criminal classification (terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime), with the possibility for the European Parliament and Council to identify "other areas of crime," in order to expand the European criminal competence.

The second legal basis is the one regarding the so called "*accessory*" *criminal competence*: when the "approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures" outside the criminal field [Art. 83(2) TFEU].

2.2 Article 325 TFEU

Finally, the third legal basis is the one specifically referring to counter "*crimes affecting the financial interests of the Union*."

Two different provisions move in this direction: the first one, starting from the criminal proceeding and the organization of justice, allows the European Council and Parliament, "by means of regulations adopted in accordance with a special legislative procedure", to establish a "*European Public Prosecutor's Office from Eurojust*" (Art. 86 TFEU), with the possibility, in the absence of unanimity in the Council, to proceed upon request of a group of at least nine Member States (so called enhanced cooperation). As Eurojust and the European Public Prosecutor's Office will specifically dealt with in the context of this research, I will not linger

over this topic, if not to mention the area of competence of the European Public Prosecutor's Office: first of all, "crimes affecting the financial interests of the Union," which will be defined in the regulation establishing the Public Prosecutor's Office, with the further possibility to "extend the powers of the Public Prosecutor's Office to include serious crime having a cross-border dimension" [Art. 86(4) TFEU], namely that area of criminality already taken into consideration within the first legal basis. I would rather focus on the substantial aspects of the new discipline.

The second normative provision, also aiming at the protection of the financial interests of the Union, is the one regarding the specific matter of "*combating fraud*," namely Article 325 TFEU, heir of Article 280 TEC, introduced in 1998 by the Treaty of Amsterdam and whose ambiguous formulation led scholars to a great debate about whether or not it implicitly attributed to the EU institution a specific competence in criminal matters in order to protect the communitarian finances. The new version of the Treaty of Lisbon settles this ambiguity (and probably it could not have been otherwise since Art. 83 explicitly gives the Union a broader competence in criminal matters).

In the first place, the Union and Member States are expected to "counter fraud and any other illegal activities affecting the financial interests of the Union through measures [...], which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies" (effectiveness and dissuasiveness of measures of protection).

In the second place, Member States are expected to adopt "the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests" (principle of assimilation).

In the third place, "the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud [... and] organise, together with the Commission, close and regular cooperation between the competent authorities" (cooperation).

Finally, EU-Parliament and Council "shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies" (effectiveness and equivalence of protection).

It is a complex system of provisions, which clearly aims at pursuing the objective of an effective, dissuasive, harmonized (or better, equivalent in all the Member States) protection of the financial interests of the Union, reached through a "close and regular cooperation between the competent authorities."

On the contrary, the ambiguous clause, which excluded from the possible measures the Council (today the European Parliament) could adopt, those measures regarding "the application of national criminal law or the national administration of justice" (Art. 280 par. 4 TEEC in the pre-Lisbon Treaty version) has been eliminated, which obviously is not an accidental omission, considering the interpretative debate generated in the past.

However, Art. 325 TFEU is still ambiguous because it does not mention criminal matters as a possible subject of those measures; yet the criminal competence of the Union in this matter could be inferred from the combined interpretation of Articles 83 and 325, and from the difficult evolution of the latter provision; moreover, crimes against the financial interests of the Union could emerge also from the catalogue contained in Article 83, *e.g.* corruption, which is generically mentioned among the "areas of particularly serious crime with a cross-border dimension," and which can include the corruption of EU officers, a classic crime against the financial interests of the Union.

Once having established that Article 325 TFEU applies also to criminal measures, scholars are now, after the entrance into force of the Lisbon Treaty, discussing the question of whether the juridical basis of the EU competence in criminal matters for the purpose of protecting the financial interests of the Union differs from (with regard to normative instruments) and is broader and more pervasive than the general competence described by Article 83 TFEU for the "serious transnational criminality" and for the accessory criminal competence of the Union.

The most significant difference—which marks an unquestioned primacy of the "communitarian finances" in the scale of priorities of the European Union's criminal policy—consists in the link (only potential but already expressly predetermined) with the establishment of the European Public Prosecutor's Office, whose competence could possibly be extended—through a contextual or subsequent decision of the Council or the European Parliament—to the typical crimes of serious transnational criminality, but not to the area of "accessory" criminal competence of the EU. This one is obviously a choice fraught with potential consequences in terms of effectiveness and equivalence of protection accorded to the interests at stake.

The further consequences that some scholars have tried to draw from the formulation of Article 83 and 325 TFEU are, instead, questionable.

Article 83 TFEU limits the criminal competence of the Union to the provision of "minimum rules concerning the definition of criminal offences and sanctions," thus defining the terms of a criminal law regulatory power shared between the EU and the Member States, according to a model in some way comparable to—in the Italian constitutional system—the relationship between the delegating law and the law made under delegate powers. Moreover, Article 83 indicates as an exclusive instrument for criminal harmonization, the "*directive*," a normative act, which imposes on the Member States the goal to achieve, leaving them some margin of discretion in the choice of the instruments for reaching it, and which assumes that the Member States enforce the directive with a national law.

Art. 325 TFEU generically mention "*measures*" to prevent and combat "fraud and any other illegal activities affecting the financial interests of the Union;" such measures must be "dissuasive" and allow "effective protection in the Member States and in all the Union's institutions, bodies, offices and agencies." From such a generic formulation of the provision, some scholars have tried to infer the consequence that the Union could exercise its criminal competence, for the purpose

of protecting its financial interests, through *regulations* immediately enforceable as law in all the Union's territory, without the necessity of implementation through legislation in the Member States. A sharp separation would thus be established—on the institutional and procedural level—between the general competence of the Union, based on the cooperative model and shared between the Union and the Member States, and the specific competence (self-protective) of the Union, exercised for the protection of its financial interests, which would then enjoy a privileged condition, much more authoritative and imperative towards Member States. The political legitimacy of such interpretation—and its acceptability on behalf of the Member States—is questionable, especially because it is based on rather weak textual arguments.

In my opinion, the interpretation of Article 325 as implicitly referring to Article 83 TFEU for the specification of the instruments and procedures of the exercise of the European criminal competence for the protection of the Union's financial interests (through directives and not regulations) is stronger and more balanced. The generic formulation of Article 325 TFEU ("measures" for the prevention and counter of "fraud and any other illegal activities affecting the financial interests of the Union") depends on the circumstance that this provision does not have an entirely criminal content, unlike Article 83; Article 325 deals with prevention, as well as repression, thus referring not only to criminal, but also to administrative measures. This constitutes a reasonable explanation of the different and more generic formulation of this provision in comparison with Article 83 and allows a harmonious coordination between the two provisions.

3 Conclusions

1) The Treaty on the Functioning of the European Union, as noted above, in order to protect the financial interests of the Union as well as for a wider criminal policy, assigns competence to the European institutions and designs a particular procedure for the exercise of this power. What is still needed, however, is the indication of a catalogue of the *guiding principles and criteria of European criminal policy*: subsidiarity, *extrema ratio*, proportion (comprehensive of the idea of culpability as both limit and foundation of criminal responsibility and of the necessity of an offence of a "legal good" deserving criminal protection: harm principle), horizontal and vertical coherence, etc. The necessity of developing a list of principles, which is able to guide and limit the European criminal policy, has been recently taken into consideration, in the institutional context, by the Stockholm Program[2] and in the academic context, by the Manifesto on the European Criminal Policy.[3]

[2] European Council, The Stockholm Programme—An open and secure Europe serving and protecting citizens, OJEU, 4 May 2010, C 115/1.

[3] A Manifesto on European Criminal Policy Initiative (2009).

2) *Crimes affecting the "financial interests of the Union:"* this is the key phrase which defines the area of effectiveness of Article 325 TFEU. How should we interpret today the relevance of this form? Is an interpretation wider than the traditional one possible?

When the *Corpus Juris* was enacted, only fraud in public EU subsidies and crimes of public EU officers (corruption, embezzlement of public funds, abuse of the powers of office) were considered crimes affecting the financial interests of the Union. Today, the question to ask is whether crimes such as market abuses should be included in this category.

This could be achieved through an "institutional" and not only a patrimonial interpretation of the phrase "financial interests of the Union:" not only the resources of the Union, but also the financial institution that are legally conformed to the Union. The stability, accuracy and transparency of financial markets would become part of this new and broader "legal good" (*Rechtsgut, bene giuridico*), thus helping to give this specific area of European criminal competence an interpretation, aiming more at the protection of interests concerning all the Union's citizens, than at the mere economic and patrimonial interests of the Union itself.

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Eurojust and the European Public Prosecutor's Office After the Lisbon Treaty

Francesca Ruggieri

Contents

Abstract This contribution starts with the analysis of the problems caused by Article 86(1) TFEU, under which, as known, it is possible to "establish a European Public Prosecutor's Office from Eurojust." Studying the Eurojust ambiguities and the transformations which characterized this body during the last years, the work assumes that the history of Eurojust—and that of all the EPP proposals—can be read as the history of a progressive shift from the horizontal to the vertical cooperation paradigm. On this basis, the Author tries to trace some of the possible, future scenarios on the regulation of the new EPP, in accordance with the fundamental rights of individuals.

Abbreviations

ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMLACM	European Convention on Mutual Legal Assistance in Criminal Matters
ECtHR	European Court on Human Rights
EJN	European Judicial Network

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EP	European Parliament
EPO	European Protection Order
EPP	European Public Prosecutor
JHA	Justice and Home Affairs
OLAF	European Anti Fraud Office
TFEU	Treaty on the Functioning of the European Union

1 Introduction

All of the novelty of the European Public Prosecutor's Office[1] contained in the Lisbon Treaty can be summed up in a single word, the preposition "from" (that is, in Italian, German and French, *da, von, à partir*):

> In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust [Art. 86(1) TFEU].

The article above was the result of a laborious compromise. It tries to clarify at least one feature of the peculiar figure of the European Public Prosecutor. The new body must, in some way, depend on or be linked to Eurojust. Even though there are slightly different interpretations, every scholar agrees that the new body must reckon with the experience so far acquired by Eurojust. The challenge will be to specify the terms and conditions of the link between them, which remains vague.[2]

Many questions remain open:

> Should the European Public Prosecutor have a structure similar to Eurojust? Will Eurojust lose its coordination powers in as much as these are assumed by the European Public Prosecutor? If we end up getting a general European Public Prosecutor for all states, with competence to hear all serious cross border crime, will Eurojust continue to exist?

Wonders a Prosecutor at the International Cooperation Section of the Technical Secretariat of the General Prosecutor's Office.[3] The former (2008) President of the College of Eurojust thinks that "the main questions opened by the Lisbon Treaty...

[1] It is really impossible here to touch upon the deep changes which have been made to the system of sources, with the abolition of third pillar. See recently, for the necessary bibliographic references, *ex multis,* Campailla (2011), p. 90; Noltenius (2010), p. 607; Suominen (2008), p. 229.

[2] See Vervaele (2008), p. 153, according to whom "the constitutional Treaty, which should directly establish the function of European Prosecutor, should also ensure that its derived legislation specifies the relationship with Eurojust."

[3] Morán Martínez (2008), p. 110, who, a bit further, highlights: "What is true is that in the denomination of the institution, a European Public Prosecutor is no longer referred to, as in the green paper, but rather a European Public Prosecutor's Office. This fact, alongside the reference to its creation from Eurojust, seems to reflect a certain desire to create a collegiate body in which there would undoubtedly be a chairman or director appointed with guarantees of transparency and balance with respect to the opinion of institutions, but with skills for the management of a body that could probably" (p. 113).

are focused, essentially, around six points: the adoption of the legal instrument setting up this new body, its organisation and operation, its competences, the rules on criminal proceedings that must be observed, its capacity for investigation and the jurisdictional control of acts which affect fundamental rights."[4] The Premier Advocate-General at the Court of Cassation in France asks "What is the current status of Eurojust and the project to create a European Public Prosecutor? What does the Treaty of Lisbon say in this respect? What is the outlook and expectations for the future in this area?"[5]

Last but not least, one of the leading scholars in the field, who has been a central supporter of the concept of an area of freedom, justice, and security, predicts that "several scenarios have been outlined above: cooperation between separate and complementary bodies; institutional links; partial integration; total integration."[6]

The answers to all of these questions must of course be mainly political ones.[7] As one of the current Italian members of Eurojust has said, "laws concerning the public prosecutor, both in the abandoned European Constitutional Treaty and in Lisbon Treaty" are "almost some sort of blanket criminal laws."[8] It is up to the interpreters to try and give the future Community legislator some more specific indications.

2 European Public Prosecutor (EPP): Eurojust's Ambiguities

The year before the tragedy 9/11 Eurojust was set up to the specific purpose of strengthening the fight against organised crime. Before and since,[9] two different ideologies have been very publicly opposing each other in Europe. The first is

> that of maintaining the idea of strengthening cooperation between the competent authorities, and that seeking to harmonise regulations and the creation of supra-national institutions. The creation of Eurojust [. . .] was the meeting point between these two ideas: for some Eurojust was the beginning, for others the end result.[10]

[4] Lopes da Mota (2008), p. 77. See also Cretin (2010), pp. 33–34.

[5] (de) Gouttes (2008), p. 101.

[6] Vervaele (2008), p. 153.

[7] Which doesn't absolutely mean putting off the problem without a solution being ever reached. As Bösch (the then Chairman of the European Parliament's Committee on Budgetary Control) (2008), p. 24, points out: "politics is known to be a short-lived business. However, the European Prosecutor is the best example of where perseverance is rewarded."

[8] Spiezia (2011), p. 16.

[9] Bibliography is immensely vast on this topic too. From time to time, different philosophies have characterised the attitude towards the articulated theme of organising judicial assistance and cooperation in full respect of the absolute sovereignty of Member States in the field of criminal jurisdiction. For a global overview, see Lagodny (2011), p. 491; Schröder (2011), p. 515; Wasmeier (2011), p. 504.

[10] Morán Martínez (2008), p. 109.

This conception begins with traditional cooperation, also called judicial assistance, usually governed by conventions or other international agreements between States; in these cases cooperation is based on sovereign States' consent.[11]

Also, there is a cooperation called "horizontal," which concerns "the judicial and/or administrative authorities from various member states." Another kind of cooperation, called "vertical," is meant to "organize the relationships between heterogeneous authorities as to their status and their tasks, authorities that are not in conditions of equality."[12]

Vertical cooperation, in particular, implies an obligation to collaborate which usually doesn't exist in horizontal cooperation, the latter being founded on mutual and consensual aids.[13]

This model, applied to the EU, defines the relationship between what can be, broadly speaking, referred to as investigative authorities (that is, magistrates and police) on the one hand and the European prosecutorial agency.[14]

The history of Eurojust—and that of all the EPP proposals—can be read as the history of a progressive shift from the horizontal to the vertical cooperation paradigm.[15]

[11] As known, in Europe cooperation was primarily organised by the Council of Europe. See in particular the ECMLACM (Strasbourg, 20.IV.1959) as subsequently modified. For a global and more detailed overview, see Lagodny (2011), p. 492. A both effective and revealing graphical representation can be found there, with concentric circles picturing the various treaties signed by member states on this topic.

[12] There is a "*coopération dite 'horizontale' … [que] concerne les autorités judiciaires et/ou administratives de différents Etats membres*." Another kind of cooperation, called "vertical," is meant to "*organise les relations entre autorités héterogènes quant à leur statut et quant aux missions qu'elles remplissent, autorités donc qui ne se palcent pas sur un plan de parité*:" French quotations from Manacorda (2001), p. 291.

[13] For an historical perspective of traditional horizontal cooperation, with a lot of bibliographic references, see Lagodny (2011), p. 491. For EU's discipline on the principle of mutual recognition and framework decisions, Wasmeier (2011), p. 504.

[14] As Schröder (2011), p. 515 states, "the vertical notion of *Rechtshilfe* is used also with regard to the cooperation between domestic judicial authorities and intergovernmental and supranational institutions." ("*für die Zusammenarbeit der nationalen Justizbehörde mit zwischen- und überstaatlichen Einrichtungen wird auch der Begriff der vertikalen Rechtshilfe verwendet*").

[15] An emblematic and worth quoting observation about this comes from Killmann and Hofmann (2011), p. 758: "the horizontal cooperation between member states must be complemented by a 'vertical' mechanisms through which the European Public Prosecutor has also operative investigative and prosecution powers." ("*Die horizontale Kooperation der Mitgliedstaaten soll durch einen 'vertikalen' Mechanismus, in welchem der Europäische Staatsanwalt auch operative Ermittlungs- und Verfolgungsbefugnisse hat, ergänzt werden*").

At the beginning, according to the Tampere European Council's (of 15–16 October 1999) deliberations as they emerge from its Presidency Conclusions, item 46[16]—"the Member States preferred a co-ordinating body."[17]

Eurojust therefore has no operational power. Its task is confined to the facilitation of coordination among investigating member state authorities, assisting in the execution of international mutual legal assistance and the implementation of extradition requests.

There is no trace in the original structure of this institution of the proposals which had been thoroughly analysed for more than a decade previously, both in the *Corpus Iuris*[18] and, later on, in the Green Paper on the criminal law-protection of the financial interests of the Community and establishing a European Prosecutor.[19] The *Corpus Iuris* designs, a centralised EPP limited to the purpose of protecting EU's financial interests, whose national members should act both under every single member state's regulations and under common rules on such topics as respect for fundamental rights as well as some typical procedures.[20] The Green Paper,

[16] Item/number 46 reads as follows: "To reinforce the fight against serious organised crime, the European Council has agreed that a unit (EUROJUST) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. EUROJUST should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis, as well as of co-operating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001."

[17] Suominen (2008), p. 219. Wide references to EU's criminal policies back in Tampere's times can be found in Piattoli (2002), pp. 51 ff. and Zöberlin (2004), pp. 36 ff. For the reconstruction of Eurojust's origins, as well as for more up-to-date and comprehensive bibliographic material in Italian, see De Amicis (2011), pp. 2 ff.

[18] There is a huge bibliography on *Corpus Iuris*. It's quite enough here to mention Delmas-Marty (1997), along with other four subsequent in-depth works: Delmas-Marty and Vervaele (2001). An effective summary in Vervaele (2008), pp. 136 ff.

[19] COM (2001) 715 final.

[20] According to Vervaele (2008), pp. 136 ff., "The 1997 *Corpus Juris* can be considered as a project with a view to attaining a European criminal justice in the sense of the EU, but it does not have as its aim the intention of being a project for European criminal law or European criminal procedure and it must not be read as such." Furthermore: "The most innovative part is unquestionably the part related to criminal procedure. Three guidelines have been included: The principle of European territoriality, the principle of judicial guarantee and the principle of proceedings which are '*contradictoire*'. [. . .] The procedural structure of the *Corpus Juris* is greatly linked to national criminal authorities. One of the big problems at this present time is the division and absence of operational coordination in international matters. For this reason, the option has been to implement a central prosecution authority, the European Public Prosecutor (EPP), which does not mean that the role of the national Public Prosecution Service has been invalidated, quite the contrary. The EPP is composed of a European Director of Public Prosecution (EDPP) and European Delegated Public Prosecutors (EDelPPs) within the Member States (Article 18) [. . .]. The EPP, therefore, consists of all the structure of the main characters in the criminal system. The EDPP is nothing more than a central authority leading all the rest. The EPP must be informed of all acts which could constitute one of the offences defined above (Articles 1–8), by the national authorities

though it borrows many of the Corpus Iuris's proposals, must be read in light of later documents: the Follow-Up Report on the Green Paper and all the other related papers collected when it was under discussion.[21] The Green Paper does not actually contain an exhaustive or detailed description of a "prosecution agency." It merely draws up the suitable options which could be adopted, considering the realities of the present EU, in the hopes of maximizing the cooperation of the member states in the plan: EPP's independence and its decentralised structure, a focus on the protection of the EU's financial interests, a national discipline which respects the principle of mutual recognition and more articulated relationships among EPP, Eurojust, Europol and Olaf.[22] As Lopes da Mota points out

> Although there may be an area of overlap in their mission, the functions [of EPP and Eurojust] are different. Eurojust, as a body of judicial co-operation, has as its objective the improvement of co-ordination and co-operation between national authorities; the European Public Prosecutor's Office aims at centralising criminal procedures and investigations and at directing Public Prosecutors responsible for the proceedings.[23]

(police, public prosecutors, pre-trial judges, agents of national administrations such as tax or Customs authorities) or the competent Community body, the European Office for the Fight against Fraud (OLAF). The dossier must be transferred to this EEP (Article 19). It may also be informed by denunciation from any citizen or by a complaint from the Commission. National authorities must submit to the European Prosecution Service at the latest when the suspect is formally 'under investigation,' under Article 29(1), or when coercive measures are employed, particularly arrest, searches and seizures or when a person's telephone is to be tapped. The EPP is not only a reactive authority; it may also act *ex officio* (pro-actively)." For a summary in French, see also Delmas-Marty (2010), pp. 164 ff.

[21] Documents/records are available on OLAF's website at the following address http://ec.europa.eu/anti_fraud/green_paper/index_en.html.

[22] For this summary s. Killmann and Hofmann (2011), p. 759. Similar contents in Vervaele (2008), 149 (149–150) who, about the concept of mutual recognition in the Green Papers, states: "there are three different types of investigation measures: firstly, there are investigation measures at the discretion of the European Public Prosecution such as gathering or seizing any useful information, hearing witnesses and questioning suspects, etc. These investigation measures do not require the exercise of any coercive power and they have the same legal scope in all the common investigation and prosecution area. For this reason, these investigation measures are considered to be Community measures. The second categories include investigation measures subject to review by the courts: subpoenas, house searches, seizures, freezing of assets, interception of communications, covert investigations, controlled or supervised deliveries, etc. The applicable national law at the warrant stage would be that of the Member State of the forum, and at the execution stage it would be that of the Member State of the place for execution of the investigation measure, assuming that this is a different Member State. On this basis, the warrant and the execution should be mutually recognised and evidence should be mutually admissible as between the Member States. [...]. Thirdly, investigation measures ordered by the judge of freedoms on application from the European Public Prosecutor, these being investigation measures that restrict or remove the liberty of the accused, especially the arrest warrant. Here the European Commission directly refers to the Council framework decision on the European arrest warrant."

[23] Lopes da Mota (2008), p. 81. The same expressions in Suominen (2008), p. 221, according to whom: "Eurojust was established as a purely co-operational unit; thus, it does not represent supranational prosecutorial system, preserving Member States' competence in criminal law matters. This distinguishes Eurojust from the *Corpus Juris* project, where so-called European federal crimes were listed, and over which the envisaged European prosecutor would have had

Only in the subsequent experience with Eurojust does faint overlap with the vertical cooperation model emerge.[24] The debate about the reform which would later lead to the issuing of Council Decision 2009/426/JHA of 16 December 2008 was had in the hope of developing Eurojust with an eye to a future EPP.[25]

The European Parliament has also, aware both of the different measures which had been taken[26] and of the post-Lisbon Treaty conditions,[27] recommended that

competence. Furthermore, a difference can be observed with regard to the Green paper, which also focused on the protection of the EU's financial interests. The crimes under the competence of Eurojust cover more crimes than merely crimes against the financial interest of the EC."

[24] De Amicis (2001), 1966, has appreciated this new cooperation model since Eurojust was first instituted.

[25] (de) Gouttes (2008), 104, according to whom "In light of the Treaty of Lisbon, it should be stated: that this new Treaty, like the former Constitutional Treaty, assigns primacy to Eurojust, to which it entrusts greater powers and which is the necessary springboard towards a European Public Prosecutor." EU should be "creating a strengthened Eurojust." Besides: "we need the Eurojust unit (which, we should remember, has certain weaknesses), improving its operation if we need to move towards the creation of a European Public Prosecutor. According to this viewpoint, France, along with other Member States, has seen fit to support the draft decision by the Council currently under consideration on strengthening Eurojust and clarifying its relations with the European Judicial Network". About the current reform, see the well-documented De Amicis and Surano (2009), pp. 4453 ff.; Grotz (2011), pp. 718 ff.; Spiezia (2011).

[26] See European Parliament recommendation of 7 May 2009 to the Council on development of an EU criminal justice area [2009/2012(INI)]: "Having regard to the Commission Communication of 23 October 2007 on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union [COM(2007) 0644], to the consolidated version of Council Decision 2002/187/JHA on setting up Eurojust with a view to reinforcing the fight against serious crime (5347/2009), to Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network(9) as well as to Parliament's positions of 2 September 2008 thereof."

[27] See European Parliament recommendation of 7 May 2009 to the Council on development of an EU criminal justice area [2009/2012(INI)], especially the points (A) ("whereas the administration of justice falls within the national competences of the Member States"), (B) ("whereas, with a view to the Treaty of Lisbon, it should be stressed that, once in force, it would widen EU competences in the field of judicial cooperation in criminal matters and would introduce the co-decision law-making process in this area by abolishing the pillar system"), (C) ("whereas the Hague Programme, like the Tampere Programme, set the creation of a European Area for Justice as a priority and stressed that the strengthening of justice should pass through confidence-building and mutual trust, the implementation of mutual recognition programmes, the development of equivalent standards for procedural rights in criminal proceedings, the approximation of laws—in order to prevent criminals from benefiting from differences in judicial systems and in order to ensure that citizens are protected regardless of where they are in the EU—and with a view to furthering the development of Eurojust") and Z ("whereas coordination bodies such as Eurojust have been shown to contribute a real added value and their action against trans-national crime has expanded remarkably despite the fact that their powers are still too limited and some Member States have proved reluctant to share information in this context") of the *Consideranda*.

Eurojust be strengthened by increased member state obligations and a boosting of its own competencies.[28]

The resulting 2008 modifications strengthened Eurojust both in terms of the exchange of information and of the power of member states.[29]

The increasing commitment to this relatively new European body,[30] whose activity has recently been articulated with OLAF[31] and Europol,[32] marks the beginning of a structure which, having abandoned its mere coordinating functions, is going to undertake more and more independent operations. Just like the future

[28] See European Parliament recommendation of 7 May 2009 to the Council on development of an EU criminal justice area (2009/2012(INI), especially the following items: "i) urge Member States to fully implement without delay the Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA (5613/2008)(18) and to encourage national authorities to involve Eurojust in the early stages of the cooperation procedures, to overcome the reluctance to share information and to fully cooperate which has been shown at national level, and fully involve Parliament, together with the Commission and with Eurojust, closely in the forthcoming activities with a view to the correct implementation of the decision implementing Eurojust; j) draw up a plan for the implementation of the above-mentioned decision, in particular with regard to Eurojust's competences on the: resolution of conflicts of jurisdiction, power to undertake investigations or prosecutions, k) take action with a view to the publication, every year, of a comprehensive report on crime in the EU, consolidating reports related to specific areas such as OCTA (Organised Crime Threat Assessment), the Eurojust annual report etc.

[29] See in particular Arts. 2, 8, 9 ff. of the 2009 Council Decision.

[30] See Spiezia (2011), p. 5, who reads and comments the figures of Eurojust Annual Report 2010. A further account on this is given by the Council conclusions on the ninth Eurojust Annual Report (calendar year 2010) 3096th Justice and Home Affairs Council meeting (Luxembourg, 9 and 10 June 2011). See for instance p. 1 § 2 of the Annual Report. Takes note of the upward trend in caseload statistics, with 1.424 new registered cases in 2010 compared with 1372 cases in 2009 (i.e. an increase of 4 %), and of the related increase in the number of coordination meetings (141 in total). Notes that the information provided in relation to the statistics of caseload indicates that one-fifth of the cases involved three or more countries.

[31] Cf. Commission Eurojust, Information regarding a 'Practical Agreement on arrangements of cooperation between Eurojust and OLAF,' 2008/C 314/02, Official Journal of the European Union C 314/3 (9.12.2008) as well as, for further references, Storbeck (2011), pp. 750 ff. See also Art. 26(1) Council Decision 2009/426/JHA (Relations with Community or Union related institutions, bodies and agencies): "1. In so far as is relevant for the performance of its tasks, Eurojust may establish and maintain cooperative relations with the institutions, bodies and agencies set up by, or on the basis of, the Treaties establishing the European Communities or the Treaty on European Union. Eurojust shall establish and maintain cooperative relations with at least: (a) Europol; (b) OLAF".

The regulation goes on talking about "(c) the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex); (d) the Council, in particular its Joint Situation Centre. Eurojust shall also establish and maintain cooperative relations with the European Judicial Training Network." These mutual links won't be further examined here for brevity's sake. However, it must be highlighted that they are at least as relevant as the collaboration with Olaf and Eurojust. See Grotz (2011), p. 726 ff. for the relationship with EJN.

[32] Agreement between Eurojust and Europol, Art. 26 ("This Agreement shall enter into force on 1 January 2010. Done at The Hague, the first day of October, two thousand and nine"). For the different forms of collaborations/cooperation and the necessary bibliography cf. again Storbeck (2011), pp. 751–2. See also Art. 26(1) Council Decision 2009/426/JHA, quoted in the previous note.

EPP, both the current body and any future one will need "legs and arms" to operate effectively in the European judicial space.[33] In this regard, it is no accident that Europol has been called a European Prosecution Office[34] and, above all, that Olaf itself has polarised all the studies and aroused all the interests aimed at creating an EPP. Under the provisions of Article 86(1) TFUE, the EPP will initially only be allowed "to combat crimes affecting the financial interests of the Union." Only later will it be possible "to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension" [Art. 86(4) TFUE].

3 The Future Creation of an EPP's Office "from" Eurojust

Today, according to Article 85 TFUE (ex Art. 31 TEU),

> Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

In the future, "the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks" which could include "(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union." According to paragraph 2: "In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials".

Eurojust, which is confirmed and placed on clearer legal footing by the Lisbon Treaty, cannot take on any of the member states' traditional powers. Even without

[33] See Lopes da Mota (2008), p. 78, who observes: "The points to know which entities and authorities must carry out the investigation and collect evidences under the direction of the European Public Prosecutor's Office, in such a way that its legal powers become effective. Without this, the European Public Prosecutor runs the risk of being a head without a body, legs or arms, incapable of moving or taking any action. In this context it will be important to analyse and define the roles of OLAF and Europol and the strengthening of their competences."

See also (de) Gouttes (2008), p. 102, according to whom "the strong points of Eurojust are," among other things, that "it has the benefits of favoured communication with the anti fraud office (OLAF) and Europol, as well as the signing of various agreements for cooperation and the exchange of data with third party countries and external bodies."

[34] "*Als europäische Staatsanwaltschaft*:" thus, very sharply (but in the framework of a brief and narrow analysis), Otto (2008), p. 19. Zöberlin (2004), pp. 54–55, expresses much more thorough, articulated and toned-down considerations, though stuck in the same mindset.

going over the (somewhat equivocal) expressions which in *Art. 85* paragraph 1(a) TFUE[35] define the future powers of this well-established community institution, the last paragraph seems to be unambiguous in its limiting of Eurojust's powers to coordination.

This is not a trivial point. Of course, on first reading

> this provision is difficult to square with the proposal for a decision that could enable a National Member of Eurojust to adopt a formal procedural act such as the emission of a letter rogatory, a seizure or authorisation of a controlled handover.[36]

However, in the last Council Decision, 2009/426/JHA, some new powers are given to member states, thus overcoming the problem. Still, the member states can wield their powers both in their capacity as national authorities and as Eurojust's delegates. This overlap makes clear that the EU legislator wants to develop Eurojust's powers and overcome the reservations of the member states by assuring their national authorities continuing pride of place.

As happened after the last reform,

> the competences of the national members of Eurojust can thus differ (and do differ) from each other. To help to ensure some kind of common standard, the national members shall have access to the information in national criminal records (to the same extent as the national prosecutor, judge or police officer has under national law).[37]

The problem is not the difference among various national rules which the single delegates have to obey, in respect of the principle of mutual recognition, explicitly enshrined in Article 82(1) TFEU.[38] The issue, with a view to a future EPP, is to identify a set of rules which will necessarily have to be established at EU level.

Though still within the (initially) limited task of countering the "offences against the Union's financial interests,"

> the European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests [. . .]. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences [Art. 86(2) TFUE].

This will not be a mere coordinating body.

As soon as such a body is created, the EU legislator

> shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to

[35] On this topic, see widely Marcolini (in press) and Mauro (in press) for the (completely equivocal) meaning of the seemingly technical terms used in Articles 82–86 of TFUE dedicated to *Judicial Cooperation in Criminal Matters,* with special reference to the typically Italian concept of "*azione penale*." For references to the German system, see also Ruggieri (in press).

[36] Morán Martínez (2008), p. 112.

[37] Suominen (2008), p. 222.

[38] For the reconstruction of the origin and the extension of the principle in EU's sources see Suominen (2011), pp. 17 ff., who considers the "principle of mutual recognition as guideline" for the building of EPP. See also Nürnberger (2009), p. 498.

> its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions [Art. 86(3) TFUE].

The Treaty seems to give wide but unspecific powers to the EU legislator in order to regulate the future EPP. Although "from the little references to the figure, confirmed by the new Treaty, there seems to be unconcern for the institutional features of the prosecutor,"[39] the frame within which EPP will have to operate can globally be considered as sufficiently defined.

The relationship with Eurojust brings along the respect for the single national rules and, above all, for the principle of mutual recognition and for the resources already offered by Olaf and Europol. Once more, the former President of the College of Eurojust's words are illuminating:

> It will not be possible for the European Public Prosecutor's Office to work solely with applicable Member States' procedural criminal rules on a case by case basis, as this may create irresolvable problems regarding trans-national investigations and prosecutions. In order to prevent these kind of problems, the experience of Eurojust confirms the need for basic common rules for cases falling into the competence of the European Public Prosecutor's Office. Experience also demonstrates the need to take into account the relationships with national procedural laws, not only in the preliminary phase of the proceedings, but also during the trial phase, where the problems relating to the validity of evidences must be considered.[40]

For activities that do not engage fundamental rights, it is possible to refer to the different national rules only. On the other hand, a common set of rules would be preferable in order to regulate activities which do raise fundamental rights issues. In fact, they all—especially the ones related to the exercise of jurisdiction[41]—require coercive power,[42] which is exclusively vested in the member states.[43]

If the discussion on whether the EPP will have to be a centralised or decentralised authority is still open, the fundamental rights of individuals being prosecuted cannot be placed on the negotiating table.

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[39] Spiezia (2011), p. 16.

[40] Lopes da Mota (2008), p. 78.

[41] See especially Favreau (2010), pp. 242 ff.; Nürnberger (2009), pp. 500–501.

[42] See Vervaele's distinctions, above footnote 21. From the German point of view this kind of activities are known as "*dopplefunktionelle Handlungen*." As they both affect fundamental rights and are useful investigative tools, they need to be regulated by a judge (*Ermittlungsrichter*, giudice per le indagini, investigative magistrate, etc.).

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The External Dimension of the Area of Freedom, Security and Justice: An Introduction

Mark A. Zöller

Contents

Abstract The external dimension of the area of freedom, security and justice has become an important aspect within the wide variety of actions in criminal matters taken by the European Union. In short, the idea of an external dimension of the area of freedom, security and justice means to extend EU standards for good governance, democracy, the rule of law and respect for human rights to as many neighboring and third states as possible to reach more common ground in the fight against transnational elements of crime. Concerns regarding this idea may arise from the fact that the external dimension lacks legal certainty and that its constitutional legitimation and boundaries are still unclear. In addition to this, recent developments in world politics have shown that hesitant and inconsistent

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behavior by the EU Member States may endanger the export of European values and legal principles to third countries.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
COM	Commission of the European Union
OJ	Official Journal of the European Union
REV	Review
TEC	Treaty establishing the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 "No Man Is an Island"

The external dimension of the AFSJ is a rather new phenomenon. Although this term has been used widely within strategic EU documents during the last few years, authors of textbooks and commentaries on European Law have been remarkably silent on the matter.[1] This selective form of silence seems to be inconsistent with the great number of publications on the subject of the AFSJ in general. Therefore, the following text tries to give a first introduction into the external dimension of this legal area which—as will be shown—is more of an overall strategy and not strictly related to criminal law and criminal proceedings.

Though poetry is a widely misused tool for endeavors to interpret actual legal principles and statutes, in our case it might indeed be useful to get a first impression on what we are talking about. A first approach to the external dimension of the area of freedom, security and justice may be facilitated by the old proverb "No man is an island." This short but beautiful phrase is taken from the "Devotions upon Emergent Occasions," a 1624 prose work by the English poet *John Donne*. It was written at a time when the author was recovering from a serious illness and consists of 23 parts (so called "devotions") describing each stage of his sickness. Each part is further divided into a Meditation, an Expostulation, and a Prayer. And in Meditation XVII John Donne writes the following most remarkable sentence:

> No man is an Iland, intire of it selfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any mans death diminishes me, because I am involved in Mankinde.

[1] Exceptions to this statement can be found *e.g.* with Mitsilegas (2007), pp. 457–497; De Bruycker and Weyembergh (2009), pp. 210–232; Wessel et al. (2011), pp. 272–300.

Human beings do not thrive when isolated from others. The same holds true, of course, for international organizations like the European Union. The EU can never be a thriving island of freedom, security and justice when it is surrounded by third states and parties that do not share European beliefs and values like good governance, democracy, rule of law or respect for human rights and freedoms. During the last few years, this firm conviction has led the European Council and the Commission to the development of a new strategy for the AFSJ, differentiating between an internal and an external dimension.

The following remarks are meant to outline the meaning of the newly discovered 'External Dimension'. They will start with some general explanations on the development of the area of freedom, security and justice (Sect. 2). Subsequently, details of the external dimension will be discussed (Sect. 3). Finally, these rather abstract ideas developed by the Council and the Commission will be brought to life with two recent examples from the field of organized crime and terrorism (Sect. 4). Of course one has to admit that talking about the external dimension of the AFSJ is talking politics. This means focusing on general challenges, objectives, issues, principles or policy instruments. For lawyers, especially those educated in a civil law country, talking about a general framework and not about certain legal provisions is not an easy task. Therefore, a fair warning has to be given: In case the readers are missing the hard facts on the external dimension of the AFSJ—there are almost none. And if this leads to a certain amount of discomfort and disappointment, please keep in mind: the author of these lines feels the same way!

2 The Area of Freedom, Security and Justice

The AFSJ was formally introduced as a new field of policy by the Treaty of Amsterdam in 1999. It replaced the earlier reference to 'Justice and Home Affairs' introduced by the Maastricht Treaty and reflects the idea that the maintenance of public order, internal peace and security is shared between the Member States and the EU.[2] Today it can be seen as one of the main objectives of the European Union. According to Article 3 TEU

> The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

A more detailed description of the practical consequences in this field can be found in Articles 67–89 TFEU. The EU policies mentioned here, e.g. asylum, immigration, border controls, prevention and combating of crime, cooperation between police and judicial authorities or mutual recognition of judgments in

[2] Wessel et al. (2011), p. 274.

civil and criminal matters, do not form a natural unity in terms of a clearly defined overall project.[3] They should rather be seen as a general framework for a multitude of instruments following one common goal: ensuring the critical balance between general security concerns and individual fundamental rights. They primarily aim at protecting the European Union from the *inside*.

3 The External Dimension

3.1 Historic Developments

The external dimension of the AFSJ is a rather new phenomenon. Initial reference can be found in Nr. 51 of the Presidency conclusions of the European Council of Santa Maria de Feira of 19–20 June 2000. It refers to the "European Union's external priorities in the field of justice and home affairs to be incorporated in the Union's overall strategy as a contribution to the establishment of the area of freedom, security and justice." From the very beginning these aspects were not intended to become an autonomous policy domain. Instead, they were seen as a mere 'dimension' of the EU's area of freedom, security and justice policies in the first and third pillar, and as a specific aspect of its external policies of the first and second pillar.

The external dimension was formalized for the first time in the "Hague Programme on strengthening freedom, security and justice in the European Union" adopted in 2004.[4] In this strategy paper the European Council outlined a series of policy domains requiring external action to be taken. These encompass the 'external dimension of asylum and migration' and comprise the establishment of partnerships with third countries, including countries of origin and of transit, as well as the conclusion of visa facilitation and readmission agreements. The external dimension is also explicitly singled out as regards the possibility of providing technical assistance to third countries in the field of counter-terrorism. In a more general way, the authors of the Hague Programme also stress the fact that "the European Council considers the development of a coherent external dimension of the Union policy of freedom, security and justice a growing priority." All powers available to the Union, including external relations, should be used in an integrated and consistent way to establish the area of freedom, security and justice.

The main policy orientations of the external dimension are further specified in two other strategy documents published at the end of 2005, "A strategy on the external dimension of the area of freedom, security and justice" by the

[3] Walker (2004), p. 5; Wessel et al. (2011), p. 273.

[4] OJ C 53 of 3 March 2005, p. 1.

Commission[5] and "A strategy for the external dimension of JHO: Global freedom, security and justice" by the Council.[6] They provide additional details as to objectives, principles, priorities and instruments available in this area.

In 2010 the *Stockholm Programme* for the area of freedom, security and justice was adopted.[7] As part of this ambitious text, Chap. 7 deals with "Europe in a Globalized World – The External Dimension of Freedom, Security and Justice." At the very beginning, the European Council emphasizes the importance of the external dimension of the Union's policy in the AFSJ and underlines the need for the increased integration of these policies into the general policies of the Union. The ambition laid down in the Stockholm Programme is that the external dimension of the AFSJ becomes an organized framework policy, keeping in mind the strongly complimentary relationship between internal and external aspects of this policy field.[8]

3.2 Challenges

The Commission[9] singled out five principal external challenges that have to be addressed by the external dimension of the AFSJ, namely

(1) Terrorist attacks, like those on 9/11, in Madrid 2004 and London 2005, which have led to an increased international commitment to combat terrorism;
(2) The ever-growing sophistication in organized crime, including money laundering or trafficking in drugs, persons and arms, which can only be countered through improved law enforcement and judicial cooperation as well as support for capacity-building in third countries;
(3) Illegal immigration confronting the EU with the need to elaborate a comprehensive approach and to address its root causes and its impact on countries of origin and transit;
(4) The failure of institutions, such as the judiciary and law enforcement bodies, in weak states and troublespots throughout the world and
(5) The need for legal certainty and predictability in relation to cross-border transactions in an increasingly global economy.

[5] COM (2005) 491 final, 12 October.
[6] 14366/3/05, 30 November.
[7] OJ C 115 of 4 May 2010, p. 1.
[8] Wessel et al. (2011), p. 286.
[9] COM (2005) 491 final, p. 3.

3.3 Objectives

For good reasons, the Commission and the Council of the European Union are convinced of the fact that the *external* dimension contributes to the *internal* area of freedom, security and justice by sharing and promoting European values with third countries outside the EU.[10] Fostering the rule of law and promoting the respect for human rights and international obligations through international cooperation are seen as especially crucial points. The objectives seem to be clear: societies based on common values will be more effective in preventing domestic threats to their own security and as well as more able and willing to cooperate against common international threats. Recent terrorist attacks in Bali, Madrid, London, Amman, and Oslo underline the fact that it is no longer useful to distinguish between the security of citizens inside the EU and those outside.[11]

It is not surprising that the Commission's and Council's strategy for the external dimension stresses the idea of *geographic prioritization*. This means that comprehensive policies encompassing *all* aspects of freedom, security and justice will only be developed with priority countries such as neighborhood[12] and candidate countries or the US, while the cooperation with other countries focus on specific issues, e.g. border management issues with regard to countries from North Africa. The EU enlargement process in particular emphasizes the role of the European Union as a 'rule generator'.[13] New Member States are obliged to adopt and implement the Union *acquis*, including the existing legal framework in criminal matters, as an indispensable condition for their joining the EU. But appropriate means to secure the AFSJ are not to be found on a bilateral or regional level alone. The EU and its member states also have to face challenges on a multilateral level. The participation in multilateral approaches can be seen as another pillar to support and protect 'Fortress Europe'. Possible examples are the participation in UN Conventions, like those on Transnational Organized Crime or against Corruption or international processes of standard setting, like the Financial Actions Task Force's Recommendations on Money Laundering.

In short, the idea of an external dimension of the AFSJ means to extend EU standards for good governance, democracy, the rule of law and respect for human rights to as many neighboring and third states as possible to reach more common ground in the fight against transnational elements of crime. This means the purpose of the strategy on the external dimension is twofold: firstly, to contribute to the successful establishment of the internal area of freedom, security and justice by creating a secure external environment, and secondly, to advance the EU's external relations objectives by promoting the rule of law, democratic values and sound

[10] COM (2005) 491 final, p. 4; 14366/3/05 REV 3, p. 2.

[11] 14366/3/05 REV 3, p. 2.

[12] Regarding the EU's neighbourhood policies see Mitsilegas (2007), pp. 465–469; Seidelmann (2009), pp. 261–282.

[13] Mitsilegas (2007), p. 459; on the general aspects see Cremona (2004), pp. 557–558.

institutions.[14] All in all, the development of the external dimension of the AFSJ is mainly triggered by the prior internal development of this area.[15] In the long run the results of these internal endeavors shall become Europe's 'export hits' for the rest of the world.

3.4 Instruments

The EU can choose from a wide variety of instruments to take the necessary steps for an effective external cooperation with third countries.[16] Due to the limited space for this introduction, only a few examples can be given here. But as a whole they should highlight the fact that specific situations in different countries can be dealt with a specifically tailored approach. One of many possible tools are *bilateral agreements*, e.g. on mutual legal assistance, extradition, readmission or visa facilitation. Also the *EU enlargement process* with Croatia and Turkey and the *stabilization and association process* with the Western Balkans include freedom, security and justice priorities. *Regional organizations* such as the Baltic Sea Task Force, the Asia-Europe Meeting (ASEM) or the Euro-Mediterranean Partnership or 'Barcelona Process' bring together actors from EU members and non-member states. Another important instrument is an *operational cooperation* between institutions like Europol, Eurojust or Frontex combined with a network of liaison officers and their counterparts in third countries. And finally, the general importance of a comprehensive *development policy* has to be stressed, including the development of institutions like an independent judiciary or a functioning police force. Addressing weak governance and state failure are key to breaking the cycle of conflict, poverty and instability as can be seen from recent developments in North Africa, the Middle East and the Gulf countries since the beginning of 2011.

4 Competences

With all this in mind, the question arises to what extent the EU is competent to become active in external actions in the AFSJ. As a result of the Lisbon Treaty, the former provisions in Title IV TEC on 'visas, asylum, immigration, and other policies related to free movement of persons' were combined with the provisions in former Title VI TEU on 'police and judicial cooperation in criminal matters' in the new Title V TFEU. The result is to be found with the current Articles 67–89 TFEU labeled 'Area of freedom, security and justice'. But altogether, the Lisbon Treaty did not bring specific external competences, at least not in relation to the

[14] COM (2005) 491 final, p. 11.

[15] De Bruycker and Weyembergh (2009), p. 210; Wessel et al. (2011), p. 284.

[16] COM (2005) 491 final, pp. 7–9.

judicial cooperation in criminal matters or police cooperation.[17] On the other hand this does not mean that external competences do not exist at all. The wording of Article 216(1) TFEU, the general legal basis for the conclusion of international agreements, does not exclude the AFSJ. Thus, it can be concluded that international agreements concerning the AFSJ cannot only be based on a decision adopted in this area but also on the fact that it is necessary in order to achieve the objective referred to in Article 3(2) TEU which proclaims the creation of an area of freedom, security and justice. Article 216 TFEU extends the ERTA doctrine, according to which the treaty making power does not derive solely from explicit mandates in the Treaties, to areas of cooperation previously falling under the non-Community pillars. This does not mean bypassing the principle of conferral (Art. 5 TEU) as Article 216(1) TFEU explicitly refers to "all objectives referred to in the Treaties" including, of course, matters relating to the AFSJ.

5 Examples

For the purpose of illustrating how the external dimension influences the EU's practice in the AFSJ, two out of many possible examples may be of special interest.

5.1 USA

A first prominent example is the cooperation between the EU and the US government which was spurred on by the atrocities of the 9/11 attacks but dates back to the 1970s with the informal Trevi Group and later on with the Transatlantic Agenda of 1995. Highlights of this cooperation are the agreements on extradition[18] and mutual legal assistance.[19] These agreements[20] seek to fine-tune the existing bilateral relations between the EU Member States and the US in terms of judicial cooperation. But they are not short of serious challenges for the protection of human rights

[17] In relation to immigration policy see Article 79(3) TFEU: "The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfill the conditions for entry, presence or residence in the territory of one of the Member States."

[18] Agreement on Extradition between the European Union and the United States of America, OJ L 181, 19 July 2003, 27.

[19] Agreement on Mutual Legal Assistance between the European Union and the United States of America, OJ L 181, 19 July 2003, 34.

[20] For further information see Mitsilegas (2007), pp. 471–477.

and basic freedoms. Though the agreement allows extradition only on the condition that the death penalty if imposed will not be carried out, it does not include any provision that allows for extradition to be refused due to *human rights concerns*. Another significant challenge for the protection of human rights relates to the *insufficient level of data protection*. The agreement on mutual legal assistance requires the parties to provide legal assistance for the exchange of a wide range of information for the purpose of identifying information regarding natural or legal persons convicted or otherwise involved in a criminal offence. In addition to this, another agreement between Europol and the USA[21] allows the exchange of data on a wide range of crimes and the delivery of data by Europol to numerous US authorities, including those at a local level. Similar concerns can be raised with regard to the EU–US Agreement of 2007 on the processing and transfer of passenger name records data[22] or the Swift Agreement of 2010 which allows American justice authorities to access data from SWIFT, the Society for Worldwide Interbank Financial Telecommunications, a cooperative of banks and other financial institutions that facilitates trillions of dollars in daily international transactions. Thus, EU external cooperation in criminal matters is being undertaken without paying sufficient attention to European core values, as they are embodied in the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union. The result is a contradiction between expectations and reality for the EU's endeavors to pursue the external dimension of the AFSJ.

Thus, *two lessons* can be learnt from the cooperation between the EU and the USA: *firstly*, that the aim of the external dimension of the AFSJ to export and share the European Union's beliefs and values with regard to human rights and the rule of law with third countries reaches its limits when dealing with politically influential and powerful partners like the US,[23] and *secondly*, that the internal deficits concerning the protection of sensitive personal data within the EU are being transferred to an external level.

5.2 *Afghanistan*

Let us look at the situation through a second example now. It is common knowledge that there are substantial and serious challenges facing the EU in its relations with Afghanistan and the wider South Asian and Central Asian regions. The resurgence of Taliban attacks in the South of Afghanistan in particular demonstrates that the security situation is still uncertain. The fragmented and porous border with Pakistan remains an issue, especially after the killing of Al-Qaeda leader *Osama bin Laden*

[21] Agreement between the United States of America and the European Police Office, http://www.europol.europa.eu/legal/agreements/Agreements/16268-2.pdf.

[22] Mitsilegas (2007), pp. 477–487.

[23] See Mitsilegas (2007), p. 496 as well as De Bruycker and Weyembergh (2009), p. 228.

by US troops in May 2011. Afghanistan is estimated to be responsible for 90 % of the world's opium production, locking the country into a cycle of poverty, organized crime, corruption and instability. To tackle these problems, the EU has taken a multitude of steps using various instruments from development policy to operational cooperation.[24] Afghanistan benefits from co-operation funding under the Asia-Latin America Regulation (ALA), a legal mechanism established by the EU in 1992 to provide aid to selected countries from these regions of the world. Three different projects adopted by the Commission in 2005 provide a budget of 70 million Euros for supporting governance, 11.5 million for the election process and another 26.7 million for counter-narcotics initiatives. In addition to this, the EU provides for training courses for the Afghan police force as well as financial means to pay for the salaries of local police officers, as the Afghan government still relies on international support to contribute towards the costs of their civil service. Through the Europe Aid Cooperation Office, the European Commission adopted a project to assist the government with Integrated Border Management Support in 2006, targeting the North-East of the country. At Council level, the EU has established a Regional Working Group to monitor the drugs problem in association with the Afghan Ministry for Counter Narcotics. In 2005, the EU contributed 250 million Euros to the Counter Narcotics Campaign operated by the Afghan government. All these actions are designed to directly fight the root causes of organized crime and terrorism. The existence and training of Islamist terrorists is to be stopped in their respective home countries, before they travel to Europe and start their deadly work here. And the trafficking of drugs shall be avoided at its very beginning by destroying the poppy fields in the Hindu Kush region before the manufacturing of drugs and their transport to EU Member States can even begin.

6 Concluding Remarks

Hopefully these two examples may help to illustrate not only the benefits but also the risks of the EU's endeavors in the external dimension of the AFSJ. The external dimension of EU policy fields usually becomes visible once the internal competences have been used. The AFSJ does not establish an exception to this rule. The need for the EU to become active externally in this area after a long period of more or less intergovernmental cooperation has never been more urgent than today. Nevertheless, it is doubtful whether the EU Member States are really up to the challenge. For centuries Europe claimed the importance of democratization for the countries in North Africa and the Middle East. Now that one dictator after another is being swept away by people seeking freedom, security and justice the EU and its Member States seem to waver. At the Italian Island of Lampedusa, for

[24] See European Parliament, the external dimension of the EU's area of freedom, security and justice in Relation to China, India and Afghanistan, Briefing Paper, Brussels 2006, pp. 22–32.

example, refugees from Tunisia, Egypt and Libya arrive every day after a dangerous boat ride risking their lives and those of their families for the hope of freedom, security and a little piece of the abundant wealth in most of the EU Member States. Instead of acting as one entity to help those people in need, all the EU was able to come up with was a narrow-minded skirmish and a desperate attempt to shift the financial burden caused by these immigrants to neighboring countries. The lack of a common sense of unity and responsibility within the EU, which is also reflected in the failed attempts to handle the financial crisis, sends the wrong message to possible cooperation partners in third countries. It seems downright absurd to promote values like democracy, human rights or the rule of law outside EU borders and then pull back the helping hand as soon as these countries finally try to adjust to these standards. As the humanitarian drama of the Lampedusa refugees points out, there is an enormous potential for the European Union to make a fool of itself.

In part the problems may arise from the fact that the subject matters assembled under the label 'area of freedom, security and justice' do not form a natural unity in terms of a clearly defined project. The external dimension lacks legal certainty and its constitutional footing and boundaries are unclear.[25] As the internal and external developments tend to reinforce one another, it comes as a small surprise that the external dimension features very little coherence as well. It will take the combined forces of all EU Member States to put into effect the great expectations raised by the pompous promise of an area of freedom, security and justice. Otherwise Lampedusa will become more than just an island—a symbol of the European Union's missed chance in history.

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[25] Wessel et al. (2011), p. 277.

The Protection of the Right of Freedom on the European Union Level: The European Arrest Warrant and Non-custodial Pre Trial Measures. The Guideline of the Principle of Proportionality: An Interpretive Perspective

Giuseppe Di Chiara

Contents

Abstract "Protection of fundamental rights in particular must be central to the operation of the system:" this formula, found at the heart of the most recent official assessment of the EAW (2011), perfectly summarizes, in terms of political policy, the progressive shift of emphasis from efficiency and security towards the primacy of the protection of individual rights across the entire field of EU measures restricting individual liberty. The experience gained in terms of the principle of proportionality thus becomes a basic paradigm for the interpretation of the system

The chapter contributions from the three first Parts of this book are quoted with the only reference to the Author's surname, either above or below, and the number of the paragraph concerned.

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in terms of applied law. The three levels through which the filter of proportionality has operated in the system of the EAW (multilevel gelling of the legislative choices; margins for evaluative discretion attributed to the judicial authority; official retrospective assessments of practice, which trigger off reinvestments in terms of "returns in circulation") offer significant tools for a wider interpretation, which extends to the phenomenon of the circulation of non-custodial pre trial measures, to which the relevant framework decision of 2009 refers. In the field of pre trial measures the harmonization of the member states' national legislations seems today to remain hazy, a mere underlying guideline: a methodological backbone that almost seems—paradoxically—to have lost its sheen but which needs to be brought back to the heart of the debate.

Abbreviations

CCP	Code of Criminal Procedure
EAW	European Arrest Warrant
EU	European Union
FD EAW	Framework Decision on the European Arrest Warrant
TEU	Treaty on the European Union

1 Efficiency, Personal Freedom and Fundamental Rights in the EU: Shifting Priorities and Changing Policies

Dostoevsky said that if you want to measure the degree of civilization of the society in which you live, you should look at its prisons. This idea lends itself perfectly to the relationship between human legal civilization and the modernity of the system for protecting the individual freedoms of a defendant on trial. The aim of these reflections is to illustrate, without in any way claiming to be comprehensive, the development of the EU protection system, looking at its priorities and shifts of emphasis which, although not always clearly visible, have characterized recent years.

It will in this sense be important to graft the experience of the EAW onto the new EU systems for the protection of fundamental rights triggered by the approval of the Lisbon Treaties. We will see that the initial emphasis on efficiency has more recently given way to increasing sensitivity towards the protection of the individual rights involved, by increasing on one hand the scope for judicial assessment, and on the other—as a natural counterpart—the multi-level elasticity of the system. In this regard, it is characteristic that precisely in the scope of the most recent assessment document on the experience of the EAW has it been reaffirmed, on the basis of

recent policy indications, that the "protection of fundamental rights in particular must be central to the operation of the EAW system."[1]

I should immediately clarify the intentions of my paper: to bring to the light the links existing between the experience of the EAW, variations over time of the emphases found in official assessments of the experience, and examples of cooperation concerning the mutual acknowledgement and circulation of non-custodial pre trial measures. I moreover intend to examine some possible repercussions—at present rather implicit and vague—in terms of harmonizing legislation with regard to the restrictions of personal liberty *ante iudicatum*.

2 The Experience of the EAW and the History of the Principle of Proportionality: the Three Levels

We first need to focus on the experience of the proportionality check with reference to the progress of the EAW in the almost 7 years since it came into force (only Italy, as is known, adapted its own system with a huge and widely criticised delay and by means of legislation that aroused, at every level, no small number of its own problems). In this regard, I will take here into consideration the case of the EAW as a pre trial measure in the strict sense, excluding from my discussion the European warrants issued following a definitive custodial sentence on conviction.

The principle of proportionality, by now consolidated, as far as regards the exercise of EU competences, by Article 5 TEU, is certainly not a recent acquisition in the field of applied law. According to its classic deconstruction by German legal scholarship, proportionality is to be interpreted in terms of *suitability* (that the measure adopted to pursue an aim is able to achieve this aim or at least to considerably facilitate its achievement), of *necessity* (there is the obligation to choose, among the various possible solutions, the one that implies the achievement of the objective through the minimum sacrifice of conflicting interests) and of *adequacy* (proportionality in the strict sense: the negative side effects caused by the measure must not be disproportionate to its advantages, and this requires a comparative assessment, involving a reflection on the pros and cons).[2]

Proportionality and adequacy are, moreover, not new concepts in Italian legislation and practice in the field of restrictions of personal freedom during trial. The concrete choice of the measure to be applied to the case at hand is performed by the judge, applying the rules of proportionality and adequacy. By adequacy, Article 275 of the Italian CCP means precisely the principle of the least sacrifice necessary

[1] COM (11 April 2001) Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, 175, para 6.

[2] On this issue see, by way of example, Sandulli (2006), pp. 4643 ff., and Cognetti (2011), pp. 12 ff.

(one has to choose the measure that, with the minimum sacrifice possible of individual liberty, allows the intended pre trial aim to be achieved).

The judgement of proportionality is, meanwhile, much more elastic, as is clear from the wide-ranging (not to say vague) legislative formula used: the measure must be proportionate "to the seriousness of the fact and to the punishment that has been issued, or that one deems may be issued." This implies a finding of fact[3] and a prognosis, as things stand, of the possible future punishment, including the conditional suspension of sentence.

The recent report by the EU commission (quoted above) on the implementation, in the period following 2007, of the framework decision of 2002[4] dedicates particular attention to the issue of proportionality: this is the severest example of the various criticisms which over recent years have been aimed at the implementation of the EAW and which will be useful to examine briefly.

The Commission report of 2011[5] criticizes the indiscriminate use of the tool that sometimes emerges in operational practice:

> Confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences. In this context, discussions in Council arising from the conclusions of the Member State evaluations show that there is general agreement among Member States that a proportionality check is necessary to prevent EAWs from being issued for offences which, although they fall within the scope of Article 2(1) of the Council Framework Decision on the EAW, are not serious enough to justify the measures and cooperation which the execution of an EAW requires.

It continues by outlining the contents that should be included in the weighing up requested of the issuing authority:

> Several aspects should be considered before issuing the EAW, including the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority and a cost/benefit analysis of the execution of the EAW. There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States. It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based

The 2011 report energetically and effectively reviews all the issues emerging in the course of the second phase of the EAW experience. As its central purpose, it considers the weighing of the relative values of the issues at stake—and thus how to manage the evaluative discretion of the judicial authority regarding the decision on

[3] Zappalà (2011), p. 430.

[4] See footnote 1, para 5.

[5] See footnote 1.

whether to issue the EAW, which can be interpreted in terms of, as the English texts eloquently put it, "appropriateness"[6] and, thus, of the judgement of proportionality.

An investigation that aims to test its solidity can start with an initial analysis of method. It is useful, in this sense, to distinguish between three levels in applying the principle of proportionality in the experience of the EAW, each corresponding to a different "scale of hardness" in terms of the manoeuvrability and controllability *ex post* of the measure:

a) The legislative level: this is the basic level of access to choices of proportionality, articulated on the dual plane of EU legislation (the framework decision of 2002) and of its implementation in national legislations;
b) The judicial level: this involves weighing up the facts of the case and, therefore, the application of common sense[7] when considering framework-laws and the irreducible "givenness" of the basic facts;
c) The level of the (official) assessment of practice: this is a procedural level in the strict sense, which returns, circularly, through recommendations and intentions, to the first two levels, bringing to them new experience.

3 The First Level: Legislative Choices and the Principle of Proportionality

The legislative level reveals the anatomy of the principle of proportion: the level of general, abstract rules provides structure for and brings together, above all, choices of proportionality.

The mechanism of the EAW establishes thresholds below which the proceeding judicial authority is forbidden from issuing a measure. These thresholds have at times been unexpectedly raised by the implementing legislation of the Member States. The setting of a threshold implies an assessment of proportionality performed by the European legislator even at the time of the introduction of the mechanism. The legislator has reserved the tool only for serious offences, deeming its extension to less serious offences in terms of type and statutory penalty incongruous and thus prohibited. Once these thresholds have been taken into account, however, there is no automatic mechanism: the judicial authority "may" (and not "must") issue the warrant (Art. 2 FD EAW). The evaluative discretion that is allowed here implies a complex weighing up of costs and benefits, revolving in fact around the principle of proportionality.

The first level is, moreover, internally composite: the framework decision needs to be implemented by the national legislations of the member countries. Italy has,

[6] See Final Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedures between Members States," 28 May 2009, Council 8302/4/09, para 3.9.

[7] Regarding the reference to good sense in the analysis of the contents of the principle of proportionality, see the superb study by Bachmaier Winter, above.

for example, made excessively restrictive choices, and was severely criticized by the results of the fourth round of assessments on the experience of the EAW.

The Italian statute of 2005[8] outlines, for the purposes of the admissibility of the EAW, higher thresholds than those indicated by the framework decision, and the test of proportionality is couched in extremely incisive terms by the *vademecum* of the Ministry of Justice for the issue of the EAW.[9] This leads, in itself, to the result that the EAW is issued only in particularly serious cases. Having said that, the Report on Italy (2009)[10] clarifies that "the expert team in general commends the application by Italy of a proportionality test and would recommend other Member States to apply such a test."

It does not however fail to mention that the assessment team "has concerns that some Italian issuing authorities apply this test too restrictively, with the consequence that too little use is made of EAWs."

4 The Second Level: The Margin for Discretionary Choices in Assessment Falling Within the Competence of the Judicial Authority

We have already seen that the task of the level of legislative choices is to identify thresholds above which the tool "may" (not "must") operate: the choice is of the judicial authority, and it is here that we have the transition from the first to the second level.

When studying the aspects of judicial practice that characterize the second level, the experiences of Poland and Romania prove valuable.

The reports on Poland[11] and Romania[12] regarding the fourth round of assessments had highlighted that the practice in these Member States was to often issue EAWs, even when dealing with cases that, although in theory falling within

[8] The law in question is Law 69/2005, containing "Provisions for bringing domestic law into line with the framework decision 2002/584/JHA of the Council (13 June 2002) regarding the European Arrest Warrant and the procedures of surrender between member states."

[9] Vademecum per l'emissione del mandato di arresto europeo, issued by the Direzione generale per la Giustizia penale, Ministero della Giustizia, 2010, http://www.giustizia.bologna.it/it/Content/Index/683, para 3.5–3.7.

[10] Evaluation Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedures between Members States." Report on Italy, 23 February 2009, Council 5832/1/09, para 7.2.1.2.

[11] Council 14240/2/07, Evaluation Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedures between Members States." Report on Poland (7 February 2008).

[12] Council 8267/2/09, Evaluation Report on the fourth round of mutual evaluation "The practical application of the European Arrest Warrant and corresponding surrender procedures between Members States." Report on Romania (20 May 2009).

the scope of the framework decision, were found during assessment to be such that they did not merit the difficult path chosen.

The report on Poland, in criticizing the phenomenon, had recommended the member state (No. 8) "*to reflect at national level on the way to ensure that EAWs are issued only when the seriousness of the offence justifies the co-operation which the execution of the EAW will require.*" The Poland report also contained the recommendation (No. 24), aimed at other member states, to implement in their own domestic legislation an explicit *proportionality check*, making it possible to recognize offences that "*are not serious enough to justify the measures and the cooperation which the execution of an EAW requires.*" There followed, with the aim of consistency, the recommendation (No. 34), aimed at the EU, to insert in the framework decision "*a proportionality requirement*" for the purposes of the EAW, clarifying however, at the same time, that this proportionality check would need to be performed "*in the issuing State only*."

The Romanian report had set itself the task of identifying a further aspect that closes the loop examined here and deserves particular emphasis: the data collected by the group of experts had shown how the authorities of Romania "*somehow almost automatically opt for detention without considering any other options*" (No. 7.3.1.3, listed under the formula "*Non-custodial preventive measures*"). This had led the report, in its proposals section, to recommend Romania (No. 10) to "*take the necessary steps to promote the use of preventive measures alternative to detention in EAW cases where appropriate, including – if necessary – amending Article 90 of the implementing law*."

In other words, to substitute (to implement a new judicial culture: "*the necessary steps to promote the use*") the "rigid automatisms" for good evaluative discretion in the presence of preventive systems which are not mono-modular but structured, in regulatory terms, to include a vast array of pre trial measures.

5 The Third Level: Official Retrospective Assessments of the Practice and Reinvestments of "returns in circulation"

The third and final level comprises the official assessments of the practice. Consider, in this regard, the final report on the fourth round of assessments,[13] which dedicates a central space to the *proportionality check* (§ 3.9 and recommendation 9), clarifying, its functions and contents:

> Basically, this proportionality test is understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing an EAW in the light of the circumstances of the case. The idea of appropriateness in this context encompasses different aspects, mainly the seriousness of the offence in connection

[13] See footnote 6.

> with the consequences of the execution of the EAW for the individual and dependants, the possibility of achieving the objective sought by other less troublesome means for both the person and the executing authority and a cost/benefit analysis of the execution of the EAW.

Having specified that the fourth round of assessments brought to light a significant discontinuity and inconsistency in the management of the proportionality check by national authorities (both legislative and judicial: there are thus included both the first and second level) of member states, the report expresses a wish (including here the "return in cycle" already mentioned) that the point be made the subject of regulatory intervention, based on "a wide consensus" that the proportionality check should not be performed by the issuing authorities. The report makes an explicit recommendation (no. 9) in this sense, specifying—with regard to the tasks of the *conditores*—that "the issue of proportionality should be addressed as a matter of priority."

We cannot, however, yet consider particularly significant the following data concerning EU legislation in the final report on the fourth round of assessments: the EU Council, in the relevant follow-up report,[14] decided only to update the European EAW manual,[15] clarifying the nature and contents of the proportionality check.

> The competent authorities should, before deciding to issue a warrant, consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include ensuring the effective protection of the public and taking into account the interests of the victims of the offence.
>
> The EAW should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention. The warrant should not be issued, for instance, where, although preventive detention is admissible, another non-custodial coercive measure may be chosen – such as providing a statement of identity and place of residence – or one which would imply the immediate release of the person after the first judicial hearing. Furthermore, EAW practitioners may wish to consider and seek advice on the use of alternatives to an EAW. Taking account of the overall efficiency of criminal proceedings these alternatives could include:
> – Using less coercive instruments of mutual legal assistance where possible.
> – Using videoconferencing for suspects.
>
> By means of a summons
> – Using the Schengen Information System to establish the place of residence of a suspect.
> – Use of the Framework Decision on the mutual recognition of financial penalties.
>
> Such assessment should be made by the issuing authority.

[14] Council 8436/2/10, Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European Arrest Warrant, during the Spanish Presidency of the Council of the European Union. Draft Council Conclusions (28 May 2010).

[15] Council 17195/1/10, European Handbook on how to issue a European Arrest Warrant, Revised version (17 December 2010), para 3.

6 Proportionality in Macro-Area Choices and Circulation of Non-custodial Pre Trial Measures: The Framework Decision of 2009

The scenarios are therefore clear: the EAW is "the first legal instrument based upon mutual recognition of decisions in criminal matters" and "implies a radical change from the old extradition system;"[16] however—as has been authoritatively specified on the institutional level—"in criminal matters, the principle of mutual recognition must apply at all stages of the Procedure" and "must extend to other types of judgment."[17]

The field of pre trial measures is not only an integral part of this prospective development of the system but, moreover, should be involved as a priority.

There are multiple issues at stake: where, in the pre trial framework, the circulation of pre trial measures should be limited to the EAW alone, to the exclusion therefore of less significant measures, this would be translated in terms of the inefficiency of the system or, worse, of a levelling upwards where cross-border cooperation is considered indispensable. There is thus also at stake a pregnant reading of the protection of personal liberty and of the presumption of innocence, which would acquire value where the issue of the EAW could be replaced with a less serious, yet still effective measure, along the lines of the "lowest sacrifice necessary," for the purposes of satisfying the preventive needs deemed to exist in the case at hand.

We find in these scenarios first the proposal of a Framework Decision on the European pre trial order in the course of preliminary investigations[18] and, subsequently, the effectively more realistic framework decision 2009/829/JHA of the EU Council "on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention."

The *Consideranda* of the Framework Decision of 2009, whose term of implementation is established as 1 December 2012, eloquently establish where to insert the new tool: it "has as its objective the monitoring of a defendant's movements in the light of the overriding objective of protecting the general public and the risk posed to the public by the existing regime, which provides only two alternatives:

[16] European Handbook on how to issue a European Arrest Warrant, Revised version, wr., Introduction.

[17] COM (10 June 2009) Communication from the Commission to the European Parliament and the Council about "An area of freedom, security and justice serving the citizen" 262 final, para 3.1.

[18] COM (29 August 2006) Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, 468 final: the proposal of the Commission concluded an itinerary whose precedent was the Green Paper on mutual recognition of non-custodial pre-trial supervision measures [COM (2004) 562 final], accompanied by a precious working document (Annex) of the services of the EU Commission [Commission Staff working paper, SEC (2004) 1046], providing ample material for comparisons.

provisional detention or unsupervised movement" (No. 3). The measures provided for "should also aim at enhancing the right to liberty and the presumption of innocence in the European Union and at ensuring cooperation between Member States when a person is subject to obligations or supervision pending a court decision," since the objective is "the promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention, even where, according to the law of the Member State concerned, a provisional detention could not be imposed *ab initio*" (No. 4).

The Framework Decision on the circulation of non-custodial preventive measures draws clear fruit from the experience of the EAW: the basic device is, *mutatis mutandis*, etched out by the Framework Decision of 2002, as is the list of the 32 offences for which there is no concrete need for the check of double criminality, almost entirely borrowed from the tried-and-tested mechanism of the EAW.

The instrument, moreover, has many resources, especially if compared with the by now superseded project to introduce a European preventive measure: here, in much more manageable terms, pressure has been put on national legislation to encourage the extensive trans-border circulation of preventive measures.

Identifying the common threads that run through the experience of the EAW and the perspective of the reciprocal acknowledgement of non-custodial pre trial measures, it makes sense to find an emphasis above all on the issues of the protection of personal liberty and of the presumption of innocence.[19]

It is also worth mentioning the well-known circumstance that all the EU countries are individually members of the Council of Europe and, in this capacity, are subject to the ECHR: Articles 5 and 6 thus represent a common basis on which the instruments in question may be built.

7 Law, Music and "Movements Towards Harmony:" Final Considerations

We should also mention the meaning, in this field, of legislative harmonization, another key tool in strengthening and increasing the mutual trust between member states. The national legal systems of nearly all the 27 EU countries distinguish to a greater or lesser extent between various types of pre trial measures, conferring upon the judge varying margins of evaluative discretion. However, the various

[19] COM (14 June 2011). A further boost in this direction, although supported by a very cautious approach, is to be found, most recently, in the Green Paper on "Strengthening mutual trust in the European judicial area. A Green Paper on the application of EU criminal justice legislation in the field of detention," 327 final: this contains, moreover, a further emphasis of the viewpoint of the protection of basic rights such as the primary value of reference in the framework of security policies involving the protection of personal liberty during trial (see above, para 1).

mechanisms vary significantly, and suffer internally from the more or less marked rigidity of their systems.

Underlying the framework decision there is an implicit message in which we find perhaps the most disruptive force of the policy direction adopted, and one that heralds much wider developments: it is a strong signal against "rigid automatism," which would transform the judge from a protector of freedom to a mere provider of security, in contradiction with the traditional nature of his role.[20] The desire is that the individual states, almost along the lines of a premise "external" to a meaningful implementation of the framework decision of 2009, may increase the flexibility of their systems by entrusting the judge who has already positively decided on whether a pre trial measure should be issued, with a variety of choices regarding the *quomodo*, in respect of the presumption of innocence and of the protection of that highly flexible asset, the personal liberty of the defendant.

The ultimate message of the entire field (EAW and the circulation of non-custodial preventive measures according to the paradigm of mutual recognition) thus converges in the institutional desire for an increase in the multilevel flexibility of the various systems and of the macrosystem which results from it, in order to encourage the possible circulation of preventive measures, mutual recognition, legislative harmonization, and mutual trust, according to the spirit of Tampere.

It is precisely this symbolic message that thus becomes the leading line of the entire field: harmonizing the protection of the accused's personal liberty from the perspective of the protection of fundamental rights rather than of efficiency.

Mirelle Delmas-Marty, on the subject of harmonization, perceptively observed that the term evokes musical resonances that take us back to remote times, in which the law was associated with singing and poetry, but that the legal field is not the musical field, and harmonization should not be confused with harmony: the term, she continued, expresses only a movement towards harmony.[21] In the concrete area of the accused's personal liberty, this movement towards harmony, albeit with difficulty, has begun: the *diapason* has vibrated, more recognizably here than elsewhere; and predicting its implications becomes not only a challenge, but a commitment required of each one of us. Such intentions are imbued with a somewhat idealistic *sapientia iuris*, one might object, but it is precisely such visionary ideas that lie at the heart of Europe.

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Mutual Recognition and Transnational Confiscation Orders

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Contents

Abstract Transnational confiscation orders are getting more and more necessary for an effective fight against cross-border organized crime. The European Union has regulated international cooperation in this context on the basis of the principle of mutual recognition, by means of the Framework Decision 2006/783/JHA, of 6 October 2006. This contribution aims to offer a general overview of the system and of its functioning (scope of application, as well as proceedings in the issuing and in the executing State). Special attention is dedicated to the instruments promoting the protection of the rights of parties and of third parties, mainly of those more directly linked to procedural safeguards.

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Abbreviations

CISA	Convention Implementing the Schengen Agreement
EU FRCh	Charter of Fundamental Rights of the European Union
FD	Framework Decision
TEU	European Union Treaty

1 International Legal Cooperation and Cross-Border Confiscation

One of the most effective ways of combating organised crime is the confiscation of property obtained from the proceeds of criminal activity, including that obtained through money-laundering: depriving offenders of the economic benefits of their crimes is very effective both as a punishment and a deterrent, and is at times more powerful than the threat of imprisonment or the loss of other personal rights inherent to the main penalty.

As a result of the increasingly transnational scale of the activities of organised criminal groups and of money-laundering it is becoming more common to find that property to be confiscated is in, or has been transferred to, a State other than that in which the unlawful activity took place, or a State other than that in which the corresponding criminal proceedings have been initiated. The penalty of confiscation can only be imposed with the help of the authorities of the State where the property in question is held. These cases involve "cross-border" confiscation.

Cross-border confiscation can affect at least three procedural activities:

- The investigation, revolving primarily around identifying and locating the property to be confiscated if it is in a State other than that in which the criminal proceedings have been initiated.
- Securing the property, once it has been located, through protective measures while waiting for the court to come to a final decision regarding confiscation.
- The act of confiscation in itself, by which the person concerned is stripped of their ownership over rights to the property and it is decided how the property will be disposed of. The following pages will focus on the last of these three activities.

2 The European Union System of Mutual Recognition of Confiscation Orders

The European Union has implemented many legal tools regulating cross-border confiscation of property, clearly surpassing the achievements of the United Nations[1] and the Council of Europe.[2]

Specifically, the following can be considered the most important laws in the sphere of European legislation:

1. Joint Action 98/699/JHA of 3 December 1998, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime.[3]
2. The Protocol of the Convention on Mutual assistance in criminal matters between Member States,[4] of 16 October 2001, useful for investigating bank accounts and transactions (which gives access to information on what property and rights can be confiscated).
3. Framework Decision 2001/500/JHA, of 26 June 2001, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime.[5]
4. Framework Decision 2003/577/JHA, of 22 July 2003, on the execution in the European Union of orders freezing property or evidence,[6] which applies the principle of mutual recognition to decisions on pre-trial orders aimed at ensuring the effectiveness of a subsequent final confiscation order on property located in another State.
5. Framework Decision 2005/212/JHA, of 24 February 2005, on confiscation of crime-related proceeds, instrumentalities and property.[7]

[1] Convention of 1988 against Illicit Traffic of Narcotic Drugs and Psychotropic Substances; and Convention of 2000 against Transnational Organised Crime.

[2] Convention 141 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg in 1990; Convention 198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, signed in Warsaw in 2005.

[3] OJ L 333, of 9 December 1998 (amended by Framework Decision 2001/500/JHA of 26 June 2001, OJ L 182 of 05.07.2001).

[4] OJ L 326, of 21 November 2001.

[5] OJ L 182, of 5 July 2001.

[6] OJ L 196, of 2 August 2003.

[7] OJ L 68, of 15 March 2005.

6. Framework Decision 2006/783/JHA, of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.[8]
7. Decision 2007/845/JHA, of 6 December 2007, concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.[9]

The key to European legislation on this subject has been the application of the principle of mutual recognition to facilitate seizure, and above all, compliance with confiscation orders. It would be inappropriate at this time to discuss at length the meaning of mutual recognition, although it should be pointed out that this form of international judicial cooperation depends on the existence of mutual trust between the countries involved and is based on a specific premise, namely, the court conducting a case in the State of origin issues an order —in this case, a confiscation order— that is in itself immediately effective in other Member States. This means that transmission of the order from the issuing court to the court in the requested State obliges the latter, as a rule, to automatically enforce the order, leading, in this case, to seizure of the property described in the confiscation order. The decision of the issuing court should be dealt with by the requested court as if it were its own or that of another court in the same State. In this way, refusal to comply would be the exception to the rule.

It is important to note, however, that European legislation —and in this regard, the Framework Decision of 2006 is no exception— does not advocate extreme application of the principle of mutual recognition in the strictest sense of the term: to date, all legal instruments passed implementing the principle of mutual recognition have always subjected application to a series of circumstances and requirements, while including possible grounds for refusing recognition together with certain procedural safeguards. These measures are aimed at guaranteeing respect for the fundamental rights of the subjects involved in the criminal proceeding giving rise to the confiscation order.

3 Scope of the Mutual Recognition System: Harmonisation of the Concept of Confiscation

Above all, the Framework Decision system is applicable when both the country issuing the confiscation order and that which is obliged to recognise and enforce it are EU Member States.

The system is applicable solely to final confiscation orders issued by a judicial body as a result of proceedings involving one or more criminal offences [Arts. 1(1) and 2(c)]. If the confiscation order is not immediately enforceable, therefore, only

[8] OJ L 328, of 24 November 2006. Although the text dates from 2006, it was originally drawn up in 2002 following an initiative of the Kingdom of Denmark to adopt a Council Framework Decision on the enforcement of confiscation orders in the European Union (OJ C 184, of 2 August 2002). Given the limitations of this article, reference will only be made to Framework Decision provisions and not to the specific national laws implementing it.

[9] OJ L 332, of 18 December 2007.

precautionary measures —through freezing orders— can be requested, under FD 2003/577/JHA.

The mutual recognition system would, *a priori*, be applicable irrespective of the crime associated with the confiscation order. If, however, the crime in question is punishable in the issuing State with a custodial sentence of up to 3 years, and can also be considered to fall under certain categories defined in Article 6(1),[10] then recognition and enforcement of the confiscation decision cannot be subject to verification of double criminality. On the other hand, if none of the foregoing circumstances apply, the mutual recognition system is subject to the condition that the activity is also defined as an offence under the laws of the executing State [Arts. 6(3) and 8(2)(b)], although limits are applied with regard to tax infringements and exchange control.

Finally, with regard to property that can be subject to cross-border confiscation in this context, Article 2(d) is based on existing legal standardisation implemented by European authorities: European law makers, above all through FD 2001/500/JHA and FD 2005/212/JHA, aim to harmonise exactly what is implied by the term confiscation, and above all what kind of property can legally be confiscated, and under what conditions. The political-policing aim of these laws was to extend the scope of confiscation beyond property and rights *directly* linked to a criminal infringement —albeit related to the activity— with the result that, under the Framework Decision, it would be possible to apply cross-border confiscation orders to the following property:

1) Property that constitutes the instrumentality of the offence.
2) Property that constitutes the proceeds of the offence —the economical benefits of crime.
3) Property subject to a value confiscation, applied when, for whatever reason, the property directly linked to the offence cannot be confiscated. In this case, other property of «equivalent value» belonging to the offender can be confiscated.
4) Property confiscated in the State of origin under one of the extended powers of confiscation set forth in Article 3(1) and (2) FD 2005/212/JHA. An extended confiscation order allows the property of convicted offenders to be confiscated if the unlawful origin of the same is assumed but their acquisition cannot be linked, either directly or through a process of transformation, to the unlawful activity on which the proceedings are based.[11]

[10] The list of 32 types of infringement included in other European laws to which the principle of mutual recognition is applied.

[11] Specifically, always within the context of organised crime, properties can be confiscated in three circumstances:

a) The court, even based on circumstantial evidence, is certain that the property in question constitutes the proceeds from unlawful activities undertaken by the convicted offender for a period prior to their sentencing that the court considers reasonable (without the requirement of proving that it derives from the specific unlawful act in question).

b) The court, even based on circumstantial evidence, is certain that the property in question constitutes the proceeds from unlawful activities similar to those undertaken by the convicted offender for a period prior to their sentencing that the court considers reasonable.

5) The property confiscated in the State of origin under other extended powers of confiscation, such as those set forth in Article 3(3) FD 2005/212/JHA, that extends confiscation to third party assets (family members of the offender or the corporation controlled by the same).[12]

4 Proceedings in the Issuing State

The authority of the issuing State responsible for issuing the confiscation order (court, prosecutor, assets recovery agency) is the competent authority for deciding to transmit the confiscation order to another State for recognition and enforcement, and must issue a certificate, annexed to the Framework Decision, explaining to the recipient the elements defining the confiscation order. Because of this, the certificate must be translated into the official language, or one of the official languages, of the executing State, even though the States can declare that they will also accept a translation in one or more of the other official languages of the Institutions of the European Communities (Art. 19).

The certificate, together with the confiscation order (or a certified copy) must be transmitted to the authority of the executing State competent to recognise and execute it [Art. 4(2)]. There are two ways of determining to which State the order and the certificate should be transmitted, depending on whether an amount of money or specific items of property are to be confiscated:

– In the case of money, the order is transmitted to the competent authority of a Member State in which the competent authority of the issuing State has reasonable grounds to believe that the natural or legal person against whom the confiscation order has been issued has property or income [Art. 4(1)(I)].

– In the case of a confiscation order concerning specific items of property, this must be transmitted to the competent authority of a Member State in which there are reasonable grounds to believe that property covered by the confiscation order is located [Art. 4(1)(II)].

– In both cases, if there are no reasonable grounds indicating a particular Member State, the confiscation order may be transmitted to the authorities of the Member State where the natural or legal person against whom the confiscation order has been issued is normally resident or has its registered seat, respectively [Art. 4(1)(III)].

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c) The value of the property exceeds the legal income of the convicted offender, and the court, basing its decision on specific facts, is certain that the assets in question proceed from the unlawful activity of the convicted offender (reversal of burden of proof).

[12] In this case, FD 2005/212/JHA does not impose harmonisation. Therefore, Article 7(5) leaves it to Member States to decide that their courts will not recognise or execute the confiscation orders passed down in these cases: in this case, it is further grounds for refusing recognition and enforcement [cf. Art. 8(2)(g)].

The order and accompanying certificate should always be transmitted directly[13] between the competent authorities involved, without going through the central authorities.[14] Furthermore, given that transmission must be made directly from one authority to another, judicial authorities can make use of the contact points of the European Judicial Network, if necessary, to determine the specific authority with competence in the executing State. And if the confiscation order is received in the executing State by an authority that has no jurisdiction in the matter, it shall immediately, *ex officio*, transmit the order to the competent authority [Art. 4(4) and (5)].

Nevertheless, as a general rule, a confiscation order may only be transmitted to one executing State at any one time (Article 5.1). The provision does not preclude subsequent transmissions if enforcement fails in one State, *v.g.* in the absence of the property to be confiscated. Furthermore, in certain cases it can be logical to allow simultaneous transmission if this is required to ensure the order is effectively enforced:

- When specific property is confiscated, Article 5(2) allows simultaneous transmission to one of more executing States where: (1) there is reason to believe that the different items of property are located in different States; (2) information available to the issuing authority leads it to believe that the property is located in one of the States to which the order is transmitted (but cannot accurately and safely specify which); and (3) the confiscation in question requires, for whatever reason, action to be taken in more than one State.
- If the confiscation involves amounts of money, simultaneous transmission is allowed when the assets needed to cover the confiscation order are located in various different States, or when no freezing order has been issued in any State, with the resulting danger that the assets could disappear [Art. 5(3)].

5 Proceedings in the Executing State

Once the confiscation order has been received in the executing State by the competent authority, it must be immediately recognised and appropriate steps taken to enforce it, provided there are no grounds for refusal or postponement [Art. 7(1)]. Specifically, the Framework Decision sets forth that recognition must be

[13] The Framework Decision does not specify the transmission procedure, and only demands that any means capable of producing a written record, under conditions allowing the executing State to establish authenticity, should be used [Art. 4(3)]: it is left to each national legislation to define these methods.

[14] Nevertheless, Article 3(2) does contemplate that Member States may designate one or more central authorities responsible for the administrative transmission and reception of the confiscation orders and to assist the competent authorities, "if it is necessary as a result of the organisation of its internal system" (considering, probably, the UK and Ireland).

made *without further formality*, meaning that the recognition procedure will not be contradictory. This, in turn, affects the way in which grounds for non-recognition or postponement of recognition can be brought to bear: the executing court may only assess, *ex officio*, those that arise directly from the request. For this reason, it must be possible, once recognition has been given and enforcement proceedings are initiated, for the subjects affected by the order to assert any non-recognition grounds they think are pertinent: this is why Article 9(1) makes it compulsory for States to provide "legal remedies against the recognition and execution of a confiscation order" for pleading the grounds for non-recognition. These remedies, however, may not be used for challenging on substantive grounds the decision to issue the confiscation order in the issuing State [Art. 9(2)].

Once the foreign confiscation order has been recognised, the court "shall forthwith take all the necessary measures for its execution," i.e., the property must be found and seized. When the property has already been frozen under FD 2003/577/JHA, recognition of the confiscation order will modify the conditions under which it is kept, enabling it to be disposed of as ordered.

Execution of the confiscation order is governed by the law of the executing State [Art. 12(1)], although certain particulars have been established:

- Confiscation of a specific item of property can be changed to confiscation of its equivalent value if so agreed by the issuing and executing authorities, and if provided for under the laws of both States [Art. 7(2)].
- Confiscation of an amount of money, if payment is not obtained, can be enforced on any item of property available for that purpose [Art. 7(3)].
- Enforcing confiscation of a monetary amount could involve converting this into the currency of the executing State. In this case, the rate of exchange in force at the time of issuing the confiscation order shall be applied [Art. 7(4)].
- The executing State may not impose custodial sanctions or other means of limiting individual freedom as alternative measures if it is not possible to enforce the confiscation order, even if this is provided for in its national laws, without the consent of the issuing State [Art. 12(4)].

The executing State might also receive several confiscation orders from other European Union Member States that clash (*v.g.* because they refer to the same specific item of property, or when the subject in question has insufficient funds to satisfy several monetary confiscations orders). In these situation, it is left to the executing State to decide, according to its laws, which orders should be enforced — in detriment to the others— after taking all the circumstances into consideration, in particular if one or more of said assets had been frozen; the relative seriousness and the place where the offence was committed; and timing issues, i.e., the date the orders were issued and the date on which they were transmitted (Art. 11).

If the confiscation order is withdrawn in the issuing State or is no longer enforceable (*v.g.,* if an appeal has been lodged), the issuing court is obliged to immediately notify the executing court so that they may terminate enforcement (Article 15). In some case it may also be necessary to take measures to re-establish the situation existing before execution, or to reimburse the subject of the confiscation order [arg. *ex* Art. 18(1)].

6 Instruments Protecting the Rights of the Parties and of Third Parties

Article 1(2) of the Framework Decision establishes that the provisions of the same may never affect the obligation to respect the fundamental rights and fundamental legal principles enshrined in Article 6 TEU. This is a generic statement that European lawmakers include systematically in all legal texts drawn up to implement judicial cooperation on criminal matters; it obliges Member States to incorporate the provisions of the framework decision or directive in such a way as not to compromise fundamental rights. In other words, it prevents national lawmakers from using the obligation to implement framework decisions as a pretext for approving laws that do not conform to the standards set forth in Article 6 TEU.

Accordingly, several provisions of the Framework Decision emphasise that confiscation orders cannot be recognised and enforced without accommodating the corresponding mechanisms designed to protect the parties and third parties. This is the purpose of the rules governing non-recognition, postponement of enforcement, simultaneous execution of a single confiscation order and appeals against the decisions of the issuing and executing courts.

6.1 Non-recognition and Non-execution

Automatic recognition and execution of the confiscation order can be denied if the court of the executing State detects certain grounds for the same. On this point, the Framework Decision does no more than provide a list of possible grounds for non-recognition or non-execution, leaving it to national lawmakers, when incorporating the Framework Decision into their legal system, to decide which to include, and therefore, which will be given the status of grounds for refusal.

Specifically, the Framework Decision, in Article 8, lays down the following grounds:

1) No certificate is provided, or the certificate is incomplete, or does not correspond to the order;
2) Execution of the confiscation order would be contrary to the principle of *ne bis in idem*;
3) There is no double criminality;
4) There is some kind of immunity or privilege under the law of the executing State which would prevent the execution of a domestic confiscation order;
5) There are rights that make it impossible to execute the order;
6) The person affected by the confiscation order was not present during the proceedings in which the confiscation order was issued;
7) Under the laws of the executing State, the issuing State infringes certain jurisdiction criteria;

8) The order was issued under the extended powers of confiscation that are non-compulsory according to the FD 2005/212/JHA;
9) The statutory time limit of the confiscation order has expired.

The list is long, but what is important to note for the moment is that some items —2,5 and 6— are clearly tools for protecting the fundamental rights of the subject of the criminal proceedings, and even those of third parties.

6.1.1 Ne Bis In Idem

The prohibition of *bis in idem* is one of the basic guarantees of criminal proceedings: European lawmakers clearly accept this, and consider it a fundamental right, as set forth in article 50 EU FRCh. However, it can be difficult to determine the scope of the *ne bis in idem* principle in the context of confiscation orders.

Generally speaking, this reason for refusal is used when the criminal proceedings giving rise to the confiscation order in the issuing State have been conducted in breach of the ban on double jeopardy: the order will not be recognised, therefore, when it has been issued in the context of a "second proceedings" with the same scope as a previous proceeding ending in a final decision.

Practical problems, however, can arise first in determining whether two proceedings have the same scope, at least when the activities on trial can be classified under the heading of organised crime. Thus, it would be difficult to determine *a priori* whether the scope of the proceedings is the same when *v.g.* the activities of certain subjects belonging to a criminal organisation have been tried generically or overall in the first proceedings, whereas in the second more specific and concrete activities were the focus, even though these were also committed by the same subjects as part of the criminal activities of the same criminal organisation.

Secondly, this can also give rise to accessory problems to be found in confiscation orders. If during the first proceedings, punishable act X was tried, and the court handed down its decision on whether to confiscate property linked to unlawful act X —either ordering or rejecting total or partial confiscation— recognition of the confiscation order issued as a result of the second proceedings, involving the same unlawful act X, must be refused. However, two factors can affect this rule: first, some systems allow independent proceedings to be held to order confiscation; and second, the introduction of extended powers of confiscation allows courts to order confiscation of property linked to offences other than those on trial, provided they are all part of the same organised crime context. This gives rise, therefore, to the following options:

– *In the first trial, unlawful act X was judged and a decision was taken on whether to confiscate the property associated with this act:* the principle of *ne bis in idem* would be breached if, during the second proceedings, a confiscation order were issued on certain property due to association with unlawful act X, even though unlawful act X was not judged during the second trial. This could occur in two

cases: (1) if the second trial is an independent confiscation proceedings in which criminal liability for offences committed are not the main scope; (2) if the second proceedings involves a criminal case in which the main scope is to judge unlawful act Z, but as a result of which, property associated with unlawful act X is confiscated using extended powers of confiscation, because X and Z are part of the same context of organised crime.

– *In the first trial, unlawful act X was judged, but no decision was taken to confiscate property associated with this act*: the principle of *ne bis in idem* will have been breached if the scope of the second proceedings is also unlawful act X, and in this case a decision is taken regarding confiscation. Even though in the context of confiscation there is no *bis in idem* in the full sense, failing to consider these grounds for refusal would be tantamount to granting legal effects to a trial that should never have been held. On the other hand, no breach of *ne bis in idem* can be claimed—and recognition cannot be denied—when the main scope of the second proceedings was not to judge unlawful act X, however a confiscation order has been issued on certain items of property on the grounds of their association with unlawful act X. This could occur if, on the one hand, the second proceeding involved an independent confiscation proceeding and on the other, if the scope of the second proceedings is unlawful act Z, but as a result of the same an order is issued to confiscate property associated with unlawful act X by virtue of extended powers of confiscation. These two latter options, however, are also limited: that the non-existence of unlawful act X, or of its unlawful nature, was not declared during the first proceedings. Otherwise, the sentence does indeed infringe the force of *res judicata*.

In any case, the grounds for refusal of recognition presupposes that the confiscation order resulting from the second proceedings has been issued in the issuing State; however, the order terminating the first proceedings does not necessarily have to have been issued in the executing State; the only requirement is that it can be enforced in said State if a confiscation order is transmitted for recognition and execution. Articles 54 and 58 CISA, and the case-law interpreting these provisions, would be the basis for determining when this cross-border extension of the effects of the decision terminating the first proceedings occurs, at least for the time being.

6.1.2 There Are Rights that Make it Impossible to Execute the Order

Article 8(2)(d) contemplates as grounds for refusal the fact that, under the legal system of the executing State, enforcement is prevented by the rights of the parties involved, including those of third parties acting in good faith (for example, when attempts are made to confiscate a specific property transferred permanently to a third party acting in good faith). With this measure, the Framework Decision attempts to compensate third parties for any deprivation of their fundamental right to be heard in the criminal proceedings issuing the order to confiscate some of their property (Art. 47 EU FRCh). Due to this, in order to assess this argument the

executing court must determine to what extent the existence of said rights has been taken into consideration by the issuing authority at the time of issuing the confiscation order, because the executing authority cannot review the substance of the decision it has to enforce.

6.1.3 The Absence of the Person Affected by the Confiscation Order in the Court Proceedings Issuing the Confiscation Order

The aim of this is to guarantee the right of the person affected by the confiscation order to a hearing (Art. 47 EU FRCh). The reform introduced in Article 8(2)(e) as a result of the FD 2009/299/JHA, of 26 February 2009, seeks a balance by establishing that merely recording the absence of the person concerned with the proceedings is not sufficient grounds for refusal. Indeed, in spite of this absence, recognition cannot be refused if any of the following three circumstances is recorded in the certificate:

- The person charged was personally summoned and informed of the place and date set for the trial resulting in the decision in a timely fashion, or received official notification of the date and place set for the trial by other recordable means, and was also informed that a decision could be taken if they do not appear.
- Being informed of the date set for the proceedings, the person in question personally engaged the services of a lawyer, or was assigned one by the State, to defend them in the proceedings, and was effectively defended by said lawyer during the trial.
- After receiving notification of the confiscation order, and being expressly informed of their right to a new trial or to lodge an appeal with the possibility that this new trial, in which they would have the right to appear, could deliver a judgement opposing the initial decision, the person charged expressly declared their intention not to challenge the decision, or not to request a new trial or to lodge an appeal within the deadline established for this purpose.

6.2 Postponement of Execution

Together with non-recognition and/or non-execution, the Framework Decision (Art. 10) also includes the possibility of the State authorities postponing enforcement and execution of the confiscation decision in several cases:

- When the confiscation order concerns an amount of money and there is a risk that the total value derived from its execution may exceed the amount specified in the confiscation order due to simultaneous execution of the confiscation order in more than one Member State. In this case, the executing authority would have to immediately notify the issuing authority that the order has been postponed and

the grounds for postponement so that the latter, in turn, can inform them whether the risk is still present or has ceased to exist [Art. 14(3)(a)].
- When an appeal has been lodged in the issuing State against the confiscation order.
- When an appeal has been lodged in the executing State against the ruling to recognise and enforce the decision.
- When execution of the confiscation order might damage an ongoing criminal investigation or proceedings (that can cease to be secret if a national court proceeds to confiscate property from members of the same criminal organisation).
- When it is deemed necessary to have the confiscation order, or parts of it, translated.
- When the property is already the subject of confiscation proceedings in the executing State.

In all the foregoing cases, the Framework Decision states that for the duration of the postponement the executing court must take all the measures it would take in a similar domestic case to prevent the property from no longer being available for the purpose of execution of the confiscation order. And, naturally, once the reasons for postponement no longer exist, the executing court must immediately take appropriate measures to enforce the confiscation order and notify the issuing court that execution has been initiated.[15]

6.3 Precautions in the Case of Multiple Executions in Several States of the Same Confiscation Order

As it has been pointed out above, an issuing authority can transmit the same confiscation order, either for specific property or amounts of money, to several different States for execution (Art. 5). This results in multiple executions of the same confiscation order in several States. This situation can also arise even when the decision has only been transmitted to one State, because the act of transmitting the decision to another State for enforcement does not prevent the issuing State from proceeding to execute the confiscation order itself [Art. 14(1)].

In the case of confiscation of amounts of money, there is a danger that execution may involve an amount of money in excess of that established in the order [Art. 14(2)] in detriment to the subject concerned. This situation can be avoided if the courts involved openly exchange information, bearing in mind also the option of postponing execution when there is the risk that an excessive amount of money can

[15] In fact, the issuing authority must also be immediately notified of the postponement of execution of the confiscation order, the grounds for the same, and if possible, the expected duration [Art. 10(4)(I)].

be confiscated. Specifically, the Framework Decision obliges Member States that national laws should put in place the following mechanisms:

1. The executing authority may postpone execution if it suspects that enforcement will produce an amount in excess of that which really applies (cf. above).
2. The issuing authority may take the initiative of notifying the executing authorities if it considers that there is a risk that enforcement could exceed the maximum amount specified (*v.g.* because it has received information from a particular executing court). This would be grounds for postponing execution in the States where this has been undertaken until information is gathered concerning the amount already obtained and, as applicable, the amount still outstanding, or it has been decided in which State the excess amount should be returned [cf. Art. 14(3)(a)]. The wording of the Framework Decision suggests that the issuing authority should centralise the information and take the corresponding decision based on the real situation of the enforcement proceedings.
3. The issuing authority must inform the executing authorities when all or part of the confiscation order has been executed in the issuing State itself or in another executing State. It must also notify any payments that have been made voluntarily in the issuing State, specifying the amount outstanding, to ensure that further confiscations do not exceed this amount [Arts. 14(3) and 12(2)]. To facilitate this, the executing court must inform the issuing court when execution of the order has been completed or when it has been terminated even though complete execution was unsuccessful [Art. 17(d)].
4. The person concerned can also prevent this from occurring [Art. 12(2)] if they can prove to the executing authority that confiscation has been totally or partially executed in another State. In this case, the authority in question must consult the issuing authority.

6.4 Legal Remedies

Together with the foregoing, the Framework Decision obliges national lawmakers to make legal remedies available to the parties concerned and third parties, enabling them to defend their legal position when they are unfairly affected by legal proceedings linked to cross-border confiscation orders:

– The substantial reasons for the confiscation order may only be challenged in the issuing State, not in the executing State [Arts. 9(2) and 13(2)].
– Executing States can put in place legal remedies against the recognition and execution of a confiscation order issued by another State; these remedies must be available to both the parties concerned and third parties and may have a suspensive effect if this is allowed under the laws of the country in question [Art. 9(1)]. The essence of these instruments must be the claim that grounds exist for refusing recognition or execution, although they can also highlight defects or invalidity related to how the procedure was conducted to execute the confiscation order.

Aside from the foregoing, appropriate protection of the parties concerned or of third parties can on occasions result in the State being forced to pay compensation: as a general rule, any compensation paid to a party by the executing State must be reimbursed by the issuing State, unless the injury is wholly or in part exclusively a result of the conduct of the executing State [Art. 18(1)].

7 Final Remarks

By regulating cross-border confiscation orders, the European Union, as with other spheres of international judicial cooperation in criminal matters, aims to strike a reasonable balance between, on the one hand, the maximum possible effectiveness of efforts to prosecute more serious forms of crime, and on the other, respect for the fundamental rights of the subjects involved in the criminal proceedings. Normal operation of the system, revolving around automatic recognition and immediate execution of confiscation orders, is an expression of the first, particularly in light of the possibility of having previously ensured effectiveness of eventual confiscation by enforcing a freezing order under the FD 2003/577/JHA. However, many other provisions are aimed at ensuring two things: (a) that recognition and execution procedures comply with basic procedural guarantees; and (b) that recognition and execution are only possible with respect to confiscation orders issued by means of proceedings that comply with basic procedural guarantees.

Mutual Recognition and Transfer of Evidence. The European Evidence Warrant

Bernd Hecker

Contents

Abstract The author examines the development of cooperation in criminal matters within the European Union with a special view to the gathering of evidence on the basis of the European Evidence Warrant (EEW). He describes the most characteristic features of the EEW and scrutinises the conception of an "admissibility of evidence throughout Europe".

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Abbreviations

CISA	Convention Implementing the Schengen Agreement
COM	Component Object Model
ECJ	European Court of Justice
ECMACM	European Convention on Mutual Assistance in Criminal Matters
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
OJEU	Official Journal of European Union
StPO	Code of Criminal Procedure (*Strafprozessordnung*)

1 Introduction

Originally enacted within the former Third Pillar of the European Union, the council framework decision of the 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters[1] entered into force on the 19 January 2009. Although the deadline for compliance with the provisions of this Framework Decision was the 19 January 2011 [Art. 23(1)], a number of member states failed to meet the deadline. By now, it seems certain that the European evidence warrant will be one of the central instruments of European criminal procedure, and will play a key role in allocating competencies and dividing labour between authorities.

Currently there is no real European criminal law in the narrower sense; neither a European criminal code nor a code of European Criminal Procedure do exist. However, the national criminal law systems are involved in a dynamic process of Europeanization. This process takes the form of activities of the Council of Europe and the European Union, cross-border cooperation of the member states of the European Union, and of course the activity of the European Courts of Justice located in Strasbourg and Luxembourg (the European Court of Human Rights, or ECtHR, and the European Court of Justice, or ECJ). On the one hand it has to be emphasized that the criminal legal systems are committed to the transnationally binding fundamental rights standards found in the European Convention on Human Rights. On the other, the European development of criminal law is also influenced by the law of the Union in many different ways. Given the subject of today's meeting, in the following I would like to examine a special difficulty of European criminal law: the gathering of evidence within the scope of cross-border criminal proceedings. By crossing this threshold, we are entering the field of so-called transnational criminal law. Transnational criminal law in its widest sense deals with the legal, institutional, and procedural instruments of cross-border cooperation in criminal matters. Of course issues of rights protection in that context can also be seen as a part of transnational criminal law.

[1] OJEU 2008 No. L 350, p. 72. For further information see Esser (2011), p. 1497 ff.; Hecker (2010), § 12 points 10–12; Roger (2010), pp. 27, 33 ff.; Satzger (2011), § 10 point 36; Zimmermann et al. (2011), pp. 56, 66 ff.

Against the background of increasingly international offending in a world ever more tightly woven together in its economy, information-sharing, and politics, it has come to be recognized that the global challenges of internationally organized crime can only be answered by cooperation among the community of the states and by supporting internationally coordinated criminal prosecutions. In particular international terrorism threatens the internal security of states. Serious organized crime such as drug, weapon, and human trafficking, illegal technology transfers, attacks on information systems, and environmental crimes represent challenges that cannot be met solely at the national level.

2 International Mutual Legal Assistance in Criminal Matters

Mutual legal assistance in criminal matters may be the field in which cross border cooperation in criminal matters has the longest tradition. The term applies to any kind of assistance for foreign criminal proceedings granted by the requested state to the requesting state. Intergovernmental extradition proceedings, the assistance in the enforcement of criminal sanctions as well as so-called "minor" or other mutual legal assistance, which covers all kinds of supporting activities that are admissible under national procedural law of the requested state, are all traditional fields of mutual legal assistance. Minor mutual legal assistance includes, for instance, the service of summonses and judgments, the hearing of witnesses and the accused, or the seizure and surrender of evidence. It enables the public authorities of the states to perform cross-border operational cooperation, such as the interception of telecommunications and the use of undercover agents, observations, and controlled deliveries.

The cultivation and development of international mutual legal assistance in criminal matters has always been a major concern of the Council of Europe, which, with its 47 member states, is the largest association of states in Europe. The Council of Europe's Conventions on mutual assistance in criminal matters have to be seen as "mother conventions" giving birth to mutual legal assistance on a European level.[2] They are the basis for numerous bilateral and multilateral agreements and crime-related conventions. However, the international cooperation of the 27 EU member states does not consist of these traditional mutual legal assistance mechanisms alone. The increasingly important role of new methods of intergovernmental cooperation in criminal matters within the European Union requires a turn away from classical mutual legal assistance mechanisms. For instance, particular cases of the "Schengen cooperation" in detailed cross-border surveillance and hot pursuit (Arts. 40 and 41 CISA) cannot be seen as mutual legal assistance in the narrower sense: observing or pursuing foreign police officers have a restricted sovereignty on foreign territory. A request for assistance made in advance is not necessary in urgent cases. Furthermore, the whole of the cooperation

[2] Hecker (2010), § 2 points 61 ff.; Zimmermann et al. (2011), pp. 56, 57 ff.

centered on Europol is carried out outside of the typical mutual legal assistance mechanisms. The European arrest warrant puts the law of extradition on new legal footing and marks a fundamental shift of paradigms at the same time.

Widespread opinion sees an urgent need for dynamic progress of the intergovernmental forms of cooperation, not least because the existing system of mutual legal assistance has often proven to be impractical and inefficient.

Mutual legal assistance between the EU member states is determined to a large extent by the European Convention on Mutual Assistance in Criminal Matters between the member states of the European Union of the 29 May 2000.[3] At EU level, the Convention lays down the conditions under which mutual assistance is granted. It contains regulations on specific forms of assistance, for example video- and telephone conferences, interception of telecommunications, controlled deliveries, joint investigation teams and cross border covered investigations. Happily, the convention follows a general trend: the requested member state requested member state must comply with the formalities and procedures indicated by the requesting member state (Art. 4).

3 Gathering Evidence in Criminal Matters

Even though the European Convention on Mutual Assistance in Criminal Matters between the member states of the European Union can be seen as a first step towards a further development of cooperation regarding mutual assistance within the EU, the goal—the realization of an "admissibility of evidence throughout Europe"—is still not in sight.

The conception of an "admissibility of evidence throughout Europe" has already been introduced and explained by the Commissions' Green Paper of the 11 December 2001,[4] though it was limited in scope to cases involving the protection of the EU's financial interests. The Commission points out that the differences of the national legal systems at the preliminary proceedings stage and not, surprisingly, the differences during the principal trial phase, are the main obstacle for transnational prosecution. Accordingly, the Commission attached special importance to the arrangement of the preliminary proceedings. The Green Paper distinguishes between national and communitarian investigation measures. The latter are to be carried out by a European Public Prosecutor, a new institution that has to be established. Investigative measures, which do not need coercive power, such as the collection of information, the hearing of witnesses or the questioning of the accused with his consent, should be subject to a precise procedure laid down by Community law. If investigative measures use coercive power, national law shall apply. In relation to coercive measures, the concept of the Commission

[3] Zimmermann et al. (2011), pp. 56, 59.

[4] Hecker (Fn. 1), § 12 point 12.

distinguishes between coercive measures that are subject to after-the-fact review by the courts and coercive measures ordered by the judge itself, e.g. arrest warrant. Summing up, the Green Paper does not want to replace national rules of procedure, but tries to combine them with one another. Supranational provisions are not envisioned. With this in mind, the commission has made the principle of mutual recognition the cornerstone of judicial cooperation in criminal matters within the Union, specifying that it will also apply to European preliminary proceedings. As a consequence, intrusive measures within criminal proceedings that were ordered or reviewed by a court of a member state—house searches, seizures, freezing of assets, interception of communications and even detention of the accused—are to become executable in every other member state without further judicial review. Evidence that has been gathered in accordance with the national provisions of a member state should be mutually admissible in the criminal courts of all other member states.

On 14 November 2003, the Commission presented a proposal for a Council framework decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Intense negotiations resulted in the final framework decision, which finally was enacted on 18 December 2008 and entered in force on 19 January 2009. The European Evidence Warrant (EEW) is based on the principle of mutual recognition and shares the same structural approach as the framework decision on the European arrest warrant.

4 The European Evidence Warrant (EEW)

4.1 Definition of the EEW

The EEW is to be a judicial decision issued by a competent authority of a member state (so-called "issuing state")[5] with a view to obtaining objects, documents and data from another member state (so-called "executing state")[6] for use in criminal proceedings [Art. 1(1), Art. 5].

4.2 Issuing Authorities

The member states can define judges, courts, investigating magistrates, public prosecutors or any other judicial authority acting in its capacity as an investigating authority in criminal proceedings as EEW issuing authorities [Art. 1(c)]. The

[5] Art. 2(a).

[6] Art. 2(b).

authorities of the issuing state are to take the necessary measures to ensure that the EEW is issued only when the evidence can be obtained under the national law of the issuing State in a comparable case and is necessary and proportionate for the purpose of the proceedings (Art. 7).

4.3 Form and Content of the EEW

The EEW is set out in a provided form and must be written in or translated by the issuing state into the official language of the executing state (Art. 6).

4.4 Transmission of the EEW

As a rule the EEW must be transmitted directly from the issuing authority to the executing authority [Art. 8(1)].

4.5 Execution on the Basis of the Principle of Mutual Recognition

The executing authority must recognize the EEW of the issuing state without any further formality being required and must immediately take the necessary action for its execution in the same way as an authority of the executing state [Art. 11(1)]. This is the true innovation of the framework decision. The executing state shall be responsible for choosing the measures which under its national law will ensure the provision of the objects, documents or data sought by an EEW and for deciding whether it is necessary to use coercive measures to provide that assistance. Any measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing state [Art. 11(2)].

4.6 Grounds for Non-recognition or Non-execution

Grounds for non-recognition or non-execution remain strictly limited (Art. 13). For instance, recognition or execution of the EEW may be refused if its execution would infringe the *ne bis in idem* principle [Art. 13(1)(a)] or if the EEW relates to acts which would not constitute an offence under the law of the executing State [Art. 13(1)(b)]. Grounds for non-recognition and non-execution are also given if the EEW‘s execution would harm essential national security interests, jeopardise the source of information or involve the use of classified information relating to specific intelligence activities [Art. 13(1)(g)].

In contrast to the traditional system of mutual legal assistance, the criterion of double criminality is not in principle a reason for refusing recognition and execution. The recognition or execution of the EEW is not subject to verification of double criminality unless it is necessary to carry out a search or seizure [Art. 14(1)]. If it is necessary to carry out a search or seizure for the execution of the EEW, the 32 offences listed in the framework decision are not subject to verification of double criminality under any circumstances as long as they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least 3 years and as long as they are defined by the law of that state [Art. 14(2)].

The scope of the EEW is limited to objects, documents or data obtained by the exercise of several procedural rights to intervene, e.g. by seizure, presentation, or search [Art. 4(1)]. Requests for mutual legal assistance in the gathering of other evidence—hearing of witnesses or questioning of the accused, obtaining of DNA samples from the body of the suspect or the interception of telecommunications and the monitoring of bank accounts—do not fall within the scope of the EEW [Art. 4(2)]. The traditional methods and procedures of mutual legal assistance must be applied for these latter types of cooperation. Article 11(3) requires that any measures which would be available in a similar domestic case in the executing state shall also be available for the purpose of the execution of the EEW.

4.7 Deadlines for Recognition, Execution and Transfer

Each Member State must take the necessary measures to ensure compliance with the deadlines provided for in Article 15. Any decision to refuse recognition or execution has to be taken as soon as possible and no later than 30 days after the receipt of the EEW by the competent executing authority [Art. 15(2)]. Unless either grounds for postponement exist or the executing authority has the objects, documents or data sought already in its possession, the executing authority must take possession of the objects, documents or data without delay and no later than 60 days after the receipt of the EEW by the competent executing authority [Art. 15(3)].

4.8 Grounds for Postponement

The recognition of the EEW may be postponed in the executing state where the form provided for in the Annex is incomplete or manifestly incorrect or the EEW has not been validated by an order of a court [Art. 16(1)(a)(b)]. The execution of the EEW may be postponed in the executing state if its execution might prejudice an ongoing criminal investigation or prosecution or if the objects, documents or data concerned are already being used in other proceedings [Art. 16(2)(a)(b)].

4.9 Legal Remedies

According to Article 18(1), member states must put in place the necessary arrangements to ensure legal remedies against the recognition and execution of an EEW. Member states may limit the legal remedies to cases in which the EEW is executed using coercive measures. According to Article 18(2), substantive reasons for issuing the EEW may be challenged only in an action brought before a court in the issuing state.

5 Conception of an "Admissibility of Evidence Throughout Europe"

On the 11 December 2009, the Commission presented the Green Paper on "Obtaining evidence in criminal matters from one Member State to another and securing its admissibility".[7] It is clear from this paper that the European evidence warrant can only be considered as a first step on what may eventually become a single, comprehensive regulation on the basis of the principle of mutual recognition. In due course this comprehensive regulation would replace all existing mutual legal assistance regulations. Such a legal instrument would replace the traditional mutual legal assistance system in the same way as the European Arrest Warrant replaced the traditional extradition system. Shortened deadlines and a restriction of the grounds for non-recognition or non-execution would lead to a greater effectiveness of this new legal instrument. Therefore the Commission had the plans to present a relevant legislative proposal in 2011 which should have been accompanied by another legislative proposal introducing common standards for gathering evidence in criminal matters in order to ensure its transnational admissibility.

The principle of mutual recognition of decisions in criminal matters, in particular in its aspirations for a European transfer of evidence by using the "admissibility of evidence throughout Europe", is obviously modelled on the rules of the free movement of citizens, which is part of the law of the Union.

On closer inspection, however, we find that the principles of the free movement of goods and services—particularly in view of the current regulatory framework—cannot plainly be applied to the area of intergovernmental transfer of evidence. Evidence obtained under a member state's national legislation cannot simply be equated with an economic product with ambition for "marketability" in all the member states. It is a simple fact that the free movement of goods and service aims to increase freedom of economy, whereas measures of the criminal justice infringe civil liberties by nature. The "import" of evidence touches the rights of the accused

[7] COM (2009), p. 624 final. See also the initiative for a European Investigation Order (OJ 2010 C 165/22). For further information see Zimmermann et al. (2011), pp. 56, 67 ff.

in an elementary way. So far the rights of the accused differ to an extremely wide degree within the criminal procedure codes of the member states at all stages of the criminal procedure, from the preliminary to the main proceedings. It is true that the procedural rights and the rights of the accused—both ensured by the ECHR—create a common fundamental rights standard for the procedure codes of the member states. However, we must not overlook the fact that the ECHR merely guarantees minimum rights and that the national legal systems—being the "complex dynamic systems" that they are—pursue various strategies to guarantee constitutional criminal procedures. To apply the principle of the freedom of evidence is to ignore that in certain cases the regulations on the taking of evidence within the preliminary proceedings and their admissibility within the main proceedings are incompatible. The following case can be seen as a typical example:

According to Spanish law an interception of telecommunications is admissible for every kind of crime provided that the measure was ordered by a judge. Assumed that we apply the principle of free movement of judicial decisions, the following would happen: the Spanish judge's order to intercept the telephone connection of a German tourist, who is suspected of mere theft, must be accepted by the German prosecution authorities even though this measure would be inadmissible under national German law (§ 100a German StPO). If the charge of theft is brought to a German court the information obtained by the investigation measure has to be admissible. As a consequence the German protection standard of the Basic Rights would be erased.

The basic problem that has been illustrated here on the example of interception of telecommunications also applies to other evidence and judicial decisions. The free compatibility of criminal procedural measures would induce a cross-border transfer of evidence, which would undermine and falsify the foundations of the member states criminal and constitutional legal systems. The variety of the possible combinations of procedural instruments of different national origins would create a confusing and incoherent universal legal construction. If the rule of law is to be afforded any consideration, such a universal legal construction cannot be seen as a suitable model for a European Criminal Procedure Law.[8]

6 Cross-Border Transfer of Evidence: Possible Approaches

The literature has begun to react by contemplating practical possibilities of solving the problem of cross-border transfer of evidence.[9]

A first approach takes the long and laborious path of a harmonization of the criminal procedure law of the member states. The more the reference systems of the

[8] Hecker (2010), § 12 point 59; Satzger (2003), pp. 137, 142; Zimmermann et al. (2011), pp. 56, 61 ff.

[9] Gleß (2003), pp. 131, 148 ff.; Hecker (2010), § 12 points 65 ff.

member states match in regard to the gathering and the admissibility of evidence, the wider the scope of the principle of mutual recognition. At this point the question arises whether the effort required might be disproportionate and whether such a solution would conflict with the principle of subsidiarity.

A second approach could be the creation of a supranational criminal procedure law. The advantage of this solution is that it would take account of the national criminal procedural systems to a greater degree than the model of a "broadband harmonization". Realistically, however, the realization of a supranational criminal procedure law will meet with limited sympathy because of the existing reservations about member states national sovereignties.

A third approach could be seen in the creation of a European evidence admission procedure. In the course of this procedure it would be necessary to review whether the evidence has been lawfully gathered in accordance with the legal basis of a common European reference system. If evidence was gathered lawfully it would be admissible and the courts of the member states would have to make use of it within the main proceedings with no further review. Thus, the differences of the national standards, which run counter to a free transfer of evidence, could be bridged by the creation of a European procedural standard for evidence admission. The provisions of the ECHR could be referenced in the design of content of the European reference system. Either a European court or the national courts could have jurisdiction over the question of the transfer of evidence. To ensure a harmonized application of law within Europe this could possibly be combined with an obligation to refer the case to a European court.

All in all, it remains an exciting and open question which direction the development the criminal law of Europe will take in the area of the admissibility of transnational evidence.

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Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?

Stefano Ruggeri

Contents

Abstract Over the past several years, the European Commission and a group of eight Member States have each launched two important initiatives with the aim of introducing a new instrument for obtaining evidence from other states within the EU. While following different paths, these initiatives share the common goal of extending the logic of mutual recognition to almost every type of evidence. This article questions, by providing a comparative analysis of the two proposals, whether this approach is the most appropriate way of both enhancing mutual confidence between national authorities and ensuring adequate protection both of the national procedural cultures and the fundamental rights of the individuals involved in criminal proceedings. On the basis of this analysis, this paper contains some

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proposals for further legislation in the field of collection of overseas evidence in Europe.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
CCP	Code of Criminal Procedure
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMACM	European Convention on Mutual Legal Assistance in Criminal Matters
EU FRA	European Union's Agency for Fundamental Rights
EU FRCh	Charter of Fundamental Rights of the European Union
EUCMACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
FD EAW	Framework Decision on the European Arrest Warrant
FD EEW	Framework Decision on the European Evidence Warrant
FD OFPE	Framework Decision on the Execution in the EU of Orders Freezing Property or Evidence
IACMACM	Inter-American Convention on Mutual Assistance in Criminal Matters
JIT	Joint Investigation Teams
PD EIO	Proposal for a Directive on a European Investigation Order
SAP ECMACM	Second Additional Protocol to European Convention on Mutual Legal Assistance in Criminal Matters
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN MTMACM	United Nations Model Treaty on Mutual Assistance in Criminal Matters

1 Introduction

The issue of collection and movement of evidence in EU cross-border cooperation in criminal matters has undoubtedly been of great significance in overall EU policy and in the scholarly debates of the past few years. Since the launching of the FD EEW, the need to reach a higher level of harmonization in this field has increasingly become the focus of particular attention both of EU institutions and some Member States.

The chapter contributions from the three first Parts of this book are quoted with the only reference to the Author's surname, above, and the number of the paragraph concerned.

After the entry into force of the Lisbon Treaty, Article 82(2)(a) TFEU includes at primary-law level the issue of admissibility of evidence in criminal matters with cross-border dimensions among the areas in which legal approximation can be promoted in order to facilitate mutual recognition of judgments and judicial decisions. This has provided a general framework for the launching of new initiatives aimed, albeit in different ways, to replace, as between the Member States, most instruments both of judicial assistance and mutual recognition with a new instrument of evidence gathering mainly based on the principle of mutual recognition and potentially related to all types of evidence. This approach partially coincides with the objectives laid down in the Stockholm Programme of 11 December 2009,[1] according to which a new approach is also needed in order to bring order to the fragmentary regime of the existing instruments.[2]

2 Object of the Analysis

The present paper deals with the issue of collection and movement of transnational evidence at horizontal level, by providing a comparative analysis of two initiatives: the proposal by the European Commission to introduce a new instrument of collecting overseas evidence and the proposal for a directive on a European Investigation Order (EIO) launched by eight Member States in 2010. The contents of these proposals are not identical, since the proposal made by European Commission was aimed both to obtain evidence abroad and to secure its admissibility, whilst the PD EIO does not directly deal with the issue of the admissibility of the evidence collected overseas. In its Action Plan Implementing the Stockholm Programme,[3] the European Commission confirmed its two-tier approach, thus announcing two (at first sight separate) legislative proposals aimed respectively: (1) to establish a comprehensive regime on obtaining evidence in criminal matters based on the principle of mutual recognition and covering all types of evidence and (2) to introduce common standards for gathering evidence in criminal matters in order to ensure its admissibility.

Of these two approaches, the Commission's proposals did not led to any legislative initiative and were dropped after the PD EIO being launched, whilst the PD EIO has not yet led to a binding legislative act. Nevertheless, a comparative analysis of these initiatives appears to be useful from the perspective of the present research, since both of them aimed at the introduction of an almost comprehensive tool of obtaining evidence overseas in the EU.

[1] The Stockholm Programme—An open and secure Europe serving and protecting citizens (2010/C 115/01).

[2] Point 3.1.1.

[3] COM (2010) 171 final.

2.1 The European Commission's Proposals: Obtaining Overseas Evidence and Securing Its Admissibility

The European Commission had already launched an ambitious challenge for overcoming the limits of the FD EEA shortly before the entry into force of the Lisbon Treaty. In its Communication entitled "An area of freedom, security, and justice serving the citizens,"[4] the Commission, assuming that the administration of justice must not be impeded by the differences between the Member States' judicial systems, proposed the setting up of a comprehensive means of collecting evidence. The proposed means was intended to be applicable to the whole area of evidence gathering throughout the Union. Among other avenues to be explored with the aim of achieving a prompt and flexible cooperation between the Member States, the Commission envisaged the establishment of minimum principles to facilitate the mutual admissibility of evidence between countries, including scientific evidence.

This approach was confirmed after the entry into force of the Lisbon Treaty in the Green Paper of 11 November 2009 on obtaining evidence in criminal matters from one Member State to another and securing its admissibility.[5] The proposal contained in this document focused on a much more complex area than that covered by the legal instruments existing at that time, since it encompassed both the obtaining of evidence in criminal matters by one Member State from another and the securing of its admissibility in the criminal process that makes use of the evidence.[6] The Commission underlined the risks arising from the co-existence of legal instruments inspired by different approaches, i.e. mutual legal assistance and mutual recognition, a situation that may cause confusion among practitioners and endanger efficient cooperation among Member States. Thus, the proposal of the European Commission consisted of replacing all the existing instruments of evidence gathering by a single tool based on the principle of mutual recognition and aimed to cover all types of evidence, i.e., (a) evidence that, although directly available, can be obtained only through procedural activities (interviews of witnesses or suspects, wire-tapping, bank accounts, etc.), (b) evidence that, though it exists, requires further investigation or examination (analysis of existing objects, documents or data or obtaining bodily material, such as samples or fingerprints).

However, the Commission was well aware of the risks arising from an overall adoption of the principle of mutual recognition for all types of evidence. Furthermore, the Commission was equally conscious that this proposal would result in a rather useless instrument if the transfer of evidence remained disconnected from the setting-up of a system capable of ensuring that the evidence will, after being

[4] COM (2009) 262 final.

[5] COM (2009) 624 final.

[6] As we will see, the aim of securing the admissibility of evidence was pursued also by the FD EEW, in that it provides for that the warrant may be issued only if the objects, data and documents could have been obtained under the law of the issuing Member State in a comparable case [Art. 7 (1)(b)]. See Vervaele (2009), p. 160.

obtained, be admitted in the proceedings in the requesting Member State. To achieve this result, the best solution, in the Commission's view, consisted of the adoption of common standards for obtaining overseas evidence. The Commission's questionnaire therefore sought to reach a consensus on this approach by interrogating whether the adoption of such general standards would be welcomed for ensuring admissibility of all evidence obtained from other Member States.

It has been noted that this approach led the Commission to announcing two legislative initiatives for 2011 in its Action Plan Implementing the Stockholm Programme, initiatives that have, however, never been launched.

2.2 *The Proposal for a Directive on the European Investigation Order*

Things were changing so rapidly in the field of evidence gathering in EU cross-border cooperation that as the Commission announced its interventions, eight Member States launched a proposal for a Directive concerning an EIO.[7] Over the course of more than 1 year, the draft text was intensively discussed in the Council, which reached a general approach in December 2011.[8] Many changes have occurred from the original proposal, whose contents have been integrated and considerably enriched during the examinations in the Council.

At first sight, the PD EIO fully echoes the Commission's proposal of introducing a new comprehensive instrument of obtaining evidence based on the principle of mutual recognition. Moreover, it is worth noting that of four possible policy options for the EU—i.e., (1) no new action in the EU, (2) non-legislative action, (3) abrogation of the FD EEA with a return to the system of mutual legal assistance, (4) new legislative action—the PD EIO opts for a new legislative action, but significantly rules out the possibility of setting up an EEW II aimed at extending the EEW I to all types of evidence. In several passages the Accompanying Document to the PD EIO points out the rigidity of the EEW and the disadvantages of following this model,[9] thus proposing a new approach focusing on the measure to be executed rather than on the evidence to be collected. On the other hand, the PD EIO did not ignore the merits of the system of mutual legal assistance with specific regard to its flexibility. The purpose of this proposal of directive was thus to provide mutual recognition in a different way, i.e., *at the same time*, through radically limiting the grounds for refusal and profiting the flexibility of judicial assistance.

The form of the request is the typical mutual recognition order and the EIO pursues a typically horizontal scope, applying to almost all investigative measures.

[7] Interinstitutional File: 2010/0817 (COD), COPEN 115 EJN 12 CODEC 363 EUROJUST 47.

[8] See doc. 18918/11, COPEN 369 EJN 185 CODEC 2509 EUROJUST 217.

[9] Accompanying Document to the Proposal for a Council Directive regarding an European Investigation Order in criminal matters, Detailed Statement, 9288/10 ADD 2, COPEN 117 EJN 185 CODEC 384 EUROJUST 217 § 3.1.2.

In the original proposal some specific measures—such as the setting up of JITs and the gathering of evidence within a JIT, as well as some forms of interception of communications (interception with immediate transmission and interception of satellite telecommunications)—were excluded from the sphere of application of the EIO [Art. 3(2)]. During the discussions in the Council,[10] however, this area has considerably been reduced by including all forms of interceptions of telecommunications into the scope of the proposal of directive, which currently leaves out only the setting up of JITs and the gathering of evidence within a JIT. Moreover, this legislative proposal appears even more ambitious than the Commission's, as it aims to regulate a much wider field than that covered by the EEA, allowing the taking of measures even during the pre-trial phases. It is quite an enormous field, extending to measures that in some cases do not exclusively aim at the gathering of evidence (*e.g.*, the temporary transfer of persons held in custody for purpose of investigation). Furthermore, additional rules have been introduced for specific investigative means, such as hearing by video or telephone conference, obtaining information related to bank accounts or bank transactions, control deliveries, etc. Like what occurs with the EEW, the issuing of the EIO has been restricted neither to specific offences nor, more generally, to criminal proceedings (Art. 4).

Alongside with the purpose of improving and speeding up the EU cross-border cooperation, the new instrument has been presented as aiming to achieve further objectives, such as the admissibility of evidence, maintaining a high level of protection of fundamental rights (especially procedural rights), reducing the financial costs, increasing mutual trust and cooperation between the Member States, and preserving the specificities of the national systems and their legal culture.[11] Of these targets the admissibility of evidence appears to be, at first sight, out of place, since the PD EIO, as noted above, does not aim at securing the admissibility of evidence.[12] But this conclusion, as we will see, can be over-hasty at least for two reasons: like the FD EEW, (a) the PD EIO imposes upon the issuing authority the duty of checking the availability of the investigative measure before issuing the order; (b) the PD EIO allows the issuing authority to require certain procedural formalities of *lex fori* to be complied with in the execution of the order, unless they infringe the fundamental principles of *lex loci*.

3 Aims and Methods of the Analysis

Though they share the common goal of introducing a single instrument of collecting overseas evidence in the EU, both the European Commission's proposal and the PD EIO have launched very ambitious challenges in different fashions: respectively,

[10] See already doc. 8474/11, COPEN 67 EJN 13 CODEC 550 EUROJUST 49 PARLNAT 13.

[11] Accompanying Document § 1.

[12] In this sense Spencer (2010), p. 602.

the adoption of common standards for obtaining transnational evidence and a new method of efficient and flexible mutual recognition.[13]

The first purpose of this paper is to ascertain whether the solution of a single instrument is the most appropriate means of overcoming the shortcomings deriving from the coexistence, at EU level, of cross-border cooperation instruments based on the principles of mutual legal assistance and mutual recognition. Furthermore, the present study aims at analysing whether and how these two approaches could achieve a satisfactory balance between the need for an efficient cross-border prosecution, the protection of individual rights and the respect for the specificities of the national systems and their legal cultures while improving mutual trust between Member States.

To carry out this task, I will analyse comparatively the proposals contained in the Commission's Green Paper of 2009, the original draft of the PD EIO and the most recent version thereof, on which the Council reached a general approach in last December. To address specific issues I will refer to intermediate drafts of the legislative proposal.

4 The Practical Justification for Introducing a New Instrument of Evidence Gathering

Doubtless, the co-existence of several tools of evidence gathering in criminal cases with transnational dimension inspired by different approaches has lead to confusion and difficulties in the law enforcement that need to be overcome within a common AFSJ. This situation may also jeopardize the success of the recent instruments based on the principle of mutual recognition, since due to their limited sphere of application, Member States will often prefer to avail themselves of the traditional tools of mutual legal assistance, which present the advantage of offering only "one channel" for the obtaining of evidence.[14]

Put briefly, efficiency is definitely a goal to be further pursued. Yet it does not necessarily mean that the introduction of a new EEW, applicable to all types of evidence and based on the principle of mutual recognition or a new method of mutual recognition, is the most proper solution. Methodologically, before affirming the *convenience* of, if not even the *need* for, replacing all existing instruments with a new single one, the first issue to be assessed concerns the causes of the current inefficiencies. In this respect, the Commission's proposals were not fully consistent with the objectives laid down by the Stockholm Programme. The European Council's approach was more cautious, since the adoption a comprehensive means of obtaining evidence in criminal cases with a cross-border dimension—also aimed at covering as many types of evidence as possible, taking account of the

[13] *Ibid*., § 3.3.1.

[14] Bachmaier Winter (2010), p. 583.

measures concerned—had to follow an *impact assessment* of the existing instruments in this area.

Nevertheless, the rapidity both of the Commission's and the Member States' interventions did not permit this previous analysis. At that time (respectively, 2009 and 2010), one could not rely on sufficient scholarly studies nor, most importantly, empirical research supporting its arguments.[15] Furthermore, the FD OFPE had not yet been transposed by many Member States and the deadline for incorporating the FD EEW had not yet been expired, and at the time of the Commission's Green Paper, the latter had been transposed only by one two Member State (Denmark).[16] However, neither the Commission nor the Member States that launched the PD EIO seemed to be interested in an overall assessment of the existing instruments or aware of the shortcomings arising from the EEW other than those relating to its limited sphere of application.[17]

Although we can still count only on partial analysis of this problem on a factual basis,[18] several studies have pointed out that, among the various causes of the inefficiency of the system of mutual legal assistance, the linguistic barrier and the defects in the execution of the requests (delays, even disappearance of requests, etc.) constitute a frequently recurring problem in cross-border cooperation,[19] and it is significant that the first EU Directive launched in criminal matters after the entry into force of the Lisbon Treaty concerns the right to interpretation and translation in criminal proceedings (2010/64/EU). However, it is worth observing that practitioners do not usually express an *a priori* rejection of the system of mutual legal assistance, and this might be the reason that both the Commission and the PD EIO smoothed their proposal of a single tool based on the principle of mutual recognition by invoking the flexibility of the mutual legal assistance instruments with regard to specific types of evidence and by admitting the inadequacy of the rigid structure of the mutual recognition instruments in some cases. Nevertheless, both proposals provide a rather radical solution, in that they attempt neither to improve nor to integrate the existing instruments (Art. 29), instead aiming only to replace them with a new tool of evidence gathering. This might also confirm the impression that it could be "rather a political choice and not necessarily the consequence of a legal analysis of the real problems" that arise in EU cross-border cooperation.[20]

[15] Allegrezza (2010), p. 570.

[16] Gleß (2011), p. 599.

[17] See, among others, Belfiore (2009), pp. 4 ff. Cf. also De Amicis (2010, 2011).

[18] See, moreover, the Preliminary Report of 2011 by Marianne Wade on the Project "Euroneeds" undertaken by the Max Planck Institute for Foreign and International Criminal Law.

[19] Bachmaier Winter (2010), p. 589.

[20] *Ibid*., p. 583.

5 The Transnational Evidentiary Procedure

Practical deficiencies often constitute only the surface of a much more complex problem rooted in the diversity of domestic rules related to evidence gathering.[21] In some cases, these diversities can even lead to incompatibilities between national legislation, mostly in cases of criminal justice systems inspired by antithetical approaches.[22] Independently of the character of the requesting state, no less serious problems can also arise where the requested evidence could not be obtained in the home state with regard to the offence for which the suspect is prosecuted. In both cases, will the issuing authorities have to make full use of the requested evidence even if it has been taken at the pre-trial stage? Clearly, the adoption of a pure logic of mutual recognition should roughly mean obliging the national authorities to recognize the evidence gathered abroad irrespective of the rules governing their criminal justice systems. Moreover, it can seriously endanger the defendant in his or her expectations of a decision based on the rules of his or her criminal justice system.

The problem has been mainly analysed by considering the issue of admissibility of overseas evidence where the criminal justice system of the requesting Member State is an adversarial legal system. This approach could appear even strengthened by the fact that the TFEU allows for minimum harmonization in the sole field of "admissibility" of transnational evidence. But what is "admissibility?" And do problems of incompatibilities between domestic laws emerge only at the stage of admission of evidence?

Doubtless, the notion of "admissibility," though widely used at EU level, remains rather undefined. In domestic criminal procedures, the admissibility stage, although it sometimes appears to coincide with the collection of some piece of evidence, usually precedes the latter stage, as only the evidence already admitted may be taken. But what meaning must be attached to "admissibility" at EU stage? Does this notion concern the decision on the admission of evidence preceding the order for obtaining evidence abroad or the admission stage following the taking of evidence once it arrives in the home state? The Commission's proposal remains unique in that it addressed directly the issue of admissibility of evidence and it is no doubt that "admissibility" relates in this approach to the phase in the home state following both the collection and movement of evidence. As noted above, however, this is not tantamount as saying that the existing EU legislation and the PD EIO have not addressed the problem of admissibility from a different perspective and by different means. It is noteworthy that in the subsequent discussion in the Council the PD EIO has incorporated a provision that inherits great part of the contents of Article 7 FD EEW, thus requiring the issuing authority to carry out a check of availability of the investigative measure before issuing the order (Art. 5a).

[21] *Ibid*., p. 571.

[22] Hecker (2010), pp. 450–451; Allegrezza (2010), p. 579.

A Solomon-like approach would suggest adopting, in light of the transnational character of overseas evidence, a wider notion of admissibility than that used in domestic procedures, a notion that encompasses both the issue of admissibility of evidence prior to its collection and the issue of admissibility and usability of the evidence already gathered after its movement to the home state. The demarcation line would be the phase of obtaining evidence and it is no doubt that serious incompatibilities between domestic laws emerge also at this stage and with regard to the forms of obtaining evidence. In a deeper sense, however, even the adoption of a double concept of admissibility represents a rather reductive view of the complex structure of transnational evidentiary procedures, which require a different reconstruction than those used for domestic procedures. This is particularly evident in the PD EIO and development of the draft proposal in the Council shows considerable strengthening of the executing authority's assessment powers prior to the execution of the requested measure and the collection of evidence, which is one of the most significant phenomena of the last season of mutual recognition.

In light of this, I will deal with three stages within the transnational procedure aimed to obtain overseas evidence, i.e., preventive admissibility, collection and issue of preventive admissibility of evidence. However, I will analyse the admissibility at trial and use as a complex stage encompassing at least two phases: (1) the first takes place in the home state and comprises of the assessments conditioning the request for assistance or the issuance of the order, (2) the second takes place in the host state and comprises of all the assessments prior to the collection of evidence. Especially in the latter stage further distinctions will be made, since some requirements condition the evidence gathering, whereas other impinge on the specific measure to be carried out and even on the procedural formalities to be applied. Within this framework I will analyse whether and how at each stage the proposed solutions can provide more efficiency than the existing instruments while ensuring a proper protection both of the procedural cultures of the cooperating Member States and the rights of the individuals involved in cross-border criminal inquiries.

5.1 Preventive Admissibility of Overseas Evidence

5.1.1 The Weak Role of the Admissibility Stage in the Examined Proposals

Neither the Commission's proposal nor the original draft of the PD EIO dealt with the issue of preventive admissibility of evidence, thus leaving this control exclusively to the domestic authority requesting assistance pursuant to its own law. In the original draft proposal no provision required the issuing authority to check beforehand the necessity and proportionality of the measure and the admissibility of the requested measure under *lex fori* in a comparable case, as preconditions for the issuance of the EIO, nor could these controls be considered as implied in that text.[23]

[23] In a different sense, in respect of the proportionality test, Bachmaier Winter (2010), pp. 583–584.

To be sure, the original proposal did not completely ignore the importance that the admissibility of evidence be assessed in advance. Significantly, however, this check was imposed upon the executing authority at least in two contexts: (1) it was required to use a different investigative measure where the same result could be reached by less intrusive means [Art. 9(1)(c)], (2) it had to assess the consistency of the requirements set by the issuing authority with the fundamental principles of its own law [Art. 8(2)]. Whereas the former assessment pertained to the sphere of proportionality, the latter concerned the admissibility of the foreign procedural formalities. Outside these cases, there was no provision that gave the executing authority and private parties any opportunity to challenge the admissibility of the measure to be executed.

This lack of consideration for the preventive control of admissibility, which is of essential importance to guarantee both the respect for individual rights and the use of evidence, was accompanied in the original draft of the PD EIO by a considerable reduction of the grounds for refusal. This led to the disappearance of conditions, such the dual criminality requirement, that have since the 1959 ECMACM belonged to the cultural heritage of the judicial assistance systems in cases of search and seizure and that appeared, albeit reduced, also in the FD EEW in the same field. Consequently, the original proposal did not give any *practical* relevance to the fundamental principle of *ne bis in idem*, despite invoking in Article 1(1) the need for respect for the fundamental principles enshrined in Article 6 TEU, which after the entry into force of the Lisbon Treaty rendered the EU FRCh binding. Finally, that text dropped the exception of territoriality, which in the FD EEW appeared among the grounds for refusal.

The choice of dropping these fundamental requirements in the original proposal was an unprecedented challenge and was strongly criticised. Firstly, the original choice made the proposal rather inconsistent with the abovementioned targets of the proposal of directive: such a drastic restriction of the grounds for refusal marked a radical shift of the new instrument towards the mutual recognition model, thus increasing its rigidity rather than its flexibility. Besides, it was difficult to understand how the drop of the dual criminality requirement and the double jeopardy rule, combined with the abolition of the exception of territoriality, could preserve the specificities of national criminal laws. Not surprisingly, the contextual abolition of these elements led to the conclusion that the proposal of directive would represent a serious threat to national sovereignty.[24] However, the heaviest repercussions of these omissions of the original proposal were on the sphere of human rights.

To start with, the main concern derived from the possibility of requesting coercive measures with the EIO without requiring respect for the dual criminality requirement. Doubtless, it is "inconsistent that a State might be obliged to restrict the fundamental rights of its own citizens in its own territory to investigate an act that is not punishable under its own laws."[25] Thus, the dual criminality requirement

[24] Peers (2010), pp. 1 ff. Surprisingly, the original draft proposal reproduced instead a typical sovereignist ground for refusal, i.e., the prejudice to essential national security interests [Art. 10(1)(b)].

[25] Bachmaier Winter (2010), p. 585.

could be waived only if the issuing authority does not require a coercive measure to be carried out.

To be sure, the issue of criminal relevance under *lex loci* had not been totally ignored by the original proposal, since it included, among the grounds for using a different measure, the case in which the requested measure exists but its use is restricted to a category of offences which does not include the one covered by the EIO.[26] In my view, the position of this provision was not entirely correct, since the need for restriction to specific offences (*Katalogtaten*) is always linked to coercive measures. At any rate, the general drop of requirement of dual criminality accentuated the shortcomings deriving from the lack of any possibility for the executing authority to challenge the necessity and proportionality of the investigative measure. There is a strict link between the dual criminality requirement and test of necessity and proportionality, since where the act is not punishable under *lex loci*, it will, by definition, be neither needed nor proportionate to the criteria established by that State.

As to the double jeopardy rule, it appeared firstly surprising that the original proposal of directive, although invoking the EAW as a model to be followed in the field of evidence-gathering, removed from the list of the grounds for refusal a principle which in that legislative act went so far as to *require* the executing authority to refuse the recognition of the EAW. Moreover, it is hardly understandable how this choice could ensure a high level of protection of human rights. By contrast, it had serious repercussions on the sphere of individual rights both from a cross-border and domestic perspective. Firstly, as noted above, it threatened, despite the solemn declaration contained in Article 1(3) and in the point 17 of the *Consideranda*, the full implementation of the *ne bis in idem* principle laid down by Article 50 EU FRCh, thus lowering the level of protection of this fundamental guarantee more than that achieved by the Framework Decision 2009/948/JHA on prevention and settlement of conflicts of jurisdiction. Besides, combining the elimination of the requirement of double jeopardy with the abolition of the exception of territoriality, the individual right not to be (further) prosecuted for the same act for which he or she had been definitively judged endangered also from a domestic perspective, since the peremptory wording of Article 8(1) obliged the executing authority to execute the requested measure irrespective of the fact that the act had been committed in its territory.

5.1.2 The Enhancement of the Admissibility Procedure and Its Double Face in the Current Draft of the PD EIO

During the procedure in the Council, the text of the proposal was significantly amended, which led to the re-appearance of these requirements and, in general terms, to a strengthening of the assessment powers in the admissibility phase both in

[26] Art. 9(1)(b) PD EIO.

the home and the host state. For the sake of clarity, I will deal with the separately, as each of them encompasses, in the current draft, complex evaluations that reflect delicate balances between respect for domestic procedural systems and human rights protection. The purpose of this analysis is to ascertain whether the adopted solutions satisfy these fundamental needs properly.

The Admissibility Assessments in the Home State

In the course of the Council examinations, the directive proposal was integrated through the introduction of an Article 5a. As noted above, the main purpose of this provision, which reproduces almost literally the wording of Article 7 FD EEW, is to *require* the issuing authority to carry out a previous check of necessity, proportionality and availability of the investigative measure. The latter control, based on the assessment of a hypothetical national case, is aimed to extend the ordinary requirements of admissibility of domestic evidence under *lex fori* to transnational cases.

Yet the formulation of this new provision calls for clarification of what is to be meant by "necessity" and especially "proportionality" at EU level, concepts that, despite their common use, are still undefined.[27] The assessments will, also here, be made difficult by the fact that the EIO can be issued in a proceeding other than a criminal procedure. Although Article 5a provides for a validation procedure after the EIO being transmitted to the executing state (paragraph 3), the possibility of conducting a proper control of these requirements in great part depends, in cases of investigative magistrate or pre-trial judge, on his or her knowledge of the results and development of the investigation, as well as on his or her independent and impartial position. Another concern derives from the fact that the executing authority is entitled to adopt a measure other than that requested. Article 9(2) requires the executing authority which has decided to use another measure to inform the issuing authority, which may withdraw the request. This provision does not, however, *require* a check of availability, necessity and proportionality on the different measure by the issuing authority, nor does it seem to be implied by Article 5a. This weakens considerably the level of individual guarantees in the current text.

The Admissibility Assessments in the Host State

In the current draft of the PD EIO, the admissibility assessment is not entirely left to the issuing authority. Despite the similarities with Article 7 FD EEW, Article 5a has a significant omission: the conditions laid down in this provision will not here be assessed *only* by the issuing authority. This omission is justified by the fact that the

[27] On this issue see Bachmaier Winter, above.

most recent draft proposal has strengthened the admissibility powers of the executing authority, while ascertaining the recognition of the requested measure.

This option is to be welcomed taking into account that the issuing authority must, in line with the aforementioned approach of the PD EIO, establish the contents of the EIO in advance by laying down the *specific* measure to be carried out abroad [Art. 1(1)]. Thus, unlike what has until now happened in any other EU legislative intervention, the executing authority, while assessing the conditions for recognition, is not entitled to choose the measures to be carried out in order to obtained the sought evidence. Significantly, the PD EIO—while repeating that the executing authority must to recognize, as a rule, the foreign order without any further formality being required [Art. 8(1)]—fails to state that it must take the necessary measures for its execution.[28] This point is of particular importance in the field of coercive measures, since unlike the FD EEW, the PD EIO does not give the executing authority any leeway to decide whether coercive measures are necessary to provide assistance [Art. 11(2) FD EEW] or coercive procedures can be applied to carry out the investigative measure (Art. 12 FD EEW).

This justifies the enhancement of the assessment powers of the executing authority allowing for a control of admissibility to be carried out under *lex loci*. On the other hand, this solution confirms that the issue of admissibility in a narrow sense (preventive admissibility) falls into the exclusive competence of national authorities and must be assessed according to domestic laws. It remains to be assessed whether the approach of the PD EIO provides an appropriate protection both of the diversities of the Member States' legal systems and the rights of the individuals involved in transnational procedures. Due to the complex structure of the admissibility phase in the host state, I will conduct this analysis distinguishing three assessments

A) The availability assessment. The current draft proposal includes a further ground for the use of a measure other than that required with the EIO: the unavailability of the requested measure in a comparable national case, which is in this case *the host state* [Art. 9(1)(b)]. The unavailability of the requested measure determines gives rise to a conflicting situation between the admissibility parameters of the cooperating states, a situation whose Solomon-like solution in the PD EIO is the use of another measure. In general terms, the availability test pursuant to Article 9(1)(b) can ensure proper respect for the procedural rules on admissibility of the host state, avoiding the execution of a measure being inadmissible under *lex loci*. Of course, the possibility of choosing a different measure presupposes the existence of a corresponding admissible measure under *lex loci*; otherwise assistance will not be provided [Art. 9(3)].

   In cases of coercive means, the legislative proposal provides for a more specific ascertainment, which can understandably determine the refusal of assistance,

[28] Cf., by contrast, Art. 5(1) FD OFPE and Art. 11(1) FD EEW.

where the request for a measure which in the executing state is restricted to a list or category of offences or to offences punishable by a certain threshold other than that of the offence covered by the EIO can be rejected. As seen above, in the original text this provision empowered the executing authority to adopt another measure, but its current position is to be preferred. Moreover, the shift of this case to the area of the grounds for refusal undoubtedly provides a stronger protection of the criminal procedural law of the host state than that offered in the original text.

A third context for conducting admissibility assessments is the ascertainment of the procedural formalities imposed upon by the issuing authority while requesting the investigative measure, ascertainment that must be conducted in light of the compatibility with the fundamental principles of *lex loci*. Compared with the aforementioned provisions, the executing authority here has a much narrower margin of appreciation of the admissibility of the procedural formalities requested by the issuing authority from the perspective of its own law, since it can refuse to provide assistance only in case of infringement of the fundamental principles of its own legal order.

The main concern arises, however, from the fact that in all these cases the issue of admissibility of evidence is entirely left, in the host state, to the executing authority, an approach which is in line with the strictest logic of mutual recognition as way of enhancing mutual trust *between the cooperating authorities*. In the PD EIO there is no room for any participation of private parties in the decision-making on the admissibility of the investigative measure. This does not, of course, rule out that these may take part in the decision on the admissibility of the investigative measure in the host state, whenever *lex loci* allows it. Yet no provision allows for private parties to take part in the decision on availability in the host state.[29] Consequently, the capability of another measure to achieve the same result of the requested measure and mainly the admissibility of such a different measure will inevitably be assessed by the sole executing authority, which can, moreover, be neither a judicial nor a prosecuting authority [Art. 2(a)(ii)]. This conclusion applies also to the decision on the compatibility of the formalities required for the execution of the requested measure with *lex loci*, formalities whose meaning the executing authority could certainly better understand and apply more properly through the support of the defence.

B) The recognition assessment. The Council procedure has led to a progressive enrichment of the grounds for refusal, which has considerably strengthened the recognition assessments. I will focus on two grounds, which, as seen above,

[29] Furthermore, as under Article 29 the PD EIO aims at replacing the *corresponding* provisions laid down in previous judicial assistance instruments, it could be stressed that Article 4 ECMACM, which allows for private parties to be present in the execution of the rogatory letters, should analogously be applied to the collection of evidence with the EIO. In the same sense Marchetti (2011), pp. 163 f.

raised several human rights concerns in the original texts: the dual criminality requirement and the double jeopardy rule.

§. It has been argued that the original text gave certain relevance to the dual criminality requirement, since it allowed for the executing authority to adopt another measure in case the requested measure existed in the host country but its use was restricted to a list or category of offences which did not include the offence covered by the EIO. As seen above, this provision has been shifted to the grounds for refusal and integrated through a reference also to the case of measures allowed in the home state for offences punishable over a certain threshold, which does not include the offence covered by the EIO. Moreover, a general reference to the dual criminality requirement has been included in Article 10, whose complex structure encompasses two levels of grounds for refusal according to the nature of the measure to be carried out: the first, "basic" level applies to every investigative measure, whilst the second level only to intrusive means of investigation.

In this context, both dual criminality and the restriction of the use of the measure to a list or category of offences or to offences punishable by a certain threshold other than that of the offence covered by the EIO constitute the additional requirements of the second level. However, there is another reference to dual criminality in the current draft proposal, a reference that belongs instead to the basic level and is coupled with the exception of territoriality: paragraph 1(f) states that assistance can be refused where the EIO was issued for obtaining a coercive measure in respect of an act allegedly committed outside the home state and wholly or partially in the territory of the host state, but this act does not constitute a criminal offence under *lex loci*. This is the only provision that explicitly relates to "coercive means" in the context of Article 10, since paragraph 1a contains a generic reference to "any non-coercive investigative measure" (lit. b), whereas paragraph 1b applies to all measures "other than those" referred to in paragraph 1a. Although in all debates, the distinction between the grounds for refusal was drawn on the basis of the coerciveness of the measures,[30] the expression laid down in the latter provision can lead to confusion and contradictory interpretations of the entire system.

What is meant by non-coercive measures? How should the other measures mentioned in paragraph 1a be considered? Their autonomous position in the context of paragraph 1a should lead to concluding that their execution can entail the use of coercion, since otherwise they would fall into the field of application of paragraph 1a(b), which contain a comprehensive clause relating to *any* non-coercive measure. This conclusion appears to be confirmed by the reference to search and seizure (letter f). But what should be meant by measures other than both non-coercive and coercive measures?

An alternative interpretation could be to deem *all* the measures provide for by paragraph 1a as always non-coercive, as the reference to hearings of victims,

[30] See doc. 10749/11 REV 2, COPEN 130 EJN 70 CODEC 914 EUROJUST 85, p. 3.

suspects and third parties (letter a) would bring to believe. Such an interpretation, apart from the aforementioned incongruence in respect of lit. b, would run counter to the clear nature of search and seizure, which cannot of course change for the simple fact that in the home state the proceedings were initiated for an offence belonging to the list of 32 offences for which dual criminality is not required. Moreover, given that the measures are subject only to the grounds for refusal laid down in paragraph 1, how could the provision under paragraph 1a(f) apply to non-coercive measures where the territoriality exception presupposes the use of coercive means? Finally, since paragraph 1a rules out the application of the sole Article 9(1) to the measures listed therein, Article 9(1bis) should apply also to these measures. But how can the executive authority use a different measure capable of achieving the same result by less *intrusive* means, if these measures should not be intrusive at all?

This interpretation cannot be shared and therefore it cannot be ruled out than even the measures listed in paragraph 1a may entail the use of coercion. Such a conclusion certainly applies firstly to search and seizure, in respect of which it is hardly understandable why these should not be subject to the dual criminality requirement within the area of the 32 offences of Annex X. This approach, inherited by the FD EEW, would be highly questionable if some of these acts did not truly constitute an offence under *lex loci*, but this is not clearly the case of the acts listed in the Annex X, which constitute offences under the law of *all* Member States.[31] Furthermore, of course even the information already in possession of the executing authority under paragraph 1a(c) could have been obtained by coercive means and therefore in the context of a procedure for an act that necessarily had to constitute an offence in the host state. Besides, if the coercive means carried out prior to the EIO is allowed under *lex loci* only for offences other than that of the EIO (*e.g.*, an interception of telecommunications), and the offence was, unlike in paragraph 1(f), committed partly in the host country and partly in the home country, why should the results of that measure be transferred to the issuing state and used at trial, thus impinging on the decision on the defendant's guilt?

These observations make the distinction line drawn by Article 10 rather questionable and thus raise the question of what should be meant by "coercive measures" at EU level in the context of this draft proposal. It is well known that the expression "coercive means" has already belonged to EU legislation since many years, without its meaning being until now clarified adequately. In the FD OFPE the freezing order entails, by definition, the use of coercion, since otherwise it would have no meaning referring to any *additional* coercive

[31] According to Klip (2012), p. 367, a "cynical approach would be that the list does not eliminate the double criminality requirement. What the list does do is establish a number of offences for which, by definition, this condition is met. The remaining crimes are serious ordinary crimes common to all criminal justice systems of the Member States. A handful of the crimes do not immediately fall within what would be regarded as generally accepted offences. This accounts for the inclusion of swindling, sabotage and criminal damage."

measures rendered necessary by the freezing order [Art. 5(2)]. In the FD EEW the provision providing for the freedom of executing authority not to be subject to coercive means was reproduced in the context of the rule requiring the same authority to fulfil the requirements set by the issuing authority: this leads to concluding that even non-coercive measures can be executed by coercive means. This conclusion applies to the hearings of Article 10(1a)(a) PD EIO, insofar as in some criminal justice systems such hearings may be conducted coercively or through investigative means that are forbidden in some Member States (*e.g.*, lie detection). But again, why should victims or witnesses be obliged to submit to an interview, with the additional risk of exposing themselves to criminal liability for an act that does not constitute an offence in that State or an act that anyway does not authorize the use of the requested measure? To clarify the contents of the expression "measures of coercion" at EU level, a comparative study of domestic systems both from inside and outside the Union should be needed. The Swiss CCP provides an extremely useful help for this analysis, in that it contains a functional legal definition of coercive measures as procedural activities impinging on the sphere of fundamental rights of the concerned individuals and pursuing specific goals of criminal proceedings, the first of which is significantly securing of evidence (Art. 196).[32] This definition is in line with the wide conception in German literature of coercive means (*Zwangsmassnahmen*) in terms of measures impinging on fundamental rights (*Grundrechtseingriffe*).[33] This concept, which lies on the assumption that especially the development of science and technology has lead to emergence of new investigative means that are not perceived by the affected individuals as coercive,[34] shows the outdatedness of the notion of "coercive measures," which no longer constitutes a fruitful reference point for EU legislation. Thus, a distinction between grounds for refusal should be conducted on the basis of the concept of *Grundrechtseingriffe*.

§. Also the introduction of the *ne bis in idem* principle into the list of the grounds for refusal is to be generally welcomed. Yet the solution adopted in the recent versions of the legislative proposal still gives rise to human rights concerns. The first concern derives from the fact that the current text, like the FD EEW, makes the violation of the *ne bis in idem* rule a facultative, rather than a mandatory, ground for refusal. Compared with the solution adopted by the FD EAW, this weakens considerably the defendant's right not to be subject to further prosecution and is not perfectly in line with the acknowledgement of the *ne bis in idem* rule as fundamental principle by the EU FRCh.[35]

[32] See Pieth (2009), pp. 104 f.

[33] Cf., among others, Amelung (1976).

[34] In this sense Kühne (2010), p. 248.

[35] In the same sense Vervaele (2009), p. 158.

Another ground for concern is that the PD EIO does not include the case of an ongoing investigation or prosecution against the same person for the same offence among the grounds for (possible) refusal. Although this case can give rise to serious attacks to the sphere of the fundamental rights of the individual such as property, liberty etc., where in the contexts of the parallel simultaneous investigations or prosecutions coercive measures are simultaneously ordered against the same person, it is not clear which guarantees this legislative proposal provides for. Following the explanations contained in the point 12a of the *Consideranda*, the consultation aimed to verify the recurrence of the infringement of the *ne bis in idem* principle is "without prejudice" to the duty to consult the issuing authority in accordance with the Framework Decision 2009/948/JHA, which is however aimed to provide a mechanism of *prevention* of conflicts of jurisdiction.[36] On the other hand, Article 14(1) allows, in the case of ongoing investigation or prosecution, the postponement of the recognition or execution until such time as the executing authority deems "reasonable." This notion is as evocative as it is vague in its meaning: it does not impede the execution of the requested measure (of *any* investigative measure, no matter if coercive or not) even before the ongoing procedure has been concluded.

To be sure, the failure to define the object of the ongoing investigation or prosecution might not be casual: a closer look reveals that the provision does not aim to prevent the risk of *lis pendens*, a situation in itself pathological that requires solutions other than the assessment of a concrete prejudice which "might" result. And as the duty of consultation provided for by the Framework Decision 2009/948/JHA does not anyway oblige Member States to waive the jurisdiction falling into their competence,[37] the executing authority can still decide both to retain its jurisdiction and to continue its investigations despite the existence of an ongoing procedure or investigation on the same object against the same person. Also here, a different solution was adopted by the FD EAW that allowed the refusal of delivery of the person in the case of an ongoing procedure in the executing Member State. But significantly also some international instruments of judicial assistance have moved in the same direction.[38]

A third ground for concern is that to avoid the risk of misusing the double jeopardy rule, the current text allows the execution of the EIO where it was issued against several persons but the final disposition has only happened for one of them, provided that the issuing authority gives proper assurance that the evidence transferred as a result of the EIO will not be used to prosecute that person. This approach appears to be rather contradictory and dangerous for the fundamental rights of the individual. First, this assurance relates only to an

[36] On this topic see Gaeta, above.

[37] See Hecker (2010), p. 421.

[38] See, *e.g.*, Article 4(1)(d) UN MTMACM, which relates both to ongoing investigation and final decision.

eventual (further) *prosecution* in the issuing Member State, which does not extend to a criminal *investigation* against the same person, although just during the criminal investigations several measures can seriously threaten various rights of the defendant. Moreover, it is hardly understandable why the EIO should nonetheless, notwithstanding the consultation procedure confirms that in respect of one person the case has been finally disposed of, be executed with regard to him or her. Indeed, the execution of investigative measures in cases of coercive measures produces the very effects which the double jeopardy rule aims to prevent.

C) The proportionality assessment. It has been noted that the original draft text already provided for a check of proportionality by the executing authority in that it required the adoption of another investigative measure capable of achieving the same result by less intrusive means. The insertion in the current version of the provision into an autonomous paragraph applying to any investigative measure, no matter whether coercive or not, is rather questionable, since, as seen above, means which do not impinge on fundamental rights will not be intrusive at all. On the other hand, in cases of *Grundrechtseingriffe* it would be preferable to adopt a provision such as that proposed by the EU FRA in its Opinion of 14 February 2011 on this legislative proposal, whereby the executing authority should adopt the *least* intrusive measure.[39]

A further opportunity for the executing authority to challenge the proportionality of the requested measure under *lex loci* is the ascertainment of the respect for the limitations relating to specific lists of offences and to certain punishment thresholds as laid down by its own law, a task that, as seen above, does not apply to the investigative means provided for by Article 10(1a). Moreover, the provision of paragraph 1b(b), unlike the provision under paragraph 1b(a), is not subject to the limitation deriving from the offences listed in the Annex X, which confirms that dual criminality has only apparently been dropped in these cases. Indeed, if the executing authority in entitled to challenge the respect for specific *punishment* thresholds and restrictions to certain lists or category of *offences*, the act must, by definition, constitute an offence under *lex loci*.

Outside these cases, however, there is still no provision that gives the executing authority the general means to assess the proportionality of the requested measure, a task it would not always be able to comply with adequately. Indeed, the fact that the executing authority may, despite the intention to fully judicialize the proposed new procedure, be neither a judicial nor a prosecuting authority increases the difficulties of conducting such examination. How could this authority assess the need and proportionality of the requested measure if it is not competent to conduct a criminal investigation or the process?

[39] Opinion of the European Union's Agency for Fundamental Rights on the draft Directive regarding the European Investigation Order, http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm, p. 12.

5.2 Collection of Evidence

Collection of evidence constituted the first issue dealt with by the proposal launched by the European Commission in the Green Paper of 2009. Yet the approach of this proposal appeared disappointing to many commentators,[40] since the Commission limited itself to propose the setting of a comprehensive instrument for obtaining any types of evidence irrespective of their different nature. To be sure, the Commission was aware of certain advantages of the current judicial assistance system and therefore asked for an examination of whether specific rules should be applied to particular types of evidence and typical mutual recognition forms would be appropriate for specific investigative means. However, the Commission's proposal said nothing as to the forms of obtaining evidence through the new instrument.

This omission does not seem to be coincidental. Indeed, the Commission, while promoting the introduction of these common rules, assumed a rather static concept of evidence, totally indifferent to how the evidence has been obtained.[41] Evidence was taken as something that can be objectively perceived even outside the proceedings, and this might confirm the impression that the Commission's preference was developing towards those criminal legal systems that do not distinguish the probative value of evidence according to how it has been gathered.[42] Following this approach, the Commission failed to consider the reasons of the defence[43] and, more generally, the repercussions of the transfer of evidence on the sphere of the person. Moreover, its proposal omitted any reference to the viewpoint of the victim in the field of evidence-gathering.

Instead, in all adversarial systems, evidence is always a legal construct:[44] the result of a procedural activity whose rules will normally play a decisive role as to the probative value that ought to be attached to it.[45] Although it cannot be ruled out that this phenomenon occurs with regard to documentary evidence, of course it is clear in the case of evidence that requires some activity within the proceedings. Therefore, the distinction between the evidence that, although directly available, does not already exist and the evidence that, although already existing, is not directly available without further investigation or examination appears to me to be rather questionable. In neither case will evidence is in itself *available* and *exist* from a legal viewpoint and in both cases it will result only from a procedural activity. Depending on the form of this activity, evidence will have a different probative value even in the context of the same proceedings. Proceeding from this

[40] See, among others, Allegrezza (2010), pp. 569 ff.; Spencer (2010), pp. 602 ff.

[41] Allegrezza (2010), p. 573.

[42] *Ibid*., p. 579.

[43] Allegrezza (2010), p. 576.

[44] Gleß (2005), p. 123. Of the same opinion Schünemann (2009), p. 8.

[45] *Unione Camere Penali Italiane – Osservatorio Europa*, Opinion on the Green Paper on obtaining evidence from one Member State to another and securing its admissibility, p. 3.

premise, the theory of relativity has significantly been applied to criminal evidence.[46]

Compared with the Commission's proposal, the PD EIO has undoubtedly paid much more attention to the issue of the *forms* of collecting evidence. The main provision is Article 8(2), which inherits one the most virtuous models of gathering overseas evidence, emerged in the most advanced instruments of judicial assistance and incorporated, almost literally, into the mutual recognition area both by the FD OFPE and the FD EEW: the possibility of combining *lex loci* with specific formalities of *lex fori*. Of course, this model does not provide any harmonization at supranational level, since no procedural rules emerge from this provision of the legislative proposal. By contrast, it aims to offer a *method* of obtaining evidence, which delegates the harmonization to the executing authority in each concrete case.[47] But to what extent can the issuing authority set these requirements of its own law? What leeway does the executing authority have to avoid the formalities required overseas and what competence does it have to collect evidence in a harmonized way? Is a concrete harmonisation a proper solution? Can this system provide a proper protection of both domestic procedural cultures? Which guarantees are granted to the individuals involved in transnational procedures?

To start with, the PD EIO does not reproduce some limitation clauses laid down in various judicial assistance texts,[48] aimed to restrict the possibility of setting formalities of *lex fori* to the cases in which they are "necessary" under the law of the requesting state. This expression was better specified in the first EU legislation in the field of evidence gathering based on the principle of mutual recognition, i.e. the FD OFPE, through a reference to the "validity" and use of overseas evidence [Art. 5 (1)]. The wording of Article 8(2) PD EIO follows almost literally the provision of Article 4(1) EUCMACM, although the same rule has obviously a very different way in a mutual recognition context, where as a rule, assistance *must* be afforded. Also, here, there are no limits as to which formalities can be requested and, as seen above, the leeway given to the issuing authority is considerably wide taking into account that only the forms contravening the fundamental principles of *lex loci* will be rejected. This reduces proportionally the margin of decision of the executing authority, which is called upon to carry out the difficult task of applying properly foreign procedures and the not less difficult task of harmonizing them with its own law and practice. Moreover, this legislative proposal has not reproduced the clause laid down in Article 12 FD EEW, which releases the executing authority from the obligation to comply with foreign formalities requiring the application of coercive measures. The only way of avoiding this obligation in the PD EIO is to invoke the infringement of the fundamental principles of *lex loci*, which is clearly different

[46] Nobili (1998), p. 11.

[47] For various meanings of "harmonization" see Gleß (2009), pp. 145 ff.

[48] See *e.g.*, Art. 8 SAP ECMACM.

from the violation of the law of the host state[49] and much more far away from the consistency with the law and practice of the requested country.[50]

Clearly, such clauses give wider leeway to the authorities of the host state, which can rule out the formalities incompatible with *any* rule or practice of its own law. However, the combination of *lex loci* with *lex fori* calls for a high level of harmonization here, one which does not render the application of foreign procedures excessively problematic insofar as they must be fully compatible with the law of the requested country. By contrast, the clause of non-infringement of the fundamental principles of *lex loci* achieves at best a minimum and even forced harmonization, which can cause serious disadvantages and additional costs above what is usually provided for by national law.[51] On the other hand, this model requires a big effort by the authorities of the host state to apply properly formalities that can be even "unfamiliar" to its own legal order.[52] Furthermore, the PD EIO does not provide for any form of participation of private parties in the execution of the EIO [Art. 8(3)]. The failure to involve them not only jeopardizes the right to a defence,[53] but it also means underestimating the importance of the contribution of the defence to ensure an appropriate application of foreign procedural formalities. Also here, this solution is in line with the pure logic of mutual recognition: to achieve the goal of an efficient application of the provisions on execution of the EIO, there is room only for a dialogue between the cooperating authorities.

5.3 *Admissibility at Trial and Use of Overseas Evidence in the Home State*

To tackle the problem of admissibility in a wide sense and subsequently the problem of usability of transnational evidence in the home proceedings, the Commission's proposal consisted of the adoption of common standards of evidence gathering. A number of criticisms were formulated against this proposal, which constituted the second part of the Commission's approach.

A first criticism was that the Commission left its proposal rather vague as the contents of this harmonization. Indeed, what degree of depth should the harmonisation of the admissibility rules achieve? The 2009 Green Paper failed to address this issue, while proposing only the alternative between general standards rules applying to any type of evidence and specific common rules applying to the

[49] See, *e.g.*, Art. 10(2) IACMACM.

[50] See, *e.g.*, Art. 6 UN MTMACM.

[51] This would happen, for instance, where Italian authorities request the transcription of telecommunications following the formalities (especially the procedure laid down for expert evidence) provided for by Article 268(5) and (6) it. CCP.

[52] In this sense see literally Art. 8 SAP ECMACM.

[53] In this sense Marchetti (2011), p. 163.

various types of evidence. Instead, in its Communication "An area of freedom, security and justice serving the citizens," the Commission had proposed, among the "other avenues to be explored," the establishment of "minimum principles to facilitate the mutual admissibility of evidence between countries." This approach was rather contradictory, since such a minimalist approach could not suffice to reach the ambitious goal of enhancing the mutual trust between the cooperating authorities.

In a deeper sense, trying to solve the *admissibility* problem through setting common rules on evidence *gathering* was rightly deemed to be misleading.[54] This confusion, which was partially due to the aforementioned ambiguities of terminology, reflected an unclear understanding of the complex structure of transnational procedures. This uncertainty is evident even at the level of EU's primary law, thus raising, as noted above, serious doubts as to the exact meaning of Article 82(2)(a) TFEU. However, in light of what has been argued in this analysis, it is clear that the TFEU does not refer to the issue of preventive admissibility of the evidence to be collected abroad. And it is significant that the TFEU provided for the final step of the transnational evidentiary procedure, i.e. the admissibility of evidence gathered abroad in the home state, as the first area in which a minimum approximation can be reached to enhance mutual recognition. Indeed, although mutual recognition does not necessarily imply the duty for the requesting Member State to admit blindly, and make full use of, the evidence gathered abroad,[55] obtaining some evidence from another Member State results in being meaningless if evidence cannot be admitted nor used at trial.

Even in this sense, the concerns expressed before the entry into force of the Lisbon Treaty are still acute. Is it the business of EU institutions to lay down the rules on admissibility of evidence at trial in the home state, thus obliging the requesting authority to admit and attach full probative value to evidence gathered abroad? Is the EU entitled to intervene on the basis of Article 82(2)(a) TFEU *in this way*, i.e., through harmonizing the rules on admissibility? It has been noted that the assessment on admissibility of evidence to be gathered abroad (preventive admissibility) falls into the exclusive competence of the requesting or issuing Member State. Why should the admissibility of the evidence gathered overseas in the home proceedings (subsequent admissibility) be assessed on the basis of parameters laid down at supranational level? And should these rules encompass both exclusionary and inclusionary rules?

An EU intervention imposing common exclusionary rules appears nowadays to be justified,[56] especially in the light of the recent Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings,[57] also incorporated into the Stockholm Programme.[58] Instead, it seems to be highly

[54] Spencer (2010), p. 604.

[55] Bachmaier Winter (2010), p. 583.

[56] Spencer (2010), p. 604.

[57] Resolution of the Council of 30th November 2009 (2009/295/01).

[58] Point 2.4.

questionable that even after the Lisbon Treaty the EU institutions may take away the responsibility of the Member States for establishing inclusionary rules on admissibility of the evidence gathered abroad, in the same way that the EU has not announced any intervention in the field of the rules on the evaluation of evidence.[59] Any attempt to introduce forms of harmonisation of inclusionary rules would be neither needed nor recommendable, mostly given the fact that overseas evidence will anyway have to be used *in domestic proceedings*. Indeed, the differences between criminal justice systems usually lead to very different regulations depending on the structure of the domestic procedures. In some legal systems these regulations do not even have full legislative character, leaving a certain leeway to the judicial authority.[60] In other legal orders, instead, specific rules on admissibility and use of evidence have been laid down at constitutional level,[61] which may raise serious problems of adaptation of the constitutional and procedural system to EU law in light of the "*controlimiti*" doctrine. Moreover, most criminal justice systems with an adversarial character lay down a definitive list of provisions through which the evidence obtained in the pre-trial phases or from other proceedings may be introduced into trial, a list sometimes accompanied by final clauses.[62] Finally, analogous forms of crime can have a different impact on the Member States, thus justifying different solutions and derogations from the normal evidential rules on use of evidence at trial.[63]

Significantly, unlike the European Commission's approach, the PD EIO does not contain any proposal for harmonization of the rules on usability at trial of overseas evidence, in the same way that it does not aim to harmonize the phases of preventive admissibility and collection of evidence, both of which remain regulated by domestic law. What the legislative proposal does is to *require* a previous check of admissibility both by the issuing and the executing authority and to *oblige* the executing authority to combine its own procedure with the requirements set by the issuing authority. As noted above both these interventions aim to establish a *method* rather than harmonised rules, a method aimed respectively at the separate (at the

[59] See, among others, Allegrezza (2010), p. 578; Bachmaier Winter (2010), p. 588; Spencer (2010), pp. 604–605.

[60] Vicoli (2009), pp. 20 ff.

[61] For instance, in Italy it has been enacted in the Constitution that not only must evidence be taken with adversarial procedure but furthermore the guilt of the defendant cannot be proved on the basis of the statements of people who have always freely refused to accept a confrontation with the defendant or his or her lawyer [Art. 111(4)]. Moreover, derogations to the *audi alteram partem* rule can be introduced by the law only in three cases laid down in the Constitution, which are respectively concerned with: (1) the defendant's consent, (2) the ascertained objective impossibility of obtaining evidence according to the adversarial principle and (3) the proved illicit conduct [Art. 111(5)]. Although this provision does not impose a fixed probative value, it implies that, in cases other than those provided for in this paragraph, any evidence gathered in the pre-trial stages will have no probative value as to the decision on the defendant's guilt. See Ferrua (2007), pp. 94 ff.

[62] See, *e.g.*, Arts. 514 and 526 it. CCP.

[63] See, *e.g.*, Article 190bis it. CCP, applying, *inter alia*, to mafia-related crimes, terrorism, sexual crimes.

admissibility stage) and joint (at the execution stage) application of *national laws*. The question arises whether this methodological approach can constitute an appropriate alternative to the harmonization of the rules of admissibility without "betraying" the meaning of Article 82(2)(a) TFEU.

This is not, however, tantamount as saying that the PD EIO does not address the issue of use of evidence at trial at all. Whereas the preventive control of availability by the executing authority is mainly aimed to ensure a proper protection of individual rights in the execution of investigative means in its own territory, both the preventive check of availability by the issuing authority and the possibility of combining *lex loci* with *lex fori* can undoubtedly prevent the risk of evidence being declared inadmissible at trial in the home state. To achieve this result, at least two conditions must be met: (1) the investigative measure must be deemed as *ex ante* admissible pursuant to *lex fori*, (2) the formalities of *lex fori* must be applied properly.

But what happens where a different measure is carried out and what instruments does the executing authority have to carry out its task properly? As seen above, Article 9(3) does not require *another* check of availability, necessity, and proportionality on the different measure by the issuing authority. As to the second point, we have seen the difficulties of harmonization caused in the execution phase by the adoption of the clause of non-infringement of the fundamental principles of *lex loci*. And we have noted how these difficulties can have serious repercussions on the proper application of foreign procedures, repercussions strengthened by the lack of any participation of private parties in the execution of the measure. The failure to involve the defence raises even more serious human rights concerns in case of obtaining evidence already in possession of the executing authority. Here, again, the phase of admissibility at trial becomes the tension field between a rather inquisitorial, static notion of evidence and the respect for defence rights.

6 Conclusive Remarks and Proposals

The comparative analysis of the Commission's proposal and the PD EIO shows that the common goal of introducing a comprehensive instrument of gathering overseas evidence has been pursued through very different paths. Whereas the Commission aimed at the introduction of a single tool presumably having the same structure, the proposal of directive provides a general framework, within which one can clearly distinguish several methods of evidence gathering and even, as seen above, measures not necessarily or not exclusively pursuing evidentiary aims. Although the proposed new instrument introduces itself as a typical mutual recognition tool, is has incorporated activities which still remain linked to the request model, such as covert investigations under Article 27, for which the EIO can be issued for the purpose of *requesting* assistance by the executing authority. Moreover, mutual recognition works very differently according to nature of the measure to be carried out and, above all, according to whether the EIO aims at an evidentiary activity that

has not yet been conducted or at obtaining evidence resulting from an activity previously carried out in the host state. The latter case appears among the main objectives of the PD EIO [Art. 1(1)] and a considerable ground for concern deriving from the current text is that it has strengthened the availability model, in that it has released the executing authority from its duty of controlling the respect for dual criminality and the criminal policy choices of the host state, while dangerously coupling the case of evidence in possession of the executing authority with the case of non-coercive investigative measures.

From the perspective of the procedural forms of obtaining evidence, the legislative proposal has enacted the solution consisting of the combination of *lex loci* with *lex fori* in a way that allows for a minimalist and even deficient harmonization to take place. Especially, (1) the executing authority is obliged to comply with coercive formalities, (2) there is no possibility for the defence to take part in any way in the execution of the EIO. This shows that the strengthening of the logic of mutual recognition does not increase the level of protection of fundamental rights and the mutual trust between foreign authorities. Instead, it can lead to a mutual bond, which will at best replace the mutual distrust that frustrates the efficient enforcement of most mutual legal assistance instruments with a forced trust in the criteria established by the foreign authority, while seriously endangering many individual's rights.[64] And one can, at best, "accept that PD EIO imposes the judicial authorities of different States to have a 'blind' trust to each other, but to require from the parties in the process an identical trust on the public authorities is perhaps not so easy to accept without objections."[65]

Furthermore, neither in the Commission's approach nor in the PD EIO is there any trace of the possibility for the defence to request the obtaining of evidence abroad. However, as had rightly been observed with regard to the Commission's proposal, the promotion "of a unique EU instrument concerning all means of evidence implies a 'positive' ('proactive') role of the defence, not only a 'negative' ('passive') one as the opponent of the prosecutor. The defence could in fact have interest not only to participate effectively to the activities carried out by the authorities of the foreign State," but also "to play a proactive role by submitting requests of evidence in favour of the accused."[66] This is a very important goal to be pursued in order to ensure effectiveness of legal defence in all cases in which the defence strategy aims not only at countering the charges levelled against the defendant but also at pleading alternative assumptions.

On the other hand, it is significant that the PD EIO, though it inherits from judicial assistance instruments the regulation of special investigative activities or

[64] Of the same opinion Schünemann (2009) pp. 2–3, according to whom the transfer of evidence based on the principle of mutual recognition "necessarily leads to a structural weakening of the legal position of the accused," while undermining the substrate of the confidence in other Member States.

[65] Bachmaier Winter (2010), p. 586.

[66] Allegrezza (2010), pp. 576–577.

methods (*e.g.*, hearings by videoconference), has provided—in addition to the clause of non-contrariety with the fundamental principles of *lex loci*—for specific rules to be applied in order both to preserve the fundamental guarantees of the law of the executing country and to ensure the effective exercise of the rights of defence of the accused. This demonstrates that both the mutual recognition model and the most advanced models of mutual legal assistance share the need for a combined approach.

In light of the above, the setting of a virtuous transnational procedure aimed at obtaining evidence overseas requires methodologically a inter-level approach, whichever system one adopts, i.e., either mutual recognition or mutual legal assistance. This methodological approach is, in my view, the most proper solution to ensure realisation of the AFSJ as construed in the terms of Article 67(1) TFEU, which can be considered as "common" *insofar as* the adoption of shared standards can also ensure a proper protection of individual rights and national legal cultures.

This approach should encompass:

A) The introduction of sunset clauses aimed at avoiding infringement of fundamental rights (*fundamental rights clauses*). Due to the complex nature of human rights, such clauses should be introduced at different levels and in respect of various stages of the transnational evidential procedure.

- As to both the admissibility stage and the phase of obtaining evidence, the need for ensuring the widest protection of fundamental rights from the combined perspective of Article 67(1) TFEU, which calls for protection both of the supranational human rights systems and of the national constitutional systems, suggests adopting two different clauses, such as those proposed in the Legislative Resolution of the European Parliament on the proposal for an FD EEW. These clauses should contain: 1) a general ground for refusal where the requested measure would prevent a Member State from applying its *constitutional rules* relating to due process, privacy and the protection of personal data, freedom of association, freedom of the press, etc.; 2) a general ground for refusal where the requested measure would undermine the obligation to respect the fundamental rights enshrined in the *ECHR* and the *EU FRCh*. As to the latter clause, in order to ensure consistency in the protection of fundamental rights, a general duty of referral to the ECJ for a preliminary ruling might be introduced.[67]
- As to the phase of admissibility at trial in the home state, a closure clause should be introduced, following again the proposals of the Legislative Resolution of the European Parliament on the proposal for an FD EEW, to avoid that the use of overseas evidence jeopardize the rights of defence applying to domestic criminal proceedings.

B) Setting up a transnational integrated procedure. This result can be achieved following two possible schemes.

[67] Hecker 2010, p. 452.

The first solution consists of combining *lex loci* with specific procedural requirements of *lex fori*, thus aiming at a bilateral horizontal integration. Following this scheme, to achieve the goal of a proper integration of domestic procedures, the requested authority should, like in the second phase of MLA, be obliged to comply only with those procedural forms that are fully consistent with its own law and practice, not with those that do not infringe the fundamental principles of its own law. This approach does not, however, necessarily suffice to ensure full respect for individual rights. The French CCP offers an interesting solution, according to which the formalities of *lex fori* can be complied with provided they do not lower the level of protection of the rights of the parties involved in cross-border activities [Art. 694-3].[68] At any rate, such solutions cannot be adequately realised without the contribution of the defence both to counterbalance the presence of officials of the home state in the investigations overseas and contribute to the correct application of *lex fori* by the authorities of the host country.

A limitation of such a solution derives from its way of rendering *lex fori* compatible with *lex loci*, which is combining specific formalities of the former with the latter. This produces a rather *unbalanced* relationship between the two laws, since it achieves a partial application of *lex fori* with the full application of *lex loci*. In sum, whatever the mode of combination is, this model remains essentially based on *lex loci*. Depending on how deeply integration is realised, *lex loci* will not necessarily remain unaffected by the requirements of foreign law, and the same applies to *lex fori*. However, this model does not aim at reaching a homogeneous integration of both laws, but only at preserving the needs of each of them, i.e., respectively the identity of the legal order of the host country and the formalities required to ensure the admissibility of evidence in the home country. Thus, in my view, the greatest shortcoming of this model is considering *separately* the requirements of the two national regulations as parts of their domestic laws rather than as sources for developing an integrated procedure rooted on a common basis. This is what makes it difficult for the requested authority to apply properly procedures that remain part of *foreign* law.

An alternative solution would be to set an *ad hoc* procedure of gathering evidence on a balanced basis. This approach starts from the premise that each of the domestic laws ceases to be part of its own law when involved in a transnational procedure.[69] This applies also to *lex loci*, which is applied on the territory of the requested State with the purpose of providing assistance to another country. But how this integration could be realised? Since integration must be sought in relation to the requested assistance, a *new* procedure must be set up and a *new* balance of interests must be achieved to ensure full respect for the domestic balances between the interest of efficient prosecution and the need to protect individual rights. In other words, a request for assistance will always give raise to an atypical procedure, whose modes must be established in the *concrete* case. The biggest shortcoming of

[68] See Lelieur 2012, § 2.1.

[69] From a similar perspective, Klip 2012, p. 393, points out that domestic judicial products are no longer products once they go across the border, where different requirements apply.

the traditional approach is that it attempts to combine *single* procedures of both laws, as if they could be dealt with outside the legal context they belong to. But any provision is part of its own law and reflects specific balances between conflicting interests against a specific *constitutional framework*. A mixture of single procedural forms can alter this scheme and lead to different constitutional balances colliding with each other. The *requirement of coherence* is of greatest importance especially where the use of measures restricting fundamental rights is at stake.

Certainly the idea of an *ad hoc* procedure would run counter to the widespread program of harmonising the rules of evidence. On the other hand, the awareness has grown today that human rights requirements must be assessed in the concrete case.[70] Neither can this approach raise concerns as to the legal basis of the combined procedure, since the new balance should firstly be sought on the basis of the *legislative* requirements predetermined by both national laws. This does not rule out that also supranational or international requirements can play an important role,[71] providing a *higher* level of protection than that of either one of the domestic laws.

An interesting solution would be to establish – either at supranational or international level – specific criteria for the solution of conflicting situations *in advance*. Significantly, many countries have incorporated – additionally to the combination rule of *lex loci* and *lex fori* – a general criterion, whereby the requested assistance cannot cause substantial disadvantages for the people involved in transnational procedures, a criterion that is usually independent from the constitutional requirements of *lex loci*.[72] Starting from this basic requirement, which shall be deemed as an "emergency brake," concrete criteria should be elaborated in relation to specific state-related interests (*e.g.*, investigation secrecy) and specific individual rights (*e.g.*, the right to information). In my view, any hierarchy of such criteria should be avoided, as it would jeopardize the flexibility of the mechanism, which aims at reaching a new balances of interests in the concrete case. An acceptable solution on an individual basis for a *fair* evidential procedure cannot, therefore, start from imperative sentences, but from the assessment of specific value-based decisions. A fruitful approach derives from the so-called "principle of quality" (*Qualitätsprinzip*) proposed in the field of conflict of jurisdiction, a principle which aims at reaching the most proper balancing between the values at stake in the concrete case.[73]

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[70] Sanders et al. 2012, pp. 29 f.

[71] In this light, the introduction, at supranational or international level, of specific guarantees in cases of investigative activities impinging on fundamental rights, such as those provided for by Article 12(1)(a) and (b) laid down in the proposal of 2003 on a FD EEW, would be welcomed.

[72] See Art. 146(2) der portugiesischen *Lei da cooperação judiciária internacional em matéria penal* (144/1999). This conclusion does not, however, apply to the French CCP, which states that „*si la demande d'entraide le précise, elle est exécutée selon les règles de procédure expressément indiquées par les autorités compétentes de l'Etat requérant, à condition, sous peine de nullité, que ces règles ne réduisent pas les droits des parties ou les garanties procédurales* prévus par le présent code" (Art. 694-3).

[73] Lagodny 2002, p. 265.

This solution cannot, however, be completely realised without a *procedural* integration. In this light, moreover, not only both the cooperating authorities, as provided for by Article 8(4) PD EIO, but also private parties should play an essential role in reaching an agreement on such modes. The contribution of the defence(s) could, in my view, be waived only in cases of investigative measures not requiring, according to both laws, the information of the individuals concerned. Where a proper agreement on a new balance of interests relating to the specific investigation requested is impossible, assistance should not, in my view, be provided. Any different solution would lead to contradictory conclusions, i.e., either obliging the requested authorities to carry out an investigative activity reflecting a balance of interests unadapted to its own law or leaving to the requesting authority the decision on whether to accept and use at trial a piece of evidence obtained without respecting the balances of interests of *lex loci* or to declare the inadmissibility of the results of the transnational procedure.

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EU Tools for the Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings

Piero Gaeta

Contents

Abstract This paper aims to demonstrate two theses. The first one is that the regulation of the jurisdictional conflicts in criminal matters constitutes a focal point of both theoretical and practical importance, as it establishes, under many aspects, the scientific proof of the effectiveness degree reached by the integration process in the European Union. The second one is that such a centrality has not yet been recognized and therefore the EU legislation appears to be widely inadequate, superficial and remarkably late; above all, incapable of facing some crucial basic decisions. The present contribution attempts to demonstrate these theses through a historic-normative reconstruction and on the basis of the analysis of the main legislative documents of European Law, while highlighting in particular the current role of Eurojust. The conclusive hypothesis is that a new stimulus to regulate the

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discipline of conflicts can come from the so-called "forced cooperation," which has been provided for by the Lisbon Treaty in an innovative way.

Abbreviations

CISA	Convention Implementing the Schengen Agreement
JHA	Justice and Home Affairs
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Preliminary Remarks

This paper makes two arguments. The first is that the issue of criminal proceedings conflicts is of vital theoretical and practical importance. From many points of view, it constitutes proof of the level reached by legal integration efforts within the EU. The second is that its importance has not been recognized: legislation at the European level of late is scarce and rough and inadequate to the task of facing important basic choices. Prevention and settlement of jurisdictional conflicts in the criminal field occupy the core of the discussion at the moment over the *de iure condendo*, which is infinitely wider than the one over the *de iure condito*.

2 Jurisdictional Conflicts and European Legal Integration

2.1 Conflicts of Jurisdiction: The Reasons Behind the Matter's Significance

Only with profound short-sightedness could one fail to see in the issue of jurisdictional conflicts and their complex solutions the real—the most precise and reliable—measure of the effectiveness of European legal integration, both in terms of cooperation between member states and in terms of guarantees achieved by individual defendants.

In fact, a series of "stricting" laws "that includes forever and always the spotting of the judge *mieux place*"[1]—and therefore make settlement possible through the finality of judgements—would first constitute the safest evidence of an effective trust between the member states over the level of reliability of their respective legal systems. Actually, if the exercise of jurisdiction is first and foremost a typical expression of the sovereignty of each state, then restrictions on the exercise of

[1] Amalfitano (2009), p. 1293.

jurisdiction over the prevention and the settlement of disputes sound politically like the silent acceptance of a restriction on national sovereignty, which is of immensely high value, though politically more than legally. A state that truly accepts the transfer of legal action to another state and thereby places the exercise of its own jurisdiction in the reasonable balance with other values that it comes to consider dominant is a state that gains the deepest, most modern and most intense value the political sovereignty, whose supreme exercise coincides with its availability and with the willingness to drop it for major reasons.[2]

The sacrifice of sovereignty through the renunciation of jurisdiction means, besides being merely a signal of confidence among jurisdictional systems, also (and mainly) an effective harmonization of the systems themselves. From this point of view, the settlement of the jurisdictional conflict is the litmus test used to highlight not just the political aspect but the true degree of uniformity between the various national legal systems. Actually, the common rules to avoid the upstream exercise of jurisdiction can only take effect over what is somehow uniform, firstly under the aspect of continuity of the predictions of criminal cases, then of the punishments linked to them, of the procedural mechanisms needed to establish them, then of the guarantees claimed for the accused and so on.

The principle establishing that "truth is symphonic" is considered valid also (mainly with reference to jurisdiction, since redundancies are usually obvious) both in the national and international field like a dyslexia of the *ius dicere*, so like a pathology.

Thus the rules governing conflicts and the prevention of conflicts within the EU plus the fact that they offer binding solutions bear witness to the level of complexity—of maturity—achieved or being moved toward under EU law. Moreover, the international settlement of competence disputes arguably constitutes the greatest fulfilment of jurisdictional European integration, as it brings out, necessarily, the principle of mutual identification.

In fact, in the process of the transfer of the exercise of a legal action from a member state that decides to "give away" its own jurisdiction in favour of another one, the primary factor is the level of recognition given to the receiving state's jurisdiction by the sending state. This is not simply about "making easier the mutual recognition of the judgements and jurisdictional decisions" [Art. 82(2) TFEU] nor just about executing another state's "completed jurisdictional work" (identifying a composition quite similar to its rules), but rather about dropping the application of the rules of its own system and recognizing the legitimacy of the whole chain of actions of the other state. Briefly, it is about an open and undetermined recognition "of the competence to judge attested to the authorities of a state—by which—it cannot help but follow the recognition of the solutions taken."[3] Further positive

[2] About the theories founding the jurisdiction in chief of the State in connection with the conflicts of jurisdiction see, recently, *ex multis*, Gaeta (2005), p. 497 ff. About the delimitation of the field of the National jurisdiction through inner and treaty laws, in connection with the rise of jurisdictional conflicts, see the thorough analysis by Amalfitano (2006), pp. 1–39.

[3] Piattoli (2007), p. 2642.

consequences are easily demonstrated. First of all, the crucial effect that follows over the structure of the jurisdictional systems themselves and creates "more flexible, osmotic systems, less formal about the discipline of some court actions."[4] Second, the positive repercussions for tools already in running order, like for example the overtaking of cases of refusal to the execution of an European arrest warrant [Art. 4(7)(*a*)] of the Framework Decision 2002/584/JHA, of 13 June 2002.[5] Third, the reduction of the (otherwise problematic) court preclusion issue in an international context, i.e. of the practicality limits of the *ne bis in idem* principle (which will be explained later). The recognition of common rules on jurisdiction—at least when it becomes a dispute matter—brings as a logical necessity the recognition of the "legal upshots" of the very national jurisdictions with which a dialogue is created. Lastly, the consideration that the rules on conflicts, which truly constitute the logical and juridical antecedent needed to create an integrally shared system, represent the real DNA sequence of the new-born European public prosecutor, the "great innovation of the constitutional treaty, fully understood in the Lisbon treaty."[6] But the rules governing the prevention and settlement of jurisdictional conflicts assume further practical importance as they are intended to come along with the exponential growth of transnational crimes. The widening of the area of transnational crimes is strictly linked to the necessary existence of prevention rules and settlement of jurisdictional conflicts. Transnational crimes and jurisdictional conflicts depict a typical Möbius strip with a single side and a single edge: having run a lap, it sets the subject on the opposite side: there cannot be separateness. If the cooperative effort in the legal field is finally expressed, in the last decade, in the progressive scheme of criminal cases whose transnational value is formally acknowledged, such a formalization would be likely to be a *flatus vocis* if not strengthened in specific rules of mutual recognition of jurisdiction.

Above all, since the UN Agreement against transnational crime signed in Palermo on 15 December 2000 (also known as Palermo's Agreement or TOC) and, for Italy, the corresponding ratification Law 146/2006,[7] the category of transnational crimes has seen a systematic development of its practical potential. After the Agreement, besides the traditional category of the transnational crimes "in nature", the added category of "serious crimes" is provided—they were defined by the states at certain conditions (extent of sanctions and expiration terms)—which, if characterized by the requirement of transnationality, result in their being included in the operative field of the Agreement itself (Art. 3).[8] Most importantly, the

[4] Allegrezza (2008), p. 3882.

[5] Piattoli (2007), p. 2642.

[6] Allegrezza (2008), p. 3882.

[7] About this see, in addition to the quotations of the following note, Di Martino (2007), p. 11 ff.

[8] See Rosi (2008) p. 3. On the same subject, by the same author, Rosi (2007), pp. 67–101. In general, on the subject of the transnational crime, see, *ex multis*, the thorough analysis by Di Martino (2006).

Palermo Agreement goes beyond object expansion and codifies the so called [Art. 15(3)] *aut dedere aut iudicare* principle, according to which the states took as commitment to regulate their jurisdiction as to avoid impunity in any case of transnational crime. These circumstances highlight that the operative expansion of transnational crimes will go on "creating overlapping problems of jurisdictions, (...) with amplified risks of jurisdictional demands."[9] In short, the future of the construction of transnational crimes is placed ahead of the capability of the integrated system to solve the several jurisdictional conflicts that will arise.[10]

2.2 *Jurisdictional Conflicts Discipline and the Ne Bis In Idem Principle*

But that's not enough. The law regarding the settlement of jurisdictional conflicts is almost incontestable proof of the level and intensity of the individual guarantees that a system is able to give and ensure to the accused at an international level.

The multiplication of proceedings on the same offence is pathological not only from an objective viewpoint, i.e. in the sense that *lis pendens* is symptomatic of useless waste of assets (and so of inefficiency of the entire legal order), but it is also pathological in that it impinges on the fundamental right of the accused to be subject to *one* criminal investigation for the same offence.

The proliferation of investigations is not just seriously prejudicial for the proportional *deminutio* of the defences that the person under investigation or the accused can gather (in terms of remedies before than of costs), but also has negative value in terms of credibility of the legal investigation itself. The suppression of the crime, mainly in a transnational context, is plausible when it is prompt and unequivocal: that is, when the same facts do not result in structurally or teleologically different treatment across different legal systems. Illegitimate or confused criminal sanction denies its own ethical ground: that is to say, the certainty of the investigation and the absence of inconsistency.

This danger is so great that legal systems work against it through the constant imposition of the difficult *ne bis in idem* principle: a principle that in authentically

[9] Rosi (2008), p. 4.

[10] Over the growing overlapping of the punitive demands in an International field and over the lack of remedies against the phenomenon of the jurisdictional conflicts see the sharp thoughts by Lupària (2010), p. 323 f., according to whom "the ancestral and nationalistic distrust towards criminal systems of the other states, in addition to the wrong belief that every damage to the fundamental rights descending from the coexistence of multiple actions may be smoothed by the prohibition to duplicate the prison sentence or, at the most, by the prohibition to reiterate a trial concluded *aliunde*, have slowed down the march leading to an organic system of anticipative demission to the jurisdiction at least in the fields of regionalization and criminal law" (p. 328).

advanced systems, however, cannot but adopt a residual validity, offering itself as *extrema ratio*. As acutely highlighted, the *ne bis in idem* actually

> delegates to a prompter way to operate of other systems the task of handling possible positive jurisdictional conflicts that it is not able to prevent and solve, but late and randomly – and so – it is usual to place at the rear of a system of mechanisms arranged to prevent or quickly solve the situations of positive jurisdictional or expertise conflicts or also just simultaneous pendency of two identical suits.[11]

In the abstract, an evolved legal system strongly geared toward the defence of civil liberties is supposed to ration recourse to the *ne bis in idem* principle, which is set up as a special cure for a pathology "upstream" in the system and suggests itself as "closure provision" of the system itself.

Therefore, the relationship that links the discipline of the jurisdictional conflicts and the workability of the *ne bis in idem* principle should be inverse proportionality: the more the sensible application of the former, the more the function of the latter is weakened as far as it is considered just a minimal final guarantee.[12] Trying to foresee a conclusion, the trend line of this relationship seems to take the path, in the European field, that leads to this target: solution of the jurisdictional conflicts as a solid rule of the transnational jurisdiction and application of the *ne bis in idem* principle as a preservation clause in case of failure of the main rule. And this tendency seems to be, in my opinion, a remarkable recent development after years ruled by a diametrically opposite trend . In fact, until the recent past, most political and technical attention was paid to the prescriptive definition of the structural elements defining the *ne bis in idem* principle, in an attempt to strengthen it as the main tool for overcoming the phenomenon of parallel trials. Starting approximately from the 2000s, a series of normative developments show instead a deeper sensitivity towards a different approach to the matter, considering its solution linked strongly to a conflict prevention system, though one which supposes—in case the prevention does not solve the conflict—the methodical workability of resolving rules of jurisdictional conflicts.[13] For the first time, there seems to be a willingness to challenge the problem of rivalry among national jurisdictions by means more sophisticated than reflexively reaching for *ne bis in idem*: instead, in a systematic dimension through rules over jurisdiction in the abstract exercisable by all the member states. Rules that, therefore, concern the more impervious and

[11] In this sense, with unique clarity and efficacy, Rafaraci (2010), pp. 634–635, according to a widely spread opinion in the Italian doctrine. See, for example, Calò (2008), p. 1120 ff. Over the residuality, in a future prospective, of the *ne bis in idem* principle as a remedy to the failure of a tool able to solve positive jurisdictional conflicts, see also Mangiaracina (2006), p. 631, and specifically p. 634. Much pregnant over the point the thoughts by Amalfitano (2009), p. 1293.

[12] This is even more evident considering the known difficulties—to which, in this paper, is not possible to even give a hint—that characterize the individuation of the "minimum definitional elements" of the *idem* and the same field of practicality of the principle.

[13] Piattoli (2007), p. 2642, according to which a system of anticipative settlement of the conflicts "would then reduce phenomena of *forum shopping*, conflicts, as well as the problem of the *ne bis in idem* itself."

complex nature of the rivalry between jurisdictions and that just for this fact, announce more mature, global, certain, and conclusive solutions, to which the comments of the next part of this speech are dedicated.

3 Solutions: A Quick Historical-Legal Reconstruction

3.1 The Eurojust Guidelines

The problem of the prevention and settlement of jurisdictional conflicts in the EU field is neither entirely the absence of a prescriptive ground nor the elaboration of localized jurisdiction assignment criteria. Nor does it exist in tiny areas of criminal juridical cooperation. Instead, it is in the elaboration of certain procedures for the determination of jurisdiction through general criteria aside from the "regionalization" of the criminal intervention. The central issue is the creation of a system that regulates jurisdiction at an international level. The fact that the prevention of duplicate criminal intervention has solid normative grounds is proved by the consistency with which its importance has been emphasized in the sources of law over the years. Concerning this, is enough to remember not only Articles 31(1)(d) and 34(2)(b) TEU (in the bibliography prior to the Lisbon Treaty), but above all the specific regulation included in the Article III-270(b) in the Treaty establishing a Constitution for the whole Europe, signed in Rome on 29 October 2004, just "directed to introduce a well defined normative ground with a view to a future adoption of a common tool—European law or framework law—designed to 'prevent and solve' jurisdictional conflicts among the authorities of the member states."[14] Nor can it be forgotten that in the same Constitutional Treaty another law—included in Article III-273(2)(c)—assigned to Eurojust the role of strengthening legal cooperation "also through the composition of demarcation disputes and through a tight cooperation with the European legal network." Nowadays, in the new era of the Lisbon treaty, the normative grounds for the prevention and settlement of the conflicts appear even more explicit: Article 82(1)(b) TFEU, in the strengthened version, actually provides for that according to the ordinary legal procedure, the European Parliament and the European Council take measures devoted, along with everything else, "to prevent and settle conflicts of jurisdiction between Member States." Besides, as mentioned before, this unmistakeable normative recognition of the problem is matched by a prediction of criteria able to settle the conflicts "here and there," i.e., concerning specific matters over which, from time to time, the political convergence of interests—and above all the urgency of the efficacy of the intervention—develops in rules.

[14] De Amicis (2006), p. 1176.

The content of these measures established and stimulated cooperation towards an "arranged jurisdiction," or in other cases expressed veritable criteria aiming the rules of the conflict even if limited to a specific matter. Just to provide an example, the Agreement concerning the protection of financial interests of the European Communities, adopted in Brussels on 26 July 1995, whose Article 6(2) makes it obligatory—in cases where more than one member state has the jurisdictional competence to deal with a crime and any of them is able, as a consequence, to exercise the criminal action for the same acts—to cooperate "In order to decide which of them should prosecute the author or the authors of the crime having as main target the centralization, whenever possible, of all the legal actions into the hands of a single member state."[15] There are a number of examples of rules of this second type as well. The most important one is the Framework Decision about the challenge against terrorism (2002/475/JHA) of 13 June 2002, whose Article 9(2) states that, in cases where more than one member state proceeds against the same crimes, they cooperate to choose which one of them will prosecute the perpetrators in order to centralize, whenever possible, the criminal action in only one member state and prescribing, in this case, "step by step" (and so according to a hierarchic order) the adoption of the "following elements of connection" (i.e. jurisdictional criteria): territory belonging to the member state in which the crime was committed; nationality or residence of the accused; nationality of the victims; territory belonging to the member state in which the accused settled.

But, as mentioned before, the problem consists in creating a new model, different from the one merely more or less spontaneously cooperative and defined to ensure an "arranged jurisdiction;" from the material one; and from the "horizontal" one, that figures out treaty agreements between the states.

All these models in fact cannot exist as a system for different reasons outside the scope of this piece: they cannot therefore ensure general procedures that apply certain criteria having on their part general value to assign the jurisdiction in a supranational context. Briefly, the real news could be represented only by the graft of some "verticality" into the regulatory framework, gradually replacing spontaneous cooperation or the "horizontal" agreements with a classified and detailed system of assignment of competency, valid for every hypothesis of jurisdictional concurrence of the member states.

The first traces of this project—an ambitious and complex one, full of clear political and juridical troubles, but the only one that appears adequate to the importance and the extent of the matter—are double-linked to Eurojust.[16] At the

[15] Similar predictions can be largely found in other Agreements about specific matters. See Art. 9(2) of the Agreement about the fight against corruption in which officers of the European communities or the member states of the EU were involved, adopted in Brussels on 26 May 1997 Art. 4(2) of the OCSE Agreement over the fight against corruption of the foreigner public officers, signed in Paris on 17 December 1997. All of these examples are taken from De Amicis (2006), p. 1176. See also the latest rules over the jurisdiction in the Parliament and Council Directive over the prevention and repression of the human beings trade. (2011/36/EU of 5 April 2011).

[16] To have a thorough, precious overview over the nature and the tasks of Eurojust, see the latest work by De Amicis (2011). Over the matter see also Di Bitonto (2010), p. 2896 ff.

time of the first outline from this body, it had already been assigned the task, both through the member states and the Council, of asking the probate authorities of the interested member states not only to estimate the opportunity of starting an investigation or a criminal action against specific acts, but above all to ask these authorities to "accept the fact that one of them seems to be more suitable to start an investigation or a criminal action against specific acts"[17] To sum up, Eurojust is meant to be recognized not only as the centre of the "optimal coordination (...) of action" [point 2 of the *Consideranda*; Arts. 6(c) and 7(c) of the Eurojust 2002 Framework Decision] of investigations and prosecutions covering the territory of more than one Member State [Art. 3(1)(a)], but also as judge of the jurisdictional competence of the various member states. This original "light centralization of certain powers and duties on a supranational juridical body"[18] further increased the novelty of Eurojust November 2003 issuance of guidelines for solving possible cases of jurisdictional conflict in the absence of tight EC regulation.[19]

These criteria are necessarily indefinite, as they are not binding and totally optional, and require Eurojust to play the role of mediator "when the representatives of the various jurisdictions are not able to reach an agreement over the place in which the act has to be prosecuted." The guidelines are based on an original assumption: that whenever possible, "a legal action must be prosecuted in the jurisdiction in which the most part of the criminal acts took place or where the most part of the damages occurred."

But, since a number of factors go into the agreement over jurisdiction, there are many other possible criteria that have to be taken into account. Among them—just to provide some examples—the guidelines indicate the criterion of the residence of the accused; the possibility of a criminal proceeding in a particular jurisdiction; the possibility to take extradition measures or the transfer of the trials; the presence of witnesses; the interests of the victims and the chance that they can be previous offenders in case the criminal act takes place in a jurisdiction rather than in another one and even the relevance of the time needed to fix the proceeding.

Annex IV itself highlights the fact that we are not dealing with a proper juridical matter: it explicitly states that "the priority and the weight to assign to each factor

[17] Arts. 6(a)(2) and 7(a)(2) of the Council Decision 2002/187/JHA of 28 February 2002, which establishes Eurojust in order to strengthen the fight against serious forms of criminality.

[18] De Amicis (2011), p. 1176.

[19] In November 2003 Eurojust organized a meeting to discuss "the matter of which jurisdiction should prosecute the transnational cases in which there's the possibility that a criminal action is begun in two or more jurisdictions." The target of the meeting was "to define the guidelines to help Eurojust in exercising its function to ask a member state to drop the criminal action in favour of another state finding itself in a better position to act." The results of this meeting—the guidelines themselves—constitute the Attachment IV of the Eurojust annual report 2004 that can be consulted (also in the Italian version) at the internet address: www.eurojust.eu.int.

differs from case to case" (excluding in this way any hierarchy among the rules, considering instead a 'flexible priority') and underlines that the aim of this guide "consists in providing a memorandum and defining the most important questions to consider while taking these decisions."

Though not definite or binding, the guidelines of November 2003 establish a valuable starting point: they actually not only show the need for a method (general discipline for the criteria of prevention and settlement of the conflicts), but also propose a body and a functional competence of it as a way to apply this method.

It is worth pointing out that the new decision 2009/426/JHA[20] about the strengthening of Eurojust, introducing appreciable changes to the previous structure created with the decision 2002/187/JHA, has prominently empowered, along with everything else, just the powers that this body owns towards the prevention and settlement of the conflicts.

Article 7(2) states that, in case two or more national members do not agree with the procedures for the settlement of a situation of jurisdictional conflict about the starting of the investigations or criminal actions, the College is asked to "express a written non-binding opinion over the case, as long as it is not solvable with a common agreement among the appropriate national authorities interested," an opinion that is forwarded to the national authorities. Further ordinances of Eurojust as a mediator in jurisdictional conflicts go beyond this: I will talk about them later, in order to keep a chronological development of the events.

3.2 The Green Paper on Jurisdictional Conflicts

The next chronological step after Eurojust guidelines was the Green Paper of the Committee of 23 December 2005 over the jurisdictional conflicts and the principle of *ne bis in idem* in criminal proceedings. It can be stated that this document is a good evidence of the first European institutional awareness of the importance of the risks of "parallel trials" and above all of emptiness in a discipline of vital importance, "facing the growing internationalization of criminality."[21] Tellingly, the document begins by stating that the juridical limit represented by the *ne bis in idem* principle (Arts. from 54 to 58 CISA) does not suffice for the prevention of "jurisdictional conflicts if multiple proceedings are ongoing in two or more member states" and that it can "play a role only avoiding the exercise of the criminal action for the second time over the same act."

[20] Decision 2009/426/JHA of the Council 16 December 2008 about the boosting of Eurojust, that modifies the decision 2002/187/JHA. On this topic see, *ex multis*, De Amicis (2010), p. 111 ff.

[21] COM(2005) 696 final, Bruxelles 23 December 2005. On this topic Rafaraci (2010), pp. 516-520; Rafaraci (2007), p. 637 ff.; De Amicis (2006), p. 1176; Mangiaracina (2006), p. 634; Paolucci (2011), p. 755.

Not forgetting that if applied to the ongoing proceedings, the *ne bis in idem* principle would be a terrible selector of jurisdiction, since under it, preference would be assigned "to any jurisdictional authority able to emit a definitive verdict:" that is to say, "first-come, first-served."

Here arises the necessity of "an adequate answer to the matter of the—positive—jurisdictional conflicts."

This admission of the "strong acts" that create the background of the matter of the jurisdictional rivalry strongly dignify the Green Paper: even though the document reveals traces of ingenuous settings and faint solutions, the uncommon awareness of the matter exposed that it establishes widely redeems these limits.

The outline of the Green Paper is based on cooperation among the proceedings' authorities: nevertheless, the informative exchange seems rather the effect of—and not the precursor to—a system that already provides specific rules over the assignment of the jurisdiction.

There is an exchange of information, a dialogue between the parts, and an informal composition of the conflict only if there is a background of rules more or less certain and strict that finalize this cooperative activity. By contrast, the background of the Green Paper seems to perpetuate the inadequate point of view of cooperation based only on the dialogue method, whilst the real target to be achieved is to fix certain criteria and rules to regulate the detection of the jurisdiction. To this aim, the Green Paper dedicates its core to a series of steps articulated in sequence: spotting and information of the "interested parties;" consultation and discussion among them; composition/mediation of the possible conflict; and the (possible) binding decision of a community tool.

This sequence itself is a good indication of the fact that the document examined is more a pedantic attempt to think over the matter than an outline of rules[22] and the analysis of all the passages reveals a free-handed sketch that all but ignores the historicity of national jurisdictions.

Briefly, the Green Paper changes back the most important alternative that permeates this entire area, commending only into the good intentions of the authorities of the member states, perhaps with the supporting administration of Eurojust; or to shape the solution on the formalisation of at least a few rules.

One option that, however, remains unaddressed in the document, very equivocal on this point. On the one hand, an "anticipatory assent on the choice of the most suitable jurisdiction to exercise the criminal action" is provided—meaning that

[22] The Green Paper stated, at its end, 24 final questions, inviting the interested parts to send, until March 2006 the related answers and observations. At the end of this period, the answers given by the Governments of the member states, universities, single scholars and professional and non-governmental associations were 44; or at least, these were the one made public (being provided the chance to ask the omission of publication of the answer by the author) by the General Direction Justice and Home Affairs of the Commission. For a general overview created by the latter, see the *Annexe au Livre Vert sur le conflits de compétences et le principe ne bis in idem dans le cadre des procèdures pénales*, SEC(2005)1767 of 23 December 2005. About it, widely detailed, Amalfitano (2009), p. 1293 f.

some national authorities "will *dismiss* or *interrupt* their proceedings while another authority will start the criminal action for the crime committed." On the other hand it is contemplated, in case of failure any spontaneous agreement, the request of a mediation on the part of another member state involved in the action, with the mediation—apparently still informal—of Eurojust, hoping the creation "of a new body fit for the composition of the conflicts," like a Council composed of national prosecutors and judging magistrates.

Briefly: the model is still a cooperative one; the target is instead to create a jurisdiction made of binding rules, even recognizing that it, considering the treaties currently in force, "would be extremely hard to carry out." The same indication of the criteria that have to be applied for the prevention and settlement of the conflicts contained in the document (territory criterion, the criteria concerning the person under investigation or the accused; the interests of the victims; the interests of the state, as well as some other criteria concerning the efficacy and the speed of the proceeding) is simply laid out without developing their analysis and in a conditional form ("the list could include")—clear evidence of theoretical uncertainty, corroborated by the statement according to which "the member states could agree on a few basic principles, to establish a priority order or a list of criteria, should this be necessary," even if it would "be more desirable a more flexible set-up." It is clear that the problem of the rivalry between jurisdictions lays in the basic choices that the Green Paper does not make: system of rules or spontaneous cooperation; rules organized according to a priority order or total flexibility of them; degree of binding of the ultimate findings of the conflict or just mediation "instructions;" jurisdictional control on jurisdictional assignment over the binding agreements; fostering of this community control or not.

3.3 The Framework Decision on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Proceedings

3.3.1 The Old and the New

In articulo mortis, on 30 November 2009—the last day before the Lisbon treaty came into effect—the Third Pillar system created its last normative act: the Council Framework Decision on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (2009/948/JHA).[23] Even considering all the shortcomings and the considerable imperfections, such a project represents a fertile,

[23] The sharp remark about the "last available day (. . .) right before it was too late" is by Rafaraci (2010), p. 513. The Council Framework Decision 2009/948/JHA of 30 November 2009 moves from a proposal by Czech Republic, Poland Republic, Slovak Republic and Sweden Reign for a Framework Decision of the Council about the prevention and settlement of jurisdictional conflicts in criminal acts (2009/C 39/03). For a further comment over the proposal see Catalano (2009), p. 425 ff.

positive turning point in the matter of national jurisdiction for a number of reasons. First of all, as it is the first document exclusively dedicated to rules aiming the settlement of positive conflicts: it is considerable circumstance that the matter of the conflict occupies by itself the role of "*prima donna*," instead of a secondary role, as in the past. Then it is recognized (point 3 of the *Consideranda*) that the Framework Decision seeks to prevent an infringement of the principle of '*ne bis in idem*', as set out in Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985. So for the first time the principle is correctly relegated to the background, and a logical order is re-established that, despite clear evidence in its favour, went neglected for a long time.

Moreover: we are eventually facing an articulated project with formalized and even detailed enough rules. To provide an example, the member state exercising the criminal action about actions that are likely to generate a "parallel procedure" in another member state has to notify to the latter of the beginning of this activity in order to address the possibility of simultaneous parallel proceedings. The principle of fully spontaneous cooperation appears to be overcome by juridically formalized categories (obligation to notify the communication; need of a written trace; obligation of a formal reply, according to a fixed scheme and so on), with procedural deadlines, competences, terms: including in the end everything that turns a standard procedure into a juridical rule.

Until a few years ago, the community bodies, regarding the jurisdictional conflicts, have tried to fill up the void of the original deregulation just boosting the standard collaborative procedures: just as if the even relevant difficulties to create a system of distribution for the jurisdiction in the European field had forced a demission to the rules, to meta-normative form's benefit. The Framework Decision of 2009 seems to constitute the first attempt—it will not be the least—to overcome the fear of the adoption of formal rules. On the very point of juridical efficacy of the tool, the Framework Decision of 2009 risks marking out a point of remarkable contradictory. It was not forgotten to underline[24] the singularity of an act that, created right before the Lisbon treaty, that remains so paradoxically "not involved (...) in the continuous progresses that, in the new uniform institutional framework come into effect from 1 December 2009, deal notably with the matter already included in the now ex Tit. VI TUE."

In conclusion, on the one hand, the different potential of the Lisbon Treaty is not exploited even in the important area of jurisdictional conflicts (so with the possibility of the standard legislative procedure also for the matters already included before in the Third Pillar)[25] and maybe, under this point of view, it would be appropriate to continue to wait for a more effective result.[26] On the

[24] Lucidly Rafaraci (2010), p. 514.

[25] Rafaraci (2010), p. 514.

[26] It is particularly important to point out that the European Parliament, over the consultative procedure, with the "European Parliament legislative resolution of 8 October 2009 on the initiative of the Czech Republic, the Republic of Poland, the Republic of Slovenia, the Slovak Republic and

other hand, the Framework Decision still seems to represent a draw of continuity just with the structural build-up of the Third Pillar, paradoxically right before its disposal. It actually continues to draw from the Hague Programme (and thus the Tampere Programme) rather than in the Stockholm Programme that, just ten days later, would have been approved by the Council. So the Framework Decision is really "something new, or rather ancient" in the field of European juridical integration. It is placed in the past as strategy and normative [its grounds are still, for the matter, Art. 31(1)(c-d), and for the source, Art. 34(2)(b) TUE]; but projected in the future considering its object and above all, its method, which is the real epiphany.

3.3.2 Contact Proceedings and Direct Consultations

The aim of the Framework Decision is, on the one hand, "to establish contacts with the proficient authorities of the member states in order to confirm the existence of parallel criminal acts over the same actions involving the same person" and on the other hand "the exchange of information trough direct consultations among the proficient authorities of two or more member states establishing parallels criminal proceedings" [Art. 2(a)]. As in every procedure, it primarily consists of formal duties: so every member state that has well-grounded reasons to assume that a parallel proceeding is ongoing in another member state is forced to "set a contact" with the proficient authorities of the other member state to confirm the existence of such a parallel proceeding and the latter has on its part the obligation to reply within a reasonable time limit (Art. 6). This exchange of information is then protected by a series of formal indexes: it is up to the single member states to nominate the proficient authorities and to arrange, within their domestic legal system, one or more central authorities responsible for the administrative transmission and receipt of the information requested, assisting the proficient authorities in the consultation process [Art. 4(3)]. As for the request as for the reply, the formalities are directed to keep a written trace (Art. 7) and above all, a minimum binding content (Arts. 8 and 9) about the certain identification of the trial history and of the stage in which it is, being understood the possibility, for the interacting authorities, to provide also other information about the criminal proceeding.

Direct interactions among authorities constitute the second phase, following the contact procedure. Its target (Art. 10) is "to reach an assent on an effective solution in order to avoid negative consequences coming from those parallel proceedings,"

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of the Kingdom of Sweden for adoption of a Council Framework Decision 2009/. . ./JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings" (that can be consulted on the institutional website) had clearly "invited the Council not to adopt formally the proposal before the Lisbon Treaty became effective in order to allow the final act to be adopted guaranteeing the total exercise of the role and the control function of the Justice Court of the European Community, of the Parliament Commission (protocol to the Lisbon Treaty over the transitional measures)." It is still unknown why the Council has disregarded so dramatically such an invitation.

particularly the unification of the criminal proceedings in one only member state. For this purpose, the decision prefigures, after a further exchange of specific information—rejectable only in case that these information can harm fundamental national interests in the field of security or harm the security of a person—a sort of combined examination of the whole criminal action. In this sense is in fact to be understood the foreshadowing included in Article 11, according to which "the proficient authorities of the member states examine the acts and the heart of the matter and all the factors that have to be taken into account" in order to reach the assent. The outcome of this consultation practice is either the unification of the criminal acts in a single member state—in this case an obligation to inform about the result of the investigation the respective proficient authority of the other member state arises on the part of the proficient authority belonging to it—or, in case the conflict is not solved, a final attempt to present the question, on the part "of any proficient authority of the involving member states" [Art. 12(2)] to Eurojust, in the limits of proficiency of this body (that is to say, according to the Article 4(1) of the Eurojust decision).

3.3.3 Final Considerations: The Limits of the Framework Decision and the Role of Eurojust

As in a movie of the best neorealist kind, the Framework Decision has a corresponding conclusion: it ends in the thick of it. The collaborative network that it elaborates maintains its logic only in cases of the favorable hypothesis in which the formalized procedures for the exchange of information and the direct contact between proficient authorities generates an assent and the "negotiation over the jurisdiction" among the member states has a positive outcome.

On the contrary, the normative document leaves exposed just the area that needed normative discipline: that is the statement of criteria for the determination of the best jurisdiction and the minimum hypothesis for a solution beyond assent in case of persistence of the conflict.

What was expected was a rationalization of the regulating criteria of the competition between national jurisdictions through a reduced *numerus clausus*: that, in other words, few but certain secondary criteria, not necessarily ordered according to a hierarchical sequence but strong enough to solve the conflict would have been figured out instead of a presumption of jurisdiction formulated in general terms and with a criterion-based nature (the place in which the most important part of the criminal act took place).

On the contrary, the content of the document does not include these criteria and appears even more elusive than the original suggestion. But it is also true that in the framework *whereas* n. 9 reminds the guidelines of the Eurojust annual relation of 2003[27]; but it is a merely illustrative reminder and moreover, expressed in a conditional form.

[27] See above, § 2.

Actually, there is some incontrovertible evidence of political choice, inside the Council, for "non-interventionism." The first one can be found in point 11 of the *Consideranda*, where is stated that "no member state should be forced to renounce or exercise jurisdictional competence against its will" and above all that "until an agreement over the centralization of the criminal acts is reached, the proficient authorities of the member states should be able to prosecute a criminal act for any crime under their national jurisdiction." National jurisdictions are not under discussion as with them would play a role also the thin, fragile figure of the national sovereignty.

The second clue is the juridical transposition of the political principle just seen: point 9 of the *Consideranda* actually states that in the attempt of reaching consensus, the competent authorities "should take into account that each case is specific and give consideration to all its facts and merits." It appears clear that the desire not to place strict rules matches necessarily with the casuistic method and represents the apparent technical-juridical justification: the necessity to solve the conflicts case by case—as each case is unique—prevents the adoption of general rules.

On this basis,[28] the absence of jurisdictional criteria in the body of the Framework Decision is fully coherent. But it has to be said that, unlike stated in the original proposal, and even in the precedent Green Paper, the Framework Decision 2009/948/JHA is missing any reference to the guarantees for the person "formally accused," either under investigation or accused. The European Parliament, with the repeatedly mentioned Legislative Resolution of 8 October 2009, had actually figured out the introduction of an Article 11bis to the text of the Proposal according to which—to recall the statements in the Green Paper—it was meant to assure to the accused a series of procedural guarantees. They basically consisted in the right of "being informed" of the exchanges of information and consultations between the authorities of the member states and between the authorities of a member state and Eurojust, of the solutions taken or of the missed achievement of an agreement, as well as of the contents and the motivations, with the right, on the part of the

[28] Even the European Parliament expressed criticism of this. Such a body, with the resolution of the European Parliament of the 8 October 2009, had actually suggested, during the consultative procedure, a series of amendments. Among them was very relevant the one brought to the Article 11 of the Proposal, in which it was stated that, in order to reach an assent, the proficient authorities of the member states should examine the facts and the heart of the case and "factors like: – the place where the act constituting a crime mainly took place; – the place where the most part of the damages was suffered; – the place where the accused or the person under investigation is and the chance to assure his handover or extradition into other jurisdictions; -the nationality or residence of the accused or the person under investigation; – the significant interests of the accused or the person under investigation; – the significant interests of the victims and the witnesses; – the admissibility of evidential elements or possible delays." Briefly: the directive jurisdictional criteria to be expressly followed in the structure of the Framework Decision and so, founding the normative grounds for the resolution of the conflicts.

accused, to put in observations over the most suitable jurisdiction before a solution is adopted, on the one hand with the right to file an appeal against any decision adopted or, on the other hand, in case of missed achievement of an agreement, to ask for a re-examination.

It appears rather unique that a normative building aiming the protection of a basic right of the accused (who has the right to be judged once for the same act) does not allow later the interlocution with the holder of this right during such a procedure: worse, that the owner of this right looks like a *desaparecido* in it. This is not, by the way, the only shortcoming: for example, although in the Framework Decision the continuous reference to the notion of "same act" persists,[29] this reference is not associated with any normative clarification of the *idem*.

Then again, not a single mention is found about the matter of the so called preservation of the acts carried out by the juridical authority of the member state whose jurisdiction turns recessive about the achieved consent. It remains, in the end, the dignified role of Eurojust: "the short breath" of the predictions of the Framework Decision[30] finds even more oxygen in the role given to this body. Article 12(2) of the Framework Decision states in fact that

> Where it has not been possible to reach consensus in accordance with Article 10, the matter shall, where appropriate, be referred to Eurojust by any competent authority of the Member States involved, if Eurojust is competent to act under Article 4(1) of the Eurojust Decision.

Moreover, the entire point 9 of the *Consideranda* above mentioned of the Framework Decision is a real apologia for such a body whose function under the Lisbon Treaty is functional. Indeed, Article 85(1)(c) TFEU assigns to Eurojust "the strengthening of juridical cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network."

Briefly, the Framework Decision, on this point, seems to create a general "technical test" for separating from Eurojust, also in the field of jurisdictional conflicts, the embryo of a European Public Prosecution.

4 Thoughts About the Future: The *De Iure Condendo* System

In a future scenario, it appears plausible that a new stimulus to the discipline of jurisdictional conflicts could come from the chance of the so-called "forced cooperation," now provided for in Article 86(1) TFEU. It deals with the chance—provided for in the Lisbon Treaty for the first time, as it was not figured out into the Constitution—that, when the unanimity is missing, the cooperation reaches a normative outcome involving the agreement of at least nine member states. So

[29] See Article 1, according to which "... to prevent situation in which the person is, in connection with the same acts, the subject of parallel criminal prosecutions."

[30] The perfect metaphor is by Rafaraci (2010), p. 524.

this is the strategy for a limited agreement needed to overcome the possible decisional *impasse* of an absolute agreement among all the member states.

Now, apart from the doubts that the idea of a new fragmentation in normative "microcosms" inside the EU can generate,[31] it seems very likely that the forced cooperation is based on systems with proved normative homogeneity, in which new common rules can bloom later. Briefly, the juridical homogeneity among similar countries for what concerns founding rules—in which the ones that discipline the exercise of the national jurisdiction are certainly included—will be able to act as a synergic force to experiment initiatives in a supranational context, despite not being extended to the whole sector of the EU law.

And it is not weird to think that the object of this change might be common rules both substantial and procedural in particularly delicate fields, i.e., the adoption of an European public prosecutor[32] or the jurisdictional conflicts, to which the initiative of some particularly active member states could act like a flywheel to establish—firstly in geographical macros of nine or more countries, susceptible to extension for subsequent adherences—innovations that would not delay to obtain the unanimity of all the member states.

A progressive convergence on solid rules about the jurisdiction that, according to an already used model (i.e. the Schengen Agreement or the Prum Treaty) would turn into a regional discipline, having as a model the latest discipline of the single states, until it's able to include the whole EU area. A long road indeed, and it is certainly hard to foresee the time needed and its precise goals. But it will surely lead to important results.

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The Right of Defence in EU Judicial Cooperation in Criminal Matters*

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Contents

Abstract The development of judicial cooperation in criminal matters in the EU requires that individual rights be enhanced. After the first attempts in 2003 and 2004, which failed, a new gradual action has been undertaken by the EU in order to introduce minimum procedural rights in criminal matters, according to art. 82 TFEU and in line with the priorities indicated in the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings of December 2009 (as implemented by the Stockholm Programme). The first result of this gradual action is Directive 2010/64/EU on the right to interpretation and translation; other proposals on the matters covered by the Roadmap are currently under discussion. The present paper questions whether these initiatives are sufficient to respond to the need of guarantees in transnational criminal proceedings, especially in the preliminary inquiry stage.

*In May 2012 the EU adopted Directive 2012/13/EU on the right to the information in criminal proceedings. The present paper was submitted for clarification by September 2011 and, therefore, does not take into account this new measure.

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Abbreviations

AFSJ	Area of Freedom, Security and Justice
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIO	European Investigation Order
FD EAW	Framework Decision on the European Arrest Warrant
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

In the European Union, the right of defence in criminal proceedings, and individual rights more generally, are very much linked to matters relating to judicial cooperation in the criminal law sector. In fact, it is following the increasing development of judicial cooperation in criminal matters and the application of the principle of mutual recognition in this field that the absence of binding EU norms concerning procedural rights has come to be considered a serious gap within the AFSJ.

Judicial cooperation tends to enhance the repressive powers of judicial authorities in an area where the position of individuals already suffers from difficulties stemming from the intervention in the proceedings of authorities of different Member States. These more penetrating powers and the possible negative effects of the involvement of foreign authorities must be counterbalanced by adequate procedural guarantees. This balancing operation is all the more necessary against the background of the application of the principle of mutual recognition, which has been—as it is well known—the cornerstone of judicial cooperation in criminal matters since the European Council held in Tampere on 15–16 October 1999.

The objective fulfilled by the application of this principle, which is to make cooperation between national authorities swifter than it is at the international level, risks bringing about effects leaning towards repression only, and contrary to the needs of fairness, especially in light of the lack of common standards throughout the EU as far as the guarantees of individual rights are concerned. It is not surprising that as early as in the Conclusions of the European Council of Tampere in 1999[1] and afterwards in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters of 2000,[2] the necessity of strengthening individual procedural rights has been explicitly stressed.

[1] See point 37 of the Conclusions.

[2] OJ C 12, 15 January 2001, p. 10.

The European Union has shown itself willing to take action in order to set common minimum standards of procedural rights in transnational criminal proceedings as well as in multi-Member State criminal proceedings (where, even if the crime is not transnational in nature, the intervention of judicial authorities of more Member States is necessary). In this context, common minimum standards do not mean low standards but adequate standards, below which it should not be possible to fall.

2 The Failure of the First Initiative (2004) and the Gradual Approach of the Roadmap (2009)

The starting points of the debate on the right of defence and procedural rights in criminal proceedings in the European Union are as follows:

(a) The European Union aims at strengthening individual rights in the area of judicial cooperation in criminal matters, as far as this is compatible with its competencies;
(b) The action that the European Union is taking is primarily based on the need to guarantee the respect of fundamental rights within its territory, but it also finds a reason in the need to further legitimate and facilitate the application of the principle of mutual recognition among Member States, since shared standards tend to increase the mutual trust on which the principle itself is founded.

It must be pointed out that, notwithstanding a good start, the action of the EU in this area has been unfruitful for too long.[3]

Thanks to the Communication from the Commission to the Council and the European Parliament of 26 July 2000[4] (where the Commission determined in which fields common minimum standards are required in order to ensure mutual trust that makes mutual recognition possible), important preparatory work—including several consultations[5]—was done, which resulted in 2003 in the presentation of a Green paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union.[6] However, this Green paper, after selecting the subject-matters where common minimum standards are much needed, postponed the action concerning most of them and dealt with a few issues only, selected by the Commission according to their immediate impact on the application of the principle of mutual recognition. The Green paper was focused on the right to legal assistance and representation (to be respected from the preliminary inquiry stage); the right to an interpreter and/or translator; the right of the suspected and accused persons to be informed of their rights; an adequate protection for especially vulnerable categories of persons; and the right to consular assistance to nationals of

[3] See Rafaraci (2008), pp. 369 f.

[4] COM (2000) 495 final, 26 July 2000.

[5] In particular, in January 2002, a document entitled "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings" was drafted and spread around experts. In September 2002, following a questionnaire concerning national legal systems, the Commission drafted another document aimed to further discussion between experts. Weyembergh (2004), p. 45 footnote 48.

[6] COM (2003) 75 final, 19 February 2003.

other Member States and of third countries. The Green paper put off, until later actions, the adoption of common minimum standards in many areas, including the right to bail (which also covers detention conditions), fairness in obtaining and handling evidence (including the prosecution's duty of disclosure), the right to silence, the right to have witnesses heard (also covering the problem of anonymous witnesses), the right to disclosure of exculpatory evidence, how the presumption of innocence is to be understood (whether there are circumstances where the burden of proof may be reversed), and many other aspects of the law of evidence.[7]

In consideration of the limited number of subjects covered by the Green paper, on the 28 of April 2004, the Commission put forward—according to former Article 31 (c) TEU—a proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union.[8] Although this proposal was considered only the first step toward a more comprehensive action to be implemented with future actions, its limited scope of application gave the impression that the most sensitive issues had remained unaddressed for political reasons. All in all, even in consideration of the selection criterion adopted by the Commission and founded on the 'impact factor' of common standards on the application of the principle of mutual recognition, there was no reason to leave outside the scope of application of this proposal important issues like pre-sentence detention.[9]

This proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union has never been adopted: agreement within the Council was never reached, and the initiative was abandoned. This negative epilogue has been the result of both the doubts on the actual competency of the European Union for the adoption of harmonizing measures as far as procedural rights are concerned,[10] and the belief that the proposal was actually useless since it reproduced rights already affirmed in the ECHR, to which all the Member States of the European Union are parties.[11]

After this failure, the attempt of the EU to intervene in procedural rights in criminal proceedings has been very cautious,[12] as clearly emerges from the proposal for a Council Framework Decision of 8 July 2009,[13] put forward by the Commission under the former EU third-pillar heading. Indeed, this proposal covered only the right to interpretation and translation, which are basic rights whose guarantee is a precondition for the recognition of any other right; the idea was that, given their

[7] With regard to proceedings *in absentia*, a reference was made to a Green paper that should have been published in 2004 in order to prepare for legislative proposals.

[8] COM (2004) 328 final, 28 April 2004. On this proposal see, *inter alia*, Arangüena Fanego (2008), pp. 3042 ff.

[9] Rafaraci (2008), p. 373.

[10] Fletcher et al. (2008), pp. 127 f.; Zimmermann et al. (2011), p. 62.

[11] De Bondt and Vermeulen (2010), p. 164.

[12] It must be pointed out that Framework Decision 2009/229/JHA (OJ L 81/24, 27 March 2009) enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, cannot be considered to be a measure aimed at harmonising national legislations.

[13] COM (2009) 338 final, 8 July 2009.

nature, these rights would have enjoyed unanimous consensus. However, since at the time of this proposal the entry into force of the Treaty of Lisbon was very near, the Council decided to table (on the 23 October 2009) the proposal according to the new institutional and legal framework, this time in the form of a directive.[14] On the 9 March 2010, a draft Directive on the right to interpretation and translation in criminal proceedings was proposed by the European Parliament and the Council,[15] and, on the 7 October 2010, it was adopted according to the co-decision procedure.[16]

This Directive, which represents the very first legal measure of the European Union devoted to the protection of procedural rights, also corresponds to the first stage of the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[17] adopted by Resolution of the Council on the 30 November 2009, and then implemented by the Stockholm Programme[18] of the 10 December 2009. This Roadmap represents also the basis for future actions by the European Union in this sector.

The rights included in the Roadmap, which may well be complemented by other rights, are considered fundamental procedural rights, and action in respect of these rights should be given priority at this stage. According to the Roadmap, initiatives of the Commission should deal, in the following order, with: (a) the right to translation and interpretation (the above mentioned Directive 2010/64 has addressed this priority); (b) the right to information on rights and about the charges[19]; (c) the right to legal advice and legal aid[20]; (d) the right to communication with relatives, employers and consular authorities; (e) special safeguards for suspected or accused persons who are vulnerable; (f) finally, the publication of a Green paper on pre-trial detention.[21]

If one considers that the rights selected by the Roadmap correspond (with the exception of the Green paper on pre-trial detention) to the selection already made under the proposal of Framework Decision of 2004, it is clear how cautious the new

[14] See Gialuz (2011), pp. 9 f.; Vidal Fernandez (2010), pp. 191 f.

[15] COM (2010) 82 final, 9 March 2010.

[16] OJ L 280, 26 October 2010, p. 1. According to Article 9, Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 October 2013.

[17] OJ C 295, 4 December 2009, p. 1.

[18] OJ C 115, 4 May 2010, p. 1 (§ 2.4).

[19] On this issue, a proposal of the Commission is under discussion within the European Parliament and the Council [COM(2010) 392 final]. For more details see: *Eucrim* 2011 (2), p. 62.

[20] On this subject-matter together with the one covered by lett. d, a proposal of Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest has been tabled on the 8 June 2011 [COM (2011) 326 def.]. See *Eucrim* 2011 (3), p. 108.

[21] On the 14 June 2011 a document has been presented [COM (2011) 327 final] on "Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention." See *Eucrim* 2011 (3), p. 108. This initiative aims at promoting a wide public consultation, not restricted to pre-trial detention.

approach is,[22] notwithstanding the new opportunities brought about by the Lisbon Treaty, which has given legal value to the EU FRCh [Art. 6(1) TEU],[23] has provided for the accession of the EU to the ECHR [Art. 6(2) TEU],[24] and has recognized the ordinary legislative procedure for the adoption of directives aimed at establishing common minimum standards, even where procedural rights in criminal proceedings are at stake [Art. 82(2)(b) TFEU].[25]

3 Directive 2010/64/EU on the Right to Interpretation and Translation in Criminal Proceedings

Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings acknowledges and formalizes several rulings delivered by the ECtHR on this issue. This is not surprising since the minimum rules established under the Directive aim at guaranteeing that the level of protection in every Member State is not lower than the level established under the ECHR or the EU FRCh, as interpreted by the ECtHR and the ECJ.[26]

To this end, in order to avoid that the Directive may actually lower either the standards of protection set in the ECHR (considered to be the best minimum standards) or the already existing national standards when higher, Article 8 lays down a clause of non-regression, according to which nothing in the Directive

> shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

The same clause is formulated in the recitals, where it is affirmed that the provisions of the Directive that correspond to rights guaranteed by the ECHR or the EU FRCh "should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union."[27] This is in line with the objective of facilitating the application of the right to interpretation and translation

[22] The European legislator has decided to intervene with different legislative acts for each procedural right. A different approach has been chosen to deal with the victims' rights, included in a single act, presented on the 18 May 2011 by the vice president of the Commission and justice Commissioner Viviane Reding. See: Eucrim 2001 (2), p. 64.

[23] See Art. 47. On the presumption of innocence and the right of defence see Art. 48.

[24] Groussot and Pech (2010), pp. 3 f. On this issue, see De Schutter (2010), pp. 535 ff.; Lock (2011), pp. 1025 ff., and Lock (2010), pp. 777 ff.

[25] This competence is conferred upon the EU: "[t]o the extent necessary to facilitate [...] police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules" [Art. 82(2) TFEU].

[26] Point 32 of the *Consideranda*.

[27] Point 33 of the *Consideranda*.

in practice, with a view to ensuring the right to a fair trial.[28] Indeed, a normative act of the European Union adopted according to Article 82(2) TFEU, in compliance with the subsidiarity principle (Art. 5 TEU), can legitimately aim at facilitating the implementation of a right that Member States must already grant: point 6 of the *Consideranda* stresses that "although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States."[29]

The essential content of the Directive can be found in the first three Articles.

Article 1 provides for the subject-matter and scope of application of the Directive. The subject-matter is the right to interpretation and translation, while the scope of application covers both criminal proceedings and proceedings for the execution of a EAW [Art. 1(1)].

The right to interpretation and translation applies to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal [Art. 2(2)]. Therefore, the right applies from the preliminary inquiry stage to the stage where sanctions are executed.[30] As already mentioned, the scope of application of the Directive covers also the proceedings for the execution of a EAW. This provision is to be welcomed not only because the FD EAW does not provide for any specific guarantee to this regard,[31] but also because it is a sign of the will to intervene to strengthen procedural rights in a field where this need has been constantly underlined.[32]

Provisions on the right to interpretation are laid down in Article 2, where safeguards are primarily affirmed in the relationship between the suspected or accused person and the authority. The first paragraph provides that

> Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without

[28] Point 14 of the *Consideranda*.

[29] After all, the review made by the ECtHR is only *ex post* and aims at assessing the overall fairness of the proceedings in the single case. See Mazza (2010), pp. 152 f. These limits risk being reproduced in those legislative acts—such as the Directive on the right to interpretation and translation (see below, § 4)—where fairness is adopted as the benchmark according to which the level of guarantees provided should be assessed. Gialuz (2011), p. 13.

[30] According to Article 1(3), "[w]here the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal."

[31] Article 11(2) FD EAW refers to the national law of the executing Member State.

[32] See the Report of 14 April 2011 by the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [COM (2011) 175 final, p. 5]. In the document, the Commission stresses, *inter alia*, the need to make a moderate use of the EAW, in compliance with the principle of proportionality.

> delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.[33]

The second paragraph deals with the relationship between the suspected or accused person and the legal counsel. Indeed, it provides that

> Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

This provision is certainly appropriate, even if it is limited only to certain situations, and the clause "where necessary for the purpose of safeguarding the fairness of the proceedings" risks weakening its imperative nature.

According to Article 2(4), Member States must ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.[34] In addition, Article 2(8) requires that interpretation be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

In function to these two provisions, Article 2(5) provides that Member States must ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings. Article 2(7) clarifies that the right to interpretation is granted also in proceedings for the execution of a EAW.

Provisions concerning the right to translation are laid down in Article 3. The first paragraph describes such right and indicates its limits: Member States must ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are "essential" to ensure that they are able to exercise their right of defence and to safeguard the fairness of

[33] Article 7 provides that "when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter [. . .] it will be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned."

[34] It is up for the competent authority to demonstrate that the defendant speaks and understands the language of the proceedings. ECtHR, 19 December 1989, *Brozicek v. Italia*, Application no. 10964/84, § 41.

the proceedings. Some documents are expressly considered as essential under Article 3(2): reference is made to "any decision depriving a person of his liberty,[35] any charge or indictment,[36] and any judgment."[37] An EAW is to be considered essential where a person subject to proceedings for the execution of a warrant does not understand the language in which the said warrant is drawn up or into which it has been translated by the issuing Member State [Art. 3(6)]. In any other case, it is for the competent authorities to decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect [Art. 3(3)].

Translation of essential documents must be unabridged and in writing. However, it is not necessary to translate "passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them" [Art. 3(4)],[38] and, as an exception to the general rules, "an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings" [Art. 3(7)].[39]

In line with the right to interpretation, translation too must be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence [Art. 3(9)]. However, the right to translation of essential documents may be waived, subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily [Art. 3(8)]. According to Article 7, the record of waiver must be kept by using the recording procedure in accordance with the law of the Member State concerned.

The common provisions dealing with both interpretation and translation require that Member States take concrete measures to ensure that the interpretation and translation provided meets the quality required (Art. 5) and request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication (Art. 6). Article 4 is of particular relevance where it establishes that Member States meet the costs of interpretation and translation resulting from the application of

[35] See Art. 5(2) ECHR, also in relation to paragraph 4 (according to which "[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful").

[36] See Art. 6(3)(c) ECHR.

[37] Translation of judgments aims at ensuring the right of appeal in criminal matters, according to Article 2, Protocol No. 7 ECHR.

[38] See ECtHR, 19 December 1989, *Kamasinski v. Austria*, Application no. 9783/82, § 74.

[39] According to Article 7, it must be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned.

Articles 2 and 3, "irrespective of the outcome of the proceedings." The cost-free service is necessary to guarantee the rights concerned, and it represents an important guarantee of the effectiveness of protection and of non-discrimination of accused persons who do not speak the language of the proceedings.[40]

4 The Present Scenario and Future Developments of Procedural Rights in the EU

The adoption of Directive 2010/64/EU and the upcoming actions on other measures, as set forth in the Roadmap, confirm the determination of the EU to follow a very prudent approach on the issues concerning procedural rights, characterized by a cautious gradualness and a strong link with the ECHR—the Directive covers rights already affirmed by the ECHR and refers to the case-law of the Court of Strasbourg. The recent initiatives of the EU in this area actually follow the same path of the initiatives of 2003 (the Green Paper) and 2004 (proposal for a Framework decision), although they both have been criticized for reproducing minimum standards already set under the ECHR (to which all the Member States adhere) and thereby not bringing any added value. However, in response to these criticisms, experience demonstrates that the legally binding value of the ECHR is not always sufficient to guarantee the respect of the rights there provided at the very best.[41]

Yet, the approach endorsed under the Directive raises doubts in that it reproduces only certain rights granted by Article 6 ECHR and does not take into account the specificities of the competences of the EU in the field of procedural rights. In fact, it is doubtful whether the rights selected in the Roadmap are really those which are likely to have the greatest impact on mutual trust between Member States and, consequently, on the application of the principle of mutual recognition to judicial cooperation in criminal matters (doubts on the priority of these rights were the reasons behind the main criticisms advanced against the Green paper of 2003 and the proposal for a Framework Decision of 2004). After all, the final goal of the EU is the creation and the development of an AFSJ where citizens and residents may enjoy in every Member State equivalent standards of protection of procedural rights in criminal proceedings.

In the light of these considerations, the method applied through the Roadmap exposes the action of the EU to a criticism: there is no direct link to the protection of rights in transnational cases, which is the specific field where the EU can legitimately exercise its competence *ex* Article 82 TFEU. And, even if it is clear that the Roadmap can contribute to increase mutual trust between Member States, with

[40] With regard to Article 6(3)(e) ECHR, see: ECtHR, 28 November 1978, *Luedicke, Belkacem and Koç v. Germany*, Application no. 6210/73; 6877/75; 7132/75, § 42.

[41] See above, § 3.

positive repercussions for judicial cooperation in criminal matters,[42] the EU action failing to be directly linked to the procedural context of transnational cases is insufficient and hardly legitimate. But even if the rights indicated in the Roadmap were eventually linked to the context of judicial cooperation and transnational proceedings, their scope of protection would remain unsatisfactory, since the specific characteristics of transnational cases require an extension of traditional procedural rights beyond the guarantee of a fair trial.

If one considers that the criminal justice system is a big cluster of procedural rights, of which traditional fair trial rights represent only a small part,[43] it is necessary to recognize and protect more procedural rights so as to include also rights and guarantees to be provided in the pre-trial activity of collection of evidence in transnational cases involving different Member States.[44] Indeed, a more comprehensive approach covering a wider range of procedural rights would lead to the establishment of common minimum rights and guarantees in every single area of judicial cooperation, including the one concerning the preliminary inquiry activity.

From this perspective, distinguishing the issue of procedural rights from the issue of collection of evidence has jeopardized the possibility of looking at the matters concerning collection of evidence under the light of procedural rights instead of repressive objectives only.[45] Indeed, although the adoption of common minimum rights is under discussion in the context of the debate on the EIO, this debate is mainly focused on how to ensure the effectiveness of the repressive activity of national authorities and the admissibility of evidence.

The adoption of common minimum guarantees in the specific sector of procedural rights, as well as in any other sector concerning judicial cooperation in criminal matters, would represent an effective enhancement of the principle of mutual recognition: common minimum guarantees are likely—more so than mutual trust—to reduce the number of cases where the authority of the issuing Member State requires that a measure is executed by the executing Member State in compliance with formalities and procedures expressly indicated by the issuing authority.[46]

Of course, the adoption of common minimum rights does not address all the issues at stake. Mutual trust may be jeopardized in cases where diverse and higher standards continue to differentiate criminal justice systems of Member States. For this reason, the debate on procedural rights now speaks of the *lex mitior:* the question concerning the applicable law in transnational proceedings

[42] A right may be generally provided in criminal proceedings but may be also referred to a specific measure of judicial cooperation: this is what has occurred in relation to the right to interpretation and translation extended to proceedings for the execution of a EAW.

[43] De Bondt and Vermeulen (2010), p. 165.

[44] *Ibid.*

[45] *Ibid.*

[46] This is specifically relevant in the area of mutual legal assistance aimed to collection of evidence, where the rule is the application of the law of the executing State.

should be addressed by applying the regime more favourable to the person involved.[47]

There are signs of this principle in EU legislative acts already adopted. These signs, however, do not reveal a conscious use of a technique aimed at protecting procedural rights rather than a device—*in favore rei*—aimed at combining a provision to be implemented at the national level with the incompatible legislation of the executing Member State. Examples of the application of the *lex mitior* can be found in the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union,[48] and, with specific reference to procedural rights, in the Framework Decision 2009/829/JHA on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.[49] In the latter, it is provided that the executing Member State cannot monitor a supervision measure for a period longer than the maximum length of time during which the monitoring of a supervision measure is allowed according to the national law of the executing Member State; in such a case, though, the possible refusal to recognize the decision on a supervision measure may lead to the issuing of a EAW, a less favourable solution for the person involved.

Hence, the principle founded on the *lex mitior* should be assessed by taking into account its practical implications.[50] Of course, this is a principle whose actual application still needs to be explored and developed, although it seems to be promising for a better protection of procedural rights in the area of judicial cooperation in criminal matters beyond a policy based just on minimum rights.

[47] The adoption of this principle would fulfil what had been hoped for in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters of 2000 (OJ C 12, 15 January 2001, p. 10): the involvement of different Member States in criminal proceedings must not undermine procedural rights of individuals.

[48] OJ L 327, 5 December 2008, p. 27. Under this Framework Decision, it is provided that where the sentence is incompatible with the law of the executing Member State in terms of its duration, the competent authority of the executing Member State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. However, the adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing Member State.

[49] OJ L 294, 11 November 2009, p. 20.

[50] De Bondt and Vermeulen (2010), p. 166.

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EU Tools for the Protection of Victims of Serious and Organized Crime

Jonathan Doak and Louise Taylor

Contents

Abstract Traditionally the European Union has been somewhat reticent in proposing specific rights for crime victims. That position changed significantly with the adoption in 2001 of the Framework Decision on the Standing of Victims in Criminal Proceedings which set down legally binding rights for victims and corresponding obligations on Member States to protect victims from primary and secondary victimisation. Whilst representing an important step forward in securing protection for victims, the Framework Decision has also been seen to fall short of its objectives in various respects. This has resulted in proposals for legislative reform including the introduction of the European Protection Order and the adoption of the draft Directive establishing minimum standards on the rights, support and protection of victims of crime. This chapter outlines the key rights and obligations set down in the Framework Decision and also considers the likely impact on the protection afforded to victims of the introduction of the proposed reforms.

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Abbreviations

ECHR European Convention on Human Rights
ECJ European Court of Justice

1 Introduction

The ascent of the crime victim in international law and policy has been nothing short of remarkable over the course of the last two decades. However, until recently, the European Union was notably more reticent than many other international organisations—including the UN and Council of Europe—to propose specific rights for crime victims. Traditionally, the task of prescribing structures and procedures that Member States ought to adopt in their criminal justice systems was seen as something that fell beyond the competency of the EU. This position shifted somewhat in 1999, when the Commission issued a communication to the European Parliament entitled "Crime Victims in the European Union: Reflections on Standards and Action,"[1] which contained 17 proposals grouped under five main headings: prevention of victimization; assistance to victims; standing of victims in the criminal procedure; compensation issues; and general issues (information, language, training), and called on all Member States to implement fair and effective legislation in these areas. Following its ratification by the Parliament, in March 2001 the Justice and Home Affairs Council adopted the Framework Decision on the Standing of Victims in Criminal Proceedings.[2] Member States were given just one year—until March 2002—to ensure that their criminal justice systems complied with its provisions.[3]

Although some of the provisions of the Framework Decision were drafted in a vague or imprecise manner, its significance should not be underestimated. In contrast to the various declarations, recommendations, bodies of principles, and other soft law pronouncements of international bodies which had been gradually emerging since the 1980s, the Framework Decision was legally binding and, as such, was directly applicable in all Member States of the European Union. Among the most important key rights conferred to victims are:

a) A right to respect and recognition at all stages of the criminal proceedings; victims should have "a real and appropriate role in its criminal legal system' and

[1] European Commission (1999) Crime Victims in the European Union: Reflections on Standards and Action (COM/1999/359), Brussels.

[2] Justice and Home Affairs Council (2001) Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/JHA), Brussels.

[3] Exceptions were provided for Articles 5 and 6, which were to be implemented by 2004, and Article 10, which was to be implemented by 2006.

that 'victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances." (Art. 2);
b) A right to be heard during proceedings and to be asked only such questions that "are necessary for the purpose of criminal proceedings" (Art. 3);
c) A right to receive information and be kept informed about the progress of the case throughout the criminal process (Art. 4);
d) A right to protection—in terms of both safety and privacy—throughout the criminal process (Art. 8);
e) A right to compensation from the offender and/or the State (Art. 9).

In addition, the Framework Decision conferred a number of corresponding duties on Member States which included:

a) The promotion of mediation in criminal cases for offences which it considers appropriate for this sort of measure (Art. 10);
b) Developing co-operation with other Member States "to facilitate the more effective protection of victims' interests in criminal proceedings" (Art. 12);
c) Access to specialist services and training of personnel to ensure better levels of support and assistance to victims (Arts. 13 and 14);
d) Taking steps to ensure that the criminal process did not result in secondary victimisation (Art. 15).

These were ambitious plans indeed, particularly given the far-reaching changes that had to be introduced within such a short period of time. Two years after the implementation date had passed, the European Commission issued a report in which serious misgivings were expressed about the extent to which Member States were implementing its provisions.[4] A more recent study,[5] commissioned by Victim Support Europe in 2010, found that while significant progress had been made in certain areas (particularly regarding the provision of information and general support), the Member States surveyed were still falling short of many of the standards imposed by the Framework Decision. Most significantly, it was underlined that changes in law and policy did not always impact on practice in the criminal justice system.

1.1 The Right to Protection

The "right to protection" arises within two main contexts. First, there is a need for the State to put in place measures to prevent people from *becoming* victims of crime in the first place. In a strict sense, this is not a right that is limited to victims

[4] European Commission (2004) Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (COM/2004/54), Brussels.

[5] Victim Support Europe (2010) Project: Victims in Europe, Lisbon.

of crime; rather, it is a right to which all citizens should be entitled, since all are potentially victims of crime. Secondly, international standards also increasingly contain provisions concerning "secondary victimisation," which is a label commonly applied to describe the additional suffering of victims that has been incurred as a result of the institutional response to an offence.

As regards the first form of protection, Article 8 of the Framework Decision obliges Member States to ensure

> a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.

What constitutes "a suitable level of protection" is open to argument, but we can assume that, in the most serious cases at least, this would reflect the obligation on states under Article 2 ECHR to put in place measures to protect life against threats from third parties.[6] Similarly, it should be borne in mind that the state owes a similar positive obligation to protect the privacy of individuals under Article 8 ECHR.[7] While the specific circumstances whereby a positive obligation will arise "do not lend themselves to precise definition,"[8] the degree of long-term trauma and emotional distress commonly associated with certain types of serious victimisation such as rape and child abuse would seem to suggest that there is clear potential for the Article to apply where vulnerable victims are subject to intrusive cross-examination at court.

While Member States have considerable leeway as to the form that protection should take, recent proposals for a European Protection Order should ensure that protections afforded to intimidated witnesses and other vulnerable victims under the laws of one Member State should be replicated within another where the subject of the order exercises their rights to free movement within the European Union.[9] These proposals have now been given effect through Directive 2011/99/EU which took effect on 10 January 2012. Under the new Directive, the Member State to which the victim or witness moves should provide such an order as an "immediate response". The Member State may then impose a number of restrictions upon the

[6] This should involve putting in place effective criminal law measures aimed at deterring and preventing crime that may pose a threat to life. See ECtHR, 28 October 1998, Osman v. UK, Application No. 23452/94. Note also Council Framework Decision of 19 July 2002 on combating trafficking in human beings [Justice and Home Affairs Council (2002)] which stipulates that states must punish any form of recruitment, transportation, transfer or harbouring of a person who has been deprived of his/her fundamental rights. National legislation must be "effective, proportionate and dissuasive."

[7] See ECtHR, 26 March 1985, X and Y v. Netherlands, Application No. 8978/80.

[8] See ECtHR, 25 November 1994, Stjerna v. Finland Application No. 18131/91, § 38.

[9] European Commission, Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Hungary, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden with a view to the adoption of a Directive of the European Parliament and of the Council on the European Protection Order (O.J. 2010/C 69/02).

"person causing danger," which may consist of one or more of the following under Article 5:

a) An obligation not to enter certain localities, places or defined areas where the protected person resides or that he visits;
b) An obligation to remain in a specified place, where applicable during specified times;
c) An obligation containing limitations on leaving the territory of the issuing State;
d) An obligation to avoid contact with the protected person; or
e) A prohibition on approaching the protected person closer than a prescribed distance.

Such an order should be issued by a judicial authority only after having verified that the relevant measure(s) meets all the requirements of the national legislation of the issuing or the requesting State. It should also contain information on the length of any obligations or restrictions imposed in addition to an express statement that their infringement would constitute a criminal offence under the law of the issuing State.

In an attempt to balance the need for protection alongside the individual's right to liberty, a court may refuse to recognise a European protection order under Article 10 in the following circumstances:

(a) The European protection order is not complete or has not been completed within the time-limit set by the competent authority of the executing State;
(b) The requirements set out in Article 2(2) have not been met;
(c) The protection derives from the execution of a penalty or measure that is covered by amnesty according to the law of the executing State and relates to an act which falls within its competence according to that law;
(d) There is immunity conferred under the law of the executing State on the person causing danger, which makes it impossible to adopt the protection measures.

Yet there is also the prospect of a more wide-ranging directive in the not too distant future which—if it enters into force—will replace the 2001 Framework Decision. The proposed Directive establishing minimum standards on the rights, support and protection of victims of crime[10] replicates much of the original wording of the Framework Decision. Given that the objectives of the Framework Decision were not wholly realised,[11] concerns have been expressed that the new Directive will similarly fail to meet its own objectives and will not really add anything new in terms of concrete measures to protect victims.[12] However, by the same token, it is

[10] European Commission (2011) Draft Directive establishing minimum standards on the rights, support and protection of victims of crime (COM/2011/275), Brussels.

[11] As acknowledged at page 2 of the Explanatory Memorandum to the draft Directive itself.

[12] Article 1 of the draft Directive states that 'the purpose of this Directive is to ensure that all victims of crime receive appropriate protection and support and are able to participate in criminal proceedings and are recognised and treated in a respectful, sensitive and professional manner, without discrimination of any kind, in all contacts with any public authority, victim support or restorative justice service.'

suggested that through framing the issues within a directive it is hoped that Member States will feel greater pressure to ensure compliance with its terms which clearly go beyond the parameters of its predecessor in several respects. The main advances made to the protection from primary victimisation under the proposals are as follows:

a) Article 2 affords an extended definition to the term "victim" to include family members of victims whose death was caused by a criminal offence. "Family members" is also interpreted widely to include cohabitees and those in registered partnerships;
b) Article 11 sets down minimum standards of protection to safeguard victims from intimidation or further victimisation when participating in mediation or restorative justice services;
c) Article 17 avoids the threshold tests that feature in Article 8 of the Framework Decision. Under the new provision Member States will be instructed to 'ensure that measures are available to protect the safety of victims and their family members from retaliation, intimidation, repeat or further victimisation' with no mention of the risk having to be of any particular seriousness. However, the draft Directive does go on to focus on victims that are regarded as "vulnerable" and outlines how an assessment of vulnerability is to be achieved. Once identified as vulnerable, victims will then have a right to special measures of protection during criminal proceedings under Articles 21 and 22. The most relevant in the context of protection from primary victimisation are those measures which allow victims to give evidence in court without having to have visual contact with the defendant,[13] measures which allow victims to give evidence without having to be present in the courtroom at all,[14] and measures that allow the case to be conducted without the presence of the public[15];
d) Article 22 focuses on the particular vulnerabilities and protection requirements of children; and
e) Article 23 adds to the existing protection of the privacy of victims and their families by requiring Member States to encourage self-regulation by the media.

As regards secondary victimisation, the key provision is Article 3 of the Framework Decision which grants victims a "right to be heard and supply evidence." It also stipulates that any questioning of victims should be "necessary for the purpose of criminal proceedings." Adversarial jurisdictions—particularly England, Scotland, Northern Ireland and the Republic of Ireland—bear a poor record as regards the way in which witnesses are routinely denigrated and humiliated about events when questioned in court by the opposing party.[16] Judges have traditionally allowed a wide range of questions to be put to complainants concerning their

[13] Article 21(3)(a).
[14] *Ibid.,* at (b).
[15] *Ibid*., at (d).
[16] See generally Ellison (2001).

previous behaviour and intimate details of their private lives which go far beyond a "need to know" basis.[17] It is not inconceivable that domestic cross-examination practice could be subject to a future challenge on this point, particularly in a case involving a child or a complainant in a case of rape.

Although robust questioning is often viewed as a *sine qua non* of the adversarial process, it is clear that the era when the ECJ granted Member States a considerable amount of elbow room in relation to their domestic criminal justice processes may well have passed. This is evidenced by the case of *Pupino*,[18] which underlines the fact that the provisions of the Framework Decision should be regarded as justiciable by victims within domestic courts.

The case concerned criminal proceedings in Italy against a nursery school teacher for offences relating to cruelty of children in her care. As with the legal systems of the UK and Ireland, Italian law stipulates that evidence should be heard in an oral form at trial. There was a procedure (*incidente probatorio*) through which the court did have the power to order pre-trial witness examination in exceptional circumstances. The prosecution sought to have a number of the child witnesses examined in this way, but the court refused on the grounds that under the Criminal Code, none of the exceptional circumstances applied in the instant case. The case thus concerned the compatibility of the relevant provisions of the Italian Code of Criminal Procedure with the Framework Decision.

The ECJ held that the Framework Decision

> must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place.[19]

The Italian court was therefore under an obligation to interpret the terms of the Criminal Code in the light of the wording and purpose of the Framework Decision. On account of the former reluctance of the ECJ to be too prescriptive in relation to domestic criminal procedure, the decision in *Pupino* is particularly welcome, and underlines the fact that the right of victims to be protected from secondary victimisation is now a standard that is directly applicable in the domestic legal order.

Article 3 of the Framework Decision is paralleled in Article 20 of the draft Directive establishing minimum standards on the rights, support and protection of victims of crime [20] with the additional requirements that Member States ensure that interviews with victims are carried out "without unjustified delay," that "the

[17] Notwithstanding, there have been efforts to regulate this type of questioning in recent years. Section 41 of the Youth Justice and Criminal Evidence Act 1999 (England) places stringent conditions on the types of questions that can be put to complainants in rape cases. Section 100 of the Criminal Justice Act 2003 restricts questions that can be asked of witnesses concerning their character.

[18] ECJ, 16 June 2005, Pupino, in Case C-105/03.

[19] *Ibid*., § 61.

[20] See above, footnote 11.

number of interviews with victims is kept to a minimum," and that these are only carried out "where strictly necessary for the purposes of criminal proceedings." While the inclusion of the word "strictly" within the Article may appear to add little to the protection that is currently afforded, this does at least indicate a heightened awareness to the potential for secondary victimisation where victims are interviewed unnecessarily.

It is also clear from the terms of Article 24 of the draft Directive that increased pressure will be applied to Member States to ensure the appropriate training of practitioners who have victim contact. Under Article 14 of the Framework Decision Member States are currently only required to encourage initiatives which allow personnel to receive suitable training. Whereas under Article 24 this obligation will be bolstered to require Member States to

> ensure that police, prosecutors and court staff receive both general and specialist training to sensitise them to the needs of victims and to deal with them in an impartial, respectful and professional manner.

The second and third paragraphs of the Article go on to extend this obligation to include the provision of appropriate training to the judiciary and those working within victim support and restorative justice services. Article 24 concludes with a description of the minimum standards of training that will be expected and states that the content of such training should include:

> matters relating to the impact that crime has on victims, the risks of intimidation, repeat and secondary victimisation and how these can be avoided and the availability and relevance of support to victims.

It is clear that by couching Article 20 in stronger terms than its predecessor and by ensuring the appropriate training of personnel under Article 24 the intention is to entrench best practice within the agencies working with victims and positively impact upon the victim experience as a result. However, only in time can an assessment be made on the success of such measures and whether they have any tangible effect on the incidence of secondary victimisation.

At the time of writing, the proposed Directive is still subject to the consultation process, but it would appear to be widely supported, not least by the Commission itself as part of the "comprehensive package of measures to protect victims' rights" which was originally promised by the Justice and Home Affairs Council in 2010.[21]

1.2 Future Issues: Challenges

With the recent integration of the Third Pillar of the European Union, Police and Judicial Co-operation in Criminal Matters, into its mainstream legal framework, harmonisation in the field of criminal justice is likely to accelerate significantly in

[21] Justice and Home Affairs Council (2010) Press release [8920/10 (Presse 88)], Brussels.

the near future. The right to protection is one area where significant progress has been made in the past ten years, but there are many other victims' rights issues falling outside the scope of this paper which are also likely to be developed on the European platform in forthcoming years. These include the participatory rights within the criminal process, the right to justice, and the expansion of mediation and restorative justice programmes. These developments underline the need for policymakers and courts alike to consider carefully the significant challenges that lie before us in determining how different legal cultures and traditions can find common ground in giving effect to the emergent rights of victims whilst simultaneously upholding the rights of the accused to a fair hearing.

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The Protection of Personal Data Processed Within the Framework of Police and Judicial Cooperation in Criminal Matters*

Rosanna Belfiore

Contents

Abstract The present paper provides a general overview of Framework Decision 2008/977/JHA on the protection of personal data processed within the framework of police and judicial cooperation in criminal matters, adopted much time after Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data—which applies only to activities falling within the scope of the former Community law and does not cover processing operations concerning the activities of the State in areas of criminal law. In line with the original three-pillar construction of the EU, such a frame results in a clear-cut distinction between the protection against data processed for commercial reasons

*This paper was submitted for publication by September 2011. In January 2012 the European Commission has put forward two legislative proposals: a Regulation setting out a general EU framework for data protection and a Directive on the protection of personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities. For obvious reasons, the paper does not take into account these proposals.

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under the former first pillar on the one hand, and the protection against data processed for crime prevention and investigation purposes under the former third pillar on the other. In the light of the entry into force of the Lisbon Treaty, which has removed the pillar structure, the present paper examines the most recent developments towards the adoption of a single legal instrument on personal data protection in the EU, aimed at replacing both the Framework Decision and the Directive.

Abbreviations

CIS	Customs Information System
EDPS	European Data Protection Supervisor
EU FRCh	Charter of Fundamental Rights of the European Union
SIS	Schengen Information System
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

As is well known, the main objective of the initial European Community integration project was limited to the creation of an area of free movement of persons, goods, services and capital. Following the foundation of the European Union and the expansion of the scope of the integration project, including the criminal law sector, the idea of free movement has been applied, *mutatis mutandis*, to information,[1] data and judicial decisions within the framework of police and judicial cooperation. The idea of free movement of information in criminal matters is therefore envisaged to favour cooperation between the competent national public authorities for the prevention, investigation and prosecution of criminal offences, leaving individuals mostly unable to escape swifter and faster legal assistance in cross-border cases.

The present paper is focused on the means of protection that have been provided to individuals by Framework Decision 2008/977/JHA[2] against the exchange of personal data processed under the framework of police and judicial cooperation in criminal matters. In the light of Article 7 EU FRCh concerning the right to privacy and Article 8 EU FRCh concerning the right to protection of personal data,[3] and on account of the implementation of the principle of

[1] On the increasing importance of information sharing at EU level, see: Gialuz (2009), 16 ff.

[2] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30 December 2008, p. 60.

[3] On the difference between privacy and data protection, see: Gutwirth and De Hert (2008), pp. 278–293, and Mitsilegas (2009), pp. 276–277.

availability in the area of police and judicial cooperation in criminal matters strongly promoted since the Hague Programme,[4] a measure aiming at the protection of individuals during data exchange for crime prevention purposes was much needed. Indeed, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data[5] does not apply to the processing of personal data in the course of an activity falling outside the scope of the former Community law, nor to processing operations concerning public security, defence, State security or the activities of the State in areas of criminal law [Art. 3(2)].[6]

Thus, in line with the original three-pillar construction of the EU, the result is a clear-cut distinction between protection against data processed for commercial reasons under the former first pillar on the one hand, and the protection against data processed for crime prevention and investigation purposes under the former third pillar on the other. However, after the adoption of the Lisbon Treaty, which has removed the pillar structure, and because of the shortcomings of Framework Decision 2008/977/JHA, the European legislator has planned to adopt a single legal instrument on personal data protection in the EU aimed at replacing both the Directive and the Framework Decision. The present paper briefly examines the most recent developments of such a plan, i.e. the Communication from the Commission of 2010 and the Opinion delivered by the European Data Protection Supervisor in 2011.

2 Framework Decision 2008/977/JHA: Scope of Application

The main objective of Framework Decision 2008/977/JHA, as expressly affirmed under Art. 1, is to ensure a high level of protection of fundamental rights and freedoms of natural persons, in particular the right to privacy, while guaranteeing a high level of public safety. In this respect, processing of personal data in the framework of police and judicial cooperation in criminal matters is emblematic of the conflict between private and public interests in the criminal law sector.

Protection as envisaged by this Framework Decision is limited in scope: it is provided only when personal data are transmitted or made available between Member States, or between Member States and authorities or information systems established under the former EU and EC Treaties [Art. 1(2)]. In principle, this

[4] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53, 3 March 2005, p. 1. On the principle of availability, see: Ciampi (2009), pp. 34 ff.

[5] OJ L 281, 23 November 1995, p. 31.

[6] After Article 286 EC Treaty concerning data protection was introduced by the Treaty of Amsterdam, Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies (this processing being left outside by the scope of application of Directive 95/46) has been adopted. Directive 95/46 has been further complemented by Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ L 201, 31 July 2002, p. 37).

means that Member States are bound by the standard set forth in the Framework Decision only when they process data among themselves, not at the domestic level. In practice, however, this standard of data protection should be ensured at the national level as well: Member States are not precluded from providing higher standards of protection for personal data collected or processed at the national level, i.e. the Framework Decision is a floor, which should not allow lower standards [Article 1(5)].[7] But there is the danger of a double standard depending on the level, national or transnational, where exchange of data takes place. The possibility of a double standard is evident also under Article 12, which provides that, where, under the law of the transmitting Member State, specific processing restrictions apply in specific circumstances to data exchanges between competent authorities within that Member State (i.e. at national level), the transmitting authority must inform the recipient of such restrictions, who in turn must ensure that these processing restrictions are met.

The Framework Decision does not apply to data exchanged as part of existing obligations and commitments incumbent upon Member States or upon the Union by virtue of bilateral or multilateral agreements with third countries (point 38 of the *Consideranda*) and is without prejudice to acts adopted on the basis of the then Title VI TEU that contains *ad hoc* data protection provisions (point 39 of *Consideranda*)—this is the case for data exchanges concerning Europol, Eurojust, the SIS and the CIS, as well as Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.[8]

Finally, protection meets its ultimate limitation where there are essential national security interests and specific intelligence activities in the field of national security [Art. 1(4)].

The scope of application of the Framework Decision is not limited by type of personal data being processed. According to Article 2a, "personal data" mean any *information* relating to an identified or identifiable natural person (defined as the "data subject"). The result of such broad definition is the questionable extension of the Framework Decision to "soft data," i.e. data based on uncertain facts or on assumptions and hearsay.[9]

Also the operations performed upon personal data that fall within the definition of "processing" are broadly defined: they consist of collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction, whether or not carried out by automatic means (Art. 2b).

[7] As explained in recital 10, the approximation of Member States' laws should not result in any lessening of the data protection they afford but should instead strive for a high level of protection within the Union.

[8] For some critical remarks, see De Hert and Bellanova (2009), p. 6.

[9] De Hert and Papakonstantinou (2009), p. 408.

3 Obligations upon the Competent Authorities

Protection under Framework Decision 2008/977/JHA is afforded not only to rights and remedies that the data subject can exercise against processing of personal data,[10] but also and primarily in the form of obligations that the competent authorities[11] must comply with in the processing of the data. Indeed, Article 3(1) provides that, according to the purpose specification principle (recalling the principle of speciality[12] traditionally envisaged in measures of legal assistance), personal data may be collected only for specified, explicit and legitimate purposes and may be processed only for the same purpose for which data were collected. Furthermore, according to the principles of legality and proportionality, processing of the data shall be lawful and adequate, relevant and not excessive in relation to the purposes for which they are collected. Unfortunately, the European legislator failed to strictly limit further processing, where most dangers for illegitimate processing occur. Indeed, further processing is permitted as long as: it is not incompatible with the purpose for which the data were collected; the competent authorities are authorised to process such data for such other purpose in accordance with the applicable legal provisions; and processing is necessary and proportionate to that other purpose [Art. 3(2)].[13] These are all open-ended conditions that create a danger of potentially arbitrary processing.[14]

A specific provision is dedicated to special categories of data, such as those revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or concerning health or sexuality, which can be processed only when this is strictly necessary and the national law provides adequate safeguards (Art. 6). Although the purpose of this provision is to guarantee a higher level of protection because of the sensitive nature of the data concerned, protection is actually equivalent, if not lessened, in respect of the standard provided

[10] See below, § 5.

[11] All the data protection rules which apply to the competent authorities are also binding on persons working for a competent authority of a Member State and allowed to have access to and process personal data (Art. 21). These rules shall apply to the members and staff of the national supervisory authorities too (Art. 25, para. 4).

[12] As pointed out by De Busser, "[...] the rule of speciality and purpose limitation both have the objective of restricting the use of data to the intended use." However "purpose limitation is [...] weaker [...] in comparison to speciality." De Busser (2007), p. 49 and p. 55.

[13] The purposes other than those for which data can be further processed are listed under Article 11. They are: (a) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties other than those for which data were transmitted or made available; (b) other judicial and administrative proceedings directly related to the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties; (c) the prevention of an immediate and serious threat to public security; or (d) any other purpose only with the prior consent of the transmitting Member State or with the consent of the data subject, given in accordance with national law. This provision is envisaged so as to have a broad scope. On this point see Hijmans and Scirocco (2009), p. 1494.

[14] For some critical comments on this issue see De Hert and Papakonstantinou (2009), p. 411.

for data in general. Indeed, the necessity criterion is nothing more than the proportionality principle already established for any category of data, and the adequacy principle refers to national laws, thereby deferring to national standards of protection, which may vary considerably.

The competent authorities are also responsible for verification of quality of data before they are transmitted or made available (Art. 8). To this end, they must take all reasonable steps to provide that personal data which are inaccurate, incomplete or no longer up to date are not transmitted or made available: in particular, the receiving Member State must be able to assess the degree of accuracy,[15] completeness, up-to-dateness and reliability of data transmitted or made available. If it emerges that data are incorrect or have been unlawfully transmitted, they must be corrected (if inaccurate), erased (when they are no longer required for the purpose for which they were collected or further processed) or blocked (if there are reasonable grounds to believe that erasure could affect the legitimate interests of the data subject), as provided under Article 4. Time limits for the retention of data are to be set by the transmitting authority, and time limits for the erasure of personal data or for a periodic review of the need for the storage of the data must be established by the receiving authority according to its national law (Arts. 5 and 9).

Another verification duty refers to the lawfulness of the data processing. For such verification, all transmissions are to be logged or documented. This may serve also the purpose of self-monitoring and ensuring proper data integrity and security (Art. 10).

A duty of information is imposed on the recipient and the transmitting Member State. First, the recipient—be it a Member State, a third country, an international body or a private party[16]—must, when requested to do so, inform the competent authority which transmitted or made available the personal data about their processing (Art. 15). Second, both the receiving and the transmitting Member States must ensure that the data subject is informed regarding the collection or processing of personal data, in accordance with national law. However, a Member State may ask another Member State not to inform the data subject, if its national law so provides; in this case, the latter Member State may not proceed to do so without the prior consent of the other Member State. Indeed, informing the data subject may jeopardise the activities carried out during the investigation stage.

Member States shall provide that the competent authorities must implement appropriate technical and organizational measures to protect data against accidental or unlawful destruction or accidental loss, alteration, unauthorised disclosure or access, especially where the processing is automated (Art. 22).

[15] The principle of accuracy of data is to be applied taking account of the nature and purpose of the processing concerned. For example, in judicial proceedings data are based on the subjective perception of individuals and in some cases are totally unverifiable. Consequently, the requirement of accuracy cannot apply to the accuracy of a statement but merely to the fact that a specific statement has been made (point 12 of the *Consideranda*).

[16] See below, § 4.

Finally, Member States shall lay down effective, proportionate and dissuasive penalties to be imposed in case of infringements of the provisions adopted under the Framework Decision (Art. 24).

4 Transmission to Third States, International Bodies or Private Parties

Article 13 of Framework Decision 2008/977/JHA concerns cases where personal data transmitted or made available by the competent authority of a Member State are transferred to third States or international bodies by the receiving Member State. Transfer is possible only if: (a) it is necessary for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties; (b) the receiving authority in the third State or receiving international body is responsible for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties; (c) the Member State from which the data were obtained has given its consent to transfer in compliance with its national law; and (d) the third State or international body concerned ensures an adequate level of protection for the intended data processing. While the conditions under (a), (b) and (d) are not decisive in order to provide sufficient safeguards for further transmission of data (the necessity principle is linked to very broad purposes, the competence of the receiving authority in the third State or international body is a preliminary condition for cooperation, and the adequacy principle refers to a standard which is different from the one provided by the Framework Decision and not easily verifiable),[17] the condition under (c) is the ultimate guarantee, as the consent of the Member State from which the data were first obtained allows to liken the further transfer to a direct transmission from the consenting Member State. However, a questionable derogation is permitted where the transfer of the data is essential for the prevention of an immediate and serious threat to public security of a Member State or a third State or to essential interests of a Member State, and prior consent cannot be obtained in good time [Art. 13(2)]. Another derogation concerns the last condition (d), from which departure is

[17] The Framework Decision attempts to explain how the adequacy of the level of protection might be assessed. Particular consideration should be given to: the nature of the data; the purpose and duration of the proposed processing operation or operations; the State of origin and the State or international body of final destination of the data; the rules of law, both general and sector-specific, in force in the third State or international body in question; and the professional rules and security measures which apply [Art. 13(4)]. Nonetheless, the assessment of adequacy remains difficult to carry out. For some critical remarks see: De Busser (2010), pp. 131–133; De Hert and Papakonstantinou (2009), p. 412; and Hijmans and Scirocco (2009), p. 1499. It is noteworthy that recently EU Commissioner Viviane Reding, responsible for Justice, Fundamental Rights and Citizenship, stressed the need to ensure that the principle of reciprocity of protection enjoyed by data subjects applies when data are transferred and processed outside the EU. V. Reding (2011), p. 5.

permitted where the national law of the Member State transferring the data provides for the transfer because of legitimate specific interests of the data subject or legitimate prevailing interests, especially important public interests [Art. 13(3)(a)]. The same condition may be derogated from in cases where the third State or receiving international body provides safeguards deemed adequate by the Member State concerned according to its national law [Art. 13(3)(b)]. This last derogation is obscure, since it does not actually constitute a derogation (the fact that the third State or international body concerned must ensure an adequate level of protection is the rule), and ambiguous, since it is not clear which one is the Member State concerned (the one that first transmits the data or the one that further transfers the data originally transmitted?).

Article 14 of the Framework Decision concerns the transmission to private parties of personal data received from or made available by the competent authority of a Member State. This transmission is possible only if: (a) the competent authority of the Member State from which the data were obtained has consented to transmission in compliance with its national law; (b) no legitimate specific interests of the data subject prevent transmission; and (c) in particular cases, transfer is essential for the competent authority transmitting the data to a private party. In this last case, the transfer must be essential for: the performance of a task lawfully assigned to the transmitting authority; the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties; the prevention of an immediate and serious threat to public security; or the prevention of serious harm to the rights of individuals. The EU legislator has linked this transmission to strict conditions because of the serious consequences that may result from too an easy exchange of data with private parties. According to the purpose specification principle, it is also provided that the competent authority transmitting the data to a private party shall inform the latter of the purposes for which the data may exclusively be used.

5 Rights of the Data Subject

Four Articles of Framework Decision 2008/977/JHA are dedicated to the rights conferred upon the data subject, which are: the right of access; the right to rectification, erasure and blocking; the right to compensation; and the right to a judicial remedy.[18]

As far as the right of access is concerned, Article 17 provides that every data subject shall have the right to obtain a confirmation from the controller or from the national supervisory authority as to whether or not data relating to him have been transmitted or made available, information on the recipients to whom data have

[18] The right to information is implied in the obligation for the Member States to inform the data subjects about the collection or processing of their personal data. See above, § 3.

been disclosed, and communication of the data undergoing processing. As an alternative, the data subject shall have the right to obtain a confirmation from the national supervisory authority that all necessary verifications have taken place. The access right is to be considered one of the central axes of the European personal data system as it guarantees transparency[19] and provides for better prevention of potential abuses. However, this right may be restricted where such a restriction constitutes a necessary and proportional measure to preserve either State's prerogatives or to safeguard individual rights. In the first case, restriction shall be allowed: to avoid obstructing official or legal inquiries, investigations or procedures; to avoid prejudicing the prevention, detection, investigation and prosecution of criminal offences or for the execution of criminal penalties; or to protect public or national security. In the second case, restriction shall be allowed to protect the data subject or the rights and freedoms of others. Any decision on refusal or restriction, together with the factual or legal reason on which the decision is based, shall be communicated to the data subject. However, the reason on which the decision is based may be omitted where a reason for restricting access exists. The data subject must in all cases be advised that he may appeal to the competent national supervisory authority, a judicial authority, or to a court.

As to the right to rectification, erasure or blocking (Art. 18), it is for the Member States to lay down whether the data subject may assert this right directly against the controller or through the intermediary of the competent national supervisory authority. If the controller refuses rectification, erasure or blocking, the refusal must be communicated in writing to the data subject who must be informed of the mechanism provided for in national law for lodging a complaint or seeking judicial remedy. Upon examination of the complaint or judicial remedy, the data subject shall be informed whether the controller acted properly or not. Member States may also provide that the data subject be informed by the competent national supervisory authority that a review has taken place. Furthermore, if the accuracy of an item of personal data is contested by the data subject, and its accuracy or inaccuracy cannot be ascertained, referencing of that item of data—this meaning the marking of stored personal data without the aim of limiting their processing in future—may take place.

The Framework Decision also provides the right to compensation (Art. 19), under which any person who has suffered damage as a result of an unlawful processing operation is entitled to receive compensation for the damage suffered from the controller or other authority competent under national law. Liability to the injured party always falls on the recipient. However, if the recipient pays compensation for damage caused by the use of incorrectly transmitted data, the transmitting competent authority shall refund to the recipient the amount paid in damages, taking into account any fault that may lie with the recipient.

Finally, the right to a judicial remedy (Art. 20) is granted to the data subject for any breach of the rights guaranteed to him by the applicable national law. It is

[19] Andoulsi (2010), p. 377.

noteworthy that this right is not granted to individuals in case of breach of the Framework Decision but instead for breach of national law (and not necessarily the piece of national legislation implementing the EU measure).

6 National Supervisory Authorities and the European Data Protection Supervisor

Crucial in the protection system envisaged by the European legislator is the role of national supervisory authorities.[20] Indeed, the application of the Framework Decision by the Member States in their territories is primarily advised and monitored by independent national supervisory authorities [Art. 25(1)], endowed with investigative powers, powers of intervention, and the power to engage in legal proceedings where the national provisions adopted pursuant to the Framework Decision have been infringed [Art. 25(2)]. Furthermore, each supervisory authority hears claims lodged by any person concerning the protection of his rights and freedoms in regard to the processing of personal data [Art. 25(3)]. National supervisory authorities must also be consulted prior to the processing of personal data, forming part of a new filing system to be created where special categories of data are to be processed or the type of processing, in particular using new technologies, mechanism or procedures, holds otherwise specific risks for the fundamental rights and freedoms, and in particular the privacy, of the data subject (Art. 23).

Of course, equally important in the EU data protection system is the role played by the EDPS, a figure that gives visibility to the system itself, provides for independence, and puts expertise at the service of the EU administration.[21] As pointed out by some scholars,[22] the main duties of the EDPS—which may be grouped into supervision (particularly significant the supervision of the EURODAC central unit as well as of large-scale databases such as the SIS II and the VIS), consultation (which implies monitoring of legislative proposals and technological developments as well as advising EU institutions and bodies), and cooperation with national supervisory authorities—permit the EDPS to claim a role as a main actor in the field of police and judicial cooperation in criminal matters.

[20] As explained under point 34 of the *Consideranda*, the supervisory authorities already established under Directive 95/46/EC will also be entrusted with the tasks to be performed under the Framework Decision.

[21] Hijmans (2006), pp. 1341–1342.

[22] De Hert and Bellanova (2009), p. 11.

7 The Way Forward: The Communication from the Commission

After Framework Decision 2008/977/JHA entered into force, Member States adopted the Treaty of Lisbon, which has changed the institutional and legal framework of the EU as a whole and in particular in the area of police and judicial cooperation in criminal matters.

The most striking novelty brought about by the new Treaty is the abolition of the pillar structure. As far as protection of personal data is concerned, this has led to the adoption of a legal basis applying to all EU policies,[23] prominently placed in Title II on "Provisions of general application:"[24] Article 16 TFEU grants individuals the right to protection of personal data, and provides that the European Parliament and the Council—acting in accordance with the ordinary legislative procedure—shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data.[25] Compliance with these rules is subject to the control of independent authorities. In addition, the Lisbon Treaty (Art. 6 TEU) confers binding force upon the EU FRCh, thereby strengthening the value of Article 7 on the right to privacy, and Article 8 on the right to the protection of personal data.[26] Clearly, this new framework calls the current scenario into question, since at the moment two different measures (the Directive and the Framework Decision) having different legal capacity and different contents apply to different sectors of EU law.

Following a roadmap towards a comprehensive new framework for the protection of personal data in the EU,[27] in 2010 the Commission addressed a Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions[28] in which it put forward some

[23] With the only exception of protection of personal data in the area of Common Foreign and Security Policy, specifically ruled under Article 39 TEU.

[24] Scirocco (2008) (emphasis added).

[25] Preservation of national security interests is guaranteed, however. In the Declaration 20 attached to the Lisbon Treaty, the Conference has declared that, "whenever rules on protection of personal data to be adopted on the basis of Article 16 could have direct implications for national security, due account will have to be taken of the specific characteristics of the matter." It has been rightly pointed out that this declaration does not add much to the current legal framework, in which exceptions for public interests and national security are already possible. See Scirocco (2008).

[26] As pointed out by Mitsilegas (2009), p. 279, "[t]he incorporation of the Charter into EU law may prove to be extremely significant in allowing European judges to develop privacy standards to be taken into account in both the implementation of existing legislation and the formulation of subsequent laws."

[27] Available at: http://ec.europa.eu/governance/impact/planned_ia/docs/72_jls_data_protection_-strategy_and_legal_framework_en.pdf.

[28] COM (2010) 609 final, Brussels, 4 November 2010.

suggestions on how to review the current legal framework. This communication followed a number of initiatives on the subject: a conference in May 2009, a public consultation that remained open until the end of 2009,[29] and a number of studies. In the public consultation in particular, all stakeholders stressed the need for an overarching instrument applying to data processing operations in all sectors and policies of the Union (p. 4 of the Communication), thereby confirming the motion, often subscribed to in the academic circles, that the protection of fundamental rights is a horizontal issue that has an impact on all EU policies.[30]

The idea suggested by the Commission—as already presented in the Communications on the Stockholm Programme and the Stockholm Action Plan[31]—is to revise and build upon the Data Protection Directive, considered to set "a milestone in the history of the protection of personal data in the European Union" (p. 2), so as to have a comprehensive protection scheme. However, this does not exclude the possibility of having specific rules for data protection for the police and the judicial cooperation sector (p. 14). Indeed, notwithstanding the abolition of the pillar structure brought about by the Treaty of Lisbon, a certain degree of differentiation between the processing of personal data for commercial purposes and the processing of personal data for crime prevention and investigation purposes is still justified. Actually, the possibility of different rules is already enshrined under Declaration 21, attached to the Lisbon Treaty, where the Conference has acknowledged that:

> specific rules on the protection of personal data and the free movement of such data in the fields of judicial cooperation in criminal matters and police cooperation based on Article 16 of the Treaty on the Functioning of the European Union may prove necessary because of the specific nature of these fields.[32]

Under the heading "Revising the data protection rules in the area of police and judicial cooperation in criminal matters" of the Communication (pp. 13–15), it is possible to recognize four main changes that the Commission wishes to undertake as far as data protection in the criminal law sector is concerned. First of all, the distinction between cross-border exchange, to which Framework Decision 2008/977/JHA currently applies, and domestic processing operations in the Member States is difficult to make in practice and can complicate the actual implementation

[29] "This public consultation was intended to reach a broad range of stakeholders, based on three very open questions, leaving them as much leeway as possible in identifying new challenges, signalling out areas that would need improvement, and making suggestions on how a future legal framework could better tackle certain problems." Reding (2010), p. 27. It is noteworthy that, in the same period, the Commission organized also a public consultation on the possibility of an agreement with the United States on data protection principles to be applied to transatlantic exchanges.

[30] Andoulsi (2010), p. 370.

[31] Respectively, COM (2009) 262, 10 June 2009, and COM (2010), 20 April 2010.

[32] Thus, such a Declaration does not favour the co-existence of different legal instruments, but actually supports the creation of a single legal framework, with some specific rules where needed. Andoulsi (2010), p. 371.

and application of the Framework Decision itself. Thus, a comprehensive data protection system should not rest on that difference. Secondly, data protection as presently envisaged in the area of police and judicial cooperation in criminal matters is undermined by too wide an exception to the purpose limitation principle, thereby opening the door to potential abuses by public authorities. Limitations on certain data protection rights should be harmonized so as to guarantee legal certainty and the respect of the rule of law throughout the EU. Thirdly, no distinction between different types of data and different categories of data subjects is currently made, despite being urgently needed. For instance, different rules may apply to the processing of genetic data for criminal law purposes, or to the categories of victims, witnesses and suspects. Fourthly, the various sector-specific data protection regimes adopted at EU level—in particular those relating to Europol, Eurojust, the SIS and the CIS—have not been replaced by Framework Decision 2008/977/JHA. This situation has led to a multi-level data protection regime where different legal instruments, and therefore different standards affecting individuals in exercising their data protection rights, apply. Indeed, some of these sector-specific instruments provide particular data protection rules while others refer to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) and Recommendation R(87) 15, both adopted outside the EU by the Council of Europe and before the widespread rise and use of new information technologies.[33] A coherent data protection system should cover all the relevant areas with a single instrument.[34]

This Communication has constituted the basis for further discussion on the subject-matter and has represented one of the first steps toward a legislative proposal for the adoption of a single EU data protection instrument.[35]

8 Opinion of the European Data Protection Supervisor

After the Commission adopted the Communication on a comprehensive approach on personal data protection in the EU, the EDPS was consulted and delivered an Opinion in January 2011.[36]

[33] De Hert and Bellanova (2009), p. 4.

[34] It must be pointed out, though, that Europol and Eurojust pleaded for taking into account the specificities of their work regarding the coordination of law enforcement and crime prevention (see p. 4, footnote 7).

[35] A proposal was expected from the Commission within the first half of 2011. At the time of writing no proposal is yet available.

[36] Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Region—"A comprehensive approach on personal data protection in the European Union," Brussels, 14 January 2011.

In general, the EDPS has shared the view of the Commission that a strong framework for data protection is necessary, especially following the adoption of the Lisbon Treaty. The EDPS has stressed that a strong framework serves both private and public interests. Not only does it promote individual rights to privacy, but it also fosters security, especially in the area of police and judicial cooperation (para. 18–24 of the Opinion).

In particular, the EDPS has assessed the proposed solutions in the Communication against two criteria: ambition and effectiveness (para. 7). In this respect, the "ambitious" objective of comprehensiveness, i.e. the adoption of a single EU instrument for data protection including police and judicial cooperation in criminal matters, is considered essential by the EDPS for "effective" data protection. In support of such single instrument, the EDPS has highlighted that: the distinction between activities of the private sector and of the law enforcement sector is blurring[37]; there is no fundamental difference between police and judicial authorities and other authorities delivering law enforcement (such as taxation, customs, anti-fraud, immigration) subject to Directive 95/46/EC; Framework Decision 2008/977/JHA is inadequate; and most Member States have implemented Directive 95/46/EC and Council of Europe Convention 108 making them applicable also to their police and judicial authorities (para. 33–35). As underlined by the EDPS, the adoption of a single instrument would also mean that EU data protection rules will no longer apply only to cross-border data exchanges but will apply also to domestic processing (para. 130). In line with this comprehensive approach, the EDPS believes that the new instrument should replace the various sector-specific legislative instruments for police and judicial cooperation in criminal matters, such as those relating to Europol, Eurojust, the SIS and Decision 2008/615/JHA (para. 135–136).

However, a comprehensive measure should not prevent the adoption of additional sector-specific regulations for police and judicial cooperation (para. 48). The EDPS too has considered the need for special rules and derogations in consideration of the unique nature of the police and justice sector, as recognized by the Commission and according to Declaration 21 attached to the Lisbon Treaty. In particular, distinctions should be drawn between different categories of data (data based on facts should be distinguished from data based on opinions and personal assessments), different categories of data subjects (criminal suspects, victims, witnesses, etc.) and different types of files (permanent, temporary, intelligence files) (para. 131–133).

Moreover, in conformity with the Communication from the Commission, the EDPS has expressed agreement with the need for harmonisation: since data protection is now recognised as a fundamental right under Article 8 EU FRCh and

[37] This has been demonstrated by the ECJ rulings in the cases of PNR and the data retention Directive (respectively, joined cases C-317 & 318/04, *European Parliament v. Council and Commission*, 2006, and Case C-301/106, *Ireland v. Parliament and Council*, 2009). On this issue see: Kosta et al. (2007), pp. 2–3; Hijmans and Scirocco (2009), pp. 1501–1508; and Scirocco (2008).

everyone is granted the right to the protection of personal data under Article 16 TFEU, an equivalent level of protection must be guaranteed throughout the EU. To this end, the most relevant areas for harmonisation recognised by the EDPS are: definitions, lawfulness of processing, grounds for data processing, data subject rights, international transfers and National Data Protection Authorities (para. 49–59).

Finally, it is noteworthy that the EDPS has suggested reconsidering the type of legal instrument to be used to review the framework of data protection. Instead of a Directive, as suggested by the Commission, the EDPS is of the opinion that a Regulation would be the best instrument to intervene in the area under consideration, as it is directly applicable at national level and leaves no much discretion to Member States in its implementation, without precluding the possibility to adopt additional rules as needed. The EDPS argues that this type of instrument would reduce room for contradictory interpretations and reduce the importance of determining the law applicable to processing operations within the EU—one of the most controversial aspects of the present system (para. 64–67).

9 Final Remarks

The protection of individuals against the exchange of personal data for crime prevention and investigation purposes is of utmost importance: it contributes to striking the right balance between security and privacy. Although in the last few years significant progress has been made, the European legislator has not yet found a satisfactory balance between these conflicting interests, and security has prevailed at the expense of privacy.

The goal emerging from the current public debate carried out at institutional level, the alignment of the current regime applying to police and judicial cooperation in criminal matters to the regime provided for by Directive 95/46/EC, is to be welcomed for two main reasons.

Firstly, the need for a single overarching instrument springs from the increasingly blurry line dividing data processing for commercial purposes from data processing for crime prevention and investigation purposes. Secondly, Framework Decision 2008/977/JHA is disappointing as it is the result of a lengthy and difficult decision-making process affected by the requirement of unanimity in the Council.[38] Its content is poor and leaves many questions open, with the assessment of the proportionality principle and of the principle of adequacy of protection being perhaps the most striking ones. Now that the Lisbon Treaty expressly provides

[38] "[...] discussions in the Council appeared a race to the lowest common denominator, and the final text appears too weak to substantially modify the previous context [...T]he European Parliament's amendments, that could have contributed to address some major issues, have not been integrated in the final text." De Hert and Bellanova (2009), p. 5. See also Mitsilegas (2009), pp. 273–274.

for the ordinary legislative procedure for the adoption of measures concerning personal data protection, whatever area of law is concerned, the hope is that braver and more coherent choices will be possible.[39] Expectations for a new comprehensive instrument on personal data protection in the EU are high. Soon, it will be possible to assess whether these expectations have been met.

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[39] As affirmed by the current EDPS, Peter Hustinx (2010), p. 1, "[o]n the basis of Article 16, a comprehensive legal framework for data protection, combining consistency and solidity, will no longer be wishful thinking but a feasible policy objective."

Part IV
Cross-Border Investigations and the Protection of Fundamental Rights. The Perspective of Domestic Legal Systems

Report on China

Shizhou Wang

Contents

Abstract This report provides an overview of the legal situation in the People's Republic of China in terms of main issues related to the transnational inquiry and the protection of fundamental rights. Types and characteristics and procedure concerning investigative cross-border cooperation are listed and briefly discussed with some European countries as examples. Hand-over and guaranty of evidence, the investigative tools and pre-trial measures involving the right to liberty are explained, not only in principles but also in detailed measures. In conflict of jurisdiction and protection of human rights, the principles, the responsible organs and the main legal basis are introduced. Special regulations in the field of transnational organized crime are analyzed and deficits are mentioned. Judicial cooperation with ad hoc tribunals and the influence of supranational case-law in transnational criminal inquiries are briefly discussed and the recent reform of criminal procedure in China is introduced.

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Abbreviations

CCC	Chinese Criminal Code
CCP	Chinese Criminal Procedure
ICC	International Criminal Court
PRC	People's Republic of China
UN CTOC	United Nations Convention against Transnational Organized Crime

1 Introduction

When it comes to the rule of law, China is still a developing country. The first CCP and the first CCC were promulgated in 1979, though the People's Republic of China (hereafter the PRC) was founded in 1949. However, the rule of law has since been developed significantly in China. In 1999, a new Amendment to the Constitution was adopted and the goal was added into its Article 5 that "the People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law." The CCP was revised in 1996 and the CCC in 1997, bringing both closer to international standards of human rights protection. In the spring of 2011, the National People's Congress happily announced that the socialist legal system with Chinese characteristics was basically formed. The Chinese legal system is moving in a modernizing direction, providing better protection for human rights and strengthening the rule of law.

2 Types and Characteristics of Investigative Cross-Border Cooperation

In accordance with the CCP, it is possible to carry out an investigative cooperation across different jurisdictions. There are six types of cooperation available for international investigations.[1]

First, it is to carry out investigation and to obtain evidence. This may include but is not limited to actions on behalf of the requesting state such as taking the statement of a litigant, questioning witnesses, victims and experts, carrying out expert evaluation, inquest and examination, search and seizure of material evidence and documentary evidence, as well as identification.

Secondly, it is to deliver documents. This may include legal documents and other documents. Legal documents refer to documents produced by judicial organs

[1] See, Chap. 13 "Judicial Assistance on Criminal Matters and Cooperation of Policing" in "Regulations on Procedures in Dealing with Criminal Cases by Public Security Organs (Revised)" issued by the Ministry of Public Security of the PRC in 1998. In: http://www.law-lib.com/law/law_view.asp?id=13934&page=2.

in criminal proceedings, such as judgments, orders, decisions, summonses and notices. Other documents refer to any documents or materials, such as ID cards and letters.

Thirdly, it is to hand over evidence. This refers to handing over material evidence, documentary evidence, audio-visual material, as well as the financial proceeds of crime.

Fourthly, it is to inform of an event or outcome of a lawsuit. This may include information about the filing of a case, carrying out investigation or compulsory measures, initiating a prosecution or not, and informing of a judgment or order.

Fifthly, it is to hand over criminal suspects or convicted criminals. This involves inter-state extradition proceedings.

Sixthly, it is to exchange criminal intelligence and cooperate in the sharing of criminal information.

All investigative cooperation may either take place between different jurisdictions domestically or internationally. But there are different characteristics for different types of cooperation.

For domestic investigative cooperation between jurisdictions within Chinese territory, there are two general types: one is direct cooperation. Every type of judicial organ in one jurisdiction may directly go to other jurisdiction and carry out the task there without giving notice to the local organs. The other is simple cooperation: the investigative cooperation between domestic jurisdictions may be conducted in a simpler way, such as telephone contact.[2] Only investigative cooperation with Hong Kong, Macau, and Taiwan need a formal procedure, although this type of cooperation is still the one within Chinese territory. As Macau and Hong Kong operate under the "one country, two systems" structure, judicial organs on the mainland must carry out cooperative investigations according to agreements and understandings between these special administrative regions and the mainland.

Investigative cooperation between China and foreign countries can only be carried out according to any bilateral treaties or agreements or multilateral conventions available, or according to the principle of mutual benefit in the international law. For example, any hand-over of a criminal suspect or convicted criminal between China and a foreign country can only be possible when it is done in accordance with Chinese Extradition Law and other regulations. By now, there are more than 30 countries that have signed agreements of mutual assistance on criminal matters with China. Many of them are European countries such as Poland, Malta, Latvia, Estonia, Lithuania, Greece, Ukraine, France, Portugal, Spain, Romania, Bulgaria, Russia and Belarus. However, some of them have only signed an agreement of extradition or mutual assistance on criminal matters, while some of them have signed both. China has concluded neither an agreement of extradition nor of mutual assistance on criminal matters with the European Union as a whole.

[2] See above, footnote 1, in Chap. 11 "Cooperation in Handling Cases."

3 Procedures Concerning Cross-Border Investigative Cooperation in China

The procedure concerning cross-border investigative cooperation in China is in principle composed of three stages.[3]

The procedure for China to issue a request to a foreign country is the following:

The first stage is to issue the request. When a Chinese judicial organ needs judicial assistance from a foreign judicial organ, a request letter must be given according to the regulations of international treaty and with the necessary documentation and corresponding translation, all of which must be submitted to the appropriate highest organ: the Supreme People's Court, Supreme People's Procuratorate, or the Ministry of Public Security, respectively. By now, the contents of the request letter of the Chinese judicial organs are standardized according to the requirements of the 1990 UN Model Treaty on Mutual Assistance in Criminal Matters. Such a letter must include at least the name and address of the requesting party and addressee, the facts of the alleged crime and the related law, any special procedure or requirements and details which the requesting party wishes to follow. It must also include the reasons, such as the relevant evidence and whether it was obtained under oath or not, as well as the required of time period for providing assistance, and so on.

The second stage is to approve the request. The Chinese highest judicial authority exercises their power of approval as the central authority according to the regulations of any treaty concerned. Any request letter and its accompanying documentation and materials to be submitted to a foreign judicial organ for a judicial assistance shall be forwarded to that foreign judicial organ or to other responsible central authority, such as Ministry of Foreign Affairs or Ministry of Justice, only after an approval is granted by the responsible highest judicial authority in China. In the case where a request is to Interpol for the arrest of a criminal suspect or for enquiring data or other investigative assistance, the request shall be approved by the Ministry of Public Security.

The third stage is to reply to the request. When a foreign judicial organ has rendered the assistance and handed over the result to the Chinese authority responsible for the case, the result is forwarded from the highest authority to the requesting organ. If the treaty provides for assistance fees, the highest judicial organ shall forward the bill of the requested party to the requesting organ and ask for payment.

When China receives a foreign request for judicial assistance, the same three stages are followed in reverse order.

After receiving a request letter from a foreign judicial organ, the responsible authority in China carries out an examination to see whether the request is in line with the Chinese laws and any treaty applicable. When the assistance requested

[3] See, *e.g.*, "Notice Regarding Issuing Certain Procedure on Dealing with the Criminal Cases of Judicial Assistance through Diplomatic Channel" issued by the Ministry of Public Security of the PRC in 1999. In: http://www.chinalawedu.com/falvfagui/fg23079/14964.shtml.

would be prohibited by the Chinese laws or any treaty, the request is rejected. In mutual criminal investigative cooperation, China does not in general provide assistance for foreign requests which may have negative influence on Chinese sovereignty, security and social public interests or those which will violate Chinese law.

In the Law of Extradition of the PRC in 2000, the conditions for rejection are specifically listed. For the conditions by which "China should reject" are the following: (1) that the person sought is a national of the PRC; (2) that the PRC has rendered an effective judgement or terminated the criminal proceedings in respect of the offence indicated in the request for extradition; (3) that the request is involved in a political offence or a person PRC has granted asylum to him/her; (4) that the person sought may be subjected to unfair treatment in judicial proceedings for reasons of that person's race, religion, nationality, sex, political opinion or personal status; (5) that the offence involved is a purely military offence; (6) that the person sought is immune from criminal responsibility because the limitation period expires or the person is pardoned; (7) that the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State; (8) that the request for extradition is made on the basis of a judgement rendered by default, unless the person sought has the opportunity to have the case retried under conditions of his presence. In addition, humanitarian considerations in view of the age, health or other condition of the person sought may also come into play. These conditions are also the major reasons listed in the treaties of judicial assistance on criminal matters concluded with European countries. For example, the Treaty with Spain in 2005 stipulates that the reasons for rejecting judicial assistance on criminal matters also include that the requested party believes that the requesting assistance lacks substantial relations with the case or the requesting party might not be able to honour confidentiality agreements or usage restrictions. In the Treaty with France in 2005, it stipulates that the requested party shall not reject assistance for bank-secrecy reasons, for example.

After examining the foreign request for judicial assistance, the Chinese highest judicial organ forwards the request to the judicial organ at the provincial level if an approval is granted. The judicial organ at the provincial level may handle it by itself or appoint another responsible organ to handle it. When completed, the result and the accompanying materials are passed through the judicial organ at the provincial level up to the highest judicial organ. When the request is not be able to be handled, e.g., the criminal suspect is dead, or when the request is too difficult to be handled, e.g., the address is unclear or the documentation or materials are incomplete, a report is submitted instead.

4 Hand-Over and Guarantee of Evidence

In judicial assistance on criminal matters between countries, evidence is guaranteed in accordance with domestic law. The Chinese system of evidence has its own characteristics.

The CCP provides not only the definition of evidence but also divides it into categories. Article 41(1) stipulates that all facts that prove the true circumstances of a case shall be evidence. Paragraph 2 stipulates that there are seven categories of evidence: (1) material evidence and documentary evidence; (2) testimony of witnesses; (3) statements of victims; (4) statements and exculpations of criminal suspects or defendants; (5) expert conclusions; (6) records of inquests and examination; and (7) audio-visual materials. Paragraph 3 stipulates that any of the above evidence must be verified before it can be used as the basis for deciding cases.

It is the requirement of the CCP that evidence be obtained lawfully. The first two sentences in Article 43 stipulate that judges, prosecutors, and investigators must, in accordance with the legally prescribed process, collect various kinds of evidence that can prove the criminal suspect or defendant's guilt or innocence and the gravity of his crime. It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means. Under the CCC, illegal collection of evidence may constitute the crime of extorting a confession from criminal suspects or defendants by torture or using force to extract testimony from witnesses (Art. 247).

At the moment, rules excluding illegal evidence are principally provided by the Supreme People's Court.[4] Illegal evidence includes illegal evidence in wording and in kind. The reasons for making evidence in wording illegal might be on the accounts of substantial illegality or procedural illegality. An example of the former might a confession extorted by torture. An example of the latter might be an investigator who violates the regulation and collects the evidence without proper legal process. Confessions obtained by illegal methods such as extorting a confession by torture and testimony obtained by using force or threatening may not serve as the basis for deciding cases. Usually, however, evidence rendered illegal by procedural illegality is allowed to be supplemented and corrected. But expert conclusion provided by the evaluation institute without statutorily required qualification and condition or by an institute whose business scope does not cover the matter to be evaluated is also excluded. Illegal evidence which was obtained in a way that violates law or regulation so as might affect a fair trial must be supplemented and corrected. In the absence of a reasonable explanation, the evidence must be excluded. This rule shall also be applied to records of inquests and examination. Chinese rules on excluding illegally-obtained evidence are still being developed.

When it comes to handing over evidence, China's rules require it to comply with treaty stipulations and concrete foreign demands. Where China has requested that a foreign country hand over evidence, the special procedure and details, if any, must also clearly indicated in the request letter, so that the evidence will not become

[4] See "Provisions on Several Issues Concerning the Exclusion of Illegal Evidence in Criminal Cases" jointly issued by "the Supreme People's Court, the Supreme People's Procuratorates, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice" in July 1, 2010. In: http://www.law-lib.com/law/law_view.asp?id=316883.

invalid in Chinese criminal proceedings for its violation of rules excluding illegal evidence.

Some principles govern the handing over of evidence across all the Sino-European treaties on judicial assistance in criminal matters.

First, the principle of legality. This principle requires that the hand-over of evidence shall be made in accordance with treaty, within the scope permitted by the law of the requested party, and in the form acceptable under the law of the requesting party.

Secondly, the "copy principle." This means that the requested party may hand over only a copy or a photocopy for a document or record to the requesting party. If the requesting party insists on having the original, however, the requested party shall try its best to satisfy the demand. And the requesting party shall return the original as soon as possible according to the agreement.

Thirdly, the principle of directness. The requested party must, insofar as it is permitted to do so by its own law, allow the personnel indicated in the request letter to be present at the place where the request is carried out and allow these personnel to question the person giving evidence through the authoritative organ of the requested party. Where a written agreement has been reached by both the requesting and requested party, and consent has been obtained from the person who is in custody, the requested party may temporarily transfer that person to the requesting party and allow him to appear in court and give testimony or assist in the investigation. After that, the requesting party must return the person transferred to it back to the requested party as soon as possible.

Fourthly, the immunity principle. This means that any witness or expert witness, no matter his nationality, who accepts a summons and appears in a court of the requesting party and gives his testimony there, shall not be prosecuted or detained or restricted for any matter or punishment occurring before he left the territory of the requested party.

Fifthly, the information principle. This principle dictates that upon receiving the request, the requested party may keep the requesting party informed of the outcome of the prosecution, criminal record of the person concerned and the sentence imposed on that person. In addition, both parties may exchange their experiences and data in implementing current or previous laws, if any.

5 Investigative Tools and Pre-trial Measures Involving the Right to Liberty

Investigative tools in transnational inquiries may engage the right to. By tools, I primarily mean taking litigants' statements, questioning witnesses, victims, and expert witness, identification, and so on. Under the CCP, pre-trial measures involving the right to liberty refer to the following: a warrant to compel the appearance of the criminal suspect or defendant, order him to obtain a guarantor pending trial, or subject him to residential surveillance, as well as detention and arrest.

In the context of transnational inquiry for a requesting party, taking litigants' statements refers mainly to the statement of a criminal suspect. In accordance with the CCP, interrogation of a criminal suspect must be conducted by the investigators of a People's Procurator or public security organ. During an interrogation, there must be no fewer than two investigators participating. Interrogation may be conducted in the designated place or at the residence of the interrogatee with their official ID documents issued by a People's Procuratorate or public security organ. The time for interrogation through summons or forced appearance shall not exceed 12 h and detention of criminal suspects under the disguise of successive summons or forced appearance is not permitted. The criminal suspect shall answer the investigators' questions truthfully, but he shall have the right to refuse to answer any questions that are irrelevant to the case. The record of an interrogation shall be shown to the criminal suspect for checking and he may make additions or corrections. When the criminal suspect acknowledges that the record is free from error, he and the investigator shall sign or affix their seals to it.

The CCP only provides regulations for questioning witnesses. However, these regulations shall also apply to questioning victims. In Chinese criminal proceedings, expert witnesses may only be questioned in court. In a transnational inquiry, however, expert witnesses are usually questioned by analogous application of the regulations on questioning a witness. Investigators may with their official ID documents carry out the interrogation either at the expert's workplace or at his residence. When necessary, the witness may be summoned to come to a people's procurator's office or public security organ to provide testimony there. However, witnesses shall be questioned individually. In cases where a minor under the age of 18 commits a crime, the criminal suspect and the legal representative of the defendant may be notified so that they may be present at the time of interrogation and trial. When a witness is questioned, he must provide evidence and give testimony truthfully and must be informed of the legal responsibility that results from intentionally giving false testimony or concealing criminal evidence.

In China, identification is done according to the regulations of the Supreme People's Procurator or the Ministry of Public Security.[5] The identification exercise must involve at least two officers and an eyewitness. An identification must be done from a lineup of at least seven persons, or five in a corruption case. Photo lineups must consist of at least ten photos, or five in dereliction of duty or corruption prosecutions. The result of the identification shall be in record and signed or sealed by the investigator, the eyewitness and the person identified.

In China, pre-trial measures that engage the right to liberty include the warrant to compel the appearance of the criminal suspect or defendant, an order him to obtain a guarantor pending trial or subject him to residential surveillance, and detention

[5] See Sect. 8 "Identification" of Chap. 7 "Investigation" in "Regulations on Criminal Procedures of People's Procuratorate (Revised)" issued by the Supreme People's Procuratorate in 1999. In: http://www.people.com.cn/item/flfgk/gwyfg/1999/1142011999902.html.

and arrest.[6] However, all of these measures are directed at suspects and defendants. Of them, a warrant to order a person to obtain a guarantor pending trial or subject him to residential surveillance shall be only applied to those who may be sentenced to public surveillance, criminal detention or simply imposed with supplementary punishments, or those who may be imposed with a punishment of fixed-term imprisonment and would not endanger society if they are allowed to obtain a guarantor pending trial or are placed under residential surveillance. Arrest is only permitted where there is evidence to support the facts of a crime and the criminal suspect or defendant could be sentenced to a imprisonment, and if such measures as allowing him to obtain a guarantor pending trial or placing him under residential surveillance would be insufficient to prevent the occurrence of danger to society. Detention can only used as a temporary measure of custody for an active criminal. In the context of transnational inquiry, these measures may not be available where the person to be investigated is not a criminal suspect or a criminal.

6 Conflict of Jurisdiction and Protection of Human Rights

Chinese criminal jurisdiction is clearly stipulated in the CCC,[7] which adopted the territoriality principle as a basis and the principle of citizenship, the protective principle, and the universal jurisdiction principle as supplements. Accordingly, those who commit crimes within the territory of the PRC, whether they are Chinese or foreigners, are subject to Chinese criminal law. A Chinese or a foreigner who commits a crime outside Chinese territory shall be subject to the CCC in the following situations: when the crime is committed aboard a ship or aircraft of the PRC, when the act or consequence of the crime takes place within PRC territory, when the crime was committed by a PRC state personnel or military personnel, and when the crime was specified in international treaties to which the PRC is a signatory state or with which China is a member and the PRC shall exercises criminal jurisdiction over such crimes within its treaty obligations. For crimes committed by PRC citizens outside the territory of the PRC, China will stop exercising its jurisdiction for those which the CCC stipulates a maximum sentence of a fixed-term imprisonment of less than 3 years for such crimes. For crimes committed by foreigners against the PRC state or its citizens outside the territory of the PRC, the CCC shall only be applied when that crime is so serious that the CCC stipulates a maximum sentence of a fixed-term imprisonment of less than 3 years for such crimes, with an exception if that crime is not punishable according to the law of the place where the crime was committed. As of now, the CCC still stipulates

[6] See Chap. 6 "Compulsory Measures" in "Criminal Procedure Law of the PRC." In: http://en.pkulaw.cn/display.aspx?cgid=13912&lib=law.

[7] See, Art. 6–11 in "Criminal Law of the PRC." In: http://en.pkulaw.cn/display.aspx?cgid=17010&lib=law.

that any person who commits a crime outside PRC territory according to the CCC may still be dealt with according to the CCC even if he has been tried in a foreign country. However, such a suspect who has already received criminal punishment in a foreign country may be exempted from punishment or given a mitigated punishment.

In the CCP, jurisdiction is allocated between investigative organs and judiciary organs.[8]

Investigation in criminal cases is conducted by the public security organs. However, crimes committed by state personnel such as corruption and dereliction of duty shall be placed on file for investigation by the People's Procurators. Cases of private prosecution are handled directly by the People's Courts.

The Primary People's Courts have jurisdiction as courts of first instance over ordinary criminal cases. However, cases endangering state security, cases of ordinary crime punishable by life imprisonment or the death penalty, and cases in which the offenders are foreigners fall under the jurisdiction of the Intermediate People's Courts as courts of first instance. The Higher People's Courts and the Supreme People's Court have jurisdiction as courts of first instance over major criminal cases that pertain to an entire province or the whole nation.

When necessary, people's courts at higher levels may try criminal cases over which people's courts at lower levels have jurisdiction as courts of first instance. If a people's court at a lower level considers the circumstances of a criminal case in the first instance to be major or complex and to necessitate a trial by a people's court at a higher level, it may request that the case be transferred to the people's court at the next higher level for trial.

Criminal cases fall under the jurisdiction of the people's court in the place where the crime was committed. If it is more appropriate for the case to be tried by the people's court in the place where the defendant resides, then that court may be given jurisdiction over the case. When two or more people's courts at the same level have jurisdiction over a case, it is tried by the people's court that first accepted it. When necessary, the case may be transferred for trial to the people's court in the principal place where the crime was committed. A people's court at a higher level may instruct a people's court at a lower level to try a case over which jurisdiction is unclear and may also instruct a people's court at a lower level to transfer the case to another people's court for trial. Jurisdiction over cases in special people's courts such as military and railway courts is exclusive.

The CCP stipulates that any unit or individual, upon discovering facts of a crime or a criminal suspect, has the right and duty to report the case or provide information to a public security organ, a people's procurator, or a people's court. When his personal or property rights are infringed upon, the victim has the right to report to a public security organ, a people's procurator or a people's court about the facts of the crime or bring a complaint to it against the criminal suspect. The public security organ, the people's procurator or the people's court must accept all reports,

[8] See Above, footnote 6, in Chap. 2 "Jurisdiction."

complaints and information. If a case does not fall under its jurisdiction, it must transfer the case to the competent organ and notify the person who made the report, lodged the complaint, or provided the information. If the case does not fall under its jurisdiction but calls for emergency measures, it must take emergency measures before transferring the case to the competent organ.

However, none of these principles are automatically applied to conflicts of jurisdiction with a foreign court. If both China and a foreign country have jurisdiction over a same criminal case, the Chinese judicial organ defines its jurisdiction according to the principle of sovereignty and Chinese laws and regulations applicable. Foreign judicial organs may consult through the treaty of mutual judicial assistance or international law with China about the issue of extradition of the criminal suspect or defendant, or about the hand-over of the relevant evidence.

7 Special Regulations in the Field of Transnational Organized Crime

China is a signatory state and has ratified the UN CTOC. Transnational organized crime is the main target of Chinese criminal justice system. However, China still has much work to do in implementing the UN CTOC.[9]

First, Article 12(7) of the UN CTOC allows a State Party to consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation. This type of inverse burden of proof is only applied in China to situations involving a large of property with an unclear source [Art. 395(1) CCC] and the crime of unlawful possessing documents, information, or other articles which are top secret or classified information of the state [Art. 282(2) CCC].

Secondly, Article 18(18) UN CTOC allows using certain high-tech methods in criminal proceeding such as video conference. However, China does not provide clear regulation on this issue yet.

Thirdly, Article 20(1) UN CTOC allows using special investigative techniques such as electronic or other forms of surveillance and undercover operations. In China, such investigative techniques are only allowed under strictly controlled conditions set forth in the National Security Law and the Law of Police.

Fourthly, Article 24 UN CTOC requires protection of witness. Article 308 CCC defines the offences of persecution and retaliation against a witness. However, the CCP still has neither concrete measures for the protection of witness nor does it extend the scope of protection to the "relatives and other persons close to" the witness.

[9] See, Chen (2009), pp. 467 ff.

However, the Chinese academy of criminal law takes the same attitude in implementing international conventions as the UNCTOC. China is poised to make some new progress in this aspect in revising its CCP.

8 Judicial Cooperation with *Ad Hoc* Tribunals

China has not yet joined in the ICC. However, China has kept a good relationship with ad hoc Tribunals. In the early days of the International Military Tribunal for the Far East in Tokyo to try Japanese war criminals, the Chinese government at that time sent Ju-ao Mei to be the Judge for the Tribunal and Zhejun Xiang to be the Prosecutor. Daqun Liu is still a Judge at the International Criminal Tribunal for the Former Yugoslavia. After the Second World War, China tried and sentenced a group of Japanese war criminals in its domestic courts. After the PRC was founded, these Japanese war criminals were pardoned and sent back to Japan.

9 The Influence of Supranational Case-Law in Transnational Criminal Inquiries

Supranational case-law is binding for China only when it has the effect of international law. In general, supranational case-law functions only as persuasive reference in transnational criminal inquiry with China.

10 Recent Reform of Criminal Procedure in China

A reform of criminal procedure has been ongoing in China for many years whose scope is the entire code of criminal procedure. However, the issues involving transnational criminal inquiries and protection of human rights are highly concerning. The most important issues are the following two.[10]

First, the right to mount a defence. The issues under heated debate right now are the following: in the serious crimes such as endangering national security, terrorist activity, underground society and corruption, must a criminal suspect obtain approval from the investigative organ before he appoints a lawyer at the investigation stage? When a lawyer meets with a criminal suspect or defendant in custody, may the investigation organ send its personnel to be present at the meeting? During the investigation, ought a defence lawyer have the right to consult, extract and

[10] See Fan et al. (2004), p. 194 ff., 307 ff.

duplicate the judicial documents pertaining to the current case, the technical verification material and confession of the defendant?

Secondly, issues involving investigative methods. The issues under heated debate right now are the following: what special investigative methods should be restricted? How should methods such as electronic investigation, secret investigation, lie detector, police entrapment, and satellite positioning be legally employed? Who will be the organ or person responsible for approving the use of special investigative method and what will the standard for approval be? The Chinese criminal justice system is rests on the basis of experiences and lessons of the Chinese construction of the rule of law, and has developed in the process of improving the protection of human rights within socialist state of rule of law. Now, the Chinese criminal justice system is trying very hard to promote its ability to deter crime and enhance the level of human rights protection. I hope to learn more from you to benefit the Chinese cause of open and reform forward toward a new era of harmony and happiness.

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Report on England and Wales

Richard Vogler

Contents

Abstract This chapter describes the early reluctance of England and Wales to engage fully with international arrangements for transborder investigations. However, despite initial non-participation in agreements such as the 1959 European Convention on Mutual Legal Assistance and the 1985 Schengen Agreement, England and Wales have in recent years made considerable progress towards participation in this area. The current arrangements for processing overseas requests for assistance, both in terms of overt and covert inquiries, are described, as are the corresponding procedures for requesting overseas assistance. The approach to the European Arrest Warrant in England and Wales is also reviewed. The chapter concludes by discussing the particular problems encountered by a decentralised system of policing such as that operating in England and Wales, in participating in an efficient system of international mutual assistance, without sacrificing human rights protections.

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Abbreviations

AFSJ	Area of Freedom, Security and Justice
CICA	Crime (International Cooperation) Act 2003
CJA	Criminal Justice Act 2003
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECIM	European Criminal Intelligence Model
ECJ	European Court of Justice
ECMACM	European Convention on Mutual Assistance in Criminal Matters
ECO	European Confiscation Order
ECoHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EEO	European Enforcement Order
EEW	European Evidence Warrant
EFO	European Freezing Order
EIO	European Investigation Order
EPO	European Protection Order
ESO	European Supervision Order
EUCMACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
NCIS	National Criminal Intelligence Service
NIM	UK National Intelligence Model
OCTA	Organised Crime Threat Assessment
PACE	Police and Criminal Evidence Act 1984
RIPA	Regulation of Investigatory Powers Act 2000
SOCA	Serious Organized Crime Agency
UKTA	UK Threat Assessment Model

1 Introduction

The leading police scholar Benyon has characterised investigative contacts between different national police forces as falling into three levels.[1] The macro level of cross-border co-operation involves international legal agreements at state level and the harmonisation of laws, the meso-level involves operational level contacts organised directly between police forces and the micro level relates to direct contacts between individual police officers engaged in particular investigations. Recently, Berenskoetter has added a new dimension to this typology by suggesting that automated information exchange, particularly in the area of collective access to databases and threat images, constitutes a further and relatively new area of

[1] Benyon (1994).

investigative communication.[2] England and Wales[3] now enjoy reciprocal relations with other nations at all these different levels in the conduct of investigations. But this has not always been the case.

Until comparatively recently, the United Kingdom had adopted a very negative attitude towards investigative co-operation between police forces. Its delegation to the First International Police Conference in Monaco in 1914 consisted of no police officers at all but a magistrate from the seaside town of Hove and three private lawyers from London.[4] This mistrust was further encouraged by the co-option of the ICPC,[5] the forerunner of Interpol, by the Nazi *Gestapo* in 1942.[6] Such an unfortunate history only partly explains early British abstentionism from international policing initiatives. Britain was also anxious to retain control of extra-territorial investigations which were carried out throughout the British Empire and Commonwealth under the Extradition Acts 1870 and 1873. Its justification for playing no part in the drafting of the 1959 European Convention on Mutual Legal Assistance in Criminal Matters (ECMACM) and refusing to sign it, was that the *Lettres Rogatoire* system would not be appropriate given the very different approach adopted by the UK to the laws of evidence and procedure to most of the rest of Europe.[7] Similar objections were expressed by the United Kingdom at the time of its refusal to sign the 1985 Schengen Agreement. In addition, the UK had no land border with any other Schengen member, so the advantages were not considered to be significant.[8] Allowing overseas armed police officers in "hot pursuit" onto UK territory where police officers were unarmed, would, so it was argued, cause serious practical and constitutional problems.

But insular isolationism has its limitations in a global age. In the 1960s the problem of illegal immigration via the channel ports caused the Kent Police, led by Sir Dawnay Lemon, to establish the Cross-Channel Intelligence Conference. This was essentially a liaison and communications operation with the French Police which has developed in recent years into more pro-active international policing and surveillance of the Channel Tunnel.[9] In 1986 Commonwealth Heads of Government at Harare in Zimbabwe entered into the "Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth." Moreover in 1989 the UK passed a new Extradition Act and in 1990, a Criminal Justice (International Cooperation) Act which, in Part II enacted provisions which would give effect to undertakings made by the UK in connection with the UN Drugs Treaty of 1988. Part

[2] Berenskoetter (2012).

[3] International contacts relating to the jurisdiction of England and Wales are usually undertaken as part of the United Kingdom of Great Britain and Northern Ireland.

[4] Harfield (2007), p. 181.

[5] The International Criminal Police Commission.

[6] Deflem (2004).

[7] Harfield (2007), pp. 185–6.

[8] O'Neill (1996).

[9] Sheptycki (2001) and Cannon (2001).

I was even more revolutionary, establishing the principle that the UK would offer assistance in response to a request from an appropriate national authority, irrespective of any treaty relations with the requesting state, any reciprocity or any requirement of dual criminality.[10] In the same year, after 32 years of prevarication, Britain finally acceded to the ECMACM and in May 1999, she formally requested permission to participate in certain mechanisms of the Schengen *Acquis*. Finally, in December 2004, Britain agreed to involvement in the Schengen judicial cooperation provisions.[11]

At the same time, Britain was also becoming more actively involved in developments in the AFSJ established by the European Union. She participated enthusiastically in the creation of Europol and both the OCTA and the ECIM used by Europol are reproduced directly from the UKTA and the NIM, respectively.[12] The UK is also deeply involved in, amongst other initiatives, the Lyon/Roma Group of senior experts which advises the G8 on questions of security cooperation and cybercrime.[13] These are important macro and meso-level connections but, particularly at the micro level identified by Benyon, there is still considerable reluctance amongst UK police officers to co-operate fully. Berenskoetter has suggested that "chocked information flows, resistance to new practices along domestic fault lines, doubts about European bureaucracy" all play their part in this continuing hesitation.[14] For example, the UK has participated in only two of Europol's 'Joint Investigation Teams' and evidence suggests that officers consider these teams excessively bureaucratic and inefficient.[15]

Notwithstanding these reservations, growing international engagement at an institutional level has required the implementation of significant domestic organisational changes in a system of policing which, up until that time, was resolutely local and regional. Internationally mobile crime was one of the specific mandates of the NCIS which was established in 1998, to be replaced by the SOCA in 2006. This was an amalgamation of NCIS, HM Customs and Excise,[16] HM Immigration Service and MI5. Under the NIM which was developed from 2003 as a "business approach" to strategic policing, representatives of intelligence units and senior officers with operational responsibilities, meet regularly to undertake informed assessments and prioritisation of problems at three defined levels, including that of international cooperation.[17] In addition, the National Security Strategy[18]

[10] With the exception of search and seizure requests or those involving certain fiscal offences. See Harfield (2007), p. 193.

[11] *Ibid*., p.190.

[12] Berenskoetter (2012), p. 46.

[13] Scherrer (2009)

[14] Berenskoetter (2012), p. 50.

[15] *Ibid*.

[16] Currently, HM Revenue and Customs.

[17] Kirby and Penna (2011).

[18] Government (2010).

involves contacts with other security services at all levels, including the sharing of telecommunications intercepts.[19] Taken together, these developments represent a significant reorientation of UK policing towards engagement with the outside world. But what procedures have been adopted in England and Wales to facilitate this engagement? This brief account of international investigations in England and Wales will look first at the collection of evidence for export and then for import, before reviewing briefly the UK approach to the implementation of the EAW.

2 Mutual Assistance in Criminal Matters and the Export of Evidence from England and Wales

The 2000 EUCMACM[20] was given effect in UK Law by the 2003 CICA, most of which came into force in 2005. The Home Office publishes "Mutual Legal Assistance Guidelines for the United Kingdom"[21] which note that requests from abroad must be directed to the United Kingdom Central Authority in London. The Guidance insists on proportionality and indicates that the police will prioritise cases that involve serious criminal offences (e.g., murder or other crimes of violence, organized crime, terrorism, corruption, or wide-scale fraud), those that involve evidence that is at risk of being concealed or destroyed, those that involve ongoing offences or where the safety of witnesses or the public is at risk and those that involve an imminent trial date.[22] All cases accepted by the Home Office are assigned to a caseworker and the current caseload of Mutual Assistance requests is in excess of 5,000.

Investigative powers in England and Wales are regulated by the 1984 PACE and this is the basis on which overseas request for evidence are processed. The Act provides a complete codification of pre-trial procedures and process rights, supported by detailed Codes of Practice, establishing tight time limits for police detention[23]and investigation, a protective regime for detainees as well as for arrest, stop, search and seizure, repeated notification of rights, including the right to silence and the right to free legal advice by a Solicitor of choice or the duty Solicitors[24] available under a rota system. Detailed monitoring and record-keeping procedures are also in place. Amongst the most important provisions is the

[19] Jacobs and Hough (2010).

[20] Signed on 29 May 2000.

[21] Home Office (2011).

[22] Section 2.

[23] Involving a succession of reviews conducted by increasingly senior officers from six h to a maximum of 36 h, after which a further detention of 12 h must be ordered by a court (ss. 41-2 PACE).

[24] Ss. 58-9 PACE.

protective regime for interrogations, which allows elective participation by a Solicitor and mandatory audio tape-recording.

Statutory powers of covert investigation are provided specifically in the Police Act 1997 and the 2000 RIPA. The statutory framework for covert investigation in England and Wales focuses on the regulation of investigator conduct. Surveillance (as a general intrusion on private life) is provided for conditionally by RIPA. Prior authorization is required before deployment of covert methods and investigator use of the legislation is subject to annual inspection by the independent Office of Surveillance Commissioners. The authority regime is designed around a hierarchy characterized by the nature of the surveillance and the degree of intrusion into private life: the more serious is the intrusion and the more sensitive is the methodology, the higher is the requisite rank of the authorizing officer.[25] A number of tribunals have been established as recipients and investigators of citizen complaints about the misuse of the various covert powers.

3 Mutual Assistance in Criminal Matters and the Importation of Evidence into England and Wales

Under s. 7 of CICA, Judges and designated Prosecutors (a definition which includes Crown Prosecutors) are empowered to make written Requests to the Secretary of State for the Home Office[26] for evidence to be obtained abroad. The Letter of Request will then be passed on to the requested state for execution under the usual Mutual Legal Assistance Treaty arrangements.[27] The Request must always be in writing and can be made either by a Judge (although, in practice this is rare) or by a Prosecutor. It can only be made where it appears that either "an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed and additionally, that proceedings in respect of the offence have been instituted or that the offence is being investigated." Under section 51(1) of CICA, evidence is defined as including "information in any form and articles, and giving evidence includes answering a question or producing any information or article." Moreover, s 7(3)(c) of CICA, permits defence applications for overseas evidence from persons who have been charged. These Requests are channelled via the Prosecutor's office to the Home Office in exactly the same way as prosecution Requests. The process of obtaining all such evidence is lengthy and the average delay has been estimated at 6 months.[28] However, it is always open to either the prosecution or defence to seek to expedite the process by collecting the evidence

[25] Harfield (2011), pp. 10–11.

[26] Specifically, the "UK Central Authority."

[27] Requests for Enforcement are made in the same way but in this case under s. 74 of the Proceeds of Crime Act 2002.

[28] Crown Prosecution Servie (2012).

themselves. It was held in *R v. Athwal*[29] that a failure to allow the defence the opportunity to collect evidence abroad could constitute an abuse of process, although the standard of proof was high.

It is worth noting that, under s. 9(2) of CICA, evidence obtained abroad pursuant to a request to the Home Secretary can be used only for the purpose for which it was sought and therefore it could not be deployed, without the specific consent of the requested state, against another defendant not mentioned on the request.[30] It must also be returned to the requested state at the conclusion of the proceedings unless that state has indicated that this is not necessary. In summary, evidence which is sought from abroad can be obtained either formally through the Letter of Request procedure outlined in CICA, or informally.

The next question to consider is the way in which such evidence is treated by the courts in England and Wales. Evidence obtained from an overseas authority, "is subject to the same provisions on the admissibility of evidence as evidence obtained under normal domestic arrangements."[31] One of the major problems in the use of written evidence obtained abroad, in the primarily oral system of trial used in England and Wales is that it is potentially inadmissible as "Hearsay." However, the situation has been transformed by the 2003 CJA which allowed a much wider range of such evidence to be admitted at trial. Evidence from abroad obtained informally, without a Letter of Request, could be admissible through the "Hearsay Pathway" of s. 116(2)(c) of the CJA which applies if the court is satisfied that the reason for the witness' inability to testify in person and directly are legitimate. To determine this, the court will apply a cost benefit analysis in deciding whether the expense of bringing the witness from abroad or arranging a live-link, outweigh the evidential advantage of his or her physical presence.[32] On the other hand, evidence obtained with a formal Letter of Request is admissible under s. 117 of the CJA since it is "created or received by a person in the course of a trade, business, profession or other occupation etc." and "prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation." Where both methods of obtaining evidence are available, the Court of Appeal has expressed a clear preference for the use of the Letter of Request procedures under the provisions of s. 7 of CICA.[33]

In all cases but particularly in respect of evidence collected overseas, s. 78 PACE Act 1984 provides judges with a discretion to exclude prosecution evidence "if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court

[29] [2009] Cr App R 14.

[30] R v. I [2009] 2 Archbold News 3, CA (Archbold 2010, 10.60a) and R v Malcolm Gooch, Court of Appeal (Crim Div), 26 June 1998.

[31] Para. 42 of CICA *Explanatory Note*.

[32] R v. Castillo, [1996] 1 Cr App R 438.

[33] R. v. Radak [1999] 1 Cr App R 187.

ought not to admit it." In relation to confession evidence, s. 76 PACE Act 1984 provides additional safeguards to exclude coerced confession [although not necessarily "any facts discovered as a result of the confession." s.76 (4) (a)]. In general the English and Welsh courts will accept evidence which has been collected in a manner which is consistent with the procedures of the requested state, even if those are not the same as those in force in the UK. Evidence collected in a manner inconsistent with international investigatory norms (*e.g.* through the use of torture) will always be excluded.[34]

With regard to covert surveillance, section 27(3) RIPA provides that surveillance authorized pursuant to s. 26 can include "conduct outside the United Kingdom." English and Welsh agencies empowered to undertake directed or intrusive surveillance within England and Wales can also do so outside the UK without offending any UK law.[35] The foreign jurisdiction where the covert investigation is to take place must also authorize such conduct and may deny permission for investigators from the requesting state to participate. Covert investigation may not involve the use of coercive police powers of detention, arrest, search of person, and questioning. Having considered the formal mutual legal assistance request, some states will allow surveillance teams from the requesting state to conduct the surveillance themselves, thus keeping the foreign agencies out of the evidence chain, very much in the manner possible for Schengen states.

4 The European Arrest Warrant in England and Wales

The Extradition Act of 2003 established an entirely new extradition regime in Britain, in line with the requirements of the EAW while also, very controversially, offering fast-track extradition procedures to certain non-EU states, notably the United States.[36] The EAW procedure was used to fast-track the return from Italy of Hussain Osman, one of the 7/7 London bombers.[37] A less widely approved use was in the case of Gerald Toben, an Australian citizen, born in Germany but arrested on a EAW Warrant while in transit at Heathrow airport for holocaust denial, not an offence known in England & Wales.[38]

The SOCA is the designated authority for the receipt and transmission of European arrest warrants in the UK. In 2009/10 the UK surrendered 699 arrestees on EAWs and received 71 inbound. 581 suspects have been returned to face trial in the UK under

[34] A v. Secretary of State for the Home Department (No.2) [2005] UKHL 71.

[35] However, Authority under the Police Act 1997 Part III, to interfere with property is limited to the relevant area commanded by the authorizing officer and, where applicable, adjacent British territorial waters (s. 93).

[36] Mackarel (2006).

[37] *Ibid*., p. 362.

[38] Joyce (2008).

EAW procedures between its introduction in 2004 and March 2011, with numbers rising from 19 in 2004 to 116 in 2010.[39] In 2009/10 the UK received 4,100 requests, of which 2,403 were from Poland. So frequent are returns to Poland that special military flights have been arranged.[40] Overall, and partly because of the distortions caused by the Polish figures, the number of requests received by the UK was well over double the total received by the next highest European recipient, Spain.[41]

Requests for EAWs have not all been accepted automatically by UK courts. In over 34 cases (most of which occurred in 2005) the court discharged the EAW, largely because of failures to provide sufficient information on the warrant or the elapse of time. No refusal by a UK court has ever been challenged by the issuing state.[42] The failure of the UK to provide itself with any opt-outs to the EAW, in contrast to other European states, has been the object of a great deal of unfavourable domestic comment.[43]

Proportionality has been addressed by UK courts to some extent, notably when Poland sought extradition on a charge of "unintentional receiving of stolen property" involving the acquisition of 100 zloty (24 Euros). The Divisional Court rejected a submission that there was no double criminality as the offence complained of was not based on any *mens* rea as would be required in the UK. Although the triviality of an offence was not, of itself, a ground for refusing extradition, it could be taken into account in deciding whether the interference with a person's right to respect for his private or family life was proportionate to the aim of honouring extradition treaties with other states. Nevertheless, the court decided that the facts of this case were nowhere near strong enough.[44]

5 Conclusion

After a good deal of initial reluctance, England and Wales are now fully engaged—some would argue, too fully engaged—with international developments in cross-border investigations. On many occasions the country has taken a leading role. Continuing concerns exist, however about the oversight of such arrangements, particularly at a time when the governance of policing is changing so significantly in the UK[45] and when new initiatives for police cooperation are proliferating across Europe.[46] These innovations present challenges for co-operation at all three levels

[39] BBC (2012).

[40] Broadbridge (2009).

[41] Joint Parliamentary Select Committee on Human Rights (2010). See also Jimeno-Bulnes (2011).

[42] Meg Hillier, Parliamentary Question to HC Deb 28 January 2009 c505W.

[43] Gilligan (2010).

[44] Broadbridge (2009), p. 4.

[45] Sampson (2012).

[46] Guille (2010).

identified by Benyon. One of the most far-reaching developments in England and Wales, where policing has traditionally been decentralised and local, has been the creation of national institutions able to communicate effectively with overseas forces. Nevertheless, these are largely channels for the flow of information and the burden of the day to day policing of internationally mobile crime continues to fall upon local forces.[47]

The main stumbling block for international investigations and cooperation is the problem of aligning police practices across a variety of jurisdictions.[48] The investigative methodology which has been used in England and Wales since the enactment of PACE 1984 is a robust one which has been viewed as a model by other states. Recent developments which have permitted the effective exchange of evidence across UK borders has not significantly altered this methodology, nor is there so far evidence of widespread UK abuse of the arrangements described above. Nevertheless, the increasing complexity and depth of international arrangements require that issues of efficiency, accountability, police ethics and the protection of human rights are kept at the forefront of the debate.

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Report on France

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Contents

Abstract Even though transnational cooperation is more and more frequently the province of judges, judicial review in France of whether rights were guaranteed during the transnational inquiry does not seem, generally speaking, to be free of the interstate logic of cooperation: actions taken in the context of interstate cooperation are still considered administrative acts carried out at the executive's discretion. The courts therefore hesitate to review them and take a less active role than in domestic inquiries.

In the opinion of this author, just as the doors to French prisons have been opened to lawyers and judges in the last 15 years, it is now time for international legal assistance to be made the subject of judicial review as well.

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Abbreviations

CCP	Code of Criminal Procedure
ECHR	European Convention on Human Rights
ECMACM	European Convention on Mutual Legal Assistance in Criminal Matters
ICC	International Criminal Court

1 Introductory Remarks

In France as in other western countries, globalisation has led to increasingly frequent transnational inquiries. At the same time, concern for improving the protection of fundamental rights has increased worldwide.[1] But the result is not what one would expect: other than in the area of the extradition or surrender of persons sought for trial or to serve their sentences,[2] which is beyond the scope of this research project, French law has not made any significant progress in recent years in protecting fundamental rights in the context of transnational criminal inquiries. It can of course be said that a logical consequence of the overall shift towards better protection of rights in criminal trials is better protection in transnational procedures. But this claim is not entirely satisfactory, given that international cooperation in criminal matters is still strongly influenced by sovereignist considerations: outside the European Union, cooperation still requires the involvement of representatives of the executive. And even though cooperation within the European Union is now the province of judges, judicial review in France of whether rights were guaranteed during the transnational inquiry does not seem, generally speaking, to be free of the interstate logic of cooperation: actions taken in the context of interstate cooperation are still considered administrative acts carried out at the executive's discretion. The courts therefore hesitate to review them and take a less active role than in domestic inquiries. But without judicial review, executive discretion has free reign and is probably what guides most prosecutors' offices when they find themselves in the situation of unavoidable legal uncertainty created when the more or less compatible procedural rules of the two countries concerned collide. Fundamental rights are doubtless even more threatened in transnational inquiries than in domestic inquiries.

[1] This concern is voiced more frequently in case law than in legislation, which directly depends on political priorities.

[2] Since a 1948 decision by the Criminal Chamber of the French *Cour de cassation* (25 November 1948, Bull. No. 259), extradition has increasingly become subject to judicial review, and is an area in which there is a genuine effort to protect fundamental rights. Recent legislation has also improved the defence rights the arrested person may invoke.

With few exceptions,[3] French legal scholars have had little to say about protecting fundamental rights in international investigations, no doubt because there is not much French case law in this regard. The most flagrant violations of fundamental rights concern the right to liberty (the right to come and go[4]), and so extradition and more recently the European Arrest Warrant have garnered most of the attention, to the detriment of other forms of international cooperation in criminal matters. Despite revisions of certain provisions made pursuant to Act 2004-204 of 9 March 2004,[5] the law of criminal procedure is still very weak on this issue. I will discuss this weakness in this report, particularly in the following paragraph, which deals with the legal instruments involved in transnational inquiries and the manner in which fundamental rights are exercised in this type of inquiry.

2 Cross-Border Investigations and Fundamental Rights

International cooperation aimed at internationalising an inquiry is currently called "mutual legal assistance," and this phrase is used as the title of the subdivision of the French CCP that includes the provisions of interest to us in this Article. In this subdivision,[6] the CCP distinguishes between requests for extradition (or the surrender of persons within the European Union) and other requests for mutual legal assistance. Such other requests may concern the notification of judicial writs or decisions, official accusations/complaints, the transfer of proceedings, search for evidence, seizure and confiscation of assets, serving of sentences, or any other aspect of cooperation: the law does not define mutual legal assistance, and therefore does not limit it to any precise acts of assistance.

Until recently, such assistance was provided strictly via international rogatory commission, which is simply a request made by the authorities of one country to the authorities of another. Other than within the European Union, international rogatory commissions are made and received through diplomatic channels. Such requests are unique in that the addressee is free to respond or not—and therefore, in the area of legal assistance prior to trial, for example, to determine whether the inquiry will become international or not.

Within the European Union, however, new means of cooperation have recently been created. With the "principle of mutual recognition," a judicial authority that

[3] Aubert (2004), p. 621; Desessard (2003), p. 573. Both of these authors discuss judicial review of requests for legal assistance in general, without limiting themselves to the protection of fundamental rights.

[4] In French: "*droit d'aller et venir*."

[5] Commentators have pointed out that this Act leaves many questions unanswered. See Desessard (2003) and Desportes (1999).

[6] Title X of Book IV of the Code, Art. 694 et seq.

wishes to obtain the assistance of a foreign counterpart gives it an order—a warrant—to perform an investigative act or any other penal measure and, unless an exception applies, the requested judicial authority must comply. By the time France had implemented a certain number of European framework decisions applying this principle, French law on international legal assistance was extensively revised. In addition, with the Convention on Mutual Assistance in Criminal Matters of 29 May 2000, the European Union created "joint investigation teams," which enable the police and judicial authorities of two or more states to jointly conduct an inquiry across their mutual borders. This can be very efficient for gathering evidence because it often allows for doing so in accordance with the law of all the various states concerned, thereby rendering it admissible in each of them. France has incorporated the European texts governing joint investigation teams[7] into its legislation, and numerous inquiries of this type have already been conducted between France and other member states of the Union.

2.1 International Legal Assistance Between France and Countries Outside the European Union

International legal assistance with non-EU countries is primarily governed by Articles 694 through 694-13 CCP, which were revised by Act 2004-204 of 9 March 2004. The first five of these Articles (Arts. 694 through 694-4 CCP) govern the transmission and execution of requests for assistance through international rogatory commissions; the next five (Arts. 694-5 through 694-9 CCP) govern special tools of assistance, such as tele- or videoconferencing and the intervention of foreign police officials on French territory (for purposes of questioning, surveillance or infiltration); and the last four (Arts. 694-10 through 694-13 CCP), introduced by Act 2010-768 of 9 July 2010, concern assistance in seizing the proceeds of a crime for their future confiscation.[8]

These Articles make only a few references to the protection of fundamental rights. One such reference appears in Article 694-3, which concerns requests for assistance made by foreign judicial authorities. Normally, the rule of *locus regit actum* applies, which means that French law governs the implementation of such requests. But Article 694-3 provides that the requesting state can ask that procedural rules specifically indicated by the competent foreign judicial authorities be used, provided (subject to invalidity) "these rules do not reduce the rights of the parties or the procedural guarantees provided for by" this Code. This provision must be understood as inviting the courts to review the acts performed in France

[7] Arts. 695-2 and 695-3 CCP.

[8] See Circular of 22 December 2010 presenting specific provisions of Act No. 2010-768 of 9 July 2010, which provides for the cross-border execution of confiscation orders in criminal matters (Arts. 694-10 through 694-13, and 713 through 713-41 CCP).

according to the law of the requesting state. The main difficulty for the reviewing courts will be preserving the rights of the parties without requiring that the law of the requesting state proceed in the same way French law does in guaranteeing such rights. Indeed, French courts cannot substitute themselves for foreign lawmakers.

Another provision concerned with the exercise of fundamental rights is Article 694-11, which is part of the rules governing the seizure of the fruits of crime for their confiscation. Article 694-11 provides that a foreign request for assistance must be denied if "one of the grounds for denial mentioned in Article 731-37 already appears to be constituted." However, Article 731-37, which is part of a series of provisions concerning international assistance in the confiscation of property, and more particularly, in executing confiscation decisions taken by foreign judicial authorities, borrows from the framework decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders to provide grounds for denying execution. Some of these grounds protect fundamental rights, and include: the foreign decision was not rendered pursuant to procedures that sufficiently protect individual freedoms and defence rights [Art. 731-37(3)]; the foreign decision was issued with the aim of prosecuting or sentencing a person due to her/his sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation [Art. 731-37(4)]; and, the facts at issue form the basis of a final judgment rendered in a state other than the requesting state [Art. 731-37(5)]. On this last point, the principle of exercising judicial review to protect fundamental rights is introduced implicitly by the Act.

2.2 International Legal Assistance Between France and Other European Union Member States

Assistance between France and other member states of the European Union is governed by simplified provisions (Arts. 695 through 695-51 CCP) that eliminate diplomatic intervention—requests for assistance are sent directly from one judicial authority to another (Art 695-1 CCP)—and reduce the applicability of the principle of double criminality.

Cooperation is governed by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (CCP arts. 695-1 through 695-3), as well as the framework decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (CCP Arts. 695-9-1 through 695-9-30). Eurojust, whose functions are set out in Articles 695-4 through 695-9, makes assistance easier.

Exact transcriptions of the European texts, these provisions offer no clarifications with respect to protecting fundamental rights, nor do they create a regime that would derogate from the one set at the European level.

3 Obtaining Evidence, Reviewing Its Admissibility, and Protecting Fundamental Rights

As mentioned above, the traditional tool of international legal assistance, the rogatory commission, is used to have evidence gathered in another state, even within the European Union because the framework decision of 18 December 2008 on the European evidence warrant is dead in the water (France did not even implement its provisions).

Since French law does not generally provide for protecting fundamental rights in the context of a transnational search for evidence in criminal matters, except in the specific case of Article 694-3 CCP mentioned above, the question arises as to how these rights are protected in practice. If such protection is to be guaranteed, the first requirement is that transnational investigations be subject to judicial review. Unless judges are in a position and are willing to review actions taken in the context of interstate cooperation, there is a significant risk that fundamental rights will be denied. Unfortunately, such review is not at all systematic in France. This can be observed in cases in which France receives a request for legal assistance from a foreign authority (A) as well as in cases in which France is the requesting state (B).

3.1 France as Receiving State

Requests for assistance are executed according to French law pursuant to the rule *locus regit actum* (Art. 694-3 CCP). But do the French judicial authorities execute the request unquestioningly, or do they review the foreign evidentiary procedure underlying the writ?

This question was raised in 2008 before the *Cour de cassation* in a case challenging the seizure of bank accounts pursuant to a request from Guatemalan judicial authorities made in the context of an investigation into acts of corruption allegedly committed by the former president of Guatemala and certain of his family members.[9] In its decision authorizing the seizure, the Investigating Chamber ruled that the French investigating judge (who was the authority competent to execute the request for assistance) did not have to provide access to the international rogatory commission and its supporting documents to enable the persons subject to the seizure to challenge these documents' validity. Nor did she have to evaluate the legitimacy of the requested act of assistance or its proportionality in relation to the acts complained of. This decision may be criticized for insufficiently protecting the rights of the defence on the first point, and fundamental rights in general—here, the right to property—on the second. But the *Cour de cassation* upheld the decision, claiming that France was acting in the public interest by fulfilling its obligations under the United Nations

[9] *Cour de cassation*, criminal chamber, 11 June 2008, Bull. crim. No. 145.

Convention against Corruption. This would seem to indicate that, prior to executing a request for assistance, French judicial authorities do not verify whether or not the requesting state respected fundamental rights when ordering the request.

The other important issue when France is the receiving state is French judicial review of the measures French authorities take to comply with a foreign rogatory commission. Such review depends on whether it is the investigating judge or the prosecutor's office that responds to the request for assistance.

3.1.1 Measures Taken by the Investigating Judge

Until 1997, French courts had no jurisdiction to verify whether or not the measures taken to execute an international rogatory commission complied with French law. This situation changed with the *Russo* decision of 24 June 1997.[10] In *Russo*, an Italian rogatory commission was presented to France in the scope of an investigation concerning misappropriation of public funds, corruption, receiving stolen goods, and violation of the Act on the financing of political parties. The suspect, Mr. Russo, filed a complaint with an Investigating Chamber challenging the validity of the measures taken by the investigating judge to execute the rogatory commission. In its decision of 24 June 1997, the *Cour de cassation* recognized that an Investigating Chamber has jurisdiction to exercise review, but conditioned such exercise on "the challenged writ [being made available to] the competent tribunal for [its] review."[11] According to the Court, this is not possible when the rogatory commission has already been sent back to the requesting state's authorities, even when the person challenging its validity produces a copy![12] Because the requesting state will probably not have jurisdiction to review the measures taken by the requested state on its own territory according to its own law, this solution is highly likely to cause "irresolvable negative conflicts of jurisdiction between the requesting and requested states,"[13] and opens the door to abuse.

3.1.2 Measures Taken by the Prosecutor

More and more frequently, requests for legal assistance are executed by the prosecutor's office, but investigating courts have no jurisdiction to review measures taken by prosecutors. In a domestic proceeding, such review is accomplished by the trial court, which determines *in limine* whether the evidence was gathered properly. But in an international case in which the final judgment will be rendered abroad, there can be no review in France of the validity of the investigative measures implemented in France, which is a serious shortcoming.

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[10] *Cour de cassation*, criminal chamber, 24 June 1997, Bull. crim. No. 252.

[11] *Cour de cassation*, criminal chamber, 24 June 1997 (footnote 9).

[12] *Cour de cassation*, criminal chamber, 3 June 2003, Bull. crim. No. 113.

[13] Argument of the Court of Appeal of Bastia in the case cited in footnote 11.

3.2 France as Requesting State

The issue here is whether French courts review the measures taken by foreign authorities when executing a French request for assistance. Since the foreign state acts according to its own law *(locus regit actum)*, such review would constitute an indirect review of the foreign state's compliance with its own laws protecting fundamental rights, and even of the compliance of these laws with internationally recognized rights or with fundamental rights recognized in France.

Until 1997, case law provided that because of the rule of *locus regit actum*, only the courts of the state executing the international rogatory commission could review the validity of evidence gathered upon France's request for assistance.[14] Consequently, French courts did not have jurisdiction to exercise such review. But today, the *Cour de cassation* will not tolerate placing blind faith in the foreign state executing the international rogatory commission. In a decision of 4 November 1997, it approved review of the foreign authority's compliance with the rights of the defence as provided in Article 6 ECHR, even when the state executing the rogatory commission is not a party to this convention. In this decision, the Court also mentioned general principles of law, which could mean that it reserves the right to review compliance with these principles (including, perhaps, French public order).

4 Cooperation with International Criminal Tribunals and Protecting Fundamental Rights

Legal cooperation between France and the ICC is the subject of its own title of the CPP (Arts. 627 through 627-20). These provisions were introduced by Act 2002-268 of 26 February 2002 and concern primarily the arrest in France and surrender of persons sought by the ICC (Art. 627-4 through 627-15), though a few also provide for carrying out sentences and compensation measures ordered by the ICC (Art. 627-16 through 627-20). The Articles introducing this title of the Code are therefore the only legal provisions of the entire title relevant to this analysis, and they provide very little information on the issue of protecting fundamental rights.

Indeed, the CCP governs only the procedural formalities of cooperation with the ICC: it sets out how and to whom the ICC's requests for assistance shall be transmitted (Art. 627-1) and names the French authorities having jurisdiction to act on these requests (the public prosecutor or the investigating judge of Paris,

[14] See *Cour de cassation*, criminal chamber, 26 Nov. 1996, Bull. crim. No. 426. See also *Cour de cassation*, criminal chamber, 24 June 1997 (footnote 9) (Article 3 ECMACM of 20 April 1959, according to which rogatory commissions must be executed as provided by the legislation of the requested state, "requires that the validity of their execution be reviewed by the courts of that state").

according to Article 627-2). The Code says nothing about challenging the decisions taken by these authorities to execute the requests on French territory, and it will therefore be for the courts to determine the admissibility of appeals filed by persons sought by the ICC who seek to defend their fundamental rights.[15] They will probably follow the principles applicable to inter-state legal assistance.

5 Conclusion

In France, the protection of fundamental rights in transnational inquiries is still in its early stages. To be sure, the most important step toward improving the situation is to encourage the judge to review the measures taken in this area. In the opinion of this author, just as the doors to French prisons have been opened to lawyers and judges in the last 15 years, it is now time for international legal assistance to be made the subject of judicial review as well.

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[15] As of this writing, the Court of Cassation has not yet rendered a decision on this issue, and in the area of cooperation with the International Criminal Court, has rendered only a few decisions concerning the surrender of individuals by France. See namely *Cour de cassation*, criminal chamber, 4 January 2011, petition No. 10-87760.

Report on Germany

Arndt Sinn

Contents

Abstract Today many criminal investigations have international dimension, because evidence, witnesses and documents of the case are often located other than in the prosecuting country. Therefore it is possible that evidence be admissible in the target country but not in the applicant one. Different rules in the target country and the applicant country make the evidence problematic. Thus, evidence transfer happens within spectra of tension. The following chapter contribution analyses critically the different ways of obtaining and collecting evidence from the perspective of the German legal system. Furthermore, it contains statements to a European standard on evidence transfer and a torture example case (El Motassadeq).

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Abbreviations

BGH	Federal High Court of Justice (*Bundesgerichtshof*)
BGHSt	Decisions of the Federal High Court of Justice in Criminal Cases (*Entscheidungen des Bundesgerichtshofs in Strafsachen*)
BVerfG	Federal Constitutional Court (*Bundesverfassungsgericht*)
BVerfGE	Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*)
ECHR	European Convention on Human Rights
ECMACM	European Convention on Mutual Legal Assistance in Criminal Matters
ECMACM	European Convention on Mutual Assistance in Criminal Matters
ECtHR	European Court of Human Rights
GG	Constitution (*Grundgesetz*)
IRG	Law on Judicial Proceedings in International Criminal Matters (*Internationales Rechtshilfegesetz*)
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
OLG	Higher Regional Court (*Oberlandesgericht*)
StPO	Code of Criminal Procedure (*Strafprozessordnung*)

1 Transnational Inquiries and the Protection of Fundamental Rights in Criminal Matters. Introductory Remarks

Crime does not stop for international boundaries. And it did not take the abolition of internal border controls under the EU for us to realize this. We speak of cross-border criminal activity, but even crimes committed entirely within the borders of a single state can have international implications. Evidence, witnesses, and documents can all be located other than in the prosecuting country: many criminal matters today are international prosecutions. In that sense, transnational investigations as discussed here are transnational in a legal sense. The problems that arise out of them are readily imaginable: differences in systems and standards lead to the irritation of one's own legal system, especially when it comes to the evaluation of evidence obtained abroad. Analysing that evidence becomes all the more difficult when there are indications that it was obtained through torture, for example. The following discussion attempts to highlight these problems. My objective is to set out some fundamental principles of the legal basis of transnational criminal investigations, and then to discuss the problem of evidence transfer in particular. The question of the role of torture evidence in the transnational context is of particular significance for human rights, and it is with that point that I shall conclude.

2 Basic Principles

Rules on investigations with transnational character are not readily accessible. International legal controls have highly complex structure, governed by many bi- and multilateral treaties. These all co-exist with newer means of cooperation in criminal justice, each containing its own rules on transnational cooperation and evidence transfer and interpretation. Cutting a path through this jungle might sensibly begin with an overview of the German position, the foundation of which is the Law on Judicial Proceedings in International Criminal Matters (IRG). The IRG applies in the absence of any more specific bilateral or multinational treaty.

Under § 73 IRG, judicial proceedings may not "significantly contradict the principles of the German legal system." The detailed scope of this starting point, especially as it applies to German constitutional rights and the ECHR, is controversial.

The law limits judicial proceedings in cases of:

a) *Threat of capital punishment* [Art. 2(2) GG].
   If the alleged offence is punishable by death, § 8 IRG prohibits extradition from Germany unless the applicant state gives assurances that the accused will not be sentenced to death or such a sentence will not be carried out.
   This prohibition applies to other judicial measures as well. Articles 102 and 2(1) GG set two limits: first, on German judicial cooperation with investigating authorities when the assistance sought is for the purposes of capital sentencing or carrying out a capital sentence, and second on German authorities' themselves making applications for foreign judicial assistance when this would lead to the opening of judicial proceedings in the other country which would lead to the death penalty.[1]
b) *Violation of the proportionality doctrine*.
   If other violations of fundamental rights might come as a consequence of judicial cooperation, cooperation can be refused where the violations are disproportionate to the alleged offence. This generally arises in cases where severe punishment is threatened in a case that German considerations rate as minor, or when the compromise of business, professional, or other secrets would cause disproportionate damage.[2]
   For extradition applications, the sentence or possible sentence must be proportionate to the offence; if German authorities consider the punishment utterly disproportionate, they will refuse extradition.[3]

[1] BGH, Decision of 7 July 1999 - 1 StR 311/99 = NStZ 1999, 634.

[2] BGH, Decision of 23 June 1977 - 4 ARs 7/77 = BGHSt 27, 222.

[3] BVerfG, Decision of 31 March 1987 - 2 BvM 2/86 = BVerfGE 75, 1 (16); OLG Stuttgart, Decision of 28 February 2003 - 3 Ausl 116/01 = Die Justiz 2003, 454.

c) *Prohibition on admission of evidence*.
If the evidence obtained because of the judicial assistance request would be inadmissible under German law, it may not be forwarded to the foreign authorities.
d) *Risk of political persecution*.
If, in the assessment of the state from which cooperation is sought, rendering judicial cooperation places the accused at the risk of a political persecution, Article 2a of the ECMACM prohibits such cooperation. This is in line with Art. 16a(1) GG, and a similar prohibition is set out in § 6(1) IRG.
e) *Lack of a guaranteed hearing*.
Extradition for the purposes of carrying out a criminal process which was concluded without the knowledge of the accused may violate the right to a guaranteed hearing in Article 103(1) GG as well as the basic right of human dignity, since no one may be made the bare object of a criminal proceeding. If the accused was not informed of the proceedings nor had an opportunity to make representations on his own behalf, extradition can be prevented[4]; this is set out in § 83(3) IRG.

3 Obtaining and Admissibility of Evidence and the Respect for Human Rights Guarantees

The collection of evidence is at the centre of transnational investigations. This leads me to the problem of the admissibility of evidence. My purpose here is to distinguish traditional evidence-transfer through judicial proceedings from the question of admission of evidence that one country has obtained upon the territory of another without that country's consent.

3.1 Evidence Obtained Through Judicial Cooperation

Evidence transfer happens within spectra of tension. Evidence can be admissible in the target country but not in the applicant one; the target country might have looser rules about its collection than the applicant country.[5] In both cases, the evidence becomes problematic.

In general, the applicable law is that of the state which has collected the evidence or at whose request the evidence was collected. It is therefore generally not a matter of abiding by the German StPO. But the German procedural code has to be adhered to in the exceptional cases where a treaty or other legally permissible mechanism

[4] BVerfG, Decision of 9 March 1983 - 2 BvR 315/83 = BVerfGE 63, 332 (336).
[5] Eisenberg (2008), point 469.

has arranged for the investigating country to do so.[6] Only in exceptional cases, measured against *ordre public*, will evidence legally collected abroad be inadmissible.

But even in the preparatory stages of an interrogation or deposition to take place abroad, German prosecuting authorities are bound to work toward the implementation of German legal standards for the collection of the evidence, for example by informing the accused of his rights.

It has been recognized in some cases that failure to uphold the procedural standards of the applicant countries, whose courts intend to use the evidence, may lead to the exclusion of this evidence entirely. This is the case for instance where foreign evidence collection practices violate the public order of the state intending to use the evidence. Hence the requirement that interrogation methods meet the general standards of the rule of law.[7] A witness interviewed abroad can challenge the consideration of that evidence in Germany if he was not informed of his right to remain silent by the interrogating country. Intentionally circumventing the German procedural code also leads to an exclusion of the evidence. This can occur in cases where an interrogation was intentionally conducted abroad in order to escape more restrictive domestic regulations.

In itself it is not a problem, however, if the interrogating official holds a different title or position than is foreseen in German law.[8]

The Federal Supreme Court has ruled that beyond these limits, any significant deviations of German law from the target state's law can only be taken into consideration in terms of the credibility of the evidence.[9]

A number of the judicial cooperation treaties signed by Germany provide for the adoption of the standards (or at least their consideration) of the applicant state. Article 3(2) ECMACM[10] requires states to cooperate with requests for witnesses or experts to testify under oath unless those requests violate the law of the target state. German treaties supplementing Article 4 of the Convention permits the applicability of applicant-state laws on the appearance of witnesses.[11] The obligation to take foreign law into consideration is formulated even more specifically in the version of Article 4 of the Convention from the year 2000.

Such a solution as to the applicability of foreign law is certainly effective; it eliminates evidence transfer problems resulting strictly from the structure of different legal systems. But it must not be overlooked that what is occurring is that a state

[6] BGH, Decision of 24 July 1996 - 3 StR 609/95 = NStZ 1998, 155 (156).

[7] See BGH, Decision of 28 October 1954 - 3 StR 466/54 = BGHSt 7, 16, 17; Decision of 11 November 1982 - 1 StR 489/81 = NStZ 1983, 181. Cf. Dölling (1993), point 26; Sander and Cirener (2010), point 55; Diemer (2008), point 20.

[8] BGH, Decision of 10 August 1994 - 3 StR 53/94 = NJW 1994, 3364 (3365).

[9] BGH, Decision of 24 July 1996 - 3 StR 609/95 = NStZ 1998, 155; Decision of 22 April 1952 - 1 StR 622/51 = BGHSt 2, 300 (304); see Sander and Cirener (2010), point 55; Diemer (2008), point 20; Velten (2012), points 39 f.

[10] Of 20 April 1959.

[11] BGH, Decision of 24 July 1996 - 3 StR 609/95 = NStZ 1998, 155 (156).

is, on its own territory, exercising coercion over its citizens to which they are essentially not subject.[12] One could assume that through ratification, the law of the applicant state is integrated into that of the target state, but the StPO is a far clearer indication of which coercive measures a citizen is subject to than is a perusal of Article 4 ECMACM. Enforcing criminal procedure through this method damages foreseeability, accountability, and acceptance.

3.2 Evidence Collected in Another Country Without that Country's Approval

It is a general principle of public international law that investigations on another sovereign territory require the permission of the state affected. Violations of this rule are violations of the sovereignty of the state—prohibited by international law and sometimes also punishable.[13] There is very little appellate case law on this area.

In cases where foreign sovereignty has been violated, the main conflict is one between subjects of public international law. The accused cannot therefore directly rely on the protections of that law. The Federal Supreme Court has not entirely prohibited the consideration of such evidence; instead, the rule is that the relative seriousness of the sovereignty violation should be the primary consideration in any such dispute.[14] Even in this case, the court prefers a balance of interests tailored to the individual case.

4 European Standards on Evidence Transfer

Germany has generally been sceptical of proposed European standards for mutual recognition of rules on evidence transfer. Even prior to the implementation deadline (19 January 2011) of the directive on European evidence rules, the Commission presented a Green Book on "Obtaining Admissible Evidence in Criminal Proceedings from the Territory of Another Member State." The Green Book goes much further than the European evidence rules. The proposal is to create "a single regulatory framework on the basis of mutual recognition. . . and including all types of evidence." The *Bundesrat* has already indicated in a position paper[15] that it views this harmonization initiative critically in light of the subsidiarity principle.[16]

[12] Criticism from Gleß (2008), p. 319.

[13] *Ibid.*

[14] BGH, Decision of 4 April 1990 - 4 BJs 136/89 - 3 StB 5/90 = BGHSt 36, 396; Decision of 30 April 1990 - 4 BJs 136/89 - 3 StB 8/90 = BGHSt 37, 30.

[15] BR-Drs. 906/09 v. 12 February 2010.

[16] BR-Drs. 906/09 v. 12 February 2010, p. 2.

I will conclude with cases of particular relevance for human rights: the collection and evaluation of evidence in cases of torture.

5 Torture Cases. The Case of El Motassadeq

The High Court in Hamburg[17] recently decided a case of this nature: *El Motassadeq's Case*. The court was considering whether, in the guilt phase of the trial, it should admit summaries sent over from the United States of statements given by senior members of Al-Qaeda who were being considered as potential witnesses. Repeated requests to the US for information about the location of the witnesses and the circumstances of their interrogation had gone ignored. It could not be determined whether the witnesses had actually been tortured, and the court thus held that the interrogation transcripts did not have to be excluded.

Contradictory though the result may seem, the reasons given by the court strengthen international prohibitions on torture. The court was of the opinion that Article 15 of the UN Convention against Torture constitutes directly effective domestic law and was therefore to be applied in reaching its decision. There was no indication, said the court, that Article 15 was merely intended to constitute an obligation on state parties to implement corresponding statutory rules: the inadmissibility of torture evidence was for the judiciary to guard, and the judiciary is the direct addressee of a number of other provisions of the convention, such as Article 6 (1). Article 15, said the court, was certain enough in situation and legal consequences to rise to the level demanded of internally applicable law and thus sufficient to give rise to legal consequences.[18] This led the court to the conclusion that Article 15 of the 1984 Convention, which prohibits torture and other inhuman or degrading treatment or punishment, was an internally directly effective measure and therefore binding in criminal proceedings. It excluded the evaluation of evidence obtained by torture, whether done at the hands of domestic state organs or of those abroad.

The restrictions of §136a StPO—the prohibition of forbidden interrogation methods and a corresponding exclusion of the evidence—complement this rule. It is directed at prosecutorial authorities and applies only to measures taken by the German state, and horizontal applicability is generally not recognized. But in egregious situations such as torture by private persons, an exception is made. The case-law extends this to citizens of other countries who use such prohibited techniques.[19] But since in this case there was insufficient evidence of a violation,

[17] OLG Hamburg, Decision of 14 June 2005 - IV - 1/04 = NJW 2005, 2326.

[18] See BVerfG, Decision of 31 May 1994 - 2 BvR 1193/93 = NJW 1994, 2883.

[19] BGH, Decision of 21 July 1998 - 5 StR 302/97 = BGHSt 44, 129.

the evidence in question could be admitted.[20] The principle of *in dubio pro reo* was not applicable[21]; suppression of evidence must remain the exception, rather than the rule.

The clarity of this reasoning is praiseworthy. A prohibition stemming directly from public international law strengthens treaty obligations and, in the domestic context, ensures the integrity of the procedure.[22] The application of § 136a StPO to foreign investigating authorities is similarly convincing. Torture emotionalizes its subject and transforms him into a mere object of the investigation, robbed of his autonomy. What remains is, as *Hassemer* has it, "just a shell of a person in pain."

The only remaining room for disagreement is the issue of burden and standard of proof that the evidence in fact was obtained by torture.[23]

Finally, there remains the issue of whether torture evidence should be subject to the *fruit of the poisonous tree* doctrine: this principle has been rejected in Germany in other than just torture cases. In the case described above, the General Federal Prosecutor *Griesbaum* called for maintaining that position even when evidence comes from abroad, a position in turn confirmed by the Supreme Court: Article 15 of the UN Convention should not be interpreted as ignoring remoteness, and no such practice is evident among other states party to the convention. The application of the convention to all evidence obtained as a result of information produced under torture could not be considered a fundamental principle of German criminal law.[24] The same was true when considering the obligations of Article 3 ECHR, which prohibits torture or inhuman or degrading treatment.

The ECtHR, however, has not excluded the possibility in some cases that proper compensation might consist of the suppression of evidence obtained following a violation of Article 3 ECHR.[25]

6 Reforms

The drive to increase the effectiveness and intensity of transnational investigations comes from the direction of the EU; discussion of reforms in this area will hardly be a purely national one anymore. From the German perspective, continual sticking points here are the so-called telecommunications data retention, enabling legislation for which has been partially voided by the Constitutional Court. New data retention legislation is still being debated, while preventative detention was reformed on 1 January 2010, and post-sentence detention on 1 January 2011.

[20] A number of examples at BGHSt 16, 165 (167).

[21] BGH, Decision of 28 June 1961 - 2 StR 154/61 = BGHSt 16, 165.

[22] See Ambos (2009), p. 161.

[23] *Ibid*., pp. 151 ff.

[24] BGH, Decision of 14 September 2010 - 3 StR 573/09.

[25] ECtHR, 1 June 2010, Gäfgen v. Germany, Application No. 22978/05.

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Report on Hungary

Krisztina Karsai

Contents

Abstract The paper contains a short overview of the Hungarian criminal justice (authorities, stages etc.), but it focused on the transnational modus operandi of investigating authorities. In this sense the paper describes and analyses the very important bilateral instruments of combatting cross border crimes within the framework of Schengen conventions.

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The second part of the report deals with the issue of transnational evidence gathering and obtaining, and with the principle of mutual recognition. The paper elaborates the neutral ('judgement-less') model of mutual recognition which could lead to more effective human rights protection in the field of transnational inquiries.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
CCP	Code of Criminal Procedure
CISA	Convention Implementing the Schengen Agreement
ECAT	European Convention against Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
FD EEW	Framework Decision on the European Evidence Warrant
ICAT	International Covenant against Torture
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
SIS	Schengen Information System
TFEU	Treaty on the Functioning of the European Union

1 Introductory Remarks

1.1 The Criminal Justice System in Hungary: An Overview

In Hungary, like in most European countries, the criminal justice system consists of three branches: agencies (1) for law enforcement, (2) for law adjudication and also (3) for the carrying out of punishment. These roles are fulfilled by the police, the prosecution service, and the judicial and correctional agencies, respectively.

The general investigating authority is the police. The National Tax and Customs Office also has investigative competences related to special criminal offences under Article 36 of the Hungarian CCP (*e.g.* misuse of excise duty; tax fraud; false marking of goods and certain other economic crimes). The Border Guard was the third body in Hungary charged with investigating special criminal offences (e.g. trafficking in human beings) in the period from 1997 to 2008, but following Hungary's accession to the Schengen Area within the European Union, it was integrated into the structure of the police force that simultaneously also took over its investigative competencies.

The Public Prosecution Service has a clearly defined independent position among the state organs in Hungary, one which is guaranteed by the Fundamental

Law (Constitution). The General Public Prosecutor is elected by the Parliament on the suggestion of the President of the Republic; thus, the Prosecution Service is entirely independent of the Government and the Minister of Interior, unlike in numerous European countries. The General Public Prosecutor, the chief of the prosecution authority, is not under anyone's authority but has the duty to report on the activity of the prosecution service to the Parliament.

When the investigating authority, i.e. the police, conducts an investigation independently, the prosecutor supervises its compliance with the Hungarian CCP. In so doing, the prosecutor may order an investigation, may instruct the investigating authority to perform further investigative actions, may be present at investigative actions, and may examine or send for the documents produced during the investigation. The prosecutor can exercise his right to intervene in the investigation whenever he considers it necessary to do so.

However, the Hungarian CCP sets forth the criminal offences the investigation of which falls within the exclusive competence of the prosecutor, including, without limitation, crimes against justice or bribery. The prosecutor has exclusive investigative competency in cases where either the offender or the victim of the offence is a Member of Parliament, a high public dignitary elected by the Parliament, a judge, a prosecutor or a member of the police.[1]

Transnational enquiries can engage both the police and the public prosecutor's office. if ever, involved.

In the criminal justice system of Hungary, there are no discrete investigative jurisdictions. The law uses the notion of investigating judge, but their role is not the same as that of their more familiar counterparts in France or in Belgium. The main competence of investigating judges is namely to perform the responsibilities of the court prior to the filing of the indictment e.g. to decide on motions concerning coercive measures falling within the competence of the court or decide on covert surveillance. The independence of the trial jurisdiction is guaranteed by the rule by which the judge acting as an investigating judge in the case is excluded from subsequent court procedures. It means that the Hungarian concept of investigating judge is understood to be a *judge of freedom*. The fact that the judge lacks the authority to investigate independently in either the national or transnational context also means that the judge can only interact with foreign authorities via requests for mutual judicial assistance.

1.2 The Structural Place of Transnational Inquiries in the Legal System

In order to talk about "transnational inquiries," it is first of all necessary to define the concept. For the purposes of my discussion transnational enquiries are the transnational acts of investigating authorities, i.e. investigating actions that have

[1] Karsai (2008), pp. 11 ff.

one or more foreign elements. In the context of a national legal system, the question of transnational inquiries can arise in four aspects:

1) If the national authorities get "foreign aid" in their own investigations
2) If or whether national authorities/officers can investigate abroad
3) If the national authorities give "aid" to foreign investigations
4) If or whether foreign authorities/officers can investigate on the soil of another state.

The list shows that I prefer the use of a narrow definition: only the very acts of investigation in a narrow sense pertain to the definition, other acts of legal assistance do not. However, this project has widened the definition of inquiry: the Hungarian concept of investigation normally excludes police cooperation before the opening the criminal proceedings because the investigation is the formal part of the opened criminal procedure according to Hungarian CCP. However, this project requires wider engagement with the whole field of transnational cooperation; therefore, it is necessary to extend the report to cover the pre-procedural phase (in a formal sense). I use the term "transnational inquiries" with such content in the written paper as well.

In Hungary, every office and contact point for international police cooperation is connected in an institutional way: 15 years ago, the International Law Enforcement Cooperation Centre (ORFK NEBEK) was established as an element of the organizational structure of the General Directorate of Criminal Investigation of the National Police Office. The unit is comprised of five divisions: the International Information Division, the Europol National Unit, the Europol Hungarian Liaison Bureau, the Interpol National Central Bureau and the SIRENE Bureau. The ORFK NEBEK has a 24/7 duty service, it receives and processes criminal investigation requests from abroad and takes the necessary measures as a matter of urgency. In cases of actual crimes, it exchanges information with Europol and Interpol; furthermore it operates a Liaison Bureau in The Hague to support domestic operational activities, where liaison officers of the Police and the Customs and Finance Guard work in the same offices. However, the Centre also handles operational cooperation, for which the necessary information is retrieved, inter alia, from the Schengen Information System (SIS).

The NEBEK is a very effective unit of international cooperation; it handles ca. 270,000 issues or requests a year. The largest share of requests involves those relevant to data-exchange with Interpol (74,000 in 2010).[2]

1.3 Overview of Rules of Investigation Concerning Transnational Issues

Hungary, as a Member state of the European Union, is obliged to cooperate within the existing framework of the AFSJ. Because of its membership in the Schengen enhanced

[2] *Source*: on individual request from International Law Enforcement Cooperation Centre, April 2011.

cooperation, Hungary furthermore follows the Schengen *Acquis* as well. National law contains every source of Union law; it is not necessary to include a detailed listing here.[3] Besides European Union law, Hungary has accepted and ratified several international instruments of the United Nations and the Council of Europe.

The special cooperation rules with foreign or international investigating authorities are laid down by Act 54 of 2002 on the International Cooperation of Investigating Authorities, and—with focus on data exchange—Act 54 of 1999 on the Cooperation and Information Exchange with Europol and Interpol. Meanwhile, the general law of criminal procedure is set forth in Act 19 of 1998. The general rules of mutual assistance with other countries in criminal cases are set out in Act 38 of 1996 on International Cooperation in Criminal Matters. Equivalent rules for the European Union are set forth by Act 130 of 2003 on Cooperation in Criminal Matters between the Member states of the European Union.

These acts contain almost every European requirement; only the FD EEW has not yet been implemented, preventing the EEW from applying in Hungary so far. Instead of the EEW, general mutual assistance continues to apply in the field otherwise covered by EEW.

Hungarian participation in investigative cooperation at EU level is the same as that of other Member states: the Hungarian police sends liaison officers to Europol and supports any requests for data exchange or other forms of cooperation. The investigative cooperation is however not really effective with partners from outside of the EU. The only functioning "investigative" method is cooperation through the framework of Interpol; otherwise, the general means of mutual assistance (legal assistance) by involving at least the public prosecution is not really effective. The practical obstacle is the excessive time that it takes to complete any request for assistance from another state.

1.4 Bilateral Agreements in Transnational Inquiries

Hungary is a country with seven neighbours: Austria, Slovenia, Croatia, Serbia, Romania, Ukraine and Slovakia. Three of these neighbours are members of both the EU and the Schengen Area (Austria, Slovakia, and Slovenia), one is a EU member state without Schengen (security) membership (Romania), and three others are not EU member states (Serbia, Croatia and Ukraine). This special geopolitical and legal situation requires special attention. It means that Hungary is bound by both global (international) instruments and EU law, but it has contracted special bilateral agreements with almost every other neighbouring state in the fight against cross-border criminality.

The aforementioned bilateral agreements with neighbouring states are also very important in the fight against crime. These bilateral agreements go beyond the

[3] Concerning the relevant norms see Hecker (2010), pp. 159–206, 367–455; Klip (2009), pp. 157–208.

special Schengen police cooperation in case of Romania,[4] Slovakia,[5] Slovenia[6] and Austria[7] as well—like the cross-border surveillance and cross-border hot pursuit (Arts. 40-40 CISA). Of particular recent importance is the conclusion between Hungary and Croatia[8] of an agreement with almost "Schengen-content,"[9] which means in particular that cross-border surveillance and hot pursuit are also allowed and regulated even though Croatia is not yet a member of the Union. The bilateral agreement between Hungary and Serbia[10] does not contain such modern Europe-shaped features; it follows the lines of traditional cross-border cooperation.

It would be easy to assume that all the agreements between Hungary and its neighbouring EU member states have the same content, but that would be a mistake. On the base of the following tables I compare the agreements from three aspects: (1) cross-border surveillance, (2) cross-border hot pursuit and (3) the legal possibility that officers can act abroad in their duty. All of these aspects examined are fruits of European integration; therefore, the content of their regulation (in these agreements) could be a plausible indicator of the overall level of cooperation.

1.4.1 Cross-Border Surveillance

Cross-border surveillance

State	*Trigger offences*	*Where?*	*How long?*
Art. 40 SAAC	Certain severe offences (not every EAW offence)		
Austria (Art. 10) *2006*	EAW offences	Whole territory	Max. 5 h without prior permission
Slovakia (Art. 12) *2006*	Offences with min. 5 years imprisonment or organised crimes (no special regulation, therefore according to law of departure state)	Whole territory	Max. 5 h without prior permission

(continued)

[4] Act 63 of 2009 on the promulgation of the Agreement on preventing and combating cross-border crimes between the Governments of Republic of Hungary and the Republic of Romania.

[5] Act 91 of 2006 on the promulgation of the Agreement on preventing cross-border crimes and combating organised crime between the Governments of the Republic of Hungary and the Republic of Slovakia.

[6] Act 108 of 2006 on the promulgation of the Agreement on cross-border cooperation of investigating authorities between the Republic of Hungary and the Republic of Slovenia.

[7] Act 37 of 2006 on the promulgation of the Agreement on preventing and combating cross-border crime between the Governments of The Republic of Hungary and the Federal Republic of Austria.

[8] Act 66 of 2009 on preventing and combating cross-border crime between the Governments of the Republic of Hungary and the Republic of Croatia.

[9] See Hecker (2010), pp. 171–179.

[10] Act 34 of 2009 on the promulgation of the Agreement on the cooperation of investigating authorities in the field of preventing cross-border crimes and combating organised crime between the Governments of the Republic of Hungary and the Republic of Serbia.

State	*Trigger offences*	*Where?*	*How long?*
Slovenia (Art. 11) *2006*	Offences with min. 5 years imprisonment or organised crimes (no special regulation, therefore according to law of departure state)	Whole territory	Max. 5 h without prior permission
Romania (Art. 12) *2009*	Offences with min. 5 years imprisonment (double punishability) or organised crimes	Whole territory	Max. 5 h without prior permission
Croatia (Art. 12) *2009*	Offences with min. 1 year imprisonment or organised crimes (law of departure state)	Whole territory	Max. 5 h without prior permission

I would like to point out that despite the common regulation of the CISA the chosen options are quite different in the five agreements:

- The category of EAW offences is generally broader than that of offences with a minimum of 5 years imprisonment
- The requirement of double punishability is a crucial point (with Romania) in comparison with the other instruments
- The use of the vague term of "organised crime" opens the door in almost every case to the imposition of double punishability. That means also only the law of the departure state is taken into consideration.

In 2010 there were 16 registered cases for cross-border surveillance: 3 between Hungary and Austria, 3 with Slovakia, and 2 with Slovenia 2; 1 from Austria to Hungary, 2 from Romania, and 4 from Slovakia.[11]

1.4.2 Cross-Border Hot Pursuit

The next table contains a comparison of the rules in the field of cross-border hot pursuit.

State	*Trigger offences*	*Where?*	*How long?*
Art. 41 SAAC	Certain severe offences (not every EAW offence) and extraditable offences		
Austria (Art. 11) 2006	EAW offences	Whole territory	Without temporal restriction
Slovakia (Art. 13) 2006	Offences with min. 1 year imprisonment (double punishability)	Whole territory	Without temporal restriction
Slovenia (Art. 12) 2006	EAW offences	Whole territory	Without temporal restriction
Romania (Art. 13) 2009	EAW offences	Whole territory	Without temporal restriction
Croatia (Art. 13) 2009	Offences with min. 1 year imprisonment (double punishability)	Whole territory	Without temporal restriction

[11] *Source*: on individual request from the International Law Enforcement Cooperation Centre, April 2011.

There are real differences concerning the scope of the offences covered as well: the EAW covers offences with a minimum of 1 year imprisonment requiring double punishability, but EAW offences also comprise crimes (listed offences) where double punishability shall not be required and the minimal imprisonment term is 3 year (as a maximum). It is also noteworthy, that the agreement with Croatia extends to this original Schengen-shaped form of cooperation, which is a solution that is not really usual in our relations with third countries.

1.4.3 Common Rules Concerning Officers' Rights While Acting Abroad

The European instruments (EU and Schengen) and the bilateral agreements contain specific rules concerning the use of force against individuals by foreign officers.

	Carrying service weapon	Use of service weapon	Use of other force	Right to arrest
SAAC surveillance	Yes	Legitimate self defence	*Not regulated*	No
SAAC hot pursuit	Yes	Legitimate self defence	Security search, handcuff, seizure	Yes, the person pursued
Austria (both surveillance and hot pursuit)	Yes	Justifiable defence or necessity (forum regit actum is not defined therefore: home country law)	Bodily force or any coercive measures—if it is proportionate	Yes, in case of flagrante delicto OR in case of escape
Romania (both surveillance and hot pursuit)	Yes	Justifiable defence or necessity (forum regit actum is not defined therefore: home country law)	Bodily force, handcuff, taser, baton and police dog—if it is proportionate Forum regit actum	Yes, in case of flagrante delicto OR in case of escape
Slovenia (both surveillance and hot pursuit)	Yes	Justifiable defence or necessity (forum regit actum is not defined therefore: home country law)	bodily force, handcuff, taser, baton and police dog—if it is proportionate Forum regit actum	yes, in case of flagrante delicto OR in case of escape
Slovakia (both surveillance and hot pursuit)	Yes	Justifiable defence or necessity (forum regit actum is not defined therefore: home country law)	Bodily force, handcuff, taser, baton and police dog—if it is proportionate Forum regit actum	Yes, in case of flagrante delicto OR in case of escape
Croatia (both surveillance and hot pursuit)	Yes	Justifiable defence (forum regit actum is not defined therefore: home country law)	Bodily force, handcuff, taser, baton and police dog—if it is proportionate Forum regit actum	Yes, in case of flagrante delicto OR in case of escape
Serbia	No	No	No	No

According to this comparison there are some dissimilarities to note. First of all, the SAAC does not provide for the use of service weapons in case of necessity; however, almost every other agreement covers this eventuality. The agreement with Croatia forbids Hungarian officers using their weapons in Croatia and vice versa.

Secondly, the use of coercive measures is also not uniformly addressed: with Austria, the proportionality principle is followed without any detailed list of applicable measures, but in the other agreements, there is an exhaustive list of measures and the requirement of proportionality is also provided for.

If we look for reasons why the agreement with Serbia differs in this respect from that with Croatia (both third countries), one might be that the status of Croatia in the accession process is more developed than that of Serbia. However, there are some special local necessities which call for special regulation of the relations between Serbia and Hungary; therefore, the agreement contains rules on establishing a joint investigation team.[12]

But there is also another important ruling concerning activities abroad. The SCA and its implementing agreements acknowledge the principle of assimilation,[13] which has three elements:

(i) During operations such as cross-border surveillance, hot pursuit, and controlled delivery, foreign officers are to be regarded as officers of the hosting country with respect to offences committed (a) against them or (b) by them.
(ii) The same is valid if (c) said officers cause damage during the operation, in such case the claims are treated under the conditions applicable to damage caused by the officers of the hosting country.

When service weapons are used, the question arises: which law is to be applied in order to decide on the existence of justifiable defence or necessity? Enforcement of the principle of assimilation would mean that the content of the hosting country's legal regulation would be applied.[14] The *forum regit actum* principle, which dominates the new measures in the field of cooperation in criminal matters, also calls for the application of the host country's law.

Therefore the knowledge of the law of neighbouring states is crucial in this regard since the officers themselves may be in a position to apply a foreign law very different from their own during their operations.

Why is this important to note? I think that these operational acts could be very effective for certain purposes; therefore, I am sure that the use of these measures

[12] Joint investigation teams shall be established in case of offences with minimum 5 years imprisonment with transnational aspect, when the successful investigation requires the coordination of the investigating authorities or if the investigation is very complex.

[13] See Hecker (2010), pp. 227–264.

[14] During these operations the foreign officers are to be regarded as officers of the hosting country with respect to offences committed against them or by them. The same is valid if the officer causes damage during his/her operation, in such a case the claims shall be treated under the conditions applicable to damage caused by the officers of the hosting country.

will intensify between the member states in the future. However, the application of foreign law might fall within a "danger zone" of misinterpretations.

2 Cross-Border Investigations and Fundamental Rights

2.1 Legal Environment

First of all it should be noted that Hungary has ratified all the significant international conventions in the field of human rights protection:

Before the democratic change the UN ICCPR was ratified by Law-Decree 8/1976; the UN ICAT was ratified by Law-Decree 3/1988.

On 6 November 1990 Hungary joined the European Council; this was followed by the Parliament's ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ECHR) under the Act Nr. XXXI of 1993. The ECAT was ratified by Act III of 1995.

This means that both Hungarian legislation and the functioning of the state's institutions are bound by these instruments. After the accession to the Rome Convention, there were cases before the ECtHR against Hungary, to the tune of ca. 400 applications per year (of which only 30–50 applications are admitted). The decided cases show that the legislator, if the ECtHR establishes the violation of the Convention, is (almost) always able and willing to change the law in order to avoid similar complaints.[15]

2.2 Special Extraordinary Remedy

It is noteworthy to mention that a key feature of Hungarian criminal procedure is Article 416 HCP, which sets forth a special extraordinary remedy for certain cases of human rights violations.

Judicial review of a final judgment can be initiated before the Hungarian Supreme Court, based upon strict requirements in special cases. One of these requirements bears a close connection with human rights protection. Namely, it might happen that an international body for the protection of human rights (particularly the ECtHR) establishes that the procedure or the legally binding decision of a Hungarian court (criminal or other procedure) has violated a provision of the ECHR. In this case, the Hungarian CCP allows the Supreme Court review of the case addressed by the decision of the international judicial body. The decision of the ECHR can disapprove of both factual and legal defects in the national procedure

[15] See more concerning Hungarian framework: Bárd (2007), pp. 237–241; Czine et al. (2009), pp. 209–237.

from a human rights point of view; however, according to Article 416(3) of the Hungarian CCP, Supreme Court review is not allowed if the human rights violation alleged is merely the infringement of the reasonable time requirement. The exclusion has a procedural reason: the persons concerned (defendant, his counsel and the private party) have the right to complain against any delay or procedural omission of the competent authorities during the whole trial procedure. If one finds that the authorities infringed the reasonable time requirement of fair trial, they are not obliged to wait for the opening of the possibility to apply in Strasbourg; instead, they have earlier access to the proper proceedings in remedy of the infringements suffered before the trial court (Art. 262/A Hungarian CCP).[16]

Naturally, procedural mistakes or abuses resulting in human rights violations can be remedied by conventional means at any time during the whole procedure. This special case is intended to deal with any situation which cannot be handled or is not to be handled by ordinary proceedings.

3 Obtaining and Admitting Evidence and Respect for Human Rights Guarantees

3.1 Introduction

This section focuses on the admissibility of evidence in criminal proceedings, whether the court takes into consideration (allows into the proceedings) evidence of foreign origin, traditionally received via formal mutual assistance. The accepted principles and institutions of this "traditional" system are very sovereignty-friendly; neither the requesting nor the executing state must forfeit their own legal standards: the act of mutual assistance must be executed according to the law of the executing state, but afterwards, the judge is free in making the decision whether the evidence obtained should be allowed to be entered in the requesting state's procedure.[17]

This philosophy dominates the instruments of the Council of Europe and the first legislative steps in the framework of the Union. In the European Union, the aforementioned traditional way of thinking has been changed, and a new era began about 10 years ago,[18] namely the principle of mutual recognition[19] among member states. The principle of mutual recognition in connection with cooperation in criminal matters continues to gain ground as double punishability becomes less

[16] Karsai and Szomora (2010), p. 207.

[17] More in Ligeti (2006) and Gleß (2003).

[18] The framework-decision on the European Arrest Warrant has recognized this new attitude for the first time as a positive legal provision.

[19] See Alegre and Leaf (2004), pp. 200–217; Peers (2004), pp. 5–36.

and less relevant in EU law. The European Council proclaimed in Tampere (15–16 October 1999) that the principle of mutual recognition should become the cornerstone of judicial cooperation even in criminal matters in the EU—the proclamation of the Presidency Conclusions lead to this "dramatic" change.[20]

Subsequent EU legislation introduced mutual recognition of other decisions of domestic authorities, such as the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (in accordance with the Framework Decision on money laundering); the execution in the European Union of orders freezing property or evidence (in accordance with the pertinent Framework Decision under the same title); the application of the principle of mutual recognition to financial penalties (in accordance with the pertinent Framework Decision); or the application of the principle of mutual recognition to confiscation orders (in accordance with the relevant Framework Decision). As these measures accumulate, the principle of mutual recognition has become the central element of the development in EU criminal law.[21]

Generally speaking, this process has advanced in such a way that it would be a mistake to speak of widespread, common acceptance of mutual recognition in national decisions on criminal matters. Only some types of decisions accept and apply mutual recognition, leading to the concept of the 'fragmented acceptance doctrine' as a way of describing the trends in the shift from double punishability to mutual recognition. Despite incomplete, fragmented acceptance, the ongoing legislative efforts in the EU seem to be progressing toward the promise of a true expansion and the general acknowledgement of mutual recognition regarding criminal decisions of all types. Eventually, it might even achieve the ultimate goal: "the free movement" of judicial decisions in criminal matters. The goal of mutual recognition is to create a framework where the decisions passed under the respective legal systems of the member states share, during their execution in another member state, the legal attributes of decisions under the domestic law of the host state: they should not diverge from the basic features applicable to "interior legal assistance."[22]

The Lisbon Treaty imposes a general rule of acknowledgment in terms of mutual recognition upon the European Union: Article 67(2) TFEU provides that

> The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

Article 82 TFEU in particular declares that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of

[20] Ligeti (2006), p. 140.

[21] Fuchs (2004), pp. 368–371; Gleß (2004), pp. 354–367.

[22] This legal instrument is used for example if the municipal court requests some procedural acts (in the criminal procedure) from the court of another town in the same country.

judgments. According to paragraph 2, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. They shall also concern the mutual admissibility of evidence between member states.

The legal foundation for the free movement of evidence has already been laid, and further development in this field cannot be obstructed. The question remains open: what aspects of this "freedom" will be realised in practice? In order to understand the mutual recognition of evidence, I would like to provide a short summary of what the principle truly means.

3.2 *The Principle of Mutual Recognition as a Judgement-Less (Neutral) Method*[23]

In my view, the principle of mutual recognition, as it says in its name, is a method without value judgement and essentially has three factors. The first factor is the object of recognition; and the recognition itself is accomplished between the other two factors (remitter entity and receiver entity). Acceptance mainly consists in the receiver's acknowledgment (adoption) of the object of recognition *as the remitter offers it* to him or as the remitter treats it. In the sphere of law it means the following: a legal act is accepted by an entity—which is independent of the original issuing entity—in its original scope and depth without any modification, as it is originated from the issuing entity. The principle contains an element of automatic recognition (without any change in substance or form of the legal figure), meaning that the remitter has the "claim" that its legal product not will be changed. The receiver is the concrete member state's law system (or the judicial authority), the objective of recognition—in the widest sense—is any legal product of criminal procedure (decisions, coercive measures, evidences), and the member states's law, from whence the legal product comes, is the remitter.

The principle of mutual recognition is restricted to interstate relations, since the remitter and the receiver entities belong to different legal systems. But this interstate relation does not necessarily entail an international law context, as the interaction does not take place between states themselves as bodies of their own sovereignty but between the concrete judicial authorities representing states. One or two foreign elements appear during the carrying out of nationally-framed criminal procedures: the accused or any of the witnesses resides abroad or the evidence (or seized objects) stays abroad. The enforcement of criminal jurisdiction and the carrying out of a criminal procedure is situated in a national framework of law

[23] More in Karsai (2008), pp. 948–954.

but national law becomes inadequate if a substantial element of or actor in the procedure is to be found abroad. This foreign element should be made—also physically—admissible (the goal of international cooperation in criminal matters) and if it is admissible and present, it should be made compatible (procedure of exequatur[24]) with the domestic law system. The legal assistance coming from a foreign legal system can still show the characteristics of its own system, and these may violate the law of the implementing state if the characteristics are not reconcilable. It is at this point that the principle of mutual recognition appears, potentially replacing the transformation's acts of internal compatibility.

The principle of mutual recognition as a judgement-less (neutral) method theoretically might work in connection with every single legal product of criminal procedure. The principle of mutual recognition is functional: it concentrates on using the legal product in question everywhere for the same reason and the same way as it was originally made. This means that it has to fulfil the same function in the receiver's frame of reference as in its own. The greatest problem of the principle of mutual recognition as a method in the criminal law context is that the legal products (legal institutions functioning in one legal system) cannot be independent of their system. They will always maintain the characteristics of their own legal system. As the subject of mutual recognition, the legal product itself will never be suitable for recognition: recognition necessarily means the recognition of the entire other legal system.

The effect of the mutual recognition principle would ultimately be to create a single criminal jurisdiction in the European Union. There would be no conflicting legislation and the relation among the acting authorities would be governed by traditional *internal* provisions for competence and jurisdiction. This is dubbed *cosmopolitan jurisdiction* by Franz von Liszt, in which the attitude of the states is described as "your law is my law."[25] Such a system is held together by the constructive confidence put by the member states in one another's jurisdiction, a point from which the present day is far removed. Today, there are complaints filed by member states on both sides of the procedure and debates about how to deal with human rights deficits. Although each member state (and in the near future the EU itself as well) is participant to the ECHR, the volume of cases before the ECtHR also shows that the minimum standards laid down by the Convention are not guaranteed in practice. This also means that the recognition of a criminal law product should entail the recognition of domestic procedural provisions with their necessary (or expressed or regulated) protection of human rights. But this aspect is not always acceptable to different member states with different levels of human right protection in practice.

The principle of mutual recognition originates in the European Court of Justice's jurisdiction, specifically in connection with the free movement of goods in the decision known as *Cassis de Dijon*.[26] Following this decision, mutual recognition

[24] Nyitrai Peter (2006), pp. 299–300.

[25] von Liszt (1882), p. 102.

[26] 120/78 REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein [ECR 1979 649.p.].

became *one* of the most important regulatory principles of Community law in furthering the fundamental freedoms. It gave birth to the idea[27] that the principle might be followed in criminal procedural cooperation and substantive criminal integration as well. This is what leads—similar to the free movement of goods—to the theory of the free movement of criminal decisions. In the territory of the European Union, in the "united jurisdictional area," a legal decision made by a member state's authority is qualified the same way, and it produces the same legal effect as in the legal system of the issuing member state.

Under Union law, the principle of mutual recognition is an instrument for reaching the fundamental freedoms adopted by EU law; concretely it means the achievement of EU citizens' economic freedom. The central element of mutual recognition in connection with the free movement of goods is the following: after a concrete good is legally put on the market in a member state, it can circulate in all the others. The subject of mutual recognition is not the goods itself (like a television, cucumbers, or wine) but rather the member state regulation which lays down how to place the goods on the (common) market for the first time. The other member states recognize the lawfulness of these rules, accept them, and consequently also accept their further free trade within the European Union. It is important to note that the trade-provisions can vary in member states. Nevertheless, these domestic norms first have to conform to EU law requirements and furthermore this conformity has a higher (supranational) control instance in the form of the European Court of Justice. Accordingly, member state's regulations, which define the rules of trade nationally, have to fulfil external, objective requirements that are enforced the same way in every member state. EU law itself provides the frame: it sets forth the means of enforcement of the fundamental freedom and its possible limitation as well. If the rules of the member states fall within these frames, they will always fulfil EU law requirements.

3.3 Mutual Recognition in Criminal Matters

According to the aforementioned EU law sense of mutual recognition, the subject of the recognition is not the decision itself (since the goods are not being recognized in relation to the free movement of goods) but rather the recognition that the Member state's procedure leads to a lawful decision. The use of mutual recognition and the free movement of decisions in criminal matters would mean that if a decision is lawfully made then it could be enforced in any of the Member states. The present situation is that some, but not all, decisions are covered by mutual recognition. The natural question is: why the double standard?

[27] For the first time, in the Conclusions of the European Council, Tampere (15–16 October 1999).

The process started with the European Arrest Warrant, but without letting each decision fall under the scope of mutual recognition, the circle has gradually broadened. There is no confirmed contextual reason, and the question is still open: why do all the decisions passed by judges not fall under mutual recognition? In my point of view the real reason is that mutual confidence is still not yet full.

The EU characteristics of mutual recognition could be enforced for criminal decisions if there were an "external" frame binding over all the member states' substantive legal frameworks similar to the mutual recognition regarding goods. Such an external frame could be e.g. the Charter of Fundamental Rights of the EU for fundamental rights protections.

3.4 Free Movement of Evidence

The FD EEW tries to provide a single, fast and effective mechanism for obtaining evidence and transferring it to the issuing state. The framework decision applies to objects, documents or data obtained under various procedural powers, including seizure, production or search powers in any member states.[28] The EEW should be used where the evidence is already directly available in the executing State, for example by extracting the relevant information from a register (such as a register of criminal convictions). The vision of free movement of evidence makes the question more complicated. According to the concept of evidence exchange, the new system would replace most of the existing cooperation in procedural assistance. The principle of *forum regit actum* would give way to *locus regit actum* and a higher level of cooperation. But *what* could be actually recognized by the member states with mutual recognition of evidence? (1) Does the evidence obtained legally qualify as evidence? (2) Is the evidence obtained admissible as evidence?

The probative value of evidence cannot be the subject of mutual recognition, as it is a question of the firm belief and inner conviction of the judge. The question about a fact being a fact also cannot be the subject of mutual recognition, since real evidence such as blood or a signature are the same in all the other member states. What is left is the "transformation" proceeding, during which facts become evidence; this is a legal one, and the procedural rules of the state provide the normative framework for the "transformation." If a fact appears in one member state as evidence then it (i.e. the fact that this evidence exists) has to be recognized. In this case the receiver state receives the existence of the fact already as evidence. But the same problem burdens this aspect of mutual recognition. Namely, the evidence, as the output of this transformation process, also bears the marks of the procedural regulation, for example procedural violations of a suspect's human rights. Consequently, in a non-national context, if the evidence needs to be "distributed" to another member state of the European Union, another State should automatically accept the validity of the procedural rules of the

[28] Gazeas (2005), pp. 18 ff., see more in Hecker (2007).

other state. While there are no objective strict standards[29] for the creation of "distributable" evidence, an automatic recognition system would lead to the recognition of *every* procedural rule in the member states. But such confidence does not exist today between the member states; mutual recognition cannot work in this context adequately, and will not as long as there is no common system of norms, contextual standards and judicial control.[30]

3.5 Breaking Points

The mutual confidence placed in other member states' judicial systems as a principle is in an *ideal case* a declaration which defines an existing phenomenon and custom. At present, this is only an *illusion*. The EU's and the member states' furtherance of the illusion is perhaps understandable as reaching for a theoretical foundation for further integration, but the illusion breaks the moment any claims are made about the total or partial reality of unconditional integration of the member states' legal systems. The principle of mutual recognition might easily let law enforcement authorities engage in forum shopping. Choosing the place for de facto jurisdiction (if the case has transnational aspects) might become a strategic decision on the basis of the place for the lowest intervention limits, i.e., the member state with the loosest human rights' protection system. The efficiency factor in connection with decision-making might lead to forum shopping.

3.6 Recommended Approaches

An EEW should be issued only where obtaining the objects, documents or data sought is necessary and proportionate for the purpose of the criminal or other proceedings concerned. In addition, an EEW should be issued only where the object, documents or data concerned could be obtained under the national law of the issuing State in a comparable case (point 11 of the *Consideranda*). The system of EEW permits the issuing authority to request the proceedings be carried out according to the law of issuing State, but in the absence of this request, the default rules are the rules of the executing state. If the request is given, the executing authority is obliged to use the foreign law with the exception of cases where the requested procedures are contrary to its fundamental principles of law. This system

[29] The human rights standards of the ECHR are not enough in this field, as it binds only the separate Member States, the legislation of the European Union is not covered by this standards in this field.

[30] To the development in this field see the Green Paper from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 of 19 February 2003.

is to be implemented by the member states however there is some skepticism concerning, among other things, the capability of the instrument for safeguarding human rights. This conference and the contributions of different speakers[31] have shown that the search for adequate solution for future development is not limited to the field of evidence-transfer.

The EEW is not a perfect system,[32] but it has very important added value to the "European Rules of Evidence," namely the refutable presumption of legality[33] and the guarantee of human rights during the obtaining process in another country. The EEW system is a new approach which precludes the general objection of origin against evidence from a foreign country: evidence from another Member state is now to be treated as legally obtained evidence. This approach can be classified as a rebuttable presumption: if doubts surface later in the issuing State that the obtained and "recognized" evidence is unlawful (because of breach of procedural rules of executing State or of human rights) the judge is entitled to exclude or disallow that evidence. But it should be underlined that generally, the judge will presume the conformity of the evidence, and there is no need to establish a special system of controlling the procedures conducted in another country in every case before its "recognition." The need for a special control procedure may be justified only if indications of breach are apparent. A potentially EU-level control procedure (for instance as an amendment to the framework decision) can be relevant only for this situation. This situation accounts for both the possibility of violation of "simple" procedural provisions and human rights.

In the latter case, the judge can surely test (because of the common minimum level of protecting human rights in Europe) conformity with human rights and whether the obtaining process constituted an infringement of human rights requirements. Hence, this model constitutes *a mutual control of human rights protections* by the domestic judges. However, it remains questionable in case of doubt and indication how the judge will be able to prove conformity with the foreign rules, since it is not to be expected that the domestic judge knows the evidence law of all EU countries.[34] This is probably a focal point where the EU could further its legislative efforts to fill a gap: it could be reasonable to establish a system of special cooperation between the judicial authorities (or between appointed judges) focused on questions about evidence gathering. Or it could also be possible to allow Eurojust to check the questionable national evidence gathering process in specific cases of controversy. It would not be a general procedure

[31] See Ruggeri and Hecker, above.

[32] Critical opinions from Hecker (2007), p. 36; Gleß (2003), pp. 131–150; Belfiore (2009), pp. 1–150.

[33] Karsai (2010), pp. 124–125.

[34] The general rule is the *locus regit actum* principle; therefore—without special request—the evidence gathering follows the law of executing State. Therefore the issuing authority will get "foreign" evidence establishing by the law of another country.

because of the aforementioned presumptions but a remedial procedure in case of any suspicion of procedural law and human rights law violations.

4 Cooperation with International Courts

4.1 International Tribunals

Hungary belonged to the group of so-called "like-minded states" during the negotiations on the Statute of the International Criminal Court and its enthusiasm about the ICC did not chill in the following time. Hungary is intent on ratifying the Statute, but the necessary legal steps have not been taken yet. The Hungarian Parliament decided on 6 February 2006 via a non-binding resolution to ratify the Statute, but the resolution was not followed by ratification via formal legislative act.

Nevertheless one can find several legal sources linked to the Statute. There was a constitutional obstacle for full implementation of the Statute as an organic part of Hungarian law, since the Head of the State may never undergo an investigation or prosecution by any means pursuant to the current constitution (in force until 31 December 2011).

There are some drafts of possible ratifying legislation, although the controversial constitutional interpretations (whether the amendment of the Hungarian Constitution is needed or not) blocks the adoption of this formal act.[35] Hopefully the new Fundamental Law of Hungary will eliminate the various interpretations and the formal ratification of the Statute will be realised.

The legal situation concerning *ad hoc* tribunals is simpler because the relevant Security Council decisions have been directly transformed into Acts of Parliament.

However, have so far been no requests for cooperation or judicial assistance from these bodies.

4.2 The Influence of Supranational Case-Law

The influence of the ECtHR has been already mentioned here. The Court of Justice of the European Union does not have special influence on transnational criminal inquiries themselves. The general impact of the Court's jurisprudence on national law is not doubted here, but it does not have any special features in this area.

Furthermore, there has not yet been any Hungarian example of a valid complaint concerning the *sui generis* transnational investigative activities (cross-border "investigations"), and therefore no specifically relevant case-law in this regard.

[35] Nevertheless, the Republic of Hungary already adopted the ratification act of the Agreement on the privileges and immunities of the International Criminal Court (Act 31 from year 2006).

It should be noted that the complexity of European law (and human rights law of "Europe") has made it necessary for the judicial system to establish a network of EU Law Advisors of the courts. These experts (judges) follow the recent case law of ECJ and ECtHR and support the decision making of their colleagues with European law knowledge.

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Report on Italy

Francesco Caprioli

Contents

Abstract In this article, the Author provides an overview of the Italian approach towards evidence gathered abroad. In particular, he analyzes national exclusionary rules, as shaped by the Italian case law.

The major issue addressed by the Author is the respect of defence rights, as well as of the adversary principle, and critical remarks are therefore expounded concerning the features of such an approach.

Furthermore, new developing modalities of cooperation between judicial authorities are taken into consideration in this article. In this regard, the Author argues that a legislative intervention, balancing efficiency and individuals' rights, might overcome present lacks and shortcomings.

Abbreviations

Cass.	Court of Cassation
Cass. (SU)	Joint Sections of the Court of Cassation
CCP	Code of Criminal Procedure

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CISA	Convention Implementing the Schengen Agreement
Const.	Constitution
ECMACM	European Convention on Mutual Assistance in Criminal Matters
ECtHR	European Court of Human Rights
EUCMACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
FD EEW	Framework Decision on the European Evidence Warrant
FD JIT	Framework Decision on Joint Investigation Teams
PD EIO	Proposal for a Directive on a European Investigation Order
SAP ECMACM	Second Additional Protocol to European Convention on Mutual Assistance in Criminal Matters

1 A Persistent Backwardness

In matters of police and judicial co-operation in obtaining evidence from abroad, the Italian legal system suffers from severe backwardness. This is primarily due to the failed ratification of some of the most important international agreements in this field, such as the EUCMACM (Brussels, 29 May 2000) and the SAP ECMACM (Strasbourg, 8 November 2001). The main international legal source that regulates this subject in Italy is thus the ECMACM signed at Strasbourg on 20 April 1959 (ratified in Italy by law no. 215 of 23 February 1961, and which entered into force on 12 June 1962), which, according to Article 696(1) of the Italian CCP, prevails over the national rules on active and passive letters rogatory.

On the active front, the basic operative model is still based upon the traditional principle of the request instead of the more advanced idea of integration between jurisdictions.[1] The Italian Eurojust desk has continued to deal mainly (around 90%) with requests of mutual assistance based on letters rogatory. This model is characterized by the following structural elements: (1) a request for co-operation—the rogatory commission—addressed to the foreign State by the Italian judicial authority (usually through the Minister of Justice); (2) the gathering of evidence in accordance with the *lex loci;*[2] and (3) the arrangement of exclusionary rules that regulate the use of foreign evidence in the Italian trial.

According to Article 696 CCP, active rogatories are governed primarily "by the European Convention on Mutual Assistance in Criminal Matters signed at Strasbourg on 20 April 1959, by other international conventions in force, and by norms of general international law." Failing that, "if these norms lack or do not provide otherwise," by the rules of Chapter II, Title III, Book XI of the CCP (Arts. 727–729 CCP). This judicial co-operation instrument (which is not only used for the gathering of evidence, but also for communications or notifications to be served

[1] Cf. Spiezia (2009), p. 191.

[2] See for example Cass. 19 November 1993, Palamara, in *CED Cass.* 198237.

abroad) typically involves a political organ. The judicial authority forwards the letter of request to the Minister of Justice, who may transmit it via diplomatic channels [Art. 727(1) CCP], unless he or she considers that this would compromise the security or other essential interests of the State [Art. 727(2) CCP]. The Minister must make this decision within a relatively short time (30 days from the receipt of the request), after which the judicial authority may directly forward the request to the diplomatic or consular agent, having so informed the Minister [Art. 727(4) CCP]. Moreover, in case of emergency, the judicial authority can directly address the diplomatic or consular agent, without prejudice to the Minister's power to stop the activities until the request has been transmitted to the foreign authority [Art. 727(5) CCP].

Except for cases of urgency or the Minister's inaction, requests for judicial assistance may be transmitted directly by the judicial authority "when an international agreement so provides:" however, in such cases, "the requesting authority must send a copy of the request to the Ministry of Justice without delay" (Art. 204bis CCP Implementing Rules, inserted by Law 367/2001). In this situation, the question arises as to whether the forwarding of the request to the Ministry serves the purpose of activating its power to stop the transmission, similar to the provision of the above mentioned Article 727(2) CCP; both the timing of this duty and the use of the term "Ministry" instead of "Minister," suggest a negative conclusion. It is understood, thus, that the informative report serves the unique function of facilitating the supervision of the Ministry departments over judicial activity.

Which cases of direct co-operation between Italian and foreign judicial authority does Article 204bis CCP Implementing Rules refer to? First, to the one envisaged by Article 53 of the CISA of 14 June 1985 (adopted in Schengen on 19 June 1990, ratified by Italy with Law 388/1993, and which entered into force on 26 October 1997), whereby "requests for assistance may be made directly between legal authorities and returned through the same channels." It has to be noted, however, that according to the case law of the Court of Cassation, the judicial authorities of the signatory Countries of the ECMACM (1959) might exchange direct requests of assistance even outside the Schengen area, and aside from specific bilateral treaties that provide for this possibility (as does the Italian–Swiss Agreement of 1998). It is true, in fact, that Article 15(1) ECMACM establishes that "letters rogatory [...] shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels." On the one hand, this rule does not seem to apply to the preliminary investigation phase [Art. 15(4) ECMACM: "requests for investigation preliminary to prosecution [...] may be communicated directly between the judicial authorities"];[3] on the other, an established practice of direct judicial assistance among the ECMACM signatory countries has a determinant role in the interpretation of the Convention.

The latter conclusion is supported by Article 31 of the Vienna Convention on the Law of Treaties between States and International Organizations or between

[3] Cf. Cass. 9 March 2006, Biego, in *CED Cass.* 234256; Cass. 20 September 2002, Monnier, in *CED Cass.* 222863.

International Organizations of 21 March 1986, which sets forth the basic rules of treaty interpretation (and derives many of its norms from the Vienna Convention on the Law of Treaties of 1969). Its first paragraph states that a treaty must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context, and in the light of its object and purpose. Paragraph 3(b) provides additional related guidance and specifies that, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"[4] shall be taken into account.

2 Foreign Evidence and Italian Exclusionary Rule

The regime of admissibility rules for evidence collected abroad according to the "traditional" model[5] is of great interest to our analysis.

Here, Italian law distinguishes between evidence specifically gathered by foreign authorities in execution of the letter of request and evidence that has already been gathered autonomously within a foreign judicial proceeding.[6] As a rule, in both cases it is provided that:

A. Documents and records of unrepeatable activities can always be used as evidence at trial;
B. Records of witness examinations can be used as evidence at trial only if at least one of these requirements has been fulfilled: (a) the defendant's counsel was present at the taking of the testimony (or was put in a condition to be present); (b) there is the consent of the accused; (c) it is impossible to cross-examine the witness at trial again.

The detailed discussion reads as follows.

[4] Cass. 20 September 2002, Monnier, in *CED Cass*. 222863.

[5] When the Italian legal system guarantees the accused or other parties the right to object to the use of a specific instrument in matter of evidence, the exercise of this right cannot be compromised by the fact that the evidence is to be gathered abroad. Therefore, it is sharable: Cass. (SU) 16 April 2003, Monnier, in *CED Cass*. 224184: "in the field of cross-border cooperation with foreign authorities, even a request for mutual legal assistance aimed at the enforcement of a seizure with evidentiary purpose (*sequestro probatorio*), insofar as it presupposes a (even implicit) order of the Italian judicial authority, is subject to a complaint before the domestic judicial authority, which has the exclusive jurisdiction for assessing the existence of the legal conditions justifying the adoption and continuation of this measure, except the further remedies eventually provided for by the legal system requested for legal assistance." See also, on preventive seizure (*sequestro preventivo*), Cass. 29.9.2009, Sunde Kolmisoppi, in *CED Cass*. 245936.

[6] Certainly, despite some ambiguities in the normative lexicon and order, the principal way of obtaining this evidence is a rogatory letter. Cf. Valentini (2001), p. 2360. However, we will come back to this point when we address the topic of the spontaneous transmission of information between judicial authorities of different States.

A) Evidence gathered abroad in execution of a letter of request can be used under the conditions set forth by Article 431(1)(d) and (f) CCP: if they consist of documents or records of activities that cannot be repeated, they will definitely enter the "trial file" (*fascicolo per il dibattimento*) pursuant to Article 431(1)(d) CCP in order to be assessable as evidence; in other cases, the admission to this file is subject to the condition that "counsel was able to attend the activities and exercise their powers under Italian law" [Art. 431(1)(f) CCP]. Hence, at trial they achieve full value of evidence subsequent to the reading under Article 511(2) CCP. If the witness statements were taken during the preliminary investigation and counsel was put in a position to be able to be present at the examination, however, they may be used as evidence with the consent of the defendant [Arts. 431(2) and 493(3) CCP] or by being read aloud under Article 512bis CCP ("the judge, requested by a party, having taken into account the other evidence admitted, may command the reading of the statements given by a person resident abroad [. . .] pursuant to an international letter rogatory, if this person has been summoned and did not appear in court, and only if the examination at trial is absolutely impossible"). The case law gives a strict interpretation to this last requirement: the judge should preliminarily assess the possibility of a joint rogatory.[7] Nevertheless, if the foreign State does not give its consent—and obtaining the presence of the witness is "absolutely impossible"—reading is allowed. Such a solution does not seem constitutionally objectionable, as the impossibility is clearly "objective" [Art. 111(5) Const.].[8]

B) If the evidence sought by the letter of request was already gathered within the foreign proceedings, its use is subject to the conditions of Article 78 CCP Implementing Rules, which distinguishes between activities carried out by foreign judicial authorities and activities carried out by the foreign police.

B1) In the first case (activities carried out by the judicial authority), the records "may be admitted under Article 238 CCP" [Art. 78(1) CCP Implementing Rules], that is, under the same conditions that allow the admissibility of records between different Italian criminal proceedings. In this respect, the law distinguishes between the records of witness examinations and records of "originally unrepeatable" activities. In the case of witness statements, Italian law provides some very strict requirements. The records can be admitted and used against the defendant only if: (a) his or her counsel has attended the examination (unlikely, as the proceedings are conducted abroad); (b) the repetition of the examination has become impossible due to unpredictable facts and circumstances that have occurred;[9] or (c) the defendant

[7] Cass. 23 April 2009, Remling, in *CED Cass*. 243956; Cass. 22 April 2005, Marku, in *CED Cass*. 234561.

[8] Cf. Daniele (2010), pp. 209 f.

[9] On the assumption that Article 238 CCP is recalled "without additional specifications" by Article 78 CCP Implementing Rules, Cass. 30 January 2003, Lodigiani, in *CED Cass*. 224145, states that the records can surely be read at trial under Article 512bis CCP, even without the consent of the accused (and without assessing the predictability *ex ante* of the impossibility of repetition).

consents to their use [Art. 238(1), (2bis), (3) and (4) CCP].[10] In the case of unrepeatable activities, however, the use of the record as evidence is "admitted anyway" [Art. 238(3) CCP]

B2) In the second case (activities carried out by the police), only the unrepeatable activities can enter the "trial file." In addition, the law requires either the consent of the parties or the cross-examination of the person who performed the act (at the Italian trial or abroad via letter of request) pursuant to Article 78(2) CCP Implementing Rules.

Therefore, in addition to the use as evidence of witness statements given in the (at least potential) presence of counsel, one could say that:

a) Evidence obtained through letters rogatory can always be used during the investigation stage (for the application of precautionary measures and the authorization of interception of communications, as well as for the decision to start criminal proceedings etc.), at the preliminary hearing (*udienza preliminare*), and in alternative proceedings.
   The Court of Cassation has clearly endorsed the above concept in respect of foreign evidence obtained according to Article 78 CCP Implementing Rules. Interceptions of communications carried out by the foreign police can be used for coercive measures even without the defendant's consent and without the police official's cross-examination; witness statements collected abroad can be used during the investigation regardless of the conditions enshrined in Article 238 CCP;[11]
b) All records of "originally unrepeatable" activities performed in a foreign country by a judicial authority may be used at trial, even if the foreign law does not provide for a protection of defense rights comparable to the one provided by Italian law (and even if during such activities defense rights are not protected at all);
c) Witness statements collected abroad without fulfilling the guarantees provided by our legal system which are different from and additional to the active counsel's assistance may be used at trial;
d) Witness statements collected in the absence of counsel can be used in the case of consent or impossible repetition.

[10] In all these cases—except, obviously, the case of "impossibility of repetition"—the accused preserves the right to have the witness examined at the Italian trial [Art. 238(5) CCP]. The witness can be examined in the Italian proceedings even if the records of his/her previous statements cannot be obtained. In this case, statements given abroad can be used only for the so-called "*contestazioni*" (that is, in order to point out possible differences between what has been said in the foreign and in the Italian proceedings) and might, as a rule, only discredit the "Italian" testimony, without counting as a proof of the asserted facts [Arts. 238(4) and 500(2) CCP].

[11] Cf. Cass. 22 January 2009, Pizzata, in *CED Cass.* 243796. See also, for a distinctive opinion, Cass. 23 January 2002, Seseri, in *CED Cass* 221831.

3 Compatibility with the Fundamental Principles of Italian Legal System

However, in the wake of a landmark decision of the Constitutional Court (Dec. 379/1995) and after the redrafting of Article 431 CCP by Article 26 of Law 479/1999—even though the legislator had intervened with the professed purpose of turning the precepts of the Constitutional Court into law—the Court of Cassation has repeatedly clarified that, in all the above-mentioned cases, the use at trial of foreign evidence is subject to an implicit requirement: *compatibility with the fundamental principles of the Italian legal system*.[12]

It is worth saying immediately that this criterion is likely to impose considerable sacrifices on our country in relation to the defense rights of the accused, as well as to the quality of the judicial assessment of the facts. Italian law protects some fundamental rights, such as the right to defense, and some fundamental principles, such as the principle of adversary hearings in the evidence gathering (*principio del contraddittorio nel momento di formazione della prova*) enshrined in Article 111(4) Const., at levels that exceed, in several ways, the minimum standard required for compliance with them. It is precisely this surplus of guarantees (subjective and objective) that ends up compromised when the law allows the use of foreign evidence that is merely "compatible" with those principles. Italian judges assess the level of harmonization between the two standards involved in a co-operation procedure according to the same ratio of efficiency that inspires—at the European level—the principle of mutual recognition (envisaged by Article 69 A of the Treaty of Lisbon[13] and Article 1(3) of the FD EEW).[14] The principle is not "aimed at meeting the highest level of guarantees provided in Europe, to which every State should adapt; its purpose is, instead, finding a minimum accepted level in order to transfer the evidence."[15] The goal, thus, is not to "work at a common strategy in order to foster those procedural rules that provide for the best balance between the

[12] With reference to previously gathered evidence in foreign proceedings, see for example Cass. 8 March 2002, Pozzi, in *CED Cass.* 222025; Cass. 1 December 2000, Rondinella, in *CED Cass.* 218214; Cass. 10 July 1997, Ibba, in *CED Cass.* 208492; Cass. 20 May 1993, Nicosia, in *CED Cass.* 194850.

[13] In the part in which it provides that the European Parliament and Council, taking into account the "differences between the legal traditions and systems of the Member States," can "*establish minimum rules*" about "mutual admissibility of evidence between Member States."

[14] "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, and any obligations incumbent on judicial authorities in this respect shall remain unaffected." To the point, critically—but in the sense that such clause could harm the effectiveness of the interstate cooperation—Vervaele (2009), p. 155.

[15] Illuminati (2009), p. 15.

interest of justice and the protection of human rights, but is to identify and remove the obstacles to the free movement of evidence."[16]

In the European area, this minimum standard ends up matching, for the most part, the catalogue of defendant's rights developed by the ECtHR. Leaving aside the well-founded perplexities concerning the suitability of the Strasbourg Court to guarantee effective harmonization of continental rules in matters of evidence,[17] the point is that this tendency leads to a result which is only partially satisfactory—this bears repeating—especially with regard to the quality of the judicial assessment of the facts as well as the rights of the accused—for legal systems which, like ours, have endorsed a more demanding approach.[18]

In this respect, there is an emblematic decision of the ECHR concerning the request for a witness statement that was taken in the absence of counsel.[19] In the opinion of the Court, the rights of the defense are restricted to an extent that is incompatible with Art. 6 of the Convention only if the conviction "is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial." This model, whereby the right to examine witness may be postponed, clearly runs counter to our legislator's choices in criminal procedure.[20]

Italian case law in matters of admissibility of evidence gathered through letters rogatory follows this conceptual framework (although references to the ECHR's decisions remain understated). For example, witness testimony taken through the direct questioning of a judge has been deemed compatible with the principle of adversary hearings in the formation of evidence,[21] despite the fact that this technique disregards one of the most distinctive ways that this principle is implemented in our legal system.

The Court of Cassation has come to the same conclusion with reference to some evidence taken abroad in the absence of an Italian public prosecutor (*pubblico ministero*)[22] and, what is more, with reference to some evidence gathered in the presence of the counsel but in the absence of the defendant (even though he had expressly asked to be present).[23]

[16] Allegrezza (2009), p. 167.

[17] Cf. Allegrezza (2007), p. 704, 713, whose opinions are shared by Mazza (2009), pp. 156 ff.

[18] Cf. Allegrezza (2009), p. 169.

[19] ECtHR, 14 December 1999, A.M. v. Italy, Application No. 37019/97.

[20] Cf. Daniele (2010), pp. 211 f.

[21] Cass. 28 April 2009, Russo, in *CED Cass*. 243938. See also Cass. 29 April 1993, Terranova, in *CED Cass*. 194901.

[22] Cass. 6 May 2004, Ciaglia, in *CED Cass*. 228241.

[23] Cass. 1 December 2010, De Falco, in *CED Cass*. 248963; Cass. 26 September 2007, Drago Ferrante, in *CED Cass*. 238041; Cass. 7 October 2005, Schneeberger, in *CED Cass*. 232701; Cass. 3 March 2003, Figini, in *CED Cass*. 225744; Cass. 13 July 1999, Pafumi, in *CED Cass*. 214338.

Leaving aside any consideration about these disputable interpretations,[24] there is the risk of a progressive reduction of the content of the adversary principle until it becomes unrecognizable. Conscious of this risk, the Court of Cassation has often resorted to a trenchant argument: using letters rogatory in order to obtain evidence that was not gathered through an adversary proceeding would not violate Article 111(4) Const.,[25] as "the following paragraph of the same article provides that formation of evidence might not occur in an adversarial proceedings in case of ascertained objective impossibility." This would be exactly the case because "a foreign legal system cannot be expected to adjust to the constitutional principles of another State."[26]

This change of perspective is very dangerous: falling within the system of exceptions envisaged by Article 111(5) Const., even the evidence gathered abroad in total disregard of the principle of adversarial hearings would find its way into the Italian trial. For example, anonymous testimony, which the ECHR holds under certain circumstances to be compatible with Article 6 of the Convention, would not necessarily be covered by Articles 431 CCP and 78 CCP Implementing Rules.[27] Be that as it may, the distance from a logic of harmonization is huge: co-operating with a foreign judicial authority would make it "objectively impossible" for Italy to demand the respect of its own fundamental principles in matter of evidence.

The same logic of a "minimum standard" of compatibility with fundamental principles of our legal system is applied with respect to the relationship between the admissibility of evidence obtained abroad and the protection of the right to defense.

In the opinion of the Court of Cassation, protecting the "basic requirements" (*esigenze essenziali*) of this right will be enough:[28] mandatory norms and fundamental principles of the legal system, compliance with which is indispensable in order to consider the evidence gathered abroad admissible, "do not necessarily

[24] In the first of the three mentioned cases, the statement does not even seem to be taken in a context in which the counsel could "exercise the power of which he/she has been invested by Italian law" [Art. 431(f) CCP]: therefore, it seems that even the minimum condition required to text the compatibility of this evidence with the fundamental principles of our legal system is missing. On the topic Daniele (2010), p. 204 ff. It is not so in the last case, as correctly pointed out by Cass. Drago Ferrante (footnote 23), since Article 431(f) CCP subordinates the insertion of the evidence in the trial file to the condition that "counsel"—and not also the defendant—was put into condition to attend the activity. It must be further pointed out that the "domestic" circulation of evidence is subordinate, under Article 238 CCP, only to the presence of counsel (and furthermore, in a trial that deals with other crimes).

[25] "The criminal process is ruled on the basis of the adversary principle in the gathering of evidence."

[26] Cass. 28 November 2002, Acri, in *CED Cass.* 223202. In the same sense, among others, Cass. 28 April 2009, Russo, in matter of the taking of witnesses statements without *cross-examination*, Cass. Drago Ferrante (footnote 23), in matter of the taking of evidence in the absence of the defendant, and Cass. 16 May 2001, Celotti, in *CED Cass.* 219740, in matter of obtaining via rogatory letter of documental evidence.

[27] Similar remarks in Daniele (2010), p. 208.

[28] Cass. 28 September 1995, Baldini, in *CED Cass.* 203070.

correspond to the rules contained in the Code of Criminal Procedure, and, particularly, to the rules governing the different modalities through which the rights of the defense can be exercised."[29] The regulation of these formalities in terms of major or minor individual guarantees falls within the "discretionary powers of the legislator, which are not imposed by the Constitution."[30]

Therefore, in the view of the Court, the following evidence can be admitted at trial:

(a) statements made abroad in the absence of counsel by people who are accused of a related or connected crime (*imputati di reato connesso o collegato*);[31] (b) statements made abroad by people who are accused of a related or connected crime whose examination has not been preceded by the same warnings as those required by our law,[32] or whose statements have not been recorded in the same forms;[33] (c) statements given abroad in the absence of the defendant's counsel where counsel, nevertheless, has received a regular notice and was put in a position to be able to be present.[34] In the same way, the rules governing the duty of confidentiality of witnesses have not been considered to be an expression of a fundamental principle of the Italian legal system.[35]

With reference to "originally unrepeatable" activities, it has been said, *inter alia*, that wiretaps made abroad can be admitted into the trial file if they were made "within the fundamental constitutional guarantees of our legal system."[36] Therefore, wiretaps need only to be executed "with the authorisation and under the supervision of the judicial authority, within the prescribed time limits and in the full respect of the constitutional balance of the right to privacy and secrecy of communications with the necessity to prosecute crimes causing a special social alarm."[37]

Moreover, according to the Court of Cassation, Italian judges would not be able to question the compliance of the evidentiary activities with the *lex loci*, since there is, on this point, a presumption of legitimacy of the judicial activities carried out abroad.[38]

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[29] So, for example, Cass. 22 January 2009, Pizzata, in *CED Cass.* 243795.

[30] Cass. Pafumi (footnote 23).

[31] Cass. 22 January 2009, Pizzata, in *CED Cass.* 243795; Cass. 21 September 2007, Basco, in *CED Cass.* 238207; Cass. 22 September 2004, Cuomo, in *CED Cass.* 230594; Cass. 28 Novermber 2002, Acri, in *CED Cass.* 223202; Cass. 5 March 1999, D'Ambrosio, in *CED Cass.* 212981; Cass. 13 December 1996, Covello, in *CED Cass.* 206777.

[32] Cass. 3 March 2003, Acri, in *CED Cass.* 226069.

[33] Cass. 5 March 1999, D'Ambrosio, in *CED Cass.* 212981.

[34] Cass. 8 November 2007, Sommer, in *CED Cass.* 239193.

[35] Cass. (SU) 25 February 2010, Mills, in *CED Cass.* 246587.

[36] Cass. 6 July 1998, Bonelli, in *CED Cass.* 211301.

[37] Cass. Bonelli (footnote 36).

[38] Cass. 18 May 2010, Mutari, in *CED Cass.* 247750; Cass. 19 February 2004, Montanari, in *CED Cass.* 228354; Cass. 27 November 1995, Staiti, in *CED Cass.* 204136.

In general, Italian judges cannot be said to have put the admissibility of foreign evidence obtained by letters rogatory through a particularly rigorous test.[39] The complexity and intricacy of these mechanisms might have had an influence on the judges' attitude. As it has been rightly held, "whenever a rogatory finally prevails over every obstacle of international and foreign law, it almost seems irresponsible (especially in case of the gravest crimes) to squander, in whole or in part, such hard-earned evidence."[40] This is also the reason why Italian law and judicial practice have progressively fostered, as we will see shortly, different and more advanced methods of judicial cooperation.

4 A Virtuous Model

Certainly a virtuous model of integration between jurisdictions evidence matters is the one proposed by Article 4 EUCMACM and by Article 8 SAP ECMACM. This model imposes on the requested State the observance of the formalities and the procedures expressly indicated by the requesting State which are not in contrast with the fundamental principles of its own legal system.

Compared to the logic of the necessary application of the *lex loci* included in the ECMACM, this is an almost Copernican revolution[41] (a similar approach is noticeable in the FD EEW[42] and in the PD EIO).[43] Entrusting the requested State with the task of checking compatibility with fundamental principles of its own legal system makes it possible to properly guarantee the compliance of the higher qualitative standards demanded by the legislation of the requesting State; integration between the two rules, therefore, is increasing.

Unfortunately, in the absence of the ratification of the two above-mentioned Conventions, Italian judicial authorities cannot generally adopt this co-operation model, which is expressly allowed by Articles 727(5bis) and 729(1bis) CCP, but

[39] In this respect, it is worth recalling the critical considerations made about the modifications of Art. 431 CCP with Law 479/1999. Cf. Caprioli (2000), p. 295.

[40] Melillo (2009), p. 110.

[41] Cf. Allegrezza (2007), p. 718 f.; Perduca (2009), p. 351.

[42] Article 11(2) FD EEW establishes that "[a]ny measures rendered necessary by the EEW shall be taken in accordance with the applicable procedural rules of the executing State." But according to Article 12 FD EEW, "the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Framework Decision and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. This Article shall not create an obligation to take coercive measures." On this topic, Mazza (2009), pp. 159 f.

[43] According to Article 8(2) PD EIO, "the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and unless that such formalities and procedures are not contrary to the fundamental principles of law of the executing State."

only in the presence of an international agreement [Art. 727(5bis) CCP].[44] The feasibility of this model, therefore, is currently limited to specific bilateral agreements which make provision for it, such as the Treaty on Mutual Assistance in Criminal Matters between the Government of the United States of America and the Italian Republic signed on 3 May 2006 and which entered into force on 1 February 2010 [Art. 4(2)], the Swiss–Italian Agreement on Judicial Cooperation signed on 10 September 1998 (Art. V), the UN CTOC, signed in Palermo on 12–15 December 2000 [Art. 18(17)].

It is worth noting that, in these cases, not only does Italian law allow the requesting authority to "specify the modalities" of the execution of the request and to "indicate the necessary elements for the use of the requested acts at trial" [Art. 727(5bis) CCP], but it also excludes, making them unusable (*inutilizzabili*), all the acts performed by the foreign authority according to procedures that are different from the ones indicated in the request [Art. 729(1bis) CCP]. However, one has to give a reasonable interpretation to this rule. Thus, the serious sanction prescribed by Article 191 CCP—i.e., the non-usability (*inutilizzabilità*)—does not apply whenever the failure to comply with the modalities of execution indicated in the request would not prevent the act from realizing its effects in the Italian legal system; in other words, whenever the modalities of the execution correspond to procedural rules whose noncompliance determines the mere irregularity of the act.[45] The disputable choice to exclude the evidence taken in violation of norms whose noncompliance would determine the (minor) sanction of nullity (*nullità*) pursuant to Articles 177–185 CCP,[46] instead, does not seem amendable with interpretation.

5 Joint Rogatories

The possibility of "exporting" means of gathering evidence that are more reliable and respectful of individual guarantees is also afforded by customary norms such as Article 4 ECMACM[47] that envisage the joint execution of requests (*rogatoria "concelebrata"*), that is, the performance of the acts in the presence of Italian magistrates. These, as well as the parties to the proceedings, can be entitled to participate in the taking of evidence in a way that may vary in intensity, up to the extreme of the direct application of the law of the requesting State (the foreign

[44] Cf. Cass. 27 November 2002, D'Avino, in *CED Cass.* 223178.

[45] Cf. Ferrua (2001), p. 36.

[46] Scella 2003, p. 365. See also Cass. Pozzi (footnote 12).

[47] "On the express request of the requesting Party, the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents."

judge being a mere supervisor of the regularity of the proceedings and the respect of the fundamental principles of his or her own legal system).

The main difference with the model described in Article 4 EUCMACM lies in the necessary consent of the requested State.[48] This consent must be based—especially for the forms of joint rogatory involving a greater sovereignty cession for the requested State—on a specific conventional disposition.

Italian case law has clarified that "joint rogatories still postulate the exercise of judiciary power only by the foreign judge, who mediates the possible intervention of the organs of the requesting party; the requesting party, therefore, does not exercise any judiciary power on the territory of the foreign State."[49] Accordingly, it has been inferred that the *Corte d'Assise* can effectively be represented abroad only by professional judges (and not by lay judges),[50] and that the absence of an Italian judge could not in any way be traced back to an hypothesis of nullity under Article 178(a) CCP.[51]

In any case, this practice is "still dependent upon the extemporary consent of the foreign authority and its reliability is still uncertain from the point of view of the possibility of using the evidence obtained."[52]

6 "Spontaneous Transmission" of Evidence

Finally, it has to be highlighted that, next to the traditional model of judicial co-operation based on letters of request, the practice of a more versatile form of co-operation, endorsed by the Court of Cassation, is currently underway. It is the model based on "spontaneous transmission" of documents and information from foreign judicial authorities to the Italian ones.

Many supranational legal sources allude to the possibility of a spontaneous exchange of information between authorities from different States. Thus, Article 46 CISA establishes that "in particular cases, each Contracting Party may, in compliance with its national legislation and without being asked, send the Contracting Party concerned any information which may be of interest to it in helping prevent future crime and to prevent offences against or threats to public order and security." Article 10 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed on 8 November 1990, provides that "without prejudice to its own investigations or proceedings, a Party may, without prior

[48] "The requested State is free either to provide or to deny the authorization for the participation, with the only to duty to inform the requesting judges of date and place of enforcement." In this sense Cass. (SU) 25 February 2010, Mills, in *CED Cass.* 246588.

[49] Cass. (SU) Mills (footnote 48).

[50] Cass. 24 October 2001, Modeo, in *CED Cass.* 220633.

[51] Cass. (SU) Mills (footnote 48).

[52] Vigoni (2003), p. 459.

request, forward to another Party information on instrumentalities and proceeds, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings or might lead to a request by that Party under this chapter." Article 28 of the Swiss-Italian Agreement on Judicial Cooperation signed on 10 September 1998, provides that "the judicial authority of one State can, without prior request, forward to the judicial authority of the other State information pertaining to criminal facts," *inter alia*, when "they believe that the exchange of this information could help the receiving authority in initiating or carrying out investigations and proceedings." Similar rules appear in Article 7 EUCMACM and in Article 11 SAP ECMACM, but as we already know, neither of them has been ratified by Italy.

Relying upon these legal bases—but not without some evident external pressure—the Court of Cassation now considers that information spontaneously transmitted by foreign judicial authorities to Italian ones (though it would be better to talk about "informal" transmission, because the act is not always purely "spontaneous")[53] could legitimately replace, in many cases, the outdated model of letters of request.[54] The reception of evidence already and autonomously gathered abroad, ruled by Article 78 CCP Implementing Rules, should be considered unrelated to the logic of rogatory letters and entirely referable to the model of spontaneous co-operation. As the Court of Cassation clearly states

> the transfer of documents between different legal systems is expressly governed by Article 238 CCP and 78 CCP Implementing Rules, which are placed among the dispositions in matter of evidence. It is true that this subject shares many similarities with that of rogatory letters; however, in this case, unlike rogatory commissions, the transferring State has already and autonomously carried out investigations, of whose results the receiving State can take advantage.[55]

This interpretation denotes a specific (even though not entirely commendable) purpose: reducing the applicability of the sanction of non-usability under Article 729(1) CCP as much as possible.[56] This is in fact the corollary that the Court of Cassation draws from its premises: "the sanction of non-usability under Article 792(1), as amended by Article 13 of Law 367/2001, is of a special type; as such, it does not apply by analogy or extension outside its specific area of applicability,

[53] Cf. Melillo (2009), p. 103.

[54] In the opinion of Cass. 2.7.2008, Catanese, in *CED Cass.* 240956, "the rogatory letters concern solely, and aim at protecting, the mutual relationships between States in order to avoid undue interference in the sphere of the respective sovereignity and jurisdiction. Where a State decides to provide information relating to a ongoing criminal proceeding, there is no infringement of national sovereignity."

[55] Cass. Pozzi (footnote 12).

[56] "The violation of the norms under Article 696(1) concerning the taking and the transferring of documents or other evidence in the execution of a letter rogatory determines their unusability."

that is, the one of letters rogatories. Consequently, it does not apply to the obtaining of information pertaining to a foreign criminal proceeding, which has been spontaneously and autonomously forwarded to the Italian judicial authority."[57]

In reality, the practice of spontaneous transmission of documents and information following previous agreements is largely taking the place of the rogatory model even when an Italian judicial authority asks the other Party to carry out a specific investigation (and not simply to transfer information or evidence already autonomously gathered). As Melillo has clearly explained, we are witnessing the spreading of investigation procedures aimed at governing the taking of evidence in the interest of another State, rather than charging someone with an offence according to national law; in other words, these investigation procedures are meant to aid judicial co-operation prior to the start of criminal proceedings against a suspect.[58]

For example, if an Italian prosecutor knows that someone under investigation for drug trafficking is going to move abroad, he or she has two options for intercepting communications and obtaining the results of this investigative activity: he or she can ask the foreign judicial authority to put the suspect's phone under control through a proper letter of request; but he or she can also come to an unofficial agreement with the foreign authority in order to commence an investigation in which the interception will be carried out and whose results will then be "spontaneously" communicated to Italy.

Practices like the one just described come in useful especially to fill the normative gap due to the lack of implementation by Italy of the FD JIT. To this end, there have been many legislative proposals, but they have so far yielded no fruit.[59] One of the most controversial points concerns the use at trial of investigative activities carried out abroad by the JIT. Usually, the above mentioned proposals allow admission into the trial file only for the unrepeatable activities; sometimes, though, admission is also envisaged for the repeatable ones, provided that they were performed in full compliance with Italian law; at others, both unrepeatable and repeatable activities can enter the "trial file" under the twofold condition that investigative activities "are not in contrast to the fundamental principles of the Italian legal system 'and that they were carried out' with limits and modalities that are similar to the ones provided by Italian law for the corresponding activities performed according to the Italian criminal procedure" (in particular, Directive 110.4 of the legislative proposal drafted by the Commission of Reform of the Code of Criminal Procedure, chaired by Prof. Riccio, during the XV legislature).

From the point of view of the standards of protection of defensive rights demanded by our legal system, the change of perspective does not seem to be very significant. Even the evidence spontaneously transmitted to Italy must pass, in

[57] Cass. Pozzi (footnote 12). In the same perspective Cass. 27 May 2009, D., in *CED Cass.* 244087; Cass. 20 February 2009, Gallitelli, in *CED Cass.* 243429; Cass. Catanese (footnote 54); Cass. 27 January 2005, Biondo, in *CED Cass.* 231048.

[58] Melillo (2009), p. 103.

[59] Cf. Melillo (2009), pp. 107 f.; Vitale (2010), pp. 83 f.

the Court of Cassation's view, through two layers of admissibility: first of all, Article 78 CCP Implementing Rules[60] and, on a residual basis (for example, when the evidence has to be used exclusively for precautionary aims), the test for compatibility with fundamental principles of the Italian legal system.[61] However, there is still a fundamental difference between the "orthodox" procedure based on letters of request and informal/spontaneous co-operation. The latter, in fact, is played on a field that is also hidden *a posteriori* from the eyes of the defence. If the preliminary investigation undertaken abroad does not lead to favourable results for the prosecution, the foreign authority is not obliged in any way to communicate these results to Italy.[62]

There are enough reasons to distrust similar practices and to call for legislative intervention which, aware of the structural and functional limits of the rogatory model, would ground the relationships of judicial co-operation in evidence matters on new bases, balancing efficiency and individual rights guarantees with a view to promoting integration between different jurisdictions.

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Melillo G (2009) Tecniche investigative speciali e squadre investigative comuni. In: Illuminati G (ed) Prova penale e Unione Europea. Bononia University Press, Bologna, p 93 ff

[60] This conclusion can be shared: even if Article 78 CCP Implementing Rules was primarily intended to govern the destiny of evidence obtained via rogatory letter (Valentini 2001, p. 2360), there is no doubt that it also applies when the foreign evidence has been spontaneously transmitted to the Italian judge.

[61] Cass. Pozzi (footnote 12).

[62] The risk that informal contacts between Italian and foreign authorities involve a "totally discretionary selection of the results of the evidence gathered abroad" is precisely reported by Melillo (2009), pp. 103 f.

Perduca A (2009) Prove, investigazioni e cooperazione giudiziaria su scala europea. In: Various Authors, Processo penale e giustizia europea. Atti del XX Convegno dell'Associazione tra gli studiosi del processo penale. Giuffré, Milano, pp 347 ff

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Report on Mexico

Javier Dondé-Matute

Contents

Abstract This chapter examines the domestic and international law applicable in the framework of mutual legal assistance in criminal matters related to Mexico. It starts with the study of cross-boarder investigations and the obtaining, admissibility and transfer of evidence with an emphasis in the protection of fundamental rights, taking also into account the special regulations in the field of organized crime. Finally, it is analyzed the cooperation between Mexico and the international criminal tribunals, especially the ad hoc tribunals and the International Criminal Court.

Abbreviations

ACHR	American Convention on Human Rights
FCCP	Federal Code of Criminal Procedure (*Código federal de procedimiento penal*)

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IACHR	Inter-American Convention of Human Rights
IACMACM	Inter-American Convention on Mutual Assistance in Criminal Matters
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
PGR	Office of the Federal Attorney-General (*Procuraduría General de la República*)
UN CITNDPS	United Nations Convention against Illegal Traffic in Narcotic Drugs and Psychotropic Substances
UN CTOC	United Nations Convention against Transnational Organised Crime

1 Introductory Remarks

The goal of this article is to provide enough information for a comparative study regarding international cooperation and fundamental rights, but it is also to assess the degree of compliance of the national scheme with more universal fundamental and human.

To set out an adequate scope for this analysis, some matters need to be clarified from the outset. The fact that Mexico has a federal system of government is perhaps the most important factor that needs to be considered. This means that each of the 32 states has its own criminal legal system that operates alongside the federal and military procedural codes. However, the Federal Constitution does provide a list of due process provisions and basic principles which all jurisdictions must comply with. Therefore, to simplify the current analysis, only the Federal legal system will be considered.

Another important issue is that Mexico is going through a radical overhaul in its criminal procedure. An adversarial system is being set up, like in most Latin-American countries. While the constitutional scheme is now in place, the different statutory codes still need to be enacted. The current analysis will focus on the new system, especially when addressing fundamental rights, which all have a constitutional basis, and which suffered some changes, particularly regarding due process considerations.

The current state of criminal procedure means that the section dealing with current and future developments is especially important. There are several new bills that will soon be presented to Congress. Consequently, only the bills that are closer to enactment will be considered.

Finally, there is very little legislation regarding mutual assistance at the federal level and practically no case-law. This will seem obvious from the very first section. However, other aspects such as fundamental rights have a more developed framework. In these cases the Federal Constitution, federal law, and case-law will be analyzed, but most of the regulations are in international treaties.

2 Cross-Border Investigations and Fundamental Rights

2.1 Basic Legal Scheme

The legal instruments available in Mexico for transnational evidence gathering are almost entirely treaty-based. There are no constitutional provisions which refer to transnational cooperation aside from Article 119, which deals with extradition. Similarly, the Federal Code of Criminal Procedure has only three articles that deal with this matter.

Article 58 mentions that federal courts which require foreign assistance must first go before the Supreme Court which will in turn ask the embassies to carry out the request.[1] Article 59 states that the request may be channelled through the secretaries at the embassies or the consular agents.[2] Article 60 requires foreign courts seeking assistance to comply with the all legal requirements including those found in treaties.[3]

These articles also provide rules regarding the legalization of signatures of court officials or diplomats, but nothing more is forest out. Despite the fact that Article 60 implies that there are laws which provide for different requirements and formalities which need to be carried out before a request can be sent abroad, there are no other provisions, at least not at the federal level.[4] Consequently, the legal framework heavily relies on international treaties.[5]

The codes of criminal procedure which will bring in the adversarial procedure in Mexico will also have an impact on transnational inquiries. The constitutional provisions are already in place, but it is now necessary to adjust the codes of criminal procedure. This has brought about a series of model codes of criminal procedure which may be used by the states in their reform process. Two of these

[1] "*Los exhortos dirigidos a los tribunales extranjeros se remitirán, con aprobación de la Suprema Corte de Justicia, por la vía diplomática al lugar de su destino. Las firmas de las autoridades que los expidan serán legalizadas por el Presidente o el Secretario General de Acuerdos de aquélla y las de estos servidores públicos por el Secretario de Relaciones Exteriores o el servidor público que él designe*."

[2] "*Podrá encomendarse la práctica de diligencias en países extranjeros a los secretarios de legaciones y a los agentes consulares de la República, por medio de oficio con las inserciones necesarias*."

[3] "*Los exhortos de los tribunales extranjeros deberán tener, además de los requisitos que indiquen las legislaciones respectivas y los tratados internacionales, la legalización que haga el representante autorizado para atender los asuntos de la República en el lugar donde sean expedidos*."

[4] By contrast, procedural codes usually have a more detailed framework dealing with assistance amongst states of the Union, but these provisions may not be used in matters of cooperation with foreign authorities, since it is common that they mention they deal with the constitutional norms which provide for such assistance.

[5] See Bueno Arús and De Miguel Zaragoza (2003), pp. 245–247. In Spain the domestic legislation in these fields is also very scarce.

have been especially influential. There is the Model Code of the Adversarial Criminal Procedure for the States and the project of a Federal Code of Criminal Procedure.

None of these include sweeping changes specifically in the field of transnational cooperation, but there are some interesting propositions. Both codes remove the requirement to go before the Supreme Court when a lower tribunal needs assistance from abroad. While the Model Code does not specify a particular procedure, simply referring to the treaties Mexico is a party to,[6] the Federal Code mentions that the courts may ask the "diplomatic authorities" abroad directly.[7]

The Federal Code does have two clauses which merit some comments. First, it states that all requests from abroad must be translated if they are not in Spanish.[8] This article may be at odds with those treaties which no longer require translations. The other interesting clause states that pre-trial measures, which may affect the rights of individuals (personally, on their property or rights generally), need to be approved by the courts, while other forms of assistance may be carried out without the courts approval.[9] Again, this may be in violation of those treaties which do not require any special formalities. In both cases, the fact that treaties supersede federal law may make these paragraphs null and void.

This meagre national legal basis contrasts sharply with the amount of international treaties that Mexico is a party to. Currently there are 30 such bilateral treaties which regulate judicial assistance in criminal matters. Mexico is also a party to the IACMACM as the sole multiparty and regional treaty on these issues. However, 37 bilateral treaties have been signed which deal with specific crimes: 2 regarding tariff fraud, 2 dealing with organized crime and 33 with drug trafficking. Finally, 5 multilateral treaties dealing with specific crimes but with provisions on mutual assistance have been ratified, most notably the UN CTOC and the UN CITNDPS.

It is also interesting to point out that Mexico is party to only four bilateral conventions with members of the European Union: Spain, France, Portugal and Greece. On the other hand, Mexico has signed a bilateral treaty specifically on organized crime with Italy and treaties on drug trafficking with the United Kingdom, Italy, France, Spain and the European Council.

The amount of treaties to which Mexico is party may seem small in comparison to other States, but by contrast, just over 30 extradition treaties have been signed, contrasting sharply with those dealing with judicial assistance in criminal matters.

This legal structure has the following consequences. First, there are very few legal precedents that interpret matters of transnational cooperation. Secondly, legal literature regarding this matter is also very scarce.[10] Thirdly, unless otherwise

[6] *Código Modelo del Proceso Penal Acusatorio para los Estados de la Federación*, *Comisión Nacional de Tribunales Superiores de Justicia de los Estados Unidos Mexicanos* (2007–2009), Art. 67.

[7] *Proyecto De Código Federal de Procedimientos Penales* (2010), Art. 105(1).

[8] *Ibid*., Art. 105(2).

[9] *Ibid*., Art. 105(3).

[10] One exception is Villareal (2004).

provided (presumably in a treaty), the national rules that govern evidence gathering apply regardless of the fact that the request originates from abroad. This includes most notably matters regarding fundamental rights and judicial review, in particular complying with the standards of the ACHR and its enforcement mechanisms.

This lack of regulations is also present in the administrative structure of the PGR which does not have a single centralized unit that deals with transnational cooperation. There is a General Directorate on Transnational Cooperation; however, it does not have powers to implement any of the international treaties or the law itself.[11] Similarly, the General Directorate on Extradition and Legal Assistance can only oversee compliance with international treaties that deal with transnational cooperation and aid the federal and state authorities in obtaining information from foreign authorities.[12] The closest administrative body that has investigative powers is the General Directorate on International Police Affairs, which serves as a liaison office with INTERPOL. However, according to the internal regulations, its investigative powers are limited to the location and retrieval of stolen vehicles, aircraft or vessels in conjunction with consular offices abroad.[13] It also has powers to locate, retrieve and repatriate stolen pieces of art, including those with historical or archaeological value, also in coordination with consular offices abroad.[14] This office also has the power to coordinate the federal, state and municipal police forces in order to comply with international obligations, regarding police work.[15] Many forms of evidence gathering require police work when this General Directorate has some intervention power, but the actual cooperation is carried out by the federal, state or municipal authorities.

As seen above, there is no federal law that establishes any specific procedure regarding the transfer of evidence. Each treaty has peculiarities that must be observed. All treaties state that the PGR will be the Central Authority for the purposes of transferring evidence[16] and, in particular, the General Directorate of Extradition and Legal Assistance will coordinate these petitions between the foreign and local authorities. Hence, when a Mexican authority is petitioned, the request must be address to the PGR, which in turn will forward it to the official that has jurisdiction over the matter. This official will then carry out the request in accordance with the international treaty. Conversely, when a federal or state court needs assistance from a foreign court, the PGR will carry out the request through the consular or diplomatic channels abroad. As seen above, in the case of federal courts, these need to address the request before the Supreme Court, who will, in turn, forward the request through the PGR.

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[11] See *Reglamento de la Ley Orgánica de la Procuraduría General de la República*, Art. 36.

[12] *Ibid*., Art. 35(VI) and (VII).

[13] *Ibid*., Art. 64(V).

[14] *Ibid*., Art. 64(VIII).

[15] *Ibid*., Art. 64(XIII).

[16] *Tratado de Cooperación entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre Asistencia jurídica mutua*, Art. 2; *Convenio de Asistencia Jurídica en materia penal entre los Estados Unidos Mexicanos y la República Francesa*, Art. 2.

The different international treaties usually specify the forms of cooperation which are available to the investigative or judicial authorities. As far as evidence is concerned, the most prominent deals with witness testimony, obtaining documents or carrying out search warrants (and transferring the evidence that may be found).[17] Some treaties include gathering testimony from expert witnesses[18] and judicial inspections.[19]

As far as witness testimony is concerned, some treaties provide for the transfer of persons who are already in custody, so that they may testify abroad. Treaties make it very clear that this only applies to potential witnesses that are already detained, for any number of reasons, such as awaiting trial or those who have already sentenced. These treaties also expressly point out that they do not extend to extraditions. This means that the people in custody may not be tried abroad since this would require a temporary extradition, which will obviously fall outside of the object of the treaty.

There are other forms of cooperation usually included in these treaties, such as pre-trial measures; and others which do not directly deal with transfer of evidence, such as summons, locating and identifying persons and exchange of information. Some treaties may include a general clause which permits any other form of assistance when there is mutual consent from the parties and it would not contravene the object and purpose of the treaty.[20] Other treaties may simply state that evidence may be obtained from abroad, without specifying the particular forms that may be requested.[21]

As for the requirements needed to execute the request, one might point out that the *locus regit actum* rule is the basis for collaboration. In the case of Mexico, the lack of precise regulation means that the request must not be illegal or unconstitutional. The most common formula simply states that the request may be refused if it is contrary to the requested State's legal order, the treaty itself, or may harm its national security or public order.

The treaties to which Mexico is a Party usually detail the content of each request; however, there seems to be a trend that relaxes the formalities. One striking example is the bilateral treaty with France, which does not even require translations

[17] *Tratado de Cooperación entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre Asistencia jurídica mutua*, Art. 1; *Tratado de Cooperación entre el Gobierno de os Estados Unidos Mexicanos y el Gobierno de la República de Bolivia sobre asistencia jurídica mutua en materia penal*, Art. 1.

[18] *Convenio de Asistencia Jurídica en materia penal entre los Estados Unidos Mexicanos y la República Francesa*, Art. 5 (2); *Convención Interamericana sobre asistencia mutua en materia penal*, Art. 7(c).

[19] *Acuerdo de Cooperación en materia de Asistencia Jurídica entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de la República de Colombia*, Art. 3(1)(d).

[20] *Tratado de Cooperación entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre Asistencia jurídica mutua*, Art. 1(4)(i); *Tratado de Cooperación entre el Gobierno de os Estados Unidos Mexicanos y el Gobierno de la República de Bolivia sobre asistencia jurídica mutua en materia penal*, Art. 1(i).

[21] *Tratado de Extradición y Asistencia mutua en materia penal entre los Estados Unidos Mexicanos y el Reino de España*, Art. 14.

of the documents[22] and even the possibility to forgo the Central Authorities allowing the requesting authority to address its counterpart directly. Indeed, more modern bilateral treaties expressly state that legalizing signatures of the functionaries and other such formalities are not necessary.

Along with the transfer of evidence, pre-trial measures are the most important forms of cooperation contained in the treaties Mexico is party. However, these also involve some standard clauses which are found in most mutual legal assistance treaties. These include seizures and freezing assets or property[23] or any form of temporary lien before or during trial on property.[24] Usually the property which is subject to these measures is objects, instruments or the proceeds of the crimes allegedly committed.[25] It is also important to note that these measures are also subject to the *locus regit actum* rule. This may be important in the field of organized crime, where Mexico has enacted asset recovery and domain extinction mechanisms which are not known in many other countries, so these requests may be denied.

It is important to note that none of the treaties to which Mexico is a party deals with the right to liberty, since this is a measure that is exclusive to the extradition process.[26] As mentioned above, some treaties even go so far as to expressly exclude extradition, meaning that any form of detention which is part of this process would automatically be excluded.[27]

2.2 *Special Regulation in the Field of Transnational Organized Crime*

Mexico is a party to two bilateral treaties involving organized crime and the general UN CTOC. While both bilateral treaties deal with the exchange of information and intelligence gathering in general terms, the UN CTOC includes more specific forms of cooperation amongst States. In this regard, it is relevant to describe the national efforts to comply with these forms of cooperation. After listing all the forms of transnational assistance available to the State Party to the UN CTOC, Article 18(3)(i) contains a residual clause which allows for any form of cooperation not

[22] *Convenio de Asistencia Jurídica en materia penal entre los Estados Unidos Mexicanos y la República Francesa*, Art. 17.

[23] *Tratado de Cooperación entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre Asistencia jurídica mutua*, Art. 1(d).

[24] *Tratado de Extradición y Asistencia mutua en materia penal entre los Estados Unidos Mexicanos y el Reino de España*, Art. 19.

[25] *Ibid.*

[26] See *Ley de Extradición Internacional*, Art. 18.

[27] *Acuerdo de Cooperación en materia de Asistencia Jurídica entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de la República de Colombia*, Art. IV(3)(a).

prohibited by the domestic law of the requested Party. This allows for cooperation using the special techniques provided by the Convention to investigate organized crime, such as confiscation,[28] the use of protected witnesses,[29] controlled delivery, electronic surveillance, and undercover operations.[30]

The issue of electronic surveillance has been dealt with above; the Federal Constitution allows this technique to be used in the investigation of any crime, so it stands to reason that it may be used against transnational organized crime as well. On the other hand, there are some interesting features of confiscation and witness protection which merit some further explanation.

The UN CTOC has a complex scheme for confiscation, which includes its own article on international cooperation that does not pose any problem for its application in Mexico. However, it is relevant to establish the scope of the term "confiscation" in Mexico, because it may be relevant to the application of the UN CTOC. Article 2(g) defines this term as follows:

> Confiscation, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority [. . .].

This is a very broad definition which may include what in Mexico is called domain extinction (*extinción de dominio*).[31] This may be similar to forfeiture in Common Law jurisdictions, however, at least one commentary suggests that forfeiture and confiscation are actually synonyms which do not differ in substance.[32] In any event, the definition only requires a court order depriving an individual of its property rights. This would definitively include domain extinction, in which a court order is preceded by a trial in which an individual's property is forfeited to the State based on his involvement with organized crime.[33] It must be made clear that this procedure is not criminal in nature, since it is carried out independently of the individual's guilt in a criminal trial and it only affects the property rights of the individual, and any other personal rights are not affected.[34]

The Federal Statute on Domain Extinction includes a chapter on international assistance. The Statute mentions that the international cooperation will be carried out through the treaties Mexico is a party to or on the basis of international

[28] See UN CTOC, Art. 13.

[29] *Ibid*., Art. 24.

[30] *Ibid*., Art. 20, but see Art. 135 of the Mexican FCCP. In Mexico City certain forms of undercover operations are allowed, but since organized crime is a federal crime, they may not be used in this field.

[31] The term itself is subset to debate. The Ministry of Foreign Affairs uses the term "domain extinction" in its official communications with the United Nations. See Press Release No. 062 (http://portal3.sre.gob.mx/english/index.php?option=com_content&task=view&id=58&Itemid=9).

[32] See McClean (2007), p. 45. Mentioning that the term "forfeiture" was included to accommodate jurisdictions where "confiscation" may not be a suitable term.

[33] See *Ley Federal de Extinción de Dominio*, Art. 3.

[34] *Ibid*., Arts. 5 and 44.

reciprocity.[35] This may be problematic if the property sought is in a country that does not recognize this procedure. While the UN CTOC's definition seems to allow the use of domain extinction, it still holds the possibility of international cooperation to the availability of this mechanism in the requested State.[36] This will also be true if international reciprocity is invoked, since it is unlikely that any State would comply with a measure that is completely unknown to them.

A foreign government may request Mexico to assist it in cases where the property sought is in Mexico. This needs to be carried out on the basis of a treaty or international reciprocity.[37] While no bilateral treaty or the UN CTOC consider carrying out a domain extinction sentence expressly, the residual clauses usually include will suffice. However, the Federal Statute states that when a foreign sentence needs to be carried out in Mexico, the foreign authorities need to petition the PGR, and then, on that basis, the PRG will petition the federal courts to carry out the trial.[38] This is truly an odd procedure since in essence it requires the Mexican authorities to start an entirely new trial, regardless of the fact that a foreign court may have already issued a sentence against the property sought in Mexico. It is hard to think of this as a form of international cooperation since this does not entail carrying out the foreign sentence, but instead the issuing of a new sentence by a national court. While this does not mean that the property will be given to the Mexican State authorities,[39] it seems to deny sentences derived from foreign courts any validity or recognition. On the other hand, this procedure seems to comply with the UN CTOC, which states that in the case of confiscation a requested State may "submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; [. . .]."[40] In other words, the requested State may carry out the procedures in domestic law necessary to obtain a confiscation order, which in the case of Mexico it entails starting a new trial and securing a different sentence.[41]

A less challenging issue is the matter of witness protection. The UN CTOC calls for assistance in relocating witnesses abroad for their protection.[42] In this matter, it does not seem to be a problem since witness protection is afforded through the Federal Organized Crime Statute. So the residual clauses or the UN CTOC itself can be the legal basis for cooperation in the relocation of witnesses. Moreover, the scope of the Federal Statute is very broad since it includes the protection of judges,

[35] *Ibid*., Art. 63.

[36] Art. 13 UN CTOC.

[37] *Ley Federal de Extinción de Dominio*, Art. 66.

[38] *Ibid*., Art. 66.

[39] *Ibid*.

[40] Art. 13(1)(a) UN CTOC.

[41] See McClean (2007), p. 155. This clause from the UN CTOC is meant to cover cases where the requesting State has not issued a confiscation order and needs to initiate this procedure in the requested State directly.

[42] See Art. 24(3) UN CTOC.

expert witnesses, victims or any other person that may need protection because of their role in the trial.[43] However, it leaves out relatives or other persons close to them if they do not personally take part in the trial. This exclusion is at odds with the UN CTOC which expressly includes these categories as part of any witness protection program.

3 Obtaining and Admissibility of Evidence and the Respect for Human Rights Guarantees

Some treaties that Mexico is a Party to have clauses pertaining to fundamental rights, but this is a generalization since others like the bilateral treaty with the United States does not mention any such matters. Commonly, the references to fundamental rights give the requested State the right to refuse cooperation when it deals with political crimes,[44] military crimes[45] or when the prosecution is based on discriminatory grounds.[46] Some treaties may also include prohibitions to cooperate when the death penalty or life imprisonment may be imposed or in violation of the double jeopardy prohibition.[47] Exceptionally, some treaties may include other prohibitions commonly found in extradition treaties such as the double criminality prohibition[48] or the minimum penalty requirement,[49] double jeopardy prohibition or a bar on the cooperation with *ad hoc* tribunals or in the prosecution of tax offences.[50]

Some generic clauses can be found in certain treaties which give the right to the requested State to refuse assistance when this may violate "public order"[51] or "international obligations."[52] These phrases may be linked to fundamental rights; hence, it could be argued that these require compliance with nationally and internationally recognized fundamental rights.

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[43] *Ley Federal contra la Delincuencia Organizada*, Art. 34.

[44] *Convenio de Asistencia Jurídica en materia penal entre los Estados Unidos Mexicanos y la República Francesa*, Art. 4(a).

[45] *Tratado de Extradición y Asistencia mutua en materia penal entre los Estados Unidos Mexicanos y el Reino de España*, Art. 6(d).

[46] *Tratado de Cooperación entre el Gobierno de os Estados Unidos Mexicanos y el Gobierno de la República de Bolivia sobre asistencia jurídica mutua en materia penal*, Art. III(1)(a).

[47] *Tratado de Extradición y Asistencia mutua en materia penal entre los Estados Unidos Mexicanos y el Reino de España*, Art. 6(f) and (g).

[48] Art. 5 ACHR.

[49] *Ibid*., Art. 6.

[50] *Ibid*. Art. 9.

[51] *Tratado de Cooperación entre el Gobierno de os Estados Unidos Mexicanos y el Gobierno de la República de Bolivia sobre asistencia jurídica mutua en materia penal*, Art. III(1)(d).

[52] *Tratado de Extradición y Asistencia mutua en materia penal entre los Estados Unidos Mexicanos y el Reino de España*, Art. 6.

It is also important to mention that Mexico has adopted the practice of refusing private parties the use of these treaties to obtain evidence from abroad.[53] These provisions are problematic since they may contravene the equality of arms principle and the right to defense, both of which are enshrined in the Federal Constitution[54] and in the IACHR[55]; however, this issue has not been challenged.

A different problem is how to challenge any fundamental rights violations. This involves two separate issues. Firstly, one must try to identify which constitutional right may be infringed, which would require an analysis of the due process provisions. Secondly, it is necessary to consider the writ of *amparo*, which is the judicial review available in Mexico.

There are several due process considerations that may be relevant.[56] While no treaty expressly authorizes assistance with regard to electronic surveillance or similar investigative methods, most treaties allow for any form of assistance permitted by national law.[57] This is the case with Mexico, where electronic surveillance is allowed, albeit with certain constitutional constraints. This may seem problematic because of the precise wording of the Federal Constitution which states that *only* the federal courts may authorize the use of electronic surveillance. Additionally, it says that this authorization may be issued by request from the state governments or the PRG.[58] A strict interpretation of these requirements may lead to the conclusion that a foreign authority may not issue any form of electronic surveillance to be used in Mexico nor a foreign government petition to the federal courts for such a measure.

As mentioned above, there is no direct precedent allowing the writ of *amparo* to proceed in matters of international assistance, so it is necessarily to look at cases derived from family law or assistance between Mexican federal states for guidance. In this context, the First Chamber of the Supreme Court had to resolve whether a request from a foreign state agent may be challenged, given that the Federal Constitution and the federal courts do not have jurisdiction over foreign state agents. The Chamber started by saying that no government action which may affect fundamental rights may go unchallenged.[59] Therefore, it had to find a way to address the territorial limitations of judicial review in Mexico. In doing so, the Chamber reasoned that although it had no jurisdiction over foreign state agents, it

[53] *Tratado de Cooperación entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre Asistencia jurídica mutua*, Art. 1(5).

[54] See Art. 20(B)(IV) and (VI) of the Mexican Constitution.

[55] Art. 8(2) ACHR.

[56] Mexico adopted an adversarial system in 2008, which is gradually being implemented at the state and federal levels of government. This system has been outlined in the Federal Constitution and should be fully functional by 2016. The analysis that follows will consider this new criminal justice.

[57] *Tratado de Cooperación entre el Gobierno de os Estados Unidos Mexicanos y el Gobierno de la República de Bolivia sobre asistencia jurídica mutua en materia penal*, Art. II(i).

[58] Art. 16(12) of the Mexican Constitution.

[59] See *Contradicción de Tesis* 34/2007-PS, VII Considerando.

did have authority over their Mexican counterparts which actually execute the petitions from abroad.[60] These courts can be made responsible for not complying with the treaty or national law, including the Federal Constitution.[61]

After resolving this issue, the Chamber had to provide for a remedy if the petition was illegal. It resolved the matter by saying that if the foreign request were illegal or unconstitutional, the federal court, on judicial review, could bar the requested authority from complying with the requesting State.[62]

It would make sense that if this reasoning applies to family law, it could also be used in criminal procedures, where fundamental rights are also at stake. Applying this reasoning to electronic surveillance in accordance with the Federal Constitution, the foreign authorities would have to petition the PGR for assistance in securing a warrant allowing for electronic surveillance. In turn, the Mexican state agent and the federal court which would grant the warrant would be subject to any constitutional challenge deriving from the request.

While the electronic surveillance scheme is particularly important because of its constitutional hierarchy, the Federal Constitution contains a clause excluding evidence obtained in violation of fundamental rights.[63] This provision may be used to challenge evidence requested abroad in violation of any due process provisions of the Federal Constitution, such as the requirement for a search warrant[64] or the prohibition against the use of torture.[65] Other due process rights which may be affected may also derive from international human rights law. The interplay with national law will be considered in the relevant section.

However, this constitutional exclusionary rule will probably be more relevant for evidence obtained from abroad, which will need to comply with the particular treaty used to obtain it, the national law of the requested State and fundamental rights, which include at a minimum those mentioned in the Federal Constitution.

There is one aspect of the newly established adversarial system which may be difficult to overcome. The Federal Constitution contains within its Bill of Rights the minimum standards for every criminal trial, which relies heavily on oral arguments brought before the judge.[66] Thus, the following are some of the due process provisions found in the Federal Constitution: the adjudicating judge must be present in every hearing,[67] only the evidence which is heard in the court will be

[60] *Ibid*.

[61] *Ibid*.

[62] *Ibid*.

[63] Art. 20(A)(IX) of the Mexican Constitution.

[64] *Ibid*., Art 16(12).

[65] *Ibid*., Art. 20(B)(II). The Federal Constitution states that these must have several requirements. The may only be issued by a judge by request of the PRG. The warrant must specify the place which is been searched, any persons which may be found inside and detained and the objects sought. The search must be documented and signed by two witnesses

[66] Art. 20 of the Mexican Constitution.

[67] *Ibid*., Art. 20(A)(II).

admissible,[68] and all the parties involved must be present at every hearing.[69] These due process rights do not seem to take into account the need to take testimony from a person found abroad. This is especially relevant if the defendant cannot question the prosecutor's witness. Compounded with the fact that many treaties bar private parties from using these conventions from obtaining evidence from abroad, the international scheme poses a risk to the equality of arms right. Other jurisdictions have solved this problem by making an exception to the hearsay prohibition,[70] but this issue has not been addressed in Mexico.

4 Cooperation with International Criminal Tribunals and the Protection of Fundamental Rights

4.1 Ad Hoc Tribunals

The relationship Mexico has with United-Nations-sponsored *ad hoc* Tribunals is complicated. Since the Federal Constitution has an express prohibition on special courts of any kind, it would stand to reason that the official position would be not to cooperate with these tribunals.[71] However, some factors do point the other way.

The official position Mexico adopted during its presidency of the United Nations Security Council was to fully cooperate with the ICTY and the ICTR.[72] Additionally, there is evidence that Mexico has indeed at least cooperated with the Yugoslav Tribunal. However, the form of assistance provided and the way it was carried out is unknown since this information is considered classified in accordance with Article 53 of the Rules of Procedure and Evidence of the international tribunal.[73]

Despite the fact that Mexico has cooperated with the ICTY, invoking the non-disclosure clause of Article 53 leaves many questions unanswered. First, there appears to be no way of knowing what was requested from Mexico, from which case the request came from, and perhaps most importantly, what the legal basis was for such cooperation. This last matter seems important since Mexico never enacted legislation allowing its authorities to assist the *ad hoc* Tribunals. One might argue that the statutes of these tribunals would be enough to provide a legal basis for cooperation; however, the legal recognition of Security Council resolutions in domestic law is questionable, let alone of other legal documents such as the Rules of Procedure and Evidence.

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[68] *Ibid*., Art. 20(A)(III).

[69] *Ibid*., Art. 20(A)(VI).

[70] Bontekas and Nash (2007), p. 387.

[71] Mex. Const., Art. 23.

[72] See México en el Consejo de Seguridad, http://www.sre.gob.mx/csocial/csonu/cont/Bol/2010/mcs0610.pdf.

[73] This information was obtained using the Federal Transparency and Right to Information Act. (Visited 8 March 2011) http://www.derechopenalinternacional.com/Documen/TPIY.pdf.

With this information, it is difficult to assess whether Mexico has complied with fundamental rights in its cooperation with the ICTY in the particular instances where assistance has been requested. However, it is plainly obvious that if there is no legal basis for such cooperation, at least the legality of these measures may be called into question.

4.2 International Criminal Court

The relationship between the ICC and Mexico is also complex. The debates over the constitutionality of the permanent court were very intense[74] and they actually ended with a constitutional amendment which in essence made it possible for the President and the Senate to ratify the Rome Statute.[75] Although the political problem was solved, the legal difficulties have only begun. The Constitutional amendment states:

> The Federal Executive may, with the Senate's approval in each case, recognize the jurisdiction of the International Criminal Court.[76]

It is obvious that this clause creates many obstacles with regard to cooperation with the ICC. The picture will be clearer once the statute, which implements the mechanisms for cooperation, is enacted. With the limited information available it is easy to conclude that the general obligation to cooperate with the ICC is far from self-evident,[77] since it would depend on the decision of the Executive and Legislative whether to comply with the international obligations derived from the Rome Statute.

There are some issues that need to be addressed by the implementing legislation, which may qualify the sweeping constitutional text. Amongst the most important aspects is the meaning of the words "case" and "jurisdiction", and consequently the concrete circumstances where approval may be necessary. This will better define the extent to which Mexico will collaborate with the ICC and the potential risk of breach of its international obligations.

Despite the potential noncompliance with the Rome Statute and the lack of implementing legislation, Mexico has already addressed requests for cooperation from the ICC without the approval of the Executive and the Senate. As with the *ad hoc* Tribunals, the Mexican government has classified all documents related to requests from the ICC on the basis of Article 87(3) of the Rome Statute. Consequently, the same conclusions may be reached as in the previous section.[78]

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[74] See García (2002), pp. 175–189; Corcuera and Guevara (2001).

[75] *Ibid.*

[76] According to Article 20(8) of the Mexican Constitution, "*El Ejecutivo Federal podrá, con la aprobación del Senado en cada caso, reconocer la jurisdicción de la Corte Penal Internacional.*"

[77] Rome Statute of the International Criminal Court, Art. 86.

[78] This information was obtained using the Federal Transparency and Right to Information Act. (Visited 8 March 2011) http://www.derechopenalinternacional.com/Documen/CPI.pdf.

While it is clear that Mexico has complied with its international obligation to cooperate with the ICC (despite the aforementioned constitutional provision), it is impossible to know at this point the details of any requests and the answers given by the government. This may entail a breach of fundamental rights, at least with regard to the legality of the actions taken in proceeding with the request, but it may have also breached the Federal Constitution insofar as no authorization was given by the Executive and the Senate.

At present, the statute enabling cooperation with the International Criminal Court Act has already been passed by the Senate and is now before the House of Deputies.

Perhaps the most important part of this statute is that it attempts to restrict the scope of the Federal Constitution which drastically limits the capacity of Mexico to comply with its international obligations, as discussed above. This is attempted by defining what it is meant by "case" and "jurisdiction" in the constitutional text. Hence, Article 10 defines "case" as any likely criminal conduct which may fall within the jurisdiction of Mexican courts. Additionally, "jurisdiction" is defined as any procedure which takes place after the ICC has authorized the Prosecutor to initiate an investigation.[79] Thus, the Executive and Senate's approval of the ICC jurisdiction would only be needed when Mexico or Mexican nationals are deemed directly affected. This still leave a wide range of cases where there might be a breach of international obligations.

The rest of the proposed statute falls in line with the requirements of the Rome Statute. There are some clauses which may be troublesome because they include exceptions to the cooperation obligations. A request for cooperation may be refused if it breaches any due process rights (*formalidades esenciales del procedimiento*),[80] if there is a risk to the life, security of health of any person,[81] or if there is a risk to national security. These objections would be subject to consultations before the ICC,[82] which is a negotiating procedure allowed by the Rome Statute to reconcile national interests with international obligations.[83] Consequently, this conciliatory procedure would presumably solve any discrepancy.

4.3 The Influence of Supranational Case-Law on the Domestic Law in the Protection of Fundamental Rights

In Mexico, the relationship between domestic law and international law, including international human rights law, is going through some interesting changes. The

[79] *Ibid*., Art. 10.

[80] *Ibid*., Art. 16.

[81] *Ibid*., Art. 17.

[82] *Ibid*.

[83] Rome Statute of the International Criminal Court, Art 98.

beginning of the discussion is Article 133 of the Federal Constitution, which states that treaties are part of domestic law. It further states that judges, both at the federal and state level, must use international treaties to guide their decisions.[84] Thus, treaties are considered self-executing where it is possible to do so without implementing legislation.[85] Since there is no distinction between which types of treaties are part of the national legal system, only providing that they go through the ratification process, the range goes from human rights conventions such as the ACHR to extradition and mutual assistance treaties.

Additionally, the Supreme Court has stated that there is a legal hierarchy that places treaties above federal and state law and subject only to constitutional provisions.[86] At the time of this ruling, the position of the High Court was considered very important because from the plain reading of the Federal Constitution it could be argued that federal law and treaties had the same hierarchy. This holding has actually opened the floodgates for a judicial acceptance of International Law as a whole, including customary international law[87] and the frequent use of General Assembly Resolutions in cases where it is necessary to determine the scope of children's rights,[88] and rules of interpretation such as the *pro persona* standard.[89]

Despite making treaties subject to the Federal Constitution in the very case mentioned above, the Supreme Court left open the possibility that human rights treaties could have constitutional hierarchy.[90] The High Court, hinted that there may be an exception with regard to human rights treaties in a case involving the use of force by police agents.[91] This trend has been followed by lower federal courts who have accepted that human rights treaties have constitutional hierarchy[92] and may even declare that a national law or act of government is void because it contravenes international human rights treaties, primarily the ACHR.[93] With supranational case-law, the situation is similar. There has been a gradual acceptance of case-law from the IACtHR. Most recently, the First Chamber of the Supreme Court has declared that the use of case-law of the Inter-American Court on Human Rights by all tribunals is compulsory.[94]

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[84] According to Article 133(1) of the Mexican Constitution, "*Esta Constitución, las leyes del Congreso de la Unión que emanen de ella y todos los Tratados que estén de acuerdo con la misma, celebrados y que se celebren por el Presidente de la República, con aprobación del Senado, serán la Ley Suprema de toda la Unión. Los jueces de cada Estado se arreglarán a dicha Constitución, leyes y tratados, a pesar de las disposiciones en contrario que pueda haber en las Constituciones o leyes de los Estados.*"

[85] Cf. Becerra (2006), pp. 18–19.

[86] *Amparo en revisión* 120/2002.

[87] *Controversia Constitucional* 5/2001.

[88] *Amparo directo en revisión* 908/2006.

[89] *Amparo directo* 202/2004; *Amparo en revisión* 799/2003.

[90] See Dondé (2010), pp. 571–581.

[91] ***DICTAMEN DEL EXPEDIENTE* 3/2006, IX CONSIDERANDO.**

[92] *Amparo directo* 1060/2008.

[93] *Ibid.*

[94] *Amparo directo en revisión* 908/2006.

While there is no case where the courts have actually used supranational case-law in situations of transnational inquiries, there is no reason to think that this trend will constitute an exception to these circumstances. Insofar as transnational inquiries are linked to the due process provisions of the ACHR and the relevant case-law, these standards are also applicable.[95]

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[95] See generally *Amparo directo* 98/2007; *Amparo directo* 165/2007. At least on the Federal Court has used the criteria of the IACtHR regarding the right to consular assistance in cases of extradition, so it stands to reason that they could be used in cases of transnational inquiries.

Report on Spain

Fernando Gascón Inchausti

Contents

Abstract Transnational inquiries in criminal matters are not strange to Spanish judicial authorities. However, apart from international conventions —very general in their regulations— internal rules don't provide precise and useful guidelines, specially concerning the respect of procedural essential safeguards, since Spanish legislative has not yet implemented the European Evidence Warrant Framework Decision. This contribution analyzes therefore Spanish case law, paying special attention to the —unduly— prevalent role granted to the respect of the *lex loci* when deciding the probative value in a Spanish procedure of criminal inquiries carried out abroad.

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Abbreviations

ECHR	European Convention on Human Rights
ECMLACM	European Convention on Mutual Legal Assistance in Criminal Matters
EU FRCh	Charter of Fundamental Rights of the European Union
EUCMACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
FD	Framework Decision
FD EEW	Framework Decision on the European Evidence Warrant
LECrim	Criminal Procedural Act (*Ley de Enjuiciamiento Criminal*)
LOPJ	Organic Law on the Judiciary (*Ley Orgánica del Poder Judicial*)
STC	Constitutional Court Judgement
STS	Supreme Court Judgement

1 Introductory Remarks

1.1 Transnational Inquiries Are a Common Feature of Spanish Legal Proceedings

§. Spanish criminal practice has openly accepted cross-border investigations since the 1990s, particularly in two specific spheres: (a) the global problem of prosecuting drug trafficking, where the most common examples of cooperation involve the controlled or supervised delivery of drugs; and (b) the specific problem of prosecuting members of the Basque terrorist organisation ETA. In this regard, political and legal cooperation with the French authorities has intensified since the 1990s, and has led above all to house searches during which documents, *lato sensu,* with relevant information are obtained.

It is therefore not uncommon for Spanish prosecuting authorities to send letters rogatory to their counterparts in other countries requiring their cooperation to obtain evidence. Neither is it uncommon for Spanish prosecuting authorities to receive and comply with letters rogatory, leading them to conduct investigations to support criminal proceedings in other countries, particularly in view of the fact that certain geographical areas of Spain are closely linked to organised cross-border criminal activity.

§. The aim of seeking international legal cooperation to pursue a criminal investigation is to gain access to information and, above all, evidence that can potentially be used in a criminal trial. It is therefore important that the procedure used to obtain such evidence should meet all the legal standards applied by the court that will assess it. This means that the procedure used in the requested State to obtain the evidence could be scrutinized according to the parameters of legality and admissibility of the requesting State, which could lead to the court assigned to pass

judgement to exclude the evidence from their assessment on grounds related to its procurement in the executing State.

It should be noted that occasionally, the cooperation requested and/or provided includes procedures that curtail fundamental rights. This is the case, for example, when searching private homes or intercepting telecommunications. However, even when cooperation involves apparently more straightforward procedures that do not infringe individual rights (*e.g.*, taking a witness statement), the individual's right to a fair trial is always at stake. In these matters it is therefore important to determine not only (1) how cooperation in cross-border investigations should be requested and provided, but also (2) what requirements must be met to ensure that the result of these investigations can validly be used as evidence on which to legally base a criminal conviction (*e.g.* how much weight should be given to both the procedures followed in another State and the objects and documents coming from another State).

1.2 Legal Basis for Conducting Transnational Inquiries in Spain

§. The legal basis for these two aspects of cross-border investigation is very heterogeneous. Regulations abound on the subject of international legal aid *stricto sensu*, above all supranational cooperation, while the admissibility of the results of this type of cooperation in criminal proceedings is the subject of very few extremely vague laws.

The following is a summary of existing Spanish legislation in this respect:

1.2.1 Supranational Legislation

§. Supranational laws provide the core set of standards on which Spanish authorities base their requests for or compliance with cross-border criminal investigations. Depending on the material and geographical scope of action, the system is the following:

§. In the context of the United Nations, Spain is part of the 1998 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (in force in Spain since 11 November 1990); the 2000 Convention Against Transnational Organized Crime (in force in Spain since 29 September 2003); the 1999 Convention for the Suppression of the Financing of Terrorism (in force in Spain since 9 May 2002); and the 2003 Convention Against Corruption (in force in Spain since 19 July 2006).

§. In the context of the Council of Europe, Spain is part of the 1959 European Convention on Mutual Assistance in Criminal Matters (in force in Spain since 16 November 1982); this law has been —and continues to be to a large extent— the key to Spanish legal practice and case-law doctrine on this matter. Spain is also part of the 1972 European Convention on the Transfer of Proceedings in Criminal

Matters (in force in Spain since 12 November 1988). This text is of particular interest because article 26 regulates the effectiveness of criminal investigations conducted in other countries; however, it seems to have had little, if any, practical application in Spain.

§. Finally, in the context of the European Union the following texts are applicable in Spain: the Convention implementing the Schengen Agreement of 19 June 1990 (in force in Spain since 1 March 1994), frequently invoked by Spanish courts because it complements the 1959 Convention, above all with regard to controlled delivery of drugs; and, naturally, the European Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, signed in Brussels on 29 May 2000. Not surprisingly, application of the provisions of this regulation is increasingly common, as Europe is the most common setting for international cooperation in criminal matters involving the Spanish authorities.

However, Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters has yet to be incorporated into Spanish law in spite of the fact that the deadline for doing so elapsed on 19 January 2011 [Art. 23(1) FD].

§. Aside from the foregoing multinational laws, Spain has, particularly over the last 15 years, developed an extensive network of bilateral treaties regulating legal assistance in criminal matters. These tackle the issue of international cooperation to obtain evidence and cross-border investigations (some —albeit very few— also regulate transmission of criminal cases or proceedings).[1]

1.2.2 National Legislation

§. With regard to national laws, however, the situation is very different. Spanish criminal proceedings are governed by the LECrim, the first version of which dates from 1882. Although this law has been redrafted several times, it contains no provisions governing transnational inquiries. Furthermore, unlike other countries, the Spanish legal system has no specific laws governing international legal cooperation on criminal matters. Articles 276 to 278 of the LOPJ, enacted in 1985, contain a few very generic regulation on international legal cooperation by Spanish courts in all fields of law (not only criminal), and defer in general to the supranational law. For those cases in which no supranational law applies, the LOPJ states that cooperation will be forthcoming when reciprocity exists or is offered, and more specific to the discussion in hand, may be denied "when the purpose of the

[1] Specifically, bilateral treaties on these matters currently exist with the following countries: Algeria (2002), Argentina (1987), Australia (1989), Bolivia (1998), Bosnia-Herzegovina (1980), Brazil (2006), Cabo Verde (2007), Canada (1994), Chile (1992), China (2005), Colombia (1997), Dominican Republic (1981), El Salvador (1997), India (2006), Mauritania (2006), Mexico (2006), Morocco (2009), Panama (1998), Paraguay (1999), Peru (2000), Philippines (2004), Serbia (1980), Tunisia (2001), United Arab Emirates (2009), United States (1990) and Uruguay (1991).

cooperation requested is clearly contrary to Spanish public policy" [Art. 278(1)(4) LOPJ]. Such a wide-ranging notion could include infringement or violation of fundamental rights during the investigation or process of obtaining evidence.

§. However, in recent years, various special laws have been enacted to implement framework decisions and other regulations passed in the European Union. One of the most important regulations in this regard is Law 16/2006 of 26 May 2006 regulating the Eurojust National Member Statute and the relationship with this European Union body. Article 16 deals with the transfer to Spain of criminal proceedings initiated in another EU Member State when a request is made to initiate criminal proceedings or to include other unlawful acts in a proceeding already initiated in Spain. In these cases, if the request to initiate or extend proceedings is accepted, section 4 states that "pre-trial inquiries conducted by the State transferring the case will be considered valid in Spain *provided they are not contrary to the fundamental principles of Spanish law*." As we shall shortly see, the problem here is how to determine which fundamental principles of Spanish law are referred to in this point.

2 Cross-Border Investigations and Fundamental Rights

§. Cross-border criminal investigations, as previously discussed, always affect fundamental rights. This can clearly be seen in cases where investigative measures restrain fundamental rights, but the same also occurs generally because the way in which the evidence on which the accusation is based is obtained is part of the essential procedural safeguards (Art. 6 ECHR, Arts. 47–48 EU FRCh, Art. 24 of the Spanish Constitution). Nevertheless, laws regulating these matters make a somewhat oblique reference to the foregoing.

§. On the one hand are laws regulating international legal assistance in obtaining evidence: in these, the foregoing issues are tackled when defining the role of *lex loci* (i.e., the criminal procedural law of the State providing assistance) and *lex fori* (i.e., the laws of the State requesting assistance) when complying with the investigative measure requested. The most advanced legislative texts [cf. Art. 3 ECMLACM, Art. 4(1) EUCMACM or Art. 12 FD EEW), allow the requesting authority, in its letters rogatory, to request that certain specific formalities or procedures be followed (included in the *lex fori*), even though this is not mandatory under the *lex loci*.

This suggests that if the requesting State asks that specific formalities or procedures be followed (*e.g.* that witnesses or experts must testify under oath: Art. 3(2) ECMLACM), it is because these formalities or procedures must be observed in order to comply with *lex fori* safeguards, which, in turn, would be essential to guarantee the validity of the evidence obtained in another country. Likewise, when the *lex fori* is used to conduct an investigation in the executing State, the most advanced laws always include the condition that the formalities requested should not contravene the "fundamental principles" of the law of the

State where it will be carried out. This is because it is also important to respect the essential safeguards of the State conducting the investigation, even though the resulting evidence will not be used by courts acting in this territory.

§. With regard to laws regulating the inclusion in a particular criminal proceedings of documents, evidence and materials obtained abroad, Article 26(1) of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters is quite permissive when it states that

> Any act with a view to proceedings, taken in the requesting State in accordance with its law and regulations, shall have the same validity in the requested State as if it had been taken by the authorities of that State, provided that assimilation does not give such act a greater evidential weight than it has in the requesting State.

From this it can be seen that compliance with *lex loci* involves the *iuris et de iure* presumption that all the *lex fori* requirements and safeguards have been respected. However, the requirement to respect the "fundamental principles" is laid out in Article 16(4) of Law 16/2006 on the National Member of Eurojust Statute, which considers valid in Spain "pre-trial inquiries conducted by the State transferring the case, provided they do not contravene the fundamental principles of Spanish law."

§. These references to the "fundamental principles of law" found in supranational and national laws are really a way of establishing the need for procedures to be conducted in compliance with the essential safeguards of criminal proceedings, and in particular, those that refer to the acquisition of evidence through investigative procedures. In order to define these safeguards, or, if one prefers, these "fundamental principles of Spanish law," I think we should distinguish between proceedings in which Spain is the requested State (i.e., the State in which the investigation is carried out), and those where Spain is the requesting State (i.e., the State instigating the criminal proceedings for which evidence is sought by requesting investigative cooperation from the authorities of another State).

3 Obtaining and Admissibility of Evidence and Respect for Human Rights Guarantees

3.1 Spain as the State Requesting and Receiving Cooperation, or to Which Proceedings Are Transferred from Another State

3.1.1 General Considerations

§. When analysing the relationship between obtaining valid evidence abroad and respecting fundamental procedural safeguards, we intuitively tend to consider how the courts in the requesting State will judge the evidence "acquired abroad" by means of one or another international legal cooperation system.

On the assumption of compliance with the laws regulating international legal assistance in each specific case, the analysis should focus on the procedures used to obtain evidence in the executing State: *e.g.*, how witness statements were taken, what was the procedure used to search closed premises, and how the interception of telephone conversations or the infiltration of an undercover agent was carried out. The laws of each country may provide various ways of carrying out a specific investigative procedure; these may at best be irrelevant in Spain, or at worst affect the fundamental principles of its legal system.

It is particularly important to determine whether any of these requirements state that authorisation for or supervision of the investigation must be issued by a judge, and not just by a public prosecutor or police official. It should be noted that the general rule in Spain is that the investigative stage of a proceedings is controlled by an examining magistrate and not by the public prosecutors: the criminal investigation department informs the judge on the progress of their investigation; the suspects and witnesses testify before the judge; experts submit their reports to the judge; and naturally, it is up to the judge to authorise implementation of investigative measures that would result in a restraint of fundamental rights. The major role played by the judiciary in criminal investigation in Spain guarantees the highest standards when Spain is called on to carry out investigations to support criminal proceedings initiated in another country. However, when the criminal proceedings are instigated in Spain and call for investigations to be conducted in another country, there is a tendency —mistaken, in my view— to consider that any action carried out abroad without judicial presence or intervention violates the basic principles of Spanish law and affects the validity of the evidence obtained during the cross-border investigation.

§. To prevent legal differences from invalidating evidence, laws regulating these matters permit the application of *lex fori* over, or in conjunction with, *lex loci*. The Spanish judge will not only request that a specific procedure be carried out, but that certain requirements be met when obtaining the evidence. These may or may not be included in the laws or legal practice of the country in question, but are essential to guarantee the probative value of the resulting evidence in Spain. Most supranational laws impose a limit to the foregoing, permitting executing States to refuse to adopt coercive measures not provided for in purely national cases, even though they are requested by the transferring State.

A good example of how *lex fori* can be accommodated is found in Article 4(1) EUCMACM, which establishes the general rule that requested States must comply with the formalities and procedures expressly indicated by the requesting State, provided that they are not contrary to the fundamental principles of law in the requested State. This same regulatory device can be seen in Article 12 FD EEW.

§. It can be extremely beneficial to be familiar with the differences between criminal investigation systems in force in cooperating States because it makes it easier to identify which *lex fori* formalities (Spanish, in this case) would not be complied with by merely applying the *lex loci* (*e.g.* German law) but are essential to ensure validity of the evidence. However, a Spanish judge sending a letter rogatory to Germany requesting the search of a home in that country does not have to know

or ascertain beforehand how such searches are conducted in Germany and define the particular formalities and procedures to be followed in the letter rogatory in order to guarantee results. What the Spanish judge must know, are the fundamental principles of Spanish law that apply to the requested inquiry, and must therefore request that the corresponding formalities and procedures be followed. These may or may not coincide with those generally applied in Germany: the *lex fori* and *lex loci* are not necessarily different.

This means that, when a Spanish judge calls on the authorities of another State to help in the investigation required to gather criminal evidence, what really matters is that they know which absolutely essential points of Spanish due process could affect the subsequent validity of the evidence obtained, without exaggerations or excessive adherence to the letter of the law. In other words, what minimum standards must have been respected in the other country for the result of the investigation to subsequently be valid in Spain.

3.1.2 The Paradoxical Criterion of Spanish Courts[2]

§. To further understand this concept it is important to bear in mind the provisions of Spanish law. First, it should be noted that case-law has always been drawn up by the Spanish Supreme Court in regard to investigations conducted in other European countries, which is probably why it is so permissive. Indeed, the attitude of the Spanish Supreme Court could be summed up as "anything goes" as long as the *lex loci* is respected: the evidence obtained in other European countries[3] and the evidence procured during cross-border investigations will be valid and effective in Spanish criminal proceedings if the procedure followed abroad complies with the existing laws of the country in question.

§. By acknowledging the priority of *lex loci*, the Spanish Supreme Court does not require that investigations conducted in another country comply with the same formalities or due process safeguards that would be required if the same investigation took place in Spain.

The foregoing is particularly evident in the controlled delivery of drugs. Under Spanish statute and case law, only a judge can authorise the opening of a postal package to ascertain whether it contains drugs and, as applicable, organise a controlled delivery operation. In other countries, however, this is not the case, and at times police or customs officials can do this *motu proprio*, or merely with an

[2] The case law used in the preparation of this article can be found on the Internet. Spanish Supreme Court Judgements (STS) and those of the Spanish *Audiencia Nacional* (Central Court) can be found in the CENDOJ (www.poderjudicial.es/search/indexAN.jsp) database and are identified by their reference number (ROJ). Constitutional Court Judgements (STC) can be found in the Spanish Constitutional Court database (www.tribunalconstitucional.es) and are identified by their reference number.

[3] It is usually that of European Union countries, although on one occasion the same consideration was given to Switzerland [Supreme Court Judgement (STS) of 21 December 1999 (ROJ 8670/1999)].

authorisation from a public prosecutor. The Spanish Supreme Court has dealt with the same issue on numerous occasions: a suspect postal package addressed to Spain is detected in a foreign airport (Germany, Italy, Holland, the UK, France), and is opened without obtaining judicial permission. After ascertaining that the package contains drugs, a controlled delivery is organised, culminating in the arrest of the addressees in Spain and their subsequent sentencing. The parties convicted of drug trafficking appeal to the Supreme Court on the grounds that the evidence was obtained unlawfully because the package was opened in another country without court authorisation. If the entire operation had been conducted in Spain, the conviction would have been reversed on the grounds of inadmissible evidence; however, this being a cross-border case, in the light of *lex loci,* the actions of the foreign authorities are legal, and the Supreme Court systematically upholds convictions in these cases.[4]

Controlled delivery, however, is unique insofar as the actions of the foreign authorities do not respond to a request previously lodged by the Spanish authorities, so there is no scope, under *lex fori*, for said request to include the special formality and procedure of judicial intervention. However, the Supreme Court applies the same criterion when dealing with other investigative measures in which foreign authorities act in response to a request sent from a Spanish court. Nevertheless, the *lex loci* criterion continues to prevail.

A particularly common case is that of house searches conducted in a foreign country, usually in France, in the context of investigations relating to the Basque terrorist organisation, ETA: the Spanish Supreme Court has reiterated its opinion that in order for the documents and objects found to be admissible as evidence, the search must have been conducted in compliance with French laws[5] without ascertaining whether French law respects the same essential safeguards established to validate a house search under Spanish law.

The same criterion has been upheld in other cases: the statement made by a rape victim to the German police without the presence of a judge[6]; authentication of business papers and witness statements given in Sweden without the presence of the

[4] With regard to controlled delivery cross-border operations, see the following Supreme Court rulings: STS of 16 June 1997 (ROJ 4234/1997); STS of 14 February 2000 (ROJ 1064/2000); STS of 8 March 2000 (ROJ 1841/2000); STS of 19 January 2001 (ROJ 3586/2001); STS of 27 February 2001 (ROJ 1459/2001); STS of 3 May 2001 (ROJ 3586/2001); STS of 18 May 2001 (ROJ 4082/2001); STS of 21 May 2001 (ROJ 4136/2001); STS of 14 September 2001 (ROJ 6785/2001); STS of 21 December 2001 (ROJ 10246/2001); STS of 1 October 2002 (ROJ 6360/2002); STS of 18 November 2002 (ROJ 7646/2002); STS of 10 January 2003 (ROJ 39/2003); STS of 17 February 2003 (ROJ 3586/2001); STS of 5 May 2003 (ROJ 3023/2003); STS of 24 May 2004 (ROJ 3530/2004); STS of 3 November 2010 (ROJ 6214/2010); STS of 8 April 2011 (ROJ 2624/2011); STS of 22 June 2011 (ROJ 4791/2011).

[5] In this regard, STS of 18 November 1999 (ROJ 7315/1999); STS of 3 March 2000 (ROJ 1701/2000); STS of 9 May 2003 (ROJ 3146/2003); STS of 1 October 2007 (ROJ 7635/2007); and STS of 13 October 2010 (ROJ 6139/2009).

[6] STS of 19 January 1995 (ROJ 140/1995).

lawyer for the defence, in the case of a Spanish employee of the Spanish Tourism Office in Stockholm, accused of embezzling public monies[7]; the procurement of documents in Switzerland[8]; interception of telephone conversations in France[9]; procurement of documents held by a party arrested in France on suspicion of collaborating with ETA.[10]

§. This legal construction of the Spanish Supreme Court is based, essentially, on the following arguments:

a) Priority must be given to *lex loci* because this is established in international conventions: in this regard, the 1959 Convention is usually mentioned, although in recent years references to CISA and the 2000 Convention have also become commonplace.[11]

In this regard, the STS of 8 April 2011 (ROJ 2624/2011) points out that

> . . . under the terms of the European Convention on Mutual Assistance in Criminal Matters, signed in Strasbourg on 20 April 1959, the laws of the country where the evidence is obtained and examined prevail with regard to the procedure used to obtain and examine evidence. There is therefore no reason to evaluate or debate the impartiality of the judges or authorities of one country or another, or the respective legitimacy of the proceedings conducted before them in the manner established by the laws of the country.

With these statements, however, Spanish case law seems to ignore the importance given to *lex fori* in the most recent supranational laws, and the possibility of requesting that the investigation be conducted in accordance with particular formalities.

b) Spanish courts cannot control or verify the manner in which foreign courts and authorities apply their own laws, i.e., they cannot analyse whether or not the manner in which an investigation has been conducted in a foreign country complies with the *lex loci*.

Therefore, the STS of 16 June 1997 (ROJ 4234/1997) states that

> . . . it is clear that no law was broken either in the country in question or in Spain because, as the sentencing court points out, the active participation of the competent German bodies in opening the package that arrived in Cologne determined that said action must be considered correct and in no way illegal by the Spanish courts because the competence of the latter, given the territorial scope of procedural rules, does not extend to declaring null and void proceedings undertaken in other countries by their courts under their corresponding laws.

And more explicitly, the STS of 5 May 2003 (ROJ 3023/2003), among others, points out that "Spanish courts cannot determine the legality of actions undertaken in other EU countries, neither can they subject said actions to the scrutiny of Spanish procedural laws."

[7] STS of 9 December 1996 (ROJ 7041/1996).

[8] STS of 21 December 1999 (ROJ 8670/1999).

[9] STS of 25 September 2002 (ROJ 6159/2002).

[10] STS of 2 November 2004 (ROJ 7024/2004).

[11] STS of 22 June 2011 (ROJ 4791/2011).

Again, the criterion is debatable, because when added to the previous argument it leads to an absurd paradox: if it is more important to respect the *lex loci*, but Spanish courts cannot establish whether or not the *lex loci* has been followed, there is no way of rejecting evidence from foreign countries, even if it has been obtained in violation of fundamental rights. . .

Because of this, some Spanish Supreme Court judgements have admitted, albeit in an abstract sense, that the illegality legality, under *lex loci*, of the investigative procedure implemented in a foreign country can indeed result in the evidence being inadmissible in Spain.[12] In all these cases, the Supreme Court has extricated itself from the quagmire by putting the burden of proof of illegality on the party affected by the evidence, or by holding that said illegality has not been proven in a particular case, and therefore evidence has never been invalidated.

c) The foreign courts and authorities charged with complying with a request for cooperation in a criminal proceedings cannot be expected to know Spanish law, and, less still, how Spanish case-law has implemented certain procedural safeguards concerning how evidence is obtained.

Therefore, with regard to opening postal packages in order to conduct controlled drug delivery operations, the STS of 8 march 2000 (ROJ 1841/2000), states the following:

> English customs officials, acting in their own country, cannot be expected to abide by the interpretation made by this court [i.e., the Spanish Supreme Court] and consider certain packages to be correspondence, for the purpose of due process.

And the STS of 14 September 2001 (ROJ 6785/2001), in a similar vein, points out that

> Officials from other countries cannot be expected to abide by Spanish laws when acting in their own country, and much less to abide by the interpretation made by this Court in considering certain packages to be correspondence, for the purpose of due process.

This argument, however, would be invalid if the Spanish Supreme Court recognised that, under the most commonly used conventions, Spanish authorities requesting cooperation can indeed indicate to foreign authorities the safeguards and formalities that, under the *lex fori*, must be respected when complying with the request.

d) In a more general sense, mention is made of the fact that, in the case of procedures implemented in other European countries, mutual trust, which is a feature of the European Judicial Area, should prevail —bolstered by the fact that all the States involved are cosignatories of the ECHR,[13] and that they all share similar, acceptable standards with regard to fundamental rights.

The STS of 9 December 1996 (ROJ 7041/1996) points out that "within the European judicial area no distinctions may be made between the guaranteed

[12] Among them, STS of 14 February 2000 (ROJ 1064/2000), STS of 27 February 2001 (ROJ 1459/2001) and STS of 22 June 2011 (ROJ 4791/2011).

[13] STS of 2 November 2004 (ROJ 7024/2004).

impartiality of judges from different countries, or the respective legality of the proceedings conducted before them." The STS of 18 May 2001 (ROJ 4082/2001), moreover, states that

> when European Union countries are involved, as with the case in hand, a stronger link is understood to exist, to the extent that the set of values and safeguards on which the criminal justice system is based, both procedurally and substantively, is shared when it corresponds to a single area of freedom, security and justice (Art. 29 of the consolidated version of the Treaty on European Union given by the Treaty of Amsterdam of 2 October 1997). As a result, collaboration between EU countries on matters of justice should be based on the shared standard of rights and safeguards, so that with regard to the case in hand, it is not up to the Spanish judiciary to verify the chain of legal actions pursued by officials in the countries in question, and specifically, compliance by the Dutch authorities with the laws of said country, least of all to subject it to scrutiny under Spanish laws.

Finally, the STS of 25 September 2002 (ROJ 6159/2002) is also of interest here:

> In other words, in this respect there exists a consolidated case-law relating to the consequences of the existence of a European judicial area in the framework of the EU, being the result of EU countries sharing the same values and safeguards, though specific implementation depends on the legal traditions prevailing in each State, but which always safeguards the essence of these values and safeguards.

This last argument is somewhat disconcerting: it would seem to suggest that Spanish case-law is only valid for proceedings conducted in other European countries, and possibly not for those conducted in other non-European countries, whose criminal justice systems it appears to distrust. There is no need to give examples of countries whose legal systems could be criticised for their disregard for fundamental rights in criminal proceedings: nevertheless, it is interesting to note the existence of bilateral agreements on international legal cooperation proclaiming the priority of *lex loci* between Spain and some of these countries. . .

§. This merely serves to illustrate how Spanish case law is more than a little paradoxical and extremely lacking from a theoretical and logical point of view. It might well have to be reviewed when defence lawyers prove infringement of *lex loci* in the conduct of a cross-border investigation, or when it is evident that the investigation in the foreign country has not been conducted in accordance with Spanish law (as *lex fori*), in spite this being requested in the application for cooperation (particularly when defence lawyers demand to play a part in drawing up letters rogatory and request compliance with *lex fori*). And, naturally, change will obviously be called for when the Supreme Court has to deal with cases in which the admissibility of evidence obtained through investigations conducted outside the sphere of the EU is questioned.

In fact, just such a case occurred in a Spanish court, at a jurisdictional level below the Supreme Court, which had to deal with a cross-border investigation on Islamic terrorism involving the United States. The judgement of the *Audiencia Nacional* (Central Criminal Court) of 30 April 2009 (ROJ 2051/2009) considered the interception of a series of electronic communication made by the US in response to a letter rogatory issued by a Spanish investigating magistrate inadmissible on the grounds of lack of judicial control: the Spanish judge had not issued a reasoned

decision justifying the need for the interception, but had simply sent a letter rogatory to the US authorities asking them to comply; in the US, however, the matter was taken up by the police, under special anti-terrorism laws, and no judge was involved.

§. Furthermore, it is also paradoxical to see how respect for actions undertaken under *lex loci*, which is the *leitmotiv* of cross-border investigation and evidence gathering case-law, does not have the same weight in another important sphere of international legal cooperation in criminal matters, namely, extradition and the surrender of individuals.

Specifically, the Spanish Constitutional Court has often dealt with the problem of extradition to serve heavy sentences passed *in absentia*. The difficulty lies in the fact that under Spanish law, criminal trials can only be held *in absentia* when a light sentence is sought (no more than two years' imprisonment); and, in the opinion of the Constitutional Court, the defendant's right to take part in the hearing and defend themselves is an essential aspect of their fundamental right to defence and a fair trial (Art. 24 of the Spanish Constitution). In view of this, the Constitutional Court ruled that the decision of a Spanish court, in the context of an extradition process, to agree to the unconditional surrender of an individual in order to serve a heavy sentence passed down *in absentia* is a violation of the right to a fair trial, and specifically, of the right to defence by a lawyer [Art. 24(2) of the Spanish Constitution], unless the extradited offender can be guaranteed the right to appeal the sentence in their country of origin.[14]

For this purpose, the Constitutional Court has introduced the doctrine of "indirect violation" of fundamental rights. Although, according to the procedural law of the State where the criminal proceedings are held (i.e., according to *lex loci*), passing down heavy sentences *in absentia* is constitutionally legitimate, from the point of view of Spain it is contrary to the fundamental right to a fair trial and to a defence. Because of this, Spanish courts would be indirectly violating the fundamental rights of an offender convicted *in absentia* if the latter is surrendered as the result of extradition proceedings without subjecting surrender to the condition that they can appeal against their conviction, and thus safeguarding their right to a defence.

In doing so, the Constitutional Court acknowledges that Spanish courts must ascertain whether or not the foreign courts have respected the fundamental rights of the accused, and if not, may refuse to cooperate. Moreover, the standard used to evaluate the extent to which fundamental rights have been respected is derived from the Spanish system for protecting fundamental rights, although certain limits are imposed: the Constitutional Court does not allow the legitimacy of foreign proceedings to be examined as if they had been held in Spain. Instead, it limits the analysis to the most basic and fundamental requirements (although these, naturally, include the requirement that the accused must be present at their trial if a heavy sentence is sought).

[14] Cf. STC 91/2000, of 30 March; STC 134/2000, of 16 May; STC 162/2000, of 12 June; STC 156/2002, of 23 July; and STC 183/2004, of 2 November.

This concept has, in fact, been extended to include application of the European arrest warrant[15] and has recently prompted the Constitutional Court to refer a question to the European Court of Justice seeking a preliminary ruling relating to the system imposed by FD 2002/584/JHA, with the possibility of subjecting execution of a European arrest warrant to the condition that the sentence in question can be reviewed in order to safeguard the right to a defence of the accused.[16]

This concept is based, therefore, on the need for Spanish courts to ensure that the essence of fundamental rights applicable to criminal proceedings is always respected, and for the same reason, does not necessarily have to be limited exclusively to the context of extradition and surrender of individuals. It could therefore also be applied to the sphere of evidence, and would enable Spanish courts to rule as inadmissible in Spain any evidence obtained in a foreign country using methods and procedures that, although valid under *lex loci*, under Spanish law would be contrary to the essence of fundamental rights. If the Constitutional Court extends this case-law criterion to the sphere of evidence, it would destroy the concept established by the Supreme Court.

3.1.3 Some Proposals

§. Case law provides little help here, and an effort should be made to settle the initial issue, and in doing so, determine what the essential safeguards are that, according to Spanish law, must be respected in cross-border investigation so that: (a) Spanish judges can request compliance with the *lex fori* when requesting international legal cooperation; and (b) Spanish judges can determine whether the evidence resulting from a request for cooperation, or following a transmission of proceedings (*v.g.,* under Law 16/2006), can be validly used as the basis for a conviction in Spain. In my opinion, these essential safeguards could be the following:

a) **Role of the judiciary**: as we have seen above, a defining feature of the investigative phase of Spanish criminal proceedings is the essential role played by the judiciary. This, however, does not mean that a judge must necessarily be present in a foreign country whenever a cross-border investigation is set in motion. In my opinion, judicial intervention is only an essential safeguard in two cases:

   – When the purpose of the cross-border cooperation is to conduct an investigation in a foreign country that *per se* will restrain fundamental rights (*v.g.,* a house search or intercepting telecommunications). In these cases, however, it is important that it is a Spanish court that, before drawing up the letter rogatory or equivalent request, issues a reasoned decision based on the principle of proportionality ordering the restriction of rights (i.e., a court

[15] This was the case in STC 177/2006, of 5 June and STC 199/2009, of 28 September.

[16] Constitutional Court ruling 86/2011, of 9 June 2011.

order must be issued *in the requesting country*).[17] On the other hand, this decision does not have to be ratified by a court in the executing State, unless required by *lex loci*, because the executing State does not have to take decisions but merely comply with the decisions of the Spanish judge. A judge would only be needed in a foreign country when the investigative measure, by its very nature, must undergo periodic judicial reviews (*v.g.,* in the case of intercepting telecommunications or a prolonged undercover operation): in these cases, these must be conducted by the foreign judge.

– When the aim of the cooperation is the examination of pre-trial evidence. At times, documents or pieces of evidence are obtained through the cooperative investigation and are then sent to the requesting State (Spain, in this case), where they are subsequently used as evidence in a Spanish criminal proceeding. However, legal cooperation can also involve investigations that cannot later be used during the hearing but must be used as pre-trial evidence, taken in the executing country. This occurs, for example, when a statement is taken in a foreign country from a witness who has no intention of attending a hearing in Spain. Under Spanish laws, any procedural steps taken during the formal investigation stage are only admissible as pre-trial evidence if they have been conducted by a judge. In view of this, in order for similar steps taken in a foreign country to be considered valid pre-trial evidence, they must also be conducted by a judge. Consequently, if a Spanish investigating judge wants a statement to be taken from a witness in Italy, and thinks it unlikely that the witness will attend the trial in Spain, in their letter rogatory they must request that the interrogation is carried out in the presence of a judge in order for the statement made before the Italian judge to be admissible as evidence in the Spanish criminal proceedings.

b) **Legal counsel.** Given the importance of the right to a defence and to legal counsel, it is essential that in all investigative procedures implemented in the foreign country in which the accused must appear personally (such as taking their statements, or subjecting them to an identification parade, or taking DNA samples), he or she must be allowed to receive legal advice, offering, as the case may be, the services of a court appointed lawyer if they either do not have one of their own or cannot afford to appoint one.

c) **The right to adversarial proceedings.** Generally speaking, the accused has the right to be apprised of the progress of inquiries relating to any aspect of a criminal investigation that has not been declared secret by the investigating judge. The accused can also exercise their right to be present when these enquiries are made, either personally or represented by their lawyer: this means that, for example, the defendant's lawyer may be present when statements are taken from witnesses or experts. This safeguard is an essential part of the right to defence, and therefore, except in legitimately secret cases, the accused

[17] As we have seen above, it was for this reason that in its judgement of 30 April 2009 the *Audiencia Nacional* ruled inadmissible a number of telecommunication interceptions made in the US.

must be offered the chance to participate, albeit through their lawyer or representative, in the execution of the letter rogatory in the foreign country (*e.g.* by taking a statement from a witness). This formality must be expressly noted in the request for cooperation addressed to the executing State, at least when so requested by the accused after being notified by the Spanish judge of their intention to request said foreign cooperation.

d) **Safeguards related to authenticity and the "chain of custody."** Finally, for evidence gathered in a foreign country to be admissible, it is also essential to be able to prove the authenticity of the actions undertaken[18]: in this case it is customary to require the presence of a public official (such as a Spanish clerk of the court) during the formalities derived from the letter rogatory. Furthermore, when the purpose of the cross-border investigation is to procure documents and objects, it is also essential to accredit "chain of custody," although at this point there should be a premise of mutual trust between States.

§. If the *lex loci*, in the abstract, guarantees that these conditions will be met during the cross-border investigations, the evidence obtained in the foreign country will easily be deemed admissible in Spain. Neither will there be a problem if the *lex loci* does not, *a priori*, guarantee this, but the Spanish court, in its letter rogatory or equivalent request, asks that the investigation be conducted in such a way as to comply with the foregoing safeguards (*lex fori*).

However, if it can be proved during the Spanish criminal proceedings that the *lex loci* does not guarantee this result (and that the problem has not been overcome by conducting the investigative measure according to the formalities required for this purpose), I believe that the evidence will have been illegally obtained under Spanish law, and cannot therefore be used. The accused, in this situation, could move for the evidence to be declared inadmissible if it can be proved that the *lex loci* procedure does not sufficiently guarantee compliance with basic due process.

It might also be the case that, in the abstract, the *lex loci* is compatible with what should be considered essential safeguards from the point of view of Spanish law, but that in a particular case, these safeguards have not been honoured while conducting the inquiries requested in the letter rogatory issued by the Spanish court. In this particular case, again, the result should be to declare the evidence inadmissible and illegally obtained, although the burden of proof of violation of *lex loci* would fall on the accused.

§. I am aware that the foregoing proposals are not compatible with the case law of the Spanish Supreme Court, but I also believe I have shown that this case law is inconsistent and is unlikely to stand the test of time, even in the medium term. However, I also believe that Spanish courts are authorised to check that *lex loci* complies with the essential safeguards of criminal proceedings in Spain, and also that *lex loci* has been followed in a particular case. In doing so, Spanish courts would not be encroaching on the sovereignty of a foreign State, because the

[18] With regard to this, see STS of 18 November 1999 (ROJ 7315/1999), STS of 17 February 2003 (ROJ 1001/2003) or STS of 1 October 2007 (ROJ 7635/2007).

intention is not to invalidate the proceedings of foreign courts but to decide whether evidence intended to be used in Spanish courts is admissible. This is a way —indeed, the only way— of ensuring, albeit indirectly, compliance with the fundamental rights afforded to the accused under the Spanish Constitution. It is paramount to bear in mind the essence of this issue: a conviction secured on the basis of evidence obtained in violation of the essence of fundamental rights cannot be considered legitimate, even when these rights were violated in a foreign country.

3.2 Spain as a State Providing International Legal Cooperation in Criminal Matters

§. In principle, international schemes for cooperation in criminal matters are regulated by supranational conventions and laws based on the general assumption that cooperation will not result in interference in the domestic policies of the State involved. Cooperation is requested and granted within the framework of each State and in accordance with their power to act. The requesting State applies to another country for cooperation in order to obtain evidence that can be included in criminal proceedings conducted in its courts and in compliance with their criminal justice system. In turn, the executing State —Spain, in this case— must provide the requested cooperation without, at least in principle, assessing the criminal justice system in force in the requesting State.

The premise is, of course, general and has its limits and exceptions, and these are associated specifically with the need to uphold the fundamental rights and guarantees inherent to criminal proceedings.

3.2.1 General Problems

§. First, the requested Spanish courts could raise generic objections to cooperation in conducting cross-border investigations when the request is issued by an authoritarian State whose criminal justice system does not, from the point of view of Spain, offer minimum standards of respect for the rights of those subject to criminal proceedings. Moreover, a general objection can be raised when the criminal proceedings from which the request for cooperation stems are considered to be unjust (*e.g.* in the case of prosecution for political offence).

In these cases, cooperation may be refused based on the declarations and reservations formulated by each State in international conventions, specifically designed to avoid, in specific cases, results that may be contrary to their essential safeguards.

One such example is the reservations to the 1959 ECMLACM formulated by some countries. Article 2 of the Convention allows States to deny legal assistance if

they consider that compliance with the request would prejudice the sovereignty, security, public order or other essential interests of its country.[19]

§. The Spanish courts can also encounter problems when the referring States request that cooperation be executed subject to specific formalities, required by *lex fori*, that are incompatible with Spanish due process, or are coercive[20]: in these cases, supranational laws allow States to refuse the request if they consider that the formalities are not compatible with the fundamental principles of Spanish law.

On the same subject, excessively inflexible attitudes should be avoided when deciding what is or not compatible with a particular legal system, and when a measure is truly coercive. For this reason, it would be wise to establish the following principles:

– If the request includes investigative measures provided for in the referring State but not in Spanish law, this alone cannot be ground for refusing cooperation. Non-cooperation would only be justified if the requested investigation restrains a particular fundamental right; this type of measures always requires express legal authorisation, and if this does not exist in Spain, the courts will not be able to comply, even though the request is made to assist in a criminal proceedings conducted in another country where such investigative measures are regulated.
  Therefore, *e.g.* it would be reasonable for Spanish courts to accept a request for cooperation involving tracking the movements of a suspect in the open air; although this is not *per se* provided for in Spain's criminal justice system, it does not violate fundamental rights. However, *de lege lata*, it would not be possible to comply with a letter rogatory asking for samples of hair from a suspect to verify whether or not they have consumed narcotics, as this is a violation of the right to physical integrity and is not permitted under Spanish law.[21]
– If a request is lodged to conduct an investigation permitted under Spanish law, but with certain formalities considered necessary by the requesting State, the Spanish authorities would, in principle, be under the obligation to comply with the formalities, unless these are considered contrary to the essence of Spanish law. In order to determine where the limits of what is acceptable lie, the standards of the Spanish system of fundamental rights coupled with the principle of proportionality must be fully applied.
  Therefore, a Spanish court can be requested to take a statement from a witness, but this must be done with the help of a lawyer because this is required in order for the statement to be admissible in a subsequent trial in the referring State.

[19] Some countries, including Belgium, the Netherlands and Luxembourg, have extended this to include cases where "there are good grounds for believing that it concerns an inquiry instituted with a view to prosecuting, punishing or otherwise interfering with an accused person because of his political convictions or religion, his nationality, his race or the population group to which he belongs."

[20] Indeed, Article 12 FD EEW clarifies that the requirement to comply with *lex fori* "shall not create an obligation to take coercive measures."

[21] STC 207/1996, of 16 December.

However, it is debatable whether a Spanish court would be obliged to comply with a request for cooperation involving taking the statement of a suspected offender, but demanding that they swear on oath to tell the truth, warning that they will be liable to prosecution if they do not.

3.2.2 In Particular, the Issue of the Intervention of the Judicial Authorities

§. In principle, when cooperating in cross-border investigations, the issue of who is ordering the investigation in question —whether it is a judge or a public prosecutor— should be irrelevant, as should the issue of who should comply with the request —again, a judge or a prosecutor. Indeed, supranational laws deliberately seek to play down the importance of this question, considering a judge or a public prosecutor to be equal for this purpose.

The oldest laws make general mention of the "judicial authorities," although signatory States are later allowed to specify exactly who the judicial authorities would be in this case, allowing them to include the prosecuting authorities (cf. Art. 24 of the 1959 ECMLACM).[22] The most recent laws have been worded to take into account that in many States criminal investigations can be directed by the prosecuting authorities or even the police: one of the clearest examples of this is Article 2(c) FD EEW.

§. This issue is only important when cooperation is sought to conduct investigations that restrain fundamental rights or entail other equally invasive actions, and the request comes from or is to be executed by a member of the public prosecutor's office or the police force (*v.g.,* intercepting telephone conversations). It is essential to bear in mind that in the case of inquiries that restrain fundamental rights, judicial authorisation or supervision is a basic guarantee of the rights affected, and also the right to a fair trial. Is it possible, then, that according to Spanish standards, a request of this kind, one not made by a judicial authority, would violate essential principles and therefore warrant refusal? In principle, the answer could depend on how international legal cooperation is regulated in each legislative text:

– In the case of a simple rogatory or request system there should be no problem, provided that in the requesting State the public prosecutor or the police are empowered to request a local judge to instigate such measures. In these cases, supranational laws grant public prosecutors or the police special powers to also request a judge in another State to execute the order, and this judge will then decide on the matter as if it were a domestic case.

[22] Many countries chose to consider as judicial authorities for this purpose members of the public prosecutor's office (Germany, Austria, Belgium, Spain, Finland, France, Israel, Italy, Luxembourg, the Netherlands and Sweden); while others chose to extend this to certain members of the police force, in addition to the prosecuting authorities (Denmark, Norway and Switzerland).

– In the case of an exequatur system, the answer might differ. In these cases, a competent authority in the requesting State has previously agreed to go ahead with the procedure and resorts to the international legal cooperation system to request that this be carried out in the executing State. Without prior judicial authorisation, the measure would be illegal under Spanish law. In this case, Spanish courts could refuse to cooperate in order to avoid contributing to a violation of a fundamental right.
– If the cooperation is part of the existing EU system of mutual recognition the outcome could be different. This is because FD EEW does not distinguish between judges and public prosecutors as far as the authority to oversee the criminal investigation is concerned. In principle, if the authority issuing the European evidence warrant is not a judge, but is empowered under national laws to issue such a document, the executing country (*e.g.* Spain) cannot refuse the request on the grounds that under national laws this type of investigation can only be carried out if ordered or authorised by a judicial authority. Certain exceptions, however, are included when the issuing authority is not a judge or a public prosecutor, and the warrant has not been validated by either [cf. Arts. 13(1(e), 11(4) and 11(5)].

4 Cooperation with International Criminal Tribunals and the Protection of Fundamental Rights

§**.** The foregoing conclusions should be applied to cooperation with international criminal tribunals, insofar Spain can be considered a State obliged to cooperate with international criminal tribunals in their investigations.

In the case of cooperation with the International Criminal Tribunal for the Former Yugoslavia, it should be noted that Article 29(2) of the Tribunal's Statute establishes the obligation of States to cooperate with and act on any order issued by the Tribunal with the intentions of gathering statements, obtaining evidence, or releasing documents. In Spain, the legislature approved Organic Law 15/1994, of 1 June, for cooperation with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. Article 1 of the Law lays out the obligation of Spanish authorities to cooperate with the Tribunal, and article 2 specifies that this cooperation should be given in compliance with UN Resolution 827 (1993), the Tribunal Statute, this Law, and for any matters not provided for, by general criminal, substantive and procedural rules. As a result, it is clear that possible orders issued by the Tribunal are implicitly limited to whatever does not contravene the fundamental principles of Spanish law —although it is hard to imagine that this could, in practice, happen.

The same conclusion would apply to cooperation with the International Tribunal for Rwanda. The provisions of article 28 of the Statute of the International Tribunal

for Rwanda obliges the Spanish authorities to cooperate in obtaining evidence *lato sensu*, under the terms of Organic Law 4/1998, of 1 July, for Cooperation with the International Tribunal for Rwanda, the substance of which is the same as the 1998 Law on the Tribunal for the former Yugoslavia.

The option of refusing to cooperate if the request is contrary to the fundamental principles of Spanish law is more clearly laid out in the case of the International Criminal Court. Article 20(1) of Organic Law 18/2003, of 10 December, on Cooperation with the International Criminal Court, implements the provisions of article 93 of the Rome Statute dealing with the cooperation of Spanish authorities in conducting investigations and obtaining evidence. In line with the safeguard clauses established in Articles 93(3) and 99(1) of the Rome Statute, the Spanish lawmakers declare that Spanish authorities "shall comply with any request for cooperation issued by the Court in article 93 of the Statute that is not prohibited under Spanish law." "Prohibited" here should be construed in the widest possible sense, and includes procedures that are incompatible with the fundamental principles of Spanish law.

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[23] There are few publications on this subject in Spanish. Cf. the ones in the following reference list:

Report on Switzerland

Günter Heine and Monika Zürcher-Rentsch

Contents

Abstract The contribution of Prof. Günter Heine, in collaboration with Monika Zürcher-Rentsch, for the International Conference on "Transnational inquiries and the protection of fundamental rights in criminal matters" held in Syracuse on May 31 to June 1, 2011, gives an overview of the Swiss legal system on the topic. It starts with identifying the fundamental rights Switzerland committed to protect and then illustrates the different national and international legal sources regulating transnational cooperation between authorities and criminal courts. The continuously

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increasing cooperation with EU-member states is treated separately. With the help of various examples the contribution shows how fundamental rights are protected in the different proceedings. Differences exist mainly between proceedings of administrative assistance and of mutual assistance.

In its second part, the paper illustrates the Swiss regulations for the cooperation with international courts as well as domestic prosecution of international crimes and the few experiences in this field in connection with the protection of fundamental rights.

Abbreviations

BGE	Decisions of the Swiss Federal Court (*Entscheidungen des Schweizerischen Bundesgerichts*)
BGer	Swiss Federal Court (*Bundesgericht*)
BStGer	Bundestrafgericht (Swiss Federal Criminal Court)
CISA	Convention Implementing the Schengen Agreement
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Erw.	Consideration (*Erwägung*)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IRSG	Swiss Federal Act on International Mutual Assistance (*Bundesgesetz über internationale Rechtshilfe in Strafsachen*)
Pr	Practice of the Swiss Federal Court (*Die Praxis*)
SIS	Schengen Information System
SR	Classified Compilation of Federal Legislation (*Systematische Sammlung des Bundesrechts*)
StGB	Swiss Criminal Code (*Schweizerisches Strafgesetzbuch*)
ZISG	Swiss Federal Law on Cooperation with the International Criminal Court (*Bundesgesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof*)

1 Transnational Inquiries and the Protection of Fundamental Rights in Criminal Matters. Introductory Remarks

Today, we are confronted with an increasing number of crimes that have an international dimension. The need for unhindered and fast cooperation is obvious, but at the same time, we need to be aware that transnational criminal investigations can lead to a weakening of the protection of fundamental rights.

In Chapter 1 of its 2nd title, the Federal Constitution of the Swiss Confederation (henceforth: the Constitution) guarantees a number of fundamental rights. First and foremost, the core of each fundamental right is inviolable. However, Article 36 of the

Constitution allows the restriction of fundamental rights under certain conditions: the restriction has to be based on law, it needs to be justified by public interest or the fundamental rights of third persons and it has to be proportional.

Switzerland signed the ECHR (in effect for Switzerland since 1974) and the ICCPR (in effect for Switzerland since 1992). Both treaties guarantee the most fundamental human rights, which according to a Swiss understanding constitute the core of the constitutional fundamental rights. The ECHR and ICCPR thus prevail over any other international agreement or national law. According to the prevailing opinion, international procedural rights such as the right to a fair trial do not belong to the international *ordre public*. The Swiss Federal Court makes efforts to maintain all rights accorded by the ECHR and the ICCPR as binding standards. This position leads to a broader protection of these rights than the jurisdiction of the ECtHR, which only prohibits extradition to states where a flagrant violation of human rights awaits the defendant.[1]

2 Cross-border Investigations and Fundamental Rights

2.1 Tools of Investigative Cooperation Between Domestic and Foreign Authorities

Switzerland has no general, all-embracing regulation of administrative assistance.[2] Administrative cooperation is regulated separately for each area of law in the respective legal provisions. There are provisions on administrative assistance in criminal investigations e.g. in the federal law on the prevention of money laundering and terrorism financing, for the combating of criminal organisations, as well as in customs or tax matters. Regarding police cooperation, Switzerland signed several bilateral police cooperation agreements with other states.[3]

2.1.1 Principles of Cooperation Between Authorities

In contrast to judicial assistance, administrative assistance does not allow the application of coercive measures, and the provisions regarding data protection apply. Measures of administrative assistance on the police level, for instance, regularly constitute an infringement of fundamental rights. The disclosure of information related to individuals in the course of exchange of information on police level constitutes an imminent threat to the fundamental right of privacy and data protection.[4]

[1] Donatsch et al. (2011), p. 54.

[2] On the IRSG see below, § 3.1.

[3] *Ibid*., pp. 6–7.

[4] Breitenmoser and Weyeneth (2010), p. 161.

Since measures of administrative assistance pose such risks, the principles of legality and proportionality need to be respected. The sources of these are Article 5 of the Constitution and Article 8 ECHR.[5] Also, the principle of speciality and the reservation of norms belonging to the *ordre public* constitute additional limits on administrative assistance.[6]

2.2 *Investigative Cooperation at EU-Level*

On 12 December 2008, the Schengen *acquis* entered into force in Switzerland. Switzerland committed itself to adopt the entire Schengen *acquis*, including future Schengen legislation, according to Article 7 of the Agreement between the European Union, the European Community and the Swiss Confederation concerning the Swiss Confederation's association with the implementation, application, and development of the Schengen *acquis*.[7]

In the course of the implementation of the Schengen *acquis*, Switzerland introduced several new and more liberal measures on administrative assistance: The Schengen *acquis* contains provisions concerning cross-border police cooperation such as cross-border pursuit and surveillance as well as exchange of information between police authorities for the purpose of prevention and search. Switzerland also participates in the SIS, the central computer network containing, among other things, information on wanted persons, stolen objects and vehicles as well as on third country nationals to whom the entry into the Schengen area was refused.[8]

The data protection framework decision, regulating a new data protection concept, is also part of the Schengen *acquis* and must be implemented by Switzerland.[9]

3 Obtaining and Admissibility of Evidence and the Respect for Human Rights Guarantees

3.1 *The Transfer of Evidence from and to Foreign Criminal Proceedings*

The IRSG of 20 March 1981 and the corresponding ordinance regulate the conditions for mutual assistance based on a treaty as well as in the absence of such a treaty. Switzerland also signed several bilateral and multilateral conventions concerning mutual assistance in criminal matters, among them the European

[5] *Ibid*., p. 162.

[6] *Ibid*., p. 168.

[7] SR 0.362.31; Link: http://www.admin.ch/ch/d/sr/c0_362_31.html.

[8] Gless (2011), pp. 158–160.

[9] *Ibid*., p. 144.

Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters (both in effect for Switzerland since 1967) and the International Convention for the Suppression of the Financing of Terrorism (in effect for Switzerland since 2003).

The IRSG allows a number of ways of legal cooperation. Apart from extradition, the so called "small mutual assistance" provides for several other categories of assistance. They are: transfer of evidence which includes, in particular, the searching of persons and rooms, seizure, editing orders, expert opinions, hearing of witnesses and line-up of persons. It also covers the delivery of objects and assets for confiscation and restitution, service and delivery of documents and instruments. Spontaneous mutual assistance is possible, too. The IRSG also provides regulations for criminal prosecution and enforcement of sentences in place of a requesting state.[10]

Several principles regulated in international conventions, the Constitution, and the IRSG grant the compliance of measures of mutual assistance with fundamental rights:

- The principle of proportionality, although not mentioned explicitly in the conventions, is deemed to be a principle of international law.
- The principle of reciprocity.
- The principle of individual protection provides the person concerned, even in respect of measures of mutual assistance, the right to claim the same infringements of rights as if the procedure had taken place in the requested state.
- The IRSG as well as most of Switzerland's conventions on mutual assistance and extradition contain the principle of dual criminality. It has recently been called into question in connection with the development of a European criminal procedure. The European Convention on Mutual Assistance in Criminal Matters, for example, does not demand this principle. It only allows the possibility of reservations regarding dual criminality, and Switzerland has made such a reservation. In the field of extradition, the principle of dual criminality is absolutely required in Switzerland and it is applied very strictly because of its severe effect on fundamental rights. The facts presented in the request for mutual assistance are examined carefully in order to ensure that any of the crimes charged are punishable according to Swiss law.
- Switzerland applies the principle of *ne bis in idem*. Some conventions on mutual assistance contain similar provisions: Concerning extradition under Articles 8 and 9 of the European Convention on Extradition or concerning "small mutual assistance" under Article 54 CISA. For the application of the European Convention on Mutual Assistance in Criminal Matters, which does not contain the principle, Switzerland has made the appropriate reservation.
- The principle of speciality.[11]

[10] *Ibid*., pp. 79–80.

[11] Donatsch et al. (2011), pp. 61–87.

3.1.1 Protection of Fundamental Rights

The relevant standards of binding international law applying in connection with mutual assistance are the right to life, prohibition of collective punishment, ban of arbitrary sentencing, and the ban on torture and other inhuman treatment.[12]

In the state providing mutual assistance, fundamental rights can be affected when coercive measures are carried out. Generally, the guarantees of Article 6 ECHR do not apply to mutual assistance procedures because they are not criminal procedures. It is recognised, however, that if irreparable damages occur, seizure in mutual assistance procedures amounts to civil issues in the sense of Article 6(1) ECHR and/or Article 14(1) ICCPR.[13]

In the case of a forthcoming extradition, the requested state has to examine if the requesting state will guarantee fundamental human rights. Unlike the ECtHR, the Swiss Federal Court has stated that Switzerland must ensure human rights protection in the requesting state not just in cases of potential extradition, but also before granting other mutual assistance.[14] The risk of violation of fundamental rights must be individual and concrete. Furthermore, the Swiss Federal Court held that a close examination needs to be undertaken especially regarding states showing democratic deficits.[15] It also takes the view that member states of the ECHR are entitled to a general assumption that they will guarantee the rights enshrined in the Convention.[16]

Switzerland demands of the requesting state particularly that it respect the following human rights: prohibition of torture and inhuman punishment, prohibition of punishment because of race or religion, the material principle of legality as well as guarantees concerning a legally competent judge and fair trial (Art. 6 ECHR, Art. 14 ICCPR) consisting, inter alia, of the presumption of innocence, the accused's right to silence, prohibition of constraint to self-incrimination, right to presence, protection of family life and protection of freedom of expression.[17]

Consequences for the decision on mutual assistance when human rights are at risk of being disregarded are the following:

– Refusal of mutual assistance: According to Article 2 IRSG, Switzerland denies mutual assistance where no treaty has been concluded with the requesting state if there are reasons to assume that the procedure in the requesting state is not compliant with the fundamental rights or procedural standards of the ECHR and the ICCPR. For this reason, mutual assistance was denied to Iran in a case in 1989.[18] Iran requested mutual assistance from Switzerland in a case of fraud and asked for documentation on bank accounts of the accused person in Switzerland

[12] *Ibid*., p. 53.

[13] *Ibid*., p. 55.

[14] BGE 123 II 616 f.

[15] BGE 123 II 167, 112 Ib 223, 108 Ib 412.

[16] Pr 85 (1996) Nr. 99, BGer of 26 March 2002, 1 A.182/2001, Erw. 5.1.

[17] Donatsch et al. (2011), pp. 56–57.

[18] BStGer, Decision of 23 February 2010, RR.2009.26.

as well as that the assets in these bank accounts be frozen. To find out if there was a risk of human rights violations in the concrete case if the request were granted, the Swiss Federal Court first considered the general situation of human rights in Iran and then examined whether the accused would be exposed to danger in the concrete circumstances. It came to the conclusion that Iran was not to be considered a constitutional state because it did not respect nor did it ensure minimal procedural safeguards according to international standards. Mutual assistance was therefore denied, as the subjects of the criminal procedure were not guaranteed sufficient protection.

Some treaties entered into by Switzerland include clauses to limit mutual assistance when human rights are disregarded, for example Article 3 of the European Convention on Extradition. When provisions of a bilateral treaty conflict with the ECHR or the ICCPR, these Conventions prevail according to Swiss opinion.[19]

– Granting mutual assistance under certain conditions: mutual assistance can be provided in these cases but it is made dependent on a confirmation of the requesting state guaranteeing the respect of fundamental rights or the possibility to monitor the procedure. In its decision BGE 131 II 228, the Swiss Federal Court considered the confirmation of Taiwan concerning the non-enforcement of the death penalty as insufficient. Such demands are constitutionally delicate insofar as they, by requiring the court of the requesting state to forego a certain punishment, can be so diplomatic in nature as to risk violating the separation of powers.[20] As an example for conditions set out for granting mutual assistance see BGE 129 II 274 where the Swiss Federal Court demanded of Nigeria the observance of Articles 7, 10 and 17 ICCPR.[21]

Mutual assistance is furthermore denied where the requesting state prosecutes or punishes the accused based on political opinion or the belonging to a certain social group, race, religion or ethnicity. This barrier is guaranteed by the IRSG, in the Swiss Criminal Code (StGB, Articles 261bis and 264), the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters. Switzerland denies mutual assistance where substantial indications show that a criminal procedure is motivated mainly by one of the reasons listed above. Accordingly, the Swiss Federal Court denied mutual assistance to the Russian attorney-general in the "Yukos" case. It considered the criminal procedure against Mr. Chodorkowski politically motivated and discriminatory. The Swiss Federal Court based its decision on reports of Amnesty International, Human Rights Watch, and the International Helsinki Federation for Human Rights of the year 2006. Those reports considered that minimal procedural guarantees according to the ECHR and the ICCPR were not present in the procedure in question.[22]

[19] Donatsch et al. (2011), pp. 57–58.

[20] See also BGE 131 II 228.

[21] Donatsch et al. (2011), pp. 58–59.

[22] BGer, Decision of 13 August 2007, 1A.29/2007, Erw. 3. See Donatsch et al. (2011), pp. 59–60.

3.2 The Transfer of Evidence at EU-Level

The association to the Schengen *acquis*, which is part of the Bilateral Agreements II between Switzerland and the European Union signed in the year 2004, changed mutual assistance in several respects. Numerous simplifications entered into force for Switzerland concerning the extradition, transfer of evidence, and the enforcement of penalties. The principle of request is weakened by the regulations of Article 52 f. CISA, providing for the possibility of direct communication between prosecuting authorities and direct service of process. An important change for Switzerland is furthermore the commitment to extensive mutual assistance in the area of consumption tax, value added tax and tollage, and the expansion of mutual assistance into cases of evasion of these types of taxes. Another novelty is the softening of the requirement of dual criminality by the broadening of the accessory mutual assistance and the expansion of mutual assistance on administrative offences sanctioned by administrative authorities.

Also part of the Bilateral Agreements II between the EU and Switzerland is the regulatory framework fraud prevention agreement.[23] The defining of indirect taxes as subject to mutual assistance and in particular the possibility of spontaneous mutual assistance constitute the principal novelties for Switzerland within this agreement.[24]

3.3 Special Regulations in the Field of Transnational Organized Crime

Membership in and supporting a criminal organisation became a crime in Switzerland on 1 August 1994.[25] Article 72 StGB allows the confiscation of assets under the de facto control of criminal organisations. If these assets belong to a person participating in a criminal organisation or supporting such an organisation, the power of disposition of the criminal organisation is presumed until proven otherwise (reversal of the burden of proof).

Switzerland ratified the UN Convention against Transnational Organised Crime in the year 2000. As a consequence of this ratification, Switzerland implemented various measures against organised crime amongst which are the commitment to several measures of mutual assistance, including extradition of possible offenders and the exchange of information on organised crime among the authorities of the member states.

[23] SR 0.351.926.81.

[24] Donatsch et al. (2011), pp. 130–133.

[25] Art. 260ter StGB.

Article 7(1) of the Treaty between Switzerland and the USA on mutual assistance in criminal matters of 25 May 1973 prescribes that there is no prerequisite of dual criminality for measures in connection with the prevention of organised crime.

Reciprocity is not a requirement for mutual assistance, according to Article 8(2) (a) IRSG, where the nature or seriousness of the offence make a response necessary, which is in particular the case of organised crime. Also, the requirements of the principle of dual criminality are lowered in respect of organised crime.[26]

4 Cooperation with International Criminal Tribunals and the Protection of Fundamental Rights

4.1 The Protection of Fundamental Rights in the Judicial Cooperation with Ad Hoc Tribunals

The Federal Resolution of 21 December 1995 on Cooperation with the International Tribunals Prosecuting Serious Violations of International Humanitarian Law regulates the judicial cooperation.[27] In general, the rules of the IRSG are applicable to the cooperation with international courts, insofar as there are no special regulations *e.g.* in a Convention.[28]

The Swiss Federal Office of Justice rejected in 2009 a request for mutual assistance from the Rwandan government for the extradition of an alleged "*génocidiaire*" because the level of human rights protection in Rwanda was not satisfying to the degree that would permit an extradition. One reason for this was the fact that the accused would not be permitted to call witnesses for his defence in the same manner and under the same conditions as witnesses for the prosecution.[29]

4.2 The Protection of Fundamental Rights in the Judicial Cooperation with the Permanent International Criminal Court

Switzerland's cooperation with the permanent International Criminal Court is regulated by a federal law.[30] Transfer of persons prosecuted or sentenced by the

[26] Donatsch et al. (2011), pp. 63 and 71.

[27] SR 351.20; Link: http://www.admin.ch/ch/d/sr/c351_20.html.

[28] Gless (2011), p. 284.

[29] Duttwiler (2009), p. 2.

[30] Federal Law of 22 June 2001 on Cooperation with the International Criminal Court, ZISG. SR 351.6; Link: http://www.admin.ch/ch/d/sr/c351_6.html.

court is the main form of cooperation. Other measures such as the recording of evidence including hearings of witnesses and suspects, searches and seizures, service of documents and protection of victims and witnesses are regulated.

The ZISG grants the fundamental rights concerning a fair trial, offering for example possibilities to lodge a complaint against a transfer to the ICC and provides guarantees such as fair hearing. Each final decision of the competent authority for any cooperation is subject to appeal, so that the relevant fundamental rights can be guaranteed. When the ICC requests the transfer of a Swiss resident, Switzerland grants special legal protection. The affected person has the possibility to lodge a complaint to the Federal Criminal Court within ten days. The court decides on the jurisdiction of the ICC. In case concurrent Swiss jurisdiction is questioned, it is the ICC that decides on the jurisdiction.[31]

The principle of speciality is also anchored in Article 27 ZISG. Dual criminality, however, is not required.

Switzerland has so far had only limited experience in the cooperation with the ICC.[32]

4.3 Domestic Prosecution of International Crimes and the Protection of Fundamental Rights

Since 1968, the Swiss Military Courts have been competent to judge violations of the Geneva Conventions and other Conventions of international humanitarian law. Due to an amendment entered into force on 1 January 2011, the competency to judge cases of genocide, crimes against humanity and war crimes belongs now to the ordinary courts. Military courts are now only competent to judge war crimes in the event of war.

According to statistics, to date the Swiss Military courts have adjudicated a total of 27 cases (Ex-Yugoslavia: 14; Rwanda: 3; Sierra Leone: 3; other countries: 4) of people presumed to have committed serious violations or grave breaches of the Geneva Convention. One trial lead to a conviction. It was the case of F. Niyontese in April 1999, a former mayor of Mushubati, Rwanda. He was convicted and sentenced to life imprisonment for murder, attempted murder, and incitement to murder as well as grave breaches of the Geneva Conventions.[33] Two cases were transferred to the International Criminal Tribunal for Rwanda for judgement and in one case mutual assistance was granted to Sierra Leone.

[31] Gless (2011), p. 287.

[32] *Ibid*., p. 285.

[33] Sentence of the Swiss Military Justice of 27 April 2001, commented in Ziegler et al. (2009), pp. 389–396.

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Report on USA

Stephen C. Thaman

Contents

Abstract This chapter in the book on transnational inquiries and the protection of fundamental rights in criminal proceedings takes into account the particular, and perhaps unique situation in the United States (US) following the terrorist attacks on 11 September 2001. It explores the laws regulating inquiries by foreign

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governments who seek evidence in the US to use in criminal proceedings overseas, but primarily the protections recognized by US statutes and jurisprudence when US officials gather evidence abroad. In this respect, the chapter focuses on protections during interrogations, searches, interceptions of confidential communications, and examinations of witnesses and explores when the protection differs, depending on whether the target of the investigative measure is a US-, or non US-citizen, or whether the investigating officials are part of the criminal justice apparatus or belong to the military or the intelligence community. Finally, the chapter explores the admissibility of evidence gathered in the same areas, depending on whether it is used in the normal civilian criminal courts, or in the newly constituted military commissions instituted for trial of foreigners accused of international terrorism.

Abbreviations

AG	Attorney General
ASPA	American Service-Members' Protection Act
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CIA	Central Intelligence Agency
CIPA	Classified Information Protection Act
Const.	Constitution
CSRT	Combatant Status Review Tribunal
DOD	Department of Defense
DOJ	Department of Justice
DTA	Detention Treatment Act 2005
FBI	Federal Bureau of Investigation
FISA	Foreign Intelligence Surveillance Act
FRCrimP	Federal Rules of Criminal Procedure
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
KSM	Khalid Sheikh Mohammed
MLAT	Mutual Legal Assistance Treaty
NATO	North Atlantic Treaty Organization
USC	United States Code
USSC	United States Supreme Court

1 Introduction

Since the terrorist acts of 11 September 2001 (hereafter 9–11) there have been radical changes in the way evidence is gathered by US officials overseas. During the administration of George W. Bush, government officials sought to justify brutal and

illegal methods, such as kidnapping or "extraordinary rendition," indefinite *incommunicado* detention and the use of torture and cruel, inhuman and degrading treatment, which would otherwise be impermissible in a normal criminal prosecution. Because evidence derived from such practices would not be admissible in a normal trial, the US set up a parallel system of military commissions to deal with those detained in the "war on terror" in which evidence tainted by illegal practices would have a better chance not only of being admitted, but also of being accepted by the triers of fact, who would be military officers in lieu of citizen jurors, and would decide by majority vote, rather than unanimous verdict. At risk are the very foundations of the American notions of due process in both the pre-trial treatment of criminal suspects and in the process of ascertaining guilt and imposing punishment.

Today, we find two sets of rules, two types of courts, and two types of accuseds: one for the normal criminal defendant and the other for the "enemy combatant." In the US, criminal defendants enjoy a presumption of release pending trial.[1] The Sixth Amendment to the US Const. guarantees them the right to a speedy, public trial by jury and the right to confront and cross-examine the witnesses against them. The Fifth Amendment to the constitution and due process prevent the use of confessions which were given involuntarily, or without knowledge of the privilege against self-incrimination and the right to counsel. "Enemy combatants," on the other hand, as will be seen below, are deprived of many of these rights.

In this country report, I will discuss the differing rules that apply for overseas investigations, depending on whether the investigation is conducted by federal law enforcement officials, or army or CIA officials, and I will discuss the admissibility of evidence gathered, both in the context of a normal criminal trial in the federal courts, and before a military commission.

2 Cross-Border Investigations and Human Rights

2.1 Investigations of Foreign Governments in the US

2.1.1 Letters Rogatory and Their Enforcement

Federal courts have the inherent power to issue letters rogatory. The relevant statute is 28 USC § 1782, which provides, in pertinent part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request

[1] 18 USC §3142(b), provides that a judicial officer "shall" release a person before trial, unless certain factors require coercive measures.

> made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court (. . .) The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

Letters rogatory may be issued in situations where ordinary means of discovery under Rule 15 FRCrimP fail.[2] According to the USSC, an "interested person," could refer not only to "litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance."[3] The term "tribunal" in the statute does not include private arbitrations,[4] but otherwise includes "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[5] Letters rogatory may be issued even if a criminal case has not yet been charged, as long as the initiation of criminal proceedings "be within reasonable contemplation."[6]

Furthermore, a court may issue a letter rogatory related to a proceeding in a foreign court even when the information sought would not be discoverable under the same circumstances in a US domestic criminal proceeding and even when the country requesting the letter rogatory would not allow discovery under the same circumstances in its own courts.[7] This approach is in line with the policy reasons behind letters rogatory of assisting foreign litigation in order to encourage reciprocal behavior on the part of foreign courts and of promoting judicial economy in international litigation.[8]

In exercising their discretion on whether to issue a letter rogatory, courts must take a number of factors into consideration: (1) Is the person from whom discovery is sought a participant in the foreign proceeding? (2) What is the nature of the foreign tribunal? (3) What is the character of the proceedings underway? (4) What is the receptivity of the foreign tribunal to US federal court assistance? (5) Does the discovery request seek to circumvent restrictions or policies of the foreign government or the US? (6) Is the discovery request unduly burdensome or intrusive?[9]

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[2] United States v. Jefferson, 594 F. Supp. 2d 655 (E.D. Va. 2009).

[3] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 257 (2004).

[4] Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999).

[5] USSC, Intel Corp. v. Advanced Micro Devices (footnote 3), 258

[6] *Ibid*., 259.

[7] *Ibid*., 262.

[8] Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1102 (2nd Cir. 1995).

[9] Intel Corp. v. Advanced Micro Devices (footnote 3), 264, 265.

2.1.2 Mutual Legal Assistance Treaties

MLATs provide an alternative framework for judicial assistance than that established by 28 USC § 1782 and subsequent case law. The US is party to dozens of MLATs, most of these being bilateral treaties. Several MLATs govern judicial assistance with supranational organizations. Such supranational organizations include the European Union, Europol and Eurojust.[10] MLATs provide a broad range of cooperation measures between the US and foreign countries in criminal matters, including the taking of testimony or statements from witnesses, obtaining documents, records, and evidence, serving legal documents, locating or identifying persons, executing requests for searches and seizures, and providing assistance related to the forfeiture of the proceeds of crime and collecting fines imposed as a sentence in a criminal prosecution.[11]

3 Investigations Conducted by US Officials Abroad

3.1 Detention of Suspects Abroad

3.1.1 Arrest and Pre-trial Detention of Suspected Criminals

The Fourth Amendment of the US Const.[12] requires probable cause that a person has committed a crime, before any arrest is possible. An arrested person must be brought before a judge as soon as is practicable, but in no case later than 48 hours from the time of arrest.[13] The prosecutor may request that a person charged with certain serious felonies be detained pretrial,[14] or a person may be detained due to an inability to post bail. However, the length of detention is strictly limited by the right to a speedy trial guaranteed by the Sixth Amendment and by the federal speedy trial statute, which requires that trial start no later than 100 to 130 days after arrest unless a judge makes a reasoned decision to grant an extension based in the interests of justice.[15]

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[10] See U.S. Dep't of State, Treaties in Force 86, 87, 88 (2010), http://www.state.gov/s/l/treaty/tif/index.htm.

[11] United States v. Atiyeh, 402 F.3d 354, 363 (3rd Cir. 2005).

[12] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[13] County of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991).

[14] 18 USC § 3142(f)(l).

[15] 18 USC §§ 3161(b,c); 3161(h)(8)(A).

The Detention of "Enemy Combatants"

On 18 September 2001, Congress gave the President the authority to "utilize all necessary and adequate force against the nations, organizations or persons who, in his opinion, planned, committed or aided the terrorist attacks which took place on September 11th, or against those who gave them refuge to prevent future acts of international terrorism against the United States by these nations, organizations and persons."[16]

On 13 November 2001, President Bush issued a decree authorizing the detention of persons whom the president identified as "enemy combatants" and their prosecution by military commissions.[17] After the invasion of Afghanistan large numbers of prisoners were transported to the US naval base at Guantánamo Bay in Cuba, which began to function as an internment camp. Other more high-level prisoners, such as the alleged mastermind of the 9–11 attacks, Khalid Sheikh Mohammed (hereafter KSM) were kept in secret "black sites" in the Middle East and elsewhere. The Bush Administration denied the internees prisoner of war status under the Geneva Conventions[18] and used this *as* pretext to subject them to severe methods of interrogation. The government also maintained, given that Guantánamo was not located on US territory, that the prisoners were not entitled to the benefits of the writ of *habeas corpus* to question the legality of their detention.[19]

The strategy of the Bush administration to find a detention center where neither international nor American law would apply, was rebuffed by the USSC. In *Rasul v. Bush*, the USSC rejected the argument, that the federal courts do not have jurisdiction over foreigners held at Guantánamo and interpreted the *habeas corpus* statute to bestow upon them the right to seek review of their detention status in the federal courts.[20] Immediately following this decision, the DOD established two types of courts to decide the legality of the Guantánamo detentions: (1) "combatant status review tribunals" (CSRT) would decide if the detainees are, in fact, enemy combatants and (2) military commissions would judge those accused of terrorist crimes, such as aiding Al Qaeda.

The USSC found, however, that the procedures before the CSRT violated the prisoners' rights to confront the charges, inasmuch as there was no right to counsel and there were no limits on the admission of hearsay testimony and the opportunity to question witnesses was "more theoretical than real." It also held that the appeal provisions again violated the right to petition in *habeas corpus* before the federal district courts.[21]

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[16] § 2, Pub. Law 107–140, 115 Stat. 224 (18 September 2001).

[17] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (13 November 2001), 66 Fed. Reg. 57833.

[18] Abrams (2008), 630.

[19] Art. I, § 9 US Const. provides that: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

[20] Rasul v. Bush, 542 U.S. 466, 483–484 (2004).

[21] Boumediene v. Bush, 553 U.S. 723, 771, 789–792 (2008).

The USSC also held that the Military Commissions Act of 2006, regulating trial before the new courts, violated the Geneva Conventions and due process, because it did not provide a defendant the safeguards one has before a normal military court martial in the US.[22] Immediately after being elected, President Obama announced that he would close the detention center at Guantánamo, but he also declared that he had the power to detain alleged terrorists indefinitely in other countries and that he would maintain prisons in Afghanistan to use for this purpose.[23] Since then, however, Congress has stifled this attempt by passing legislation preventing the transfer of any of the Guantánamo detainees to prisons on US soil except to stand trial.[24]

Kidnapping and Extraordinary Rendition

In order to avoid the restrictions on torture by US officials, the CIA has, since 1996, engaged in the practice of "extraordinary rendition," that is, transporting prisoners captured overseas to "black sites" in the Middle East and elsewhere, so they could be subjected to torture or cruel, inhuman or degrading treatment while interrogated by foreign officials.[25]

Already in 1886, the USSC held that the fact that a US citizen is kidnapped overseas in order to be brought to trial in the US does not violate due process or prevent a trial from going forward.[26] More recently, the USSC held that the kidnapping of a Mexican citizen in Mexico, and his forced transport to the US, did not prevent his standing trial for murder of a US drug enforcement officer even if the abduction violated the US-Mexico extradition treaty.[27]

Although Art. VI, US Const., expressly gives treaties status as the "law of the land," the US courts have authorized Congress to, if necessary, enact laws which contravene customary international law.[28] As early as 1989, the Office of Legal Counsel of the US DOJ, issued an opinion, claiming it does not violate the Fourth Amendment for the US FBI to investigate and arrest criminal suspects overseas even if it violates customary international law.[29]

In the few cases of "extraordinary rendition" that have made it to the US courts, it has been difficult for the victims to prevail in their suits against the government due to the doctrine of "official secrets." Thus, a civil suit by Khalid el-Masri,

[22] Hamdan v. Rumsfeld, 548 U.S. 557, 615–624 (2006).

[23] Savage (2009), A20.

[24] Mayer (2010), 60.

[25] Since 9–11, the C.I.A. has transported from 100 to 150 alleged terrorists between countries, especially in the Middle East. See Jehl and Johnston (2005).

[26] Ker v. Illinois, 119 U.S. 436, 444–445 (1886).

[27] United States v. Alvarez-Machain, 504 U.S. 655, 669–670 (1992).

[28] United States v. Yousef, 327 F.3d 56, 86 (2nd Cir. 2003).

[29] O.L.C, D.O.J. Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities (21 June 1989).

a German citizen of Lebanese descent who was detained in Macedonia, turned over to the CIA, and then sent to a "black site" in Afghanistan, where he alleged he was tortured, was prevented from suing the CIA and private companies because the government claimed it would have to reveal classified information relating to the program of rendition which would compromise national security.[30]

3.2 Interrogations

3.2.1 Rules If Conducted by US Law Enforcement Officials (or with their Cooperation)

In normal criminal investigations, American courts use two tests to ascertain the constitutionality of a police interrogation: the test developed in the landmark decision of *Miranda v. Arizona*, which applies only to suspects who are in police custody and requires police, before interrogating, to advise the suspect of the right to silence, the right to counsel, and the right to court-appointed counsel if indigent,[31] and the "voluntariness" test, which applies to all interrogations, even those which are conducted after a suspect is properly advised of his rights under the *Miranda* decision.

An important exception to the rules articulated in the *Miranda* case was carved out when the USSC allowed interrogators to withhold giving the warnings if there were an issue of public safety, such as finding a dangerous weapon.[32] On 21 October 2010, the FBI issued a memorandum, advising its officers to intensively interrogate terrorism suspects under the "public safety" exception, about any possible plots or dangers before advising them of their rights under *Miranda*.[33]

Confessions obtained by torture and other methods designed to undermine the free will of the suspect have always been prohibited in the US under the "voluntariness" test.[34] The US ratified the CAT in November of 1994.

If an interrogation is conducted abroad by US officials, or by foreign officials in a "joint venture," in which US officials play a substantial role, then US rules apply to the extent practicable. Courts have, however, said that the *Miranda* warnings may be modified due to the possibility that the government will have difficulty overseas in obtaining counsel for prisoners.[35]

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[30] El-Masri v. United States, 479 F.3d 296, 311 (4th Cir. 2007).

[31] Miranda v. Arizona, 384 U.S. 436, 467–468 (l966).

[32] New York v. Quarles, 467 U.S. 649, 655–656 (1984).

[33] Savage (2011), A14.

[34] Brown v. Mississippi, 297 U.S. 278, 286–287 (1936).

[35] In re Terrorist bombings of U.S. Embassies in East Africa, 552 F.3d 177, 198–199 (2d Cir. 2008).

Finally, the Fifth Amendment right against self-incrimination does not prevent US officials from compelling a citizen under oath in an extradition proceeding to make statements that might open him up to criminal liability in the country seeking his extradition.[36]

3.2.2 Rules If Conducted by Military Officials or the CIA

Before 9–11, the US military used deception, tricks, and certain types of threats during interrogation of prisoners, which might have violated the due process test of "voluntariness" and the fruits of which would not have been admissible in a normal criminal trial. But the U.S. military has never officially allowed techniques that would violate the CAT.

But after 9–11, the official attitude changed. After the publication of photographs of the sadistic acts of torture and humiliation performed by US soldiers in the Iraqi prison of Abu Ghraib, it was revealed that lawyers in the White House and DOJ had written memoranda, maintaining that the President has the right to use "enhanced interrogation methods" in the exercise of his emergency powers during wartime. They maintained that, for a technique to amount to "torture," it would have to inflict physical pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." For purely mental pain or suffering to amount to torture, it would have to "last for months or even years."[37]

The DOD permitted so-called "Category II" techniques, which included the use of stress positions, false information and documents, isolation of up to 30 days, interrogations which lasted up to 20 hours, stimulus deprivation, the use of hooding, forced nudity, cutting the hair and beards of Muslim detainees, the exploitation of phobias and scaring the prisoners with dogs. However, only with the permission of Secretary of Defense Donald Rumsfeld, could the interrogators resort to more intensive "Category III" techniques, such as exposure to cold and water, the use of a wet towel to provoke a false perception of asphyxiation ("waterboarding")[38] and the use of physical contact which did not cause injuries.[39]

Congress finally responded to the outrage caused by the torture memos and specifically prohibited the use of torture and cruel, inhuman or degrading methods in the 2005 DTA.[40] Upon taking office, President Barack Obama decreed that all

[36] United States v. Balsys, 524 U.S. 666, 673 (1998).

[37] Bybee memorandum, 1 August 2002 (main author, John Yoo). In: Abrams (2008), 460.

[38] Water boarding was used more than 183 times against KSM. Mayer (2010), 58.

[39] US DOD, Legal Brief on Proposed Counter-Resistance Strategies (Oct. 11, 2002). Abrams (2008), 461.

[40] 42 USC § 2000dd. The DTA defines "cruel, inhuman or degrading treatment" as that prohibited by the Fifth, Eighth and Fourteenth Amendments, thus referring back to the "involuntariness" test discussed above.

interrogations in the war on terror would, in the future, abide by the US Army Field Manual on Interrogation,[41] which, in its 2006 revision, clearly prohibits cruel, inhuman and degrading treatment and classifies waterboarding as torture.[42]

In 2010, however, Congress drew a clear line between the rules applicable for interrogations conducted by DOJ personnel (such as the FBI) for purposes of normal criminal investigations, and military or CIA interrogators, by explicitly prohibiting the latter from advising suspects of their right to counsel and to silence as required by *Miranda*.[43]

3.2.3 Rules If Conducted by Foreign Officials

Although courts have not enforced the strict requirements of due process and *Miranda* on foreign interrogators when not acting in a "joint venture" with US authorities, and would accept evidence gathered in violation of those tests, the line has been drawn at conduct which "shocks the conscience of the court," and torture would certainly constitute such conduct.

3.3 Conducting Searches Abroad

3.3.1 Rules If Conducted by Foreign Officials

The USSC has elaborated comprehensive case-law governing searches conducted by US law enforcement officials in the US. In general, a search warrant based on probable cause is required for the search of homes and other private spaces, unless the police act under exigent circumstances.[44] However, these rules are not applied when foreign officials independently conduct searches which yield evidence that is subsequently offered in a US court. As with interrogations, the only limitation would be if the way in which the search was conducted "shocked the conscience" of the US Court. If US law enforcement officials "substantially participate" in the investigation leading up to the search, then US Fourth Amendment law will be applied. Mere presence of US law enforcement officials during the search and their having requested foreign police to conduct the search does not, however, constitute "substantial participation."[45]

[41] Shane et al. (2009), A16.

[42] §§ 5–74, 5–75 Army Field Manual on Interrogation, FM2-22.3 (FM 34–52), Abrams (2008), 474.

[43] 10 USC § 1040(a)(1)(2010).

[44] For the exigent circumstances exception related to "hot pursuit" of a criminal, see Warden v. Hayden, 387 U.S. 294, 310–311 (1967). For exceptions to protect life or property, see Brigham City, Utah v. Stuart, 547 U.S. 398, 403–404 (2006).

[45] United States v. Rosenthal, 793 F.2d 1214, 1230–1231 (11th Cir. 1986).

3.3.2 Rules If Conducted by US Law Enforcement Officials (or with Their Cooperation)

If US officials conduct a search overseas, the target of which is a US-Citizen, then the Fourth Amendment protection against "unreasonable searches and seizures" applies. US courts have, however, determined that it is would not be practicable to necessarily require judicial authorization, due to the lack of US magistrates overseas who have authority to issue such search warrants.

If a search is conducted overseas, however, and the target of the search is not a US-citizen and has no ties to the US, then the USSC has held that the Fourth Amendment only protects "the People" and that a foreigner would not be included among the "People" as envisioned by the authors of the US Bill of Rights.[46] The Fourth Amendment also does not apply when US officials search a foreigner on board a ship in international waters.[47]

3.4 Interception of Confidential Communications Abroad

3.4.1 Rules If Conducted by Foreign Officials

As with searches, a wiretap conducted by foreign officials will be governed by US law and the Fourth Amendment if it is characterized as a "joint venture." For instance, in one case wiretaps by Danish authorities were considered to be "joint ventures" because US officials requested the wiretaps, were involved in daily decoding and translation of the intercepted messages, and all information gathered was turned over to US officials.[48] Once a "joint venture" has been found, then US courts do not apply the US wiretap law, but determine, rather, whether the procedure used by the foreign country was "reasonable" under the Fourth Amendment.[49]

3.4.2 Rules If Conducted by US Law Enforcement Officials

Where US officials engage in wiretapping overseas in normal criminal cases, then courts will apply the Fourth Amendment "reasonableness" analysis, and not insist on judicial authorization, because there is usually no ability for US courts to issue warrants in such situations.[50] Thus the federal wiretapping statute, known as "Title III", which requires probable cause and judicial authorization,[51] will not be applied.

[46] United States v. Verdugo-Urquidez, 494 U.S. 259, 274–275 (1990).

[47] United States v. Bravo, 489 F.3d 1, 8–9 (1st Cir. 2007).

[48] United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995).

[49] *Ibid*., 1094–1095 (here Danish law appeared to give similar protection as American law).

[50] In re Terrorist Bombings of US Embassies in East Africa, United States v. Odeh, 552 F.3d 157, 159 (2nd Cir. 2008)

[51] 18 USC § 2516.

In 1978 Congress enacted the FISA, which allowed the President, through the AG, to order wiretapping of foreign agents or foreigners engaged in international terrorism and conduct searches without judicial authorization.[52] The only exception was if the execution of the measure might affect a US citizen or permanent resident, in which case an order was required from a secret court, the FISA Court, based on probable cause that the persons whose conversations were to be intercepted were "foreign agents" or "involved in international terrorism." However this law was mainly conceived for wiretapping and bugging within the US.

Following amendments to FISA in 2008, the President, through the AG, may now authorize wiretaps of foreigners abroad for up to 1 year to collect foreign intelligence information or if there is probable cause that they are involved in international terrorism. Although no judicial authorization is required, the AG must submit a certification to the court indicating the necessity of the wiretaps, the fact that precautions have been made to minimize interception of conversations of US citizens, etc.[53]

If, however, the government wants to intercept conversations of US citizens when they are abroad, but by using telecommunications facilities located in the US, they must get authorization from the FISA court, which authorization is valid for 90 days.[54] If there are emergency circumstances, however, the government may intercept private conversations of a US-citizen for 7 days before getting retroactive authorization from the FISA court.[55] If US officials wish to target a US-citizen abroad under any other circumstances (i.e. when the law enforcement officials are conducting the interceptions abroad) in order to obtain foreign intelligence information, then they only may do so if the person would not have a reasonable expectation of privacy[56] had the interception been conducted in the US.[57]

3.5 Depositions of Witnesses Abroad

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right [. . .] to be confronted with the witnesses against him." The Confrontation Clause is meant "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding." This is accomplished generally by giving a criminal defendant "the

[52] 50 USC § 1802.

[53] 50 USC § 1881a(a,g).

[54] 50 USC § 1881b(a,b).

[55] 50 USC § 1881b(d)(1)(B).

[56] Only investigative actions which violate a citizen's "reasonable expectation of privacy" are regulated by the Fourth Amendment. USSC, Katz v. United States, 394 U.S. 347, 360–361 (1967) (Harlan, concurring).

[57] 50 USC § 1881c(a)(2).

right to confront appearing witnesses face to face and the right to conduct rigorous cross-examination of those witnesses."[58] Out-of-court statements introduced to prove the truth of the matter stated, which are the results of police investigative measures, such as questioning, or depositions, are barred by the Sixth Amendment unless it is shown that the witness is unavailable to testify at trial and the defendant had prior opportunity to cross-examine the witness.[59]

Depositions to preserve testimony in criminal cases, are, pursuant to FRCrimP 15, to be used only in "exceptional circumstances and in the interest of justice" and are generally disfavored in criminal cases.[60] When the government conducts a Rule 15 deposition in a foreign land with a view toward introducing it in a US criminal trial, the Sixth Amendment requires, at a minimum, that the government undertake diligent efforts to facilitate the defendant's presence at the deposition and the witness's presence at trial.[61]

A court was held to have "diligently" undertaken to secure the defendant's appearance at a deposition in the United Kingdom, where it directed the US government to transport the defendant's attorney to the deposition and install two telephone lines—one to allow the defendant to monitor the deposition from prison and another to allow him to consult privately with counsel.[62]

In a case involving an alleged Al-Qaeda affiliate charged with a number of terrorist acts in the US, including conspiracy to assassinate President George W. Bush, the validity of a handwritten confession given by the defendant in Saudi Arabian custody was at issue. Because it was impossible to bring two Saudi officials, whom the defendant accused of torturing him, to the US, the trial court ordered two defense attorneys to attend their depositions in Saudi Arabia. A live, two-way video link was used to transmit the proceedings to a courtroom in Virginia, where the defendant and his lawyer could see and hear the testimony contemporaneously and the witnesses could see and hear the defendant as they testified.[63] The USSC has allowed the taking of testimony in the physical absence of the defendant so long as the denial of face-to-face confrontation is "necessary to further an important public policy" and "the reliability of the testimony is otherwise assured."[64] In *Abu Ali*, the court found that national security against terrorist acts was a sufficiently compelling public policy."[65] In contrast, in a prosecution for

[58] United States v. McKeeve, 131 F.3d 1, 8 (1st Cir. 1997).

[59] Crawford v. Washington, 541 U.S. 36, 59 (2004).

[60] United States v. Drogoul, 1 F.3d 1546, 1551 (11th Cir. 1993).

[61] United States v. McKeeve, 131 F.3d 1, 8–9 (1st Cir. 1997).

[62] *Ibid*., 9.

[63] USSC, United States v. Abu Ali, 528 F.3d 210, 238–243 (4th Cir. 2008).

[64] USSC, Maryland v. Craig, 497 U.S. 836, 849–852 (1990)(case involving testimony of a child who was allowed to testify outside of the courtroom to avoid direct confrontation with her alleged sexual abuser).

[65] USSC, United States v. Abu Ali (footnote 63), 240.

fraud and conspiracy, it was reversible error to allow two Australian witnesses to testify via two-way video, when there was no important public policy other than the convenience of not paying for their trip to the US.[66]

4 Admissibility of Evidence Gathered Abroad in US Courts

4.1 Effect of Unlawful Detentions on Admissibility of Evidence

4.1.1 In the Civilian Criminal Courts

An unlawful arrest constitutes an unlawful "seizure" in terms of the Fourth Amendment, but will never constitute a hindrance to a prosecution of the person arrested. On the other hand, a person unlawfully arrested may move to suppress evidence which was gathered pursuant to a search incident to the arrest as long as it is deemed to have been a "fruit of the poisonous tree".[67] Similarly, a confession taken after an unlawful arrest has also been deemed to be "fruit of the poisonous tree" even when the police have advised the unlawfully arrested person of the right to silence and aid of a lawyer as required by the *Miranda* decision.[68]

Although a person arrested by police without an arrest warrant must be brought to court within 48 hours to enable him to challenge the validity of his arrest,[69] the fact that this time limit was violated will not automatically lead to suppression of a statement taken after the 48 hours had elapsed.[70] In the federal courts, however, there is a presumption that a confession will be suppressed if it was taken more than 6 hours after arrest and the defendant was not brought to court in a speedy manner.[71] When someone has been held as an enemy combatant for years at Guantánamo Bay, for instance, and is then charged in the criminal courts, the US courts do not treat the time spent in the camps for enemy combatants as time which counts in the analysis of whether the right to a speedy trial, guaranteed by the Sixth Amendment of the US, has been violated.[72] At any rate, the remedy for a violation of the right to a speedy trial in the US civilian courts is normally dismissal, and not suppression of evidence.[73]

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[66] USSC, United States v. Yates, 438 F.3d 1307, 1316 (11th Cir. 2006). But for a case allowing two robbery victims to testify by video link from Argentina against the person who allegedly robbed them during a visit to the U.S. Harrell v. Butterworth, 251 F.3d 926, 928–931 (11th Cir. 2001).

[67] Wong Sun v. United States, 371 U.S. 471, 477–479 (1963).

[68] Brown v. Illinois, 422 U.S. 590, 602–603 (1975).

[69] County of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991).

[70] Powell v. Nevada, 511 U.S. 79, 84–85 (1994).

[71] 18 USC § 3501(c). Corley v. United States, 129 S.Ct. 1558, 1571 (2009).

[72] Padilla v. Hanft, 547 U.S. 1062 (2006) (cert. denied).

[73] Barker v. Wingo, 407 U.S. 514, 522 (1972).

4.1.2 In Military Commissions

The Sixth Amendment right to a speedy trial is not applicable in a trial by military commission.[74]

4.2 Admissibility of Evidence Resulting from Illegal Interrogations

4.2.1 In the Civilian Criminal Courts

The USSC has consistently held that "involuntary" confessions which were the products of coercion, deception, threats or promises, most of which do not amount to "cruel, inhuman or degrading treatment", much less torture, could not be used in US criminal trials. The prevailing view has been that evidence derived from involuntary statements is inadmissible in a criminal trial, even if the "fruit" of the involuntary statement is a subsequent voluntary statement.[75] The prohibition extends to all "fruits of the poisonous tree", including physical evidence.[76] For example, Rwandan nationals were arrested in Uganda for the murder of two US tourists. They were first subject to coerced interrogation by Ugandan officials and then turned over to US officials, who interviewed them in a non-coercive manner. The US federal district court, however, refused to use the statements taken by US officials, for it ruled they were the "fruit" of the earlier coercive interrogations by Ugandan officials.[77]

Where US law enforcement officials are involved in conducting interrogations overseas and are thus required to give modified *Miranda* warnings to those under interrogation, a failure to give the modified warnings would also lead to exclusion of the statements.

4.2.2 In Military Commissions

The secret use of the "enhanced interrogation techniques," described above, in Afghanistan, Iraq, Guantánamo, and other unnamed "black sites" by military and CIA interrogators, would, of course, result in the inadmissibility of any declaration, or its "fruits" in a subsequent criminal prosecution in the civilian courts. However, the USSC recently ruled that the Fifth Amendment privilege against self-incrimination is not violated unless the statement gathered as a result of the use illegal interrogation methods is actually used in a criminal proceeding.[78] Thus, the

[74] 10 USC § 948b(d)(1)(A).

[75] Oregon v. Elstad, 470 U.S. 298, 316–317 (1985).

[76] United States v. Patane, 542 U.S. 630, 639 (2004). LaFave et al. (2009), 543.

[77] United States v. Karake, 443 F.Supp.2d 8, 86–89 (D.D.C. 2006).

[78] Chavez v. Martinez, 538 U.S. 760, 767 (2003).

government could conceivably continue to use torture or cruel, inhuman or degrading treatment for the purpose of gathering intelligence information, as long as they do not present it at trial. For example, José Padilla, an American citizen who alleged he was tortured after being arrested for having allegedly planned an attack on American soil with a "dirty bomb," was denied the right to sue one of the author of the torture memos, John Yoo, because no incriminating statements were introduced in criminal proceedings against him.[79]

It has been surmised, that the evidence linking Padilla to the "dirty bomb" plot resulted from the "waterboarding" of KSM and that the government thus eventually dropped those charges when Padilla's case was set for trial in the civilian courts.[80] Many believe that the government established military commissions, however, for the express purpose of prosecuting alleged terrorists using such tainted evidence.

10 USC § 948r(a) of the Military Commissions Act of 2009, which amended the 2006 act after Obama took office, explicitly outlaws use of any statements induced by torture or cruel, inhuman or degrading treatment, in trials by military commission. 10 USC § 948r(c) also provides that only "voluntary" statements are admissible before military commissions, unless "the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence." This allowance of more intensive methods of interrogation would thus only apply where the capture of the interrogated person was effected under battlefield-like conditions.

4.3 Admissibility of Evidence Resulting from Illegal Searches

4.3.1 In the Civilian Criminal Courts

In a certain sense, evidence gathered by foreign officials, even if done in violation of their own laws, is admissible on a "silver platter" in the US courts, which will not inquire into whether the foreign officials followed their own laws properly.[81] The underlying reason for the Fourth Amendment exclusionary rule in the US is to deter willful police violations of the constitutional rights of US citizens,[82] and exclusion of evidence in the US courts would not have such an effect on foreign law enforcement officials.[83] Evidence from a foreign search of a US-citizen will,

[79] Padilla v. Yoo, 633 F. Supp. 2d 1005, 1035–1036 (N.D. Cal. 2009).

[80] Risen et al. (2004), A1, A13.

[81] Government of Canal Zone v. Sierra, 594 F.2d 60, 71–72 (5th "Cir. 1979).

[82] United States v. Leon, 468 U.S. 897, 918–923 (1984) (holding, therefore, that violations made in "good faith" therefore do not require exclusion).

[83] United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976).

however, be inadmissible, if the manner in which the foreign officials conducted the search "shocks the conscience" or if the search is part of a "joint venture" with US officials and it violates the Fourth Amendment.[84]

4.3.2 In Military Tribunals

10 USC § 949a(b)(2)(B) of the Military Commissions Act of 2009, provides that "evidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization. This essentially means, that the Fourth Amendment exclusionary rule articulated in *Mapp v. Ohio* does not apply to such trials.

4.4 Admissibility of Evidence Resulting from Illegal Wiretaps

4.4.1 In the Civilian Criminal Courts

When core provisions of the US wiretap statute have been violated, 18 USC § 2515 provides that "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof." This is likely the broadest explicit statutory exclusionary rule in US law and clearly extends to "fruits of the poisonous tree." It also does not allow a "good faith" exception.[85] A similar strong exclusionary rule applies if the provisions for FISA are violated, either during a wiretap or search for foreign intelligence information conducted in the US or in relation to a US-citizen abroad.[86]

4.4.2 In Military Tribunals

It is unclear whether the provision in the Military Commissions Act of 2009, which allows evidence to be used even if it was gathered without judicial authorization, would trump the seeming ironclad exclusionary rules in the domestic wiretap act and FISA.

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[84] United States v. Rosenthal (1986), 1230–1231.

[85] United States v. Rice, 478 F.3d 704, 711–712 (6th Cir. 2007).

[86] 50 USC §§ 1805(e)(1);1881d(b)(4) relating to emergency wiretaps that are not retrospectively validated by the FISA court.

4.5 Admissibility of Evidence Gathered in Violation of the Right to Confrontation

4.5.1 In the Civilian Criminal Courts

In a normal criminal trial, due process requires that exculpatory evidence or evidence which might mitigate punishment must be turned over to the defense. If that evidence is not turned over, and would have resulted in an acquittal or mitigation in charge or judgment, reversal of the judgment is required.[87] If the potentially exculpatory evidence is protected by a privilege, then, once the defendant has made a plausible offer of proof that the evidence could be relevant and helpful to defense, the judge usually must review the requested material in an *in camera* hearing to determine whether the evidence should be disclosed.[88] If it should, then the prosecutor has a choice of revealing the evidence, or dismissing the case to protect the privileged information.[89]

Since 9–11, the federal government has maintained that nearly all evidence gathered during terrorist investigations, especially that gathered overseas by intelligence agents, is subject to the "official secrets" privilege and that its revelation would prejudice national security and impede the war against terrorism.[90]

In 1980 Congress passed the *Classified Information Protection Act* (CIPA),[91] to deal with cases involving state secrets or "classified information." In CIPA, the legislator attempted to balance the right of the defense to discover evidence in the hands of the prosecution against the needs of the state to protect information which was crucial to national security. CIPA attempted to minimize the defense threat to reveal secret evidence during the trial, a practice called "graymail." According to CIPA, "classified information" consists in any information or material determined by the government of the US to "require protection against unauthorized revelation for reasons of national security."[92] A typical "graymail" case is where a former employee of the CIA, charged with criminal wrongdoing, threatens to reveal, or to use in his defense, evidence the government considers to be classified.

If the defendant seeks discovery of information which is "classified" or contains state secrets, which may be in the form of statements given by a witness to US officials, the judge may authorize the prosecutor to "eliminate classified information in the documents which are turned over to the defense" or to substitute it with a summary of the information in lieu of the secret documents themselves, or to offer a declaration, admitting the relevant facts which the classified information would

[87] United States v. Bagley, 473 U.S. 667, 678–682 (1985).

[88] Pennsylvania v. Ritchie, 480 U.S. 39, 56–58 (1987).

[89] Roviaro v. United States, 353 U.S.53, 62 (1957).

[90] Referral to Abu Ali (2008), pp. 244–248.

[91] Pub.Laws 96–456, 94 Stat. 2025 (Oct. 15 1980), codified at 18 USC app. 3 ff.

[92] 18 USC app. 3 § 1(a).

have a tendency to prove."[93] The prosecutor can request that the hearing be held *in camera* to prevent divulgation of the information to the public.[94] If a summary or substitute finding of fact is deemed by the trial judge to not satisfactorily protect the rights of the defendant to present a defense, the court may order full disclosure.

CIPA played a role in the case against Zacharias Moussaoui, an admitted member of Al Qaeda, who the Department of Justice originally thought was the 20th hijacker in the 9–11 attacks. Moussaoui's defense counsel wanted to interview two Al Qaeda members, Ramzi bin al-Shibh and KSM, when they were being held by the CIA in "black sites" at an unknown location. Moussaoui maintained, that the prisoners could have testified at trial that he did not participate in the conspiracy which resulted in the 9–11 attacks. Despite this claim, the appellate courts ruled that the trial should continue despite the fact that the defendant did not have the possibility to examine the witnesses. The court of appeal relied on CIPA in holding that the prosecutor could utilize a summary of the declarations of the prisoners in lieu of the declarations.[95] The use of "summaries," or stipulations in lieu of actual witnesses clearly undermines the right to confront witnesses, the right to discovery of useful evidence, and the ability of the triers of fact, whether jury or military panel, to assess the credibility of evidence in terrorist cases.

4.5.2 In Military Commissions

Provisions very similar to those of CIPA are also included in the Military Commissions Act of 2009, and allow the use of stipulations, summaries, and other substitutes for directly cross-examining a witness.[96] More importantly, however, while the defendant has a right to cross-examine the witnesses who testify against him,[97] the rule of *Crawford v. Washington*, which prevents the introduction of testimonial evidence in the form of witness declarations made outside of trial (for instance to a police officer), does not apply, for hearsay evidence is clearly admissible. Thus, 10 USC § 949a(b)(2)(A) allows the judge to accept any evidence which would have "probative value to a reasonable person" and 10 USC § 949a(b)(2)(E) provides:

> hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained).

[93] 18 USC app. 3 § 4.

[94] 18 USC app. 3 § 6(a).

[95] USSC, United States v. Moussaoui, 365 F.3d 292, 312–315 (4th Cir. 2004); United States v. Moussaoui, 382 F.3d 453, 476–478 (4th Cir. 2004).

[96] 10 USC § 949d(f).

[97] 10 USC § 949b(b)(1)(A).

5 Cooperation with International Tribunals and Human Rights

5.1 *The* Ad Hoc *Tribunals*

American judicial assistance to the International Criminal Tribunal for the Former Yugoslavia and the Rwanda Tribunal (hereafter the *ad hoc* tribunals) is given through two surrender agreements,[98] corresponding implementing legislation,[99] and use of the normal judicial assistance framework including the use of letters rogatory discussed above. These provide American cooperation with *ad hoc* tribunals in conformity with Article 29 of the ICTY Statute, and Article 28 of the ICTR Statute governing judicial assistance.

5.2 *The International Criminal Court*

It is well-known that President George W. Bush withdrew former President Bill Clinton's signature of the Rome Treaty which set up the ICC, and withdrew all cooperation with the new court. The US has signed bilateral agreements with at least one hundred countries preventing those countries from extraditing US citizens to the ICC without prior US approval.[100] The goal of these agreements is to protect US citizens, and especially US military personnel, from ICC prosecution. Critics have accused the US of blackmailing third countries into signing Article 98 agreements with the specter of withdrawal of US aid.[101] In 2002, Congress passed the ASPA[102] which prohibits military assistance to countries (other than NATO countries or major non-NATO allies) that are party to the ICC but do not have Article 98 agreements with the US.

Apart from withholding military aid from countries not signing Article 98 agreements, the ASPA also puts a long list of restrictions on US involvement with the ICC, as well as with countries who are parties to the ICC. These include: (1) a prohibition on funding extradition to a foreign country that is under an obligation to surrender persons to the ICC[103]; (2) a prohibition on judicial cooperation with the ICC, including responding to requests for assistance, transmitting letters rogatory sent by the ICC to their intended recipient, providing financial

[98] Both agreements are identical. Godinho (2003), 502–516. The ICTY agreement is UNTS, vol. 1911, at 224 (UNTS reg. no. 32555); TIAS. No. 12570.

[99] National Defense Authorization Act, Pub. L. No. 104–106, §1342, 110 Stat. 486 (1996), providing that federal extradition statutes are to apply to the surrender of persons to the ICTR and the ICTY.

[100] Elsea (2006), p. 26.

[101] Ribando (2006), p. 2.

[102] P.L. 107–206, title II.

[103] 22 USCA. § 7402.

assistance to the ICC, extraditing to the ICC, or allowing ICC agents to perform investigations within the US[104]; (3) a prohibition on sending classified information to the ICC[105]; (4) express authorization for the president to use "all means necessary and appropriate" (apart from bribes) to release US citizens or allies detained or imprisoned by, on behalf of, or at the request of the ICC.[106]

The Obama administration, however, has increased its cooperation with the ICC. State Department legal advisor Harold Koh said after the 2010 Kampala conference, at which the crime of aggression was defined, that "we have reset the default on the US relationship with the court from hostility to positive engagement." The US was the only country not a State Party to make a pledge at the Kampala conference. Secretary of State Hillary Clinton said in 2009 regarding US relations with the ICC: "Whether we work toward joining or not, we will end hostility toward the ICC and look for opportunities to encourage effective ICC action in ways that promote US interests by bringing war criminals to justice."[107] The US became an observer nation to the ICC in 2009, and is continuing to look for ways to assist the ICC in spite of US laws restricting cooperation.[108]

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[104] 22 USCA. § 7423.

[105] 22 USCA. § 7425.

[106] 22 USCA. § 7427.

[107] Pincus (2009).

[108] Elsea (2009), p. 4.

Part V
Transnational Inquiries and Fundamental Rights in Comparative Law

Transnational Inquiries and the Protection of Fundamental Rights in Comparative Law. Models of Gathering Overseas Evidence in Criminal Matters

Stefano Ruggeri

Contents

Abstract The present contribution contains a comparative analysis of this research. The comparison has been carried out combining the experiences of ten legal orders both of European and non-European countries with three international levels relating respectively to the UN, Council of Europe and EU legislation. This study focuses of two main modes of collecting overseas evidence corresponding to a wide and a narrow notion of transnational inquiries, i.e., mutual assistance and extraterritorial investigations. Within these two areas various tools of cross-border cooperation have

The chapter contributions from the three first Parts of this book are quoted with the only reference to the Author's surname, above, and the number of the paragraph concerned. The national reports are quoted with the only reference to the Author's surname, the indication of the report and the number of the paragraph concerned.

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been analyzed. Moreover, these forms of cooperation have been developed in the frame of two models, the mutual assistance and the mutual recognition model.

The analysis follows the scheme of functional comparison and aims to ascertain whether and how the selected legal orders succeed in carrying out efficient forms of transnational criminal investigations by preventing both sovereignty and human rights violations. To answer properly this question, the present research has analysed the significant developments occurred, outside and inside Europe, in all the aforementioned forms of transnational inquiries both at international and domestic level.

Abbreviations

AFSJ	Area of Freedom, Security and Justice
CCP	Code of Criminal Procedure
CISA	Convention Implementing the Schengen Agreement
ECHR	European Convention on Human Rights
ECMACM	European Convention on Mutual Assistance in Criminal Matters
ECtHR	European Court of Human Rights
EU	European Union
EU FRCh	Charter of Fundamental Rights of the European Union
EUCMACM	Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union
FD EAW	Framework Decision on the European Arrest Warrant
FD EEW	Framework Decision on the European Evidence Warrant
FD EEW	Framework Decision on the European Evidence Warrant
FD JIT	Framework Decision on Joint Investigation Teams
FD OFPE	Framework Decision on the Execution in the EU of Orders Freezing Property or Evidence
FISA	Foreign Intelligence Surveillance Act
IACHR	Inter-American Convention of Human Rights
IACMACM	Inter-American Convention on Mutual Assistance in Criminal Matters
IACtHR	Inter-American Court of Human Rights
PD EIO	Proposal for a Directive on a European Investigation Order
SAP ECMACM	Second Additional Protocol to European Convention on Mutual Assistance in Criminal Matters
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN CTOC	United Nations Convention against Transnational Organised Crime
UN MTMACM	United Nations Model Treaty on Mutual Assistance in Criminal Matters
USSC	United States Supreme Court

1 Introduction

1.1 Structure of the Research Project

The protection of fundamental rights in the field of transnational inquiries in criminal matters is of great delicateness in the current tangled web of domestic and international legal sources and case law. Due to the complexity of the systems of individual rights protection in cross-border cooperation, this research has been carried out from a four-level perspective.

Part II provides a general framework of the multilevel systems of protecting fundamental rights in criminal investigations and consist of two subparts. Subpart I provides an analysis of the protection of human and fundamental rights in Europe and Latin America both from the perspective of supranational and constitutional case-law, as well as an analysis of the influence of ECtHR and IACtHR case-law on the domestic case-law in both continents in two main fields respectively relating to the protection of personal liberty and the protection of the rights of the victim of serious violations of human rights. Finally, Subpart I also deals with the role of the proportionality principle in the field of cross-border investigations impinging on fundamental rights. Subpart II is specifically dedicated to human rights protection in judicial cooperation concerned with international and organized crime with specific regard to terrorism and organized crime.

Part III is specifically dedicated to fundamental rights protection in EU judicial cooperation. This Part consists of three Subparts. Subpart I analyses the development of and new perspectives for EU cross-border cooperation in the field of financial and serious organized crime. Particular attention has been paid to the role of Eurojust and the perspectives for the setting up of a European Public Prosecutor's Office as well as to the external dimension of the FSJ area with specific regard to transnational terrorism. Subpart II deals with the EU tools of mutual recognition and their repercussions for the fundamental rights sphere with specific regard to transnational confiscation and the cross-border gathering of evidence. Subpart III is specifically dedicated to some of the most delicate human rights issues in the field of EU police judicial cooperation, such as the right not to be subjected to repeat prosecution, the right to personal liberty, the right to a defence, the rights of the victim of serious and organized crime and finally the protection of personal data.

Part III aims to provide an analysis of fundamental rights protection in transnational investigations in comparative law from the perspective of ten European and non-European countries. National reports focus on human rights protection in two main fields: cross-border inquiries aimed at obtaining evidence abroad by means of bilateral cooperation and cooperation with international criminal tribunals. Within this common area, every report analyses different issues reflecting the peculiarities of its own system of judicial cooperation.

1.2 Aim, Method and Structure of the Comparative Analysis

1.2.1 Aim and Method of the Comparative Research

The present paper provides a comparative study of the ten legal systems both from European and non-European countries in the field of transnational inquiries. Cross-border investigations are an extremely complex phenomenon which is linked to the criminal offence engaging foreign legal systems and jurisdictions. This does not necessarily lead to parallel investigations or prosecutions in various countries. Indeed, "even crimes committed entirely within the borders of a single state can have international implications," since relevant evidence can "be located other than in the prosecuting country."[1] This research analyses, however, the cases in which several investigations or proceedings are underway in different countries. Within this area, of the several issues concerned with transnational inquiries the present study focuses on bilateral cross-border cooperation aimed at obtaining overseas evidence. To address specific issues, further aspects will be analysed within this framework.

Methodologically, this comparative analysis aims, following the requirements of a functional comparison,[2] to verify whether and how the selected legal orders succeed in carrying out efficient transnational criminal investigations by preventing violations of both sovereignty and human rights. Doubtless, the increasing importance of transnational prosecution and the consequent need for high protection of widely shared human rights furnish new justification for comparative criminal researches, i.e., the achievement of a proper individual rights protection.[3] This provides, moreover, the present comparative study with a specific *tertium comparationis*, which constitutes a common reference point for both European and non-European countries.[4] Indeed, the particular "vulnerability of defendants facing international investigations" poses the need for compliance with higher standards of protection of human rights *within* cross-border criminal investigations than those "currently available in domestic proceedings."[5] Especially the capability of new forms of transnational investigations to properly achieve the aim of facilitating and speeding up judicial and police cooperation can be positively assessed according to their ability to provide full respect for domestic criminal justice systems and adequate protection of human rights.

[1] Sinn, Report on Germany, § 1.

[2] On this method see Jescheck (1955), pp. 36 ff.; Reimann (2002), 679 f.; Sieber (2006), pp. 112 ff. Criticism against function comparative law has been raised by Großfeld (1984), pp. 12 ff.

[3] In this sense Sieber (2006), pp. 80 f.

[4] For the need for an autonomous common reference point see Jescheck (1955), p. 40; Gleß (2006), p. 45 f.

[5] Vogler, above, § 1.

Against this background, the present comparative research pursues, moreover, a scientific-theoretical purpose[6] in that it aims to provide, on the basis of a systematic reconstruction of current international and domestic laws within the selected area, a proposal for further supranational and domestic legislation.

1.2.2 Structure of the Comparative Analysis

The structure of the comparative analysis has been set up in conformity with the aim of this research. This is clear from the selection of the domestic legal and evidentiary orders, which is due to different criteria in light of the human rights approach of this study.

In general terms, both outside and inside Europe judicial cooperation in criminal matters is still influenced by strong "sovereignist considerations."[7] This is apparent in the way many countries, both outside and inside Europe, provide legal assistance to foreign requests. *China* and *USA* provide, for different reasons, a clear example thereof. Within the EU's AFSJ, the realization of the mutual recognition model has been largely frustrated by the confused and incomplete implementation of EU legislation relating to cross-border investigations and overseas evidence. This conclusion applies to *Italy*, as proven by the very low number of EU legislative tools enacted in Italian law and mostly by the failure to ratify the EUCMACM. All the other European countries analysed in this study are part of this Convention and have shown considerable openness to the former third pillar legislation. This is the case of *Hungary*, *France*, *Germany* as well as of *England* and *Wales* after their initial concerns about the traditional rogatory letters system. Significantly, however, even those countries that have domesticated several mutual recognition instruments have raised serious concerns about the propriety of applying the same method to the collection of evidence abroad, which has led to the general failure to implement the EEW despite of its limited scope of application. Thus, obtaining evidence abroad still continues to be generally regulated by the 2000 EUCMACM, which has, moreover, allowed all the European countries analysed here to develop another important form of cross-border cooperation, i.e., extraterritorial investigations.

In this context, however, "international inquiries present a very different and much more complex array of challenges to human rights than domestic inquiries."[8] Worldwide, we are witnessing a clear tendency to lower the usual guarantee standards in conducting investigations and admitting evidence taken abroad. Both situations are very clear from the analysis of several cases both within and beyond Europe. Thus, a rather permissive approach in using the results of foreign inquiries has been adopted by cases in countries such as the *USA*, *Italy* and *Spain*. In the frame of mutual assistance *France* offers an interesting legislative solution

[6] For this aim of comparative criminal law see Eser (1998), pp. 1515 ff.

[7] In this sense Lelieur, Report on France, § 1.

[8] Vogler, above, § 1.

for balancing, while providing mutual assistance, respect for foreign sovereignty and individual rights protection. In this context two legal systems deserve special consideration, i.e., *Mexico* and *Switzerland*. *Mexico* contains a general clause excluding evidence obtained in violation of fundamental rights contained in the Federal Constitution, an exclusionary rule that is "probably more relevant for evidence obtained from abroad"[9] than for evidence taken in Mexican territory. *Switzerland* provides for a highly-developed system of principles governing restrictions on fundamental rights. It is significant that most of these principles, which are in large part enshrined in the Swiss Federal Constitution, apply also to mutual legal assistance.

Furthermore, the specific human rights approach of the present study suggests widening the scope of the comparative research. Thus, the traditional research at domestic level will be combined with the analysis of the most significant multilateral international instruments on mutual assistance. Taking into account the variety of the selected legal orders, three levels will be analysed: UN, Council of Europe, and EU legislation. Finally, attention will be paid to the former third pillar legislative tools, despite their failed implementation by most countries, as well to the proposal for a directive on a European investigation order.

2 The Project's Notion of "Transnational Inquiries"

Defining the approach of this comparative analysis requires the notion of "transnational inquiries" to be clarified in advance even within the area of obtaining evidence. This expression is all but clear, since it can, according to the reference point, encompass very different phenomena. Of all the multiple forms of transnational inquiries, the comparative analysis of the selected legal orders has led the present research to focusing on two main modes of cross-border cooperation: a) obtaining mutual assistance from abroad, and b) conducting extraterritorial investigations overseas.[10]

These two main fields allow for a systematic distinction between a narrow and a wide notion of "transnational inquiries." In a narrow sense the transnational character should be attached solely to extraterritorial investigations conducted by domestic authorities implying forms of investigative cooperation between two or more domestic prosecution authorities. It is well known, however, that these investigative forms constitute relatively recent modes of cross-border cooperation. The historical development of judicial cooperation both among European and non-European countries shows that judicial assistance was originally conceived in terms of non-binding or relatively binding requests of assistance, which the host authorities upheld conducting enquiries and obtaining evidence directly. This

[9] Dondé Matute, Report on Mexico, § 3.

[10] Karsai, Report on Hungary, § 1.2.

system did not exclude forms of participation of officials and interested persons in the investigations conducted by the foreign authorities according to the foreign law.[11] Yet, this participation was limited to permitting foreign authorities and parties only to be "present" for overseas procedures.

Of course, within these two main frames, many further distinctions can be made, depending on the forms of providing legal assistance to foreign countries and on the ways investigations are carried out outside national boundaries, etc. These further distinctions, which can blur the difference between legal assistance and carrying out investigations abroad, pose different balance problems between human rights, prosecution efficiency and sovereignty needs.

3 Transnational Inquiries in a Wide Sense: The Judicial Assistance Models

Under the wide notion of "transnational inquiries" I will deal, in the following paragraphs, with various models of judicial assistance. The main common feature of these models of bilateral cooperation is that all of them aim at an action being conducted overseas by foreign authorities, no matter whether or not authorities or individuals form the home state are admitted to participate. The analysis of the historical evolution of these models will show, moreover, how each of them has developed different forms of obtaining evidence in foreign countries. However, neither of these models implies a substantial investigative participation by authorities from the home state, which is structured in terms of national officials being present and at best supporting the activities carried out by foreign authorities. In this context, I will analyse three models of assistance, based respectively upon the principles of mutual assistance, mutual recognition and availability of evidence.[12]

3.1 The Mutual Assistance Model

3.1.1 Development of the Mutual Assistance Model

The International Level

Mutual assistance is the most traditional method and letters rogatory are the most classical instruments for gathering evidence overseas. The grounds for the world-wide recourse to this model are linked to its main features, i.e., *a*) a request for cooperation left to wide discretion of the requested authority both as to whether and

[11] See Art. 4 ECMACM.

[12] For a similar approach see Klip (2012), pp. 342 ff.

how assistance can be provided, *b*) the necessary intervention of central political authorities (the ministries of justice) and *c*) the strict application of the *lex loci* rule. These requirements reflect a strongly sovereignist approach and give rise to serious concerns about the efficiency of transnational prosecution and the respect for human rights, especially taking into account the wide margin of appreciation left to the requested state, which leads to great uncertainty as to whether and how assistance can be provided. Furthermore, political authorities play an overwhelming role in the decision-making process and this explains why sovereignty, security, public order (*ordre public*), as well as other essential public interests of the requested state, are of primary importance among the grounds for refusal of legal assistance. Moreover, the strict application of the *lex loci* rule cannot ensure the admissibility of the evidence gathered abroad in the requesting state, thus raising many concerns about the usefulness of the entire procedure.

Nevertheless, the request model has for the last half century undergone radical changes worldwide and nowadays appears in several and very different versions worldwide. Its strictest application in Europe was contained in the 1959 ECMACM, which provided for the possibility of attenuating two of the aforementioned requirements. Indeed, *a*) it allowed for letters rogatory to be addressed in case of urgency directly by the judicial authorities of the requesting Party to the judicial authorities of the requested party [Art. 15(2)]; and *b*) it imposed upon the requested party the duty to comply with the request of witnesses and experts giving evidence on oath if the requesting party expressly so requested and if the law of the requested country did not prohibit it [Art. 3(2)]. Both these approaches were continued in subsequent international instruments.

The CISA was the first multilateral agreement in Europe to provide for direct contact between judicial authorities as the ordinary way of forwarding requests for legal assistance without prejudice to recourse to central authorities (Art. 53 CISA). This solution was incorporated into the ECMACM by the SAP ECMACM, which dropped the urgency requirement for the requests to be directly forwarded by the judicial authority of the requesting party to the judicial authority of the requested party (Art. 4). Finally, the EUCMACM provided for direct transmittal of requests for mutual assistance between the EU Member States as the rule, while leaving the recourse to the central authority as possible solution "in specific cases" [Art. 6(1)]. This solution paved the way for the mutual recognition approach.

Another radical change in the field of mutual assistance occurred in the laying down of a general obligation for the requested party to comply with the procedures required by the requesting party that are not contrary to the law of the requested country. Among the international instruments analysed in this study, the UN MTMACM was the first to adopt this approach by setting out a duty to fulfil the requested procedures "in the manner" indicated by the requesting state to the extent consistent not only with its law but also with its practice (Art. 6). A similar formulation was enacted in the IACMACM, which dropped, however, the reference to the practice of the requested state [Art. 10(2)]. A more specific expression was laid down in Europe by the EUCMACM, which specified that the requested Member State shall also comply with the "formalities and procedures expressly

indicated" by the requesting Member State [Art. 4(1)]. On the other hand, the margins for refusal by the requested Member State were significantly reduced, since the requested authority could be released from its duty of complying with the requirements set by the requesting authority only if they were not contrary to the "fundamental principles of law" of the requested country [Art. 4(1)]. Moreover, it is worth noting that the EUCMACM provided for that

> if the request cannot, or cannot fully, be executed in accordance with the requirements set by the requesting Member State, the authorities of the requested Member State shall promptly inform the authorities of the requesting Member State and indicate the conditions under which it might be possible to execute the request. The authorities of the requesting and the requested Member State may subsequently agree on further action to be taken concerning the request, where necessary by making such action subject to the fulfilment of those conditions [Art. 4(3)].

This provision allowed for an agreement between the interested authorities to be reached which permitted adequate balance of the requirements of evidence gathering of both countries.

This model has been incorporated into the ECMACM by the SAP ECMACM, which specifies that the formalities or procedures must be "necessary under the law of the requesting party" (Art. 8). Furthermore, the approach of this international instrument proves more rigid than the latter at least for two reasons: *a*) the requested state must comply with the requirements set by the requesting authority "even if unfamiliar to the requested party" (Art. 8); *b*) there is no general clause allowing different conditions to be agreed where the formalities required are contrary to the fundamental principles of law of the requested country.[13]

The Domestic Level

The comparative analysis of the selected legal systems shows a general tendency to follow the development of the traditional judicial assistance model of obtaining evidence abroad occurred at international level. However, this phenomenon has occurred in various manners and at different levels, which are still far from full implementation of the most advanced methods of mutual assistance.

Outside Europe, *China* follows a centralized conception of mutual assistance, as any request for mutual assistance for the purpose of obtaining evidence overseas must be submitted to the highest judicial authority or to other responsible central authority, i.e., the Supreme People's Court, the Supreme People's Procurator and the Ministry of Public Security, respectively. However, China has, following the

[13] This model was partially adapted to particular investigative tools by the 2001 SAP ECMACM. Especially, requests for hearing witnesses and experts by videoconference can be reasoned through the impossibility and the simple non-desirableness of the person appearing in the territory of the requesting state. Furthermore, the requested state must agree with the videoconference provided it is not contrary to the fundamental principles of law of the requested country and the latter has the technical means to carry out the hearing.

1990 UN MTMACM, developed an approach that has led it to mitigating the *lex loci* rule both while collecting evidence requested by a foreign country and while requesting the obtaining of evidence overseas. This tendency is clear in all Sino-European treaties on judicial assistance in criminal matters, which respectively *a*) impose upon Chinese authorities the duty of handing over evidence in accordance with the foreign request for assistance and *b*) require, while requesting legal assistance, special procedures and formalities to be followed in order to avoid evidence becoming invalid in China.[14]

A partially different approach applies to *Mexico* due to its ongoing process of transition to adversarial system after the constitutional reform on criminal justice and public security of 2008.[15] The Mexican domestic legal framework in the field of cross-border cooperation is extremely scant, as it relies, at federal level, only on three provisions. These still reflect a vertical approach in that a lower tribunal, where it requests legal assistance from abroad, requires preventive approval by the Supreme Court. This requirement has been dropped both by the Model Code of Adversarial Criminal Procedure and the Project of Federal Code of Criminal Procedure, i.e., two model codes provincial states are using in their reform process.[16] However, no domestic provision in Mexico explicitly relates to the collection and transfer of evidence from abroad. This field is almost entirely governed by international treaties, which in general terms provide that requests for assistance must be coordinated by the Federal Attorney-General and that overseas evidence must be taken pursuant to *lex loci*, an approach that applies also to pre-trial measures. It is noteworthy, however, that some bilateral treaties between Mexico and European countries, such as France, show a clear tendency to relax these formalities by allowing the requesting authority to bypass the central authority. Moreover, Mexico is party to the 1992 IACMACM, which imposes upon Mexican authorities the obligation to comply with the requirements set by the requesting state provided they do not violate Mexican law.[17]

In the *USA* the judicial order aimed at obtaining evidence abroad for the use in a proceeding in a foreign or international tribunal may, pursuant to 28 USC § 1782, establish the practice and procedure, which can be in whole or part the practice and procedure of the foreign country or the international tribunal for obtaining evidence. It is unclear whether the application of these foreign formalities is not instead subject to any clause of compatibility with US law. Moreover, the application of *lex loci* presupposes that the judicial order does not prescribe otherwise and it is noteworthy that where the US courts sets specific requirements to be followed in the collection of evidence, this will take place in accordance with the Federal Rules of Civil Procedure.

[14] Wang, Report on China, §§ 3–4.

[15] See García Ramirez (2010).

[16] Dondé Matute, Report on Mexico, § 2.1.

[17] *Ibid*., § 2.1.

In Europe the request model remains of crucial importance in the field of cross-border cooperation. This is mainly due to the fact that despite the overwhelming role of the mutual recognition principle in the AFSJ, all legislative interventions in the field of evidence gathering made until now at EU level have had a limited scope of application and have not been enacted in all EU Member States. I will deal with this issue below at § 3.2. The comparative analysis of the selected European countries has shown, however, a clear evolution of the judicial assistance model. This is largely due to the enactment in most countries of the international instruments of improved mutual assistance, i.e., the EUCMACM and the SAP ECMACM, which provide therefore the general frame for gathering overseas in Europe.

France gives a clear example of this development. Title X of Book IV of the CCP on international mutual assistance contains a chapter specifically aimed at regulating judicial cooperation between France and other EU Member States. This chapter recognizes the EUMLACM as the main legislative basis of EU cooperation, while establishing that, unless otherwise provided for, requests can, at EU level, be sent directly from one judicial authority to another.[18] Finally, in February 2012, France ratified the SAP ECMACM, which will entry into force in June 2012. Significantly, however, even outside EU cooperation, France has adapted its legal order to the most advanced models of mutual assistance. Unlike cooperation with EU countries, mutual assistance between France and non-EU countries is primarily governed by the CCP, which states that French judicial authorities, while providing international assistance to foreign authorities, must comply with the procedural rules expressly set by them, provided (subject to invalidity) such rules do not reduce the rights of the parties or the procedural guarantees provided for by the French code. I will deal in more detail with this clause, which allows for domestic authorities to conduct a human rights check while assessing the compatibility between *lex loci* and *lex fori*.

Of the selected countries *Italy* remains unique in Europe in dealing with police and judicial cooperation in the field of transnational evidence.[19] Because of the failed ratification both of the EUMLACM and the SAP ECMACM, Italy has no general framework for providing assistance according to the methods of improved mutual assistance even at EU level. To be sure, Italian CCP has domesticated the rule allowing of combining *lex loci* and *lex fori*, a rule that can, however, be applied only in cases of international agreements signed by Italy. It is significant, moreover, that this rule has been enacted in the sole field of requests for mutual assistance made by Italian authorities (the so-called "active letters rogatory"). Therefore, within the scope of application of specific international agreements domestic authorities are entitled to specify the "modalities" of the execution of the request [Art. 727(5bis) CCP]. Furthermore, no explicit reference is contained in the CCP to the possibility for the requested state to verify whether the fundamental principles

[18] Lelieur, Report on France, § 2.1.

[19] Caprioli, Report on Italy, § 1.

of its law have been violated or not. Nevertheless, this possibility cannot in anyway be limited, as it constitutes an essential part of all international agreements to which the Italian rule applies. Nor can Italian authorities circumvent the obligation to follow the requirements of foreign law when requested to provide assistance pursuant to an international agreement ratified by Italy.[20] At any rate, compliance with the procedures established by Italian authorities is of crucial importance to ensure probative value of the results of the acts performed overseas. The wording of Article 729(1bis) CCP seems to indicate that in *any* case non-compliance with the modalities laid down by the Italian authority should lead to the inadmissibility of the evidence obtained through letters rogatory. Such a conclusion would, however, make Italian law excessively formalist and one can therefore share the interpretation according to which only the failure to comply with the modalities of execution aimed at preventing the act from realizing its effects in the Italian legal system should hinder its use in domestic proceedings.[21]

An unexpected scenario is instead that of *Spain*. Having ratified the EUMLACM, Spain relies on a general legal basis for applying the methods of improved mutual assistance, especially the application of *lex fori* over, or in conjunction with, *lex loci*, provided *lex fori* does not contravene the fundamental principles of Spanish law.[22] Moreover, this exemption clause has been enacted in Spanish Law 16/2006 on the Eurojust National Member Statute, which states, by way of dealing with the transfer to Spain of criminal proceedings initiated in another Member State, that pre-trial inquiries conducted by the transferring state will be considered valid in Spain provided they are not contrary to the fundamental principles of Spanish law.[23] Surprisingly, however, Spanish courts have, in the field of cross-border cooperation with other EU countries, generally adopted a rather permissive attitude. Despite the frequent reference to the EUMLACM, the Spanish Supreme Court is generally satisfied with the sole compliance with *lex loci* while assessing the possibility of using the evidence obtained from abroad. By stating that *lex loci* would prevail over *lex fori* and that there would be no need to evaluate the legitimacy of the procedures followed overseas, Spanish case law appears thus fully oblivious to the importance of complementing the foreign procedures with the formalities of *lex fori* to ensure that evidence collected abroad has probative value.[24]

[20] To be sure, most of these agreements blur somewhat the obligation of the requested authority to comply with the requirements set by the requesting authority. Thus, according to Article 18(17) 2000 UN CTOC, compliance with the *lex fori* rule is subject both to the non-contrariety to the fundamental principles of the requested state and to the condition of possibility ("where possibile"). Similarly, pursuant to Article V(1) 1998 of the Swiss-Italian Agreement on Judicial Cooperation, the requested authority must do its best to fulfill the conditions set by the requesting authority.

[21] Caprioli, Report on Italy, § 4.

[22] Gascón Inchausti, Report on Spain, § 1.2.1.

[23] *Ibid*., § 1.2.2.

[24] *Ibid*., § 3.1.2.

The conclusions applying to Italy and Spain are symptomatic of the persistent difficulties of some European countries with fully integrating the most advanced methods of mutual assistance, difficulties that demonstrate a considerable backwardness of domestic statutes and case law compared with the developments on the international level. Surprisingly, this phenomenon has also emerged in countries such as *France*, which has embodied in its code specific rules on cross-border cooperation within the EU area, rules that have domesticated most instruments of advanced mutual assistance. The most frequent argument invoked to justify this general satisfaction with *lex loci* is the growing mutual confidence between EU Member States, which leads the Member States to abandon *a priori* evaluation of the methods of evidence collection in other EU states. This conclusion can be rebutted, however. As has been argued in the sphere of mutual recognition, acceptance will only apparently be given to single pieces of evidence, since these always belong to, and are integral part of, the legal orders from which they proceed.[25] In a deeper sense, therefore, the question arises as to whether the legal systems to which the "evidential products" belong can be accepted. In this perspective, the reluctance to fully follow the development of mutual assistance occurred at international level reflects the cultural rejection of transnational procedures that allow for foreign law to take precedence over domestic law.

3.1.2 Functional Assessment

Answering the functional question of how mutual assistance models can both ensure respect for national sovereignty and proper protection of human rights presupposes a different assessment of the two aforementioned main methods of obtaining evidence overseas.

A) There is no doubt that the strict application of *lex loci* allows domestic authorities to retain control of their own procedures while dealing with transnational cases. The traditional mutual assistance model prevents the risk of domestic authorities being subject to foreign procedural formalities while collecting evidence, formalities that can impose standards of human rights protection incompatible even with national law. A classic example is where investigative powers infringing fundamental rights are exercised in respect of acts that do not constitute offences under national law or are exercised outside the field of offences for which they are allowed under national law. From the viewpoint of the requesting state, the classic judicial assistance model implies blind confidence in the laws of evidence and the human rights standards of the foreign country. This can explain very different approaches of European countries against this model, such as the long refusal of *England* and *Wales* to accede to the ECMACM and the Schengen *Acquis*,[26] and the persistent recourse to the ECMACM by Spanish case law in spite of the entry into force of more modern methods of obtaining evidence overseas.[27]

[25] Karsai, Report on Hungary, § 3.2.

[26] Vogler, Report on England and Wales, § 1.

[27] Gascón Inchausti, Report on Spain, § 3.1.2.

Of course, the issue of respect for the human rights of the parties involved in criminal investigations while executing requests for assistance arises irrespective of the questions concerning the use of foreign evidence. Significantly, the ECMACM had already allowed contracting states to make the execution of a request for assistance concerned with search and seizure dependent on the dual criminality requirement. This provision was improved by the CISA, which required respect for dual criminality over a minimum penalty involving deprivation of liberty or a detention order of six months (Art. 51). Moreover, the CISA has been the first international agreement in Europe to release the contracting parties from the duty to ensure police cooperation whenever requests for assistance necessitated the execution of measures of constraint by the requested state [Art. 39(1)]. These provisions confirm that whenever overseas enquiries impinge on fundamental rights, the generic compliance with *lex loci* cannot suffice to grant them adequate protection and that the problem of avoiding both sovereignty and human rights violations must be tackled in advance.

From the viewpoint of the home state, the mutual assistance model provides two ways of protecting national sovereignty and human rights: through the participation of authorities and parties from the home state in the execution of letters rogatory on the one hand and while assessing the admissibility of overseas evidence on the other.

From a procedural perspective, even the traditional instruments of mutual assistance allowed officials and interested persons from the home state to be present in the execution of the request. Yet, the drawbacks of this solution cannot be overlooked. Firstly, this participation is subject to the consent of the requested state, which makes political considerations interfere also with the decision as to whether or not representatives of the requesting country can be present and leaves considerable uncertainty as to whether or not the evidence obtained can be used in the requesting state.[28] Secondly, the mere possibility of being present grants neither officials nor interested persons the right to take a proactive role in the requested procedure and does not thus suffice to prevent violations either of the requesting state's national interests or of the parties' right to a defence.

At any rate, the main context for protecting the national interests of the home state is the ascertainment of the admissibility of the evidence gathered abroad. The comparative analysis of the selected countries shows very different approaches to this problem, although the common trend is to submit overseas evidence to a general test of consistency with *lex fori* after entering into the requesting state. A good example is offered by *Italy*, where case law has attempted to compensate for the failure to domesticate the most advanced European instruments of mutual assistance by submitting the use at trial of the evidence gathered through letters rogatory to a check of compatibility with the fundamental principles of Italian legal system.[29] Italian case law appears, at first sight, to rely on the same control required at international level while ascertaining the possibility of applying *lex fori* in the

[28] *Ibid*., § 5.

[29] *Ibid*., § 3.

execution of a request for assistance, thus allowing a concrete check of consistency of overseas evidence with national law and the domestic standards of protection of human rights. However, the adoption of this criterion has been accompanied by a rather permissive approach, which has led to a level of scrutiny well below that required in domestic cases, admitting, *e.g.*, evidence collected in the defendant's absence or by the sole judge. This approach has been adopted invoking two rather questionable arguments, i.e., *a*) the need to apply the minimum standards protection provided by ECtHR case law and *b*) the exemption clause of "objective impossibility" [Art. 111(5) it. Const.] as means for admitting overseas evidence collected outside an adversarial procedure.[30]

In sum, Italian experience provides a worrying example of how the limit of consistency with the fundamental principles of domestic law can be turned into a rather vague clause that permits admissibility at trial of the evidence taken abroad without respect for some of the essential defence rights enshrined for domestic proceedings. It can appear paradoxical that the frequent recourse to the "fundamental constitutional guarantees of the national legal system" has been used to require compliance merely with the "basic requirements" of many fundamental rights, particularly the right to a defence.[31] Yet, relaxing the rules on admissibility of evidence can also be seen as a reaction to the extreme complexity of the traditional letters rogatory model.[32] This practical approach raises many human rights concerns, especially taking into account that it is usually accompanied by an *a priori* refusal to question the compliance with *lex loci* in the foreign proceedings.[33] This position is shared by other countries, such as *Spain*, where case law has often started from a dangerous presumption of legitimacy of the enquiries carried out abroad, thus imposing the burden of proof on the party affected by the foreign evidence.[34]

Outside Europe, a similar approach is adopted by the *USA*, where the courts do not even inquire into whether foreign law was followed properly.[35] It appears significant that US case law, while assessing the admissibility of the results of overseas investigations conducted by foreign authorities without acting in "joint venture" with US authorities, often invokes the same argument used by Italian case law, based on the impossibility of requiring full respect for US rules on evidence. This has led to considering even constitutional rules on evidence gathering as not applicable when dealing with pieces of evidence collected abroad by foreign officials. Thus, US courts tend to accept the results of interrogations conducted overseas without strict compliance with the due process requirements or administration of "*Miranda warnings*."[36] A similar conclusion applies to the results of

[30] *Ibid*., § 3.
[31] *Ibid*., § 3.
[32] *Ibid*., § 3.
[33] *Ibid*., § 3.
[34] In critical terms, with regard to Spanish case law, see Gascón Inchausti, Report on Spain, § 3.1.2.
[35] Thaman, Report on USA, § 3.2.3.
[36] *Ibid*., § 3.2.3.

searches conducted overseas without probable cause.[37] The only limit to the use at trial of these pieces of evidence is where the investigations were conducted abroad in a way that shocks the conscience of the court,[38] a rather undefined requirement that leaves room for enormous discretion in admitting evidence collected in violation of fundamental rules of US evidence law.

B) Without a doubt, the possibility for the requesting state to require specific procedures to be followed in the execution of requests of assistance has constituted a Copernican revolution in the way judicial assistance is provided and a point of no return in the development of the mutual assistance model.[39] Obliging the requested authority to comply with the procedural requirements set by the requesting authority, provided they do not infringe the fundamental principles of the requested country, does not simply mean a shift of the control of consistency with domestic law from the requesting authority to the requested authority. Anticipating this check from the decision on the admissibility of the evidence *already* collected overseas back to the ascertainment *prior to* the execution of the request of assistance implies a radical change in the very idea of cross-border cooperation. The traditional mutual assistance model neither favours mutual knowledge nor aims at mutual integration of domestic laws and procedures. The requesting authority does not need to know foreign laws, since it cannot interfere, except in specific cases, with the way investigations are carried out and evidence is taken abroad. It is given only the possibility of ascertaining the admissibility at trial of the results of overseas enquiries and it is thus understandable that the decision on the use of evidence already obtained shifts towards more permissive parameters than in domestic cases, as occurs in *Italy* and *Spain*. On the other hand, the requested authority needs neither to know the law of the requesting state, which will not be applied at all in the collection of evidence in its territory, nor to question the decision on the use of that evidence in the home proceedings.

In light of these premises, the first change produced by the interaction between the laws of the requesting and requested state is the need for each of the competent authorities to get familiar with the other's law.[40] Neither of them can any longer afford to ignore, and to remain indifferent to, the other's procedural system. The requesting authority must know foreign law while considering which procedures of its own law can be applied overseas without infringing the fundamental principles of *lex loci*. The requested authority must know which rules of foreign law can integrate its national procedures without jeopardizing the core principles of its legal system.

This knowledge requirement is of essential importance where the request for assistance aims at executing measures that impinge on the fundamental rights of the parties. The 1992 IACMACM lays down a very clear provision in this respect, which empowers the competent authority of the state requested to carry out certain measures of coercion (search, seizure, attachment, surrender of any items,

[37] *Ibid*., § 3.3.1.

[38] *Ibid*., §§ 3.2.3 and 3.3.1.

[39] In this sense Allegrezza (2007), p. 718 f.; Caprioli, Report on Italy, § 4.

[40] In the same sense see Gascón Inchausti, Report on Spain, § 3.1.1.

documents, records, or effects) to determine whether the request contains information that *justifies* the proposed action [Art. 13(1)]. This provision is important for two reasons. On the one hand, it presupposes a duty for the requesting state both to check the necessity and the proportionality of the requested measure after lodging the request and to justify them to the requested authority. On the other, it entitles the requested authority to challenge the check carried out by the requesting state and to refuse the execution of the requested measure if unjustified.

In the UN MTMACM, the *police* cooperation rule on the requests involving measures of constraint becomes a specific ground for refusal of *judicial* cooperation where the request implies the adoption of compulsory measures inconsistent with the law and practice of the requested state [Art. 4(1)(e)]. This inconsistency can be due to the lack of legal basis of the requested coercive measure pursuant to *lex loci*, but it can also be the result of combination of *lex loci* and *lex fori* according to the requested procedures. The case of coercive measures clearly confirms that shifting the check of consistency with domestic law to the execution of requests for assistance is not simply aimed to solve the sole problem of the admissibility of overseas evidence. Attenuating *lex loci* allows for a concrete check of compatibility of the requested action with the procedural culture of the requested state to be carried out and testifies to the awareness that individual rights violations can take place both in the execution of requests and in the use of overseas evidence.

A further advantage of combining *lex loci* with *lex fori* relates to the possibility for officials and interested parties of the criminal proceedings to be involved in the overseas procedure. It has been argued that in the traditional request model the possibility of participating in the execution of letters rogatory was reduced to the mere presence of authorities and parties from the home state in the requested action and therefore did not ensure any effectiveness of defence rights. The advanced model of mutual assistance gives new significance to this possibility, which allows both the parties of the proceedings and the representatives of the requesting state to take part in investigative activities carried out pursuant also to its own law, thus guaranteeing the proper application of the requested procedures. It is noteworthy that the evolution of the mutual assistance model has been accompanied by significant strengthening of the possibility of participating in overseas investigations. Of the international instruments analysed in this study the most advanced is the IACMACM, which grants officials and parties of the requesting state the right not only to be present at but also to participate in the execution of the request for assistance if not prohibited by the law of the requested state [Art. 16(2)].

It is to be carefully assessed whether combining *lex loci* with *lex fori* procedures, with the limitation of non-contrariety to the fundamental principles of the law of the requested state, suffices both to satisfy sovereignty needs of the requested state and ensure the admissibility of the results of overseas activities. As noted above, the SAP ECMACM takes into account the difficulties of the requested state being subject to formalities that, albeit not contrary to the fundamental principles of *lex loci*, are unfamiliar to, and thus merely compatible with, the law of the requested country. Doubtless, this model can alter the usual procedures of evidence gathering of the requested state, creating a tangled web of procedural rules whose only exit is through the ascertainment of infringement of the fundamental principles of the

requested state. Compliance with these formalities indicated by the requesting authority is certainly aimed to ensure the use of overseas evidence. This is clear from the FD EEW. Also, in *Italy* the CCP entitles domestic authorities requesting mutual assistance to specify, where an international agreement provides for such a specification, which requirements are necessary for the use of the requested evidence. Nevertheless, the analysis of the Italian legislation shows that non-compliance with the requested formalities does not necessarily lead to inadmissibility of overseas evidence.

A very delicate problem is whether the improved model of mutual assistance ensures proper protection of fundamental rights. As noted above, a first problem relates to the necessary knowledge to apply correctly the procedures requested by foreign authorities, a problem which is accentuated in countries, such as the *USA*, where compliance is explicitly requested also with foreign practice. Furthermore, compliance with the procedures of *lex fori* in conjunction with *lex loci* does not necessarily suffice to protect the parties' rights and there is no doubt that, where neither of those laws can ensure this result, the collected evidence cannot be admitted at trial in the requesting country.[41] Indeed, "a conviction secured on the basis of evidence obtained in violation of the essence of fundamental rights cannot be considered legitimate, even when these rights were violated in a foreign country."[42]

It is worth noting that to prevent human rights violations, international texts have set further conditions to be satisfied in the collection of evidence or in respect of specific investigative activities overseas. The international instruments analysed in this study provides various examples of this phenomenon. Thus, the IACMACM provides that the requested state must determine what requirements must be met to protect the interests held by third parties in the items that are to be transferred. These requirements must be in accordance not only with the law of the requested country but also with the provisions of the convention. Furthermore, under the SAP ECMACM, in case of hearing by video-conference, the requested party must ensure—at the request of the person to be heard, regardless of whether the requesting authority agrees or national law foresees—that the person to be heard is assisted by an interpreter, if necessary [Art. 9(5)(d)].

However, domestic case law does not appear to be fully aware of the potential of the new methods of mutual assistance in the light of human rights protection. As noted above, *Spain* provides a clear example of how national authorities are still satisfied with compliance with *lex loci*, thus ignoring the possibility of requiring domestic procedures to be followed abroad. This possibility constitutes a precise duty for the requested state. Therefore, stating that foreign authorities cannot be expected to know national law and especially case law interpretations, as Spanish courts usually do,[43] means ignoring the cultural changes occurring in the mutual assistance system, which require each of the competent authorities to acquire adequate knowledge of the other's law and practice (Art. 6 UN MTMACM).

[41] See Gascón Inchausti, Report on Spain, § 3.1.2.

[42] *Ibid*., § 3.1.3.

[43] In the sense Gascón Inchausti, Report on Spain, § 3.1.3.

On the other hand, some domestic laws set more specific requirements than compliance with the fundamental rights of the requested law to be fulfilled when receiving a request for judicial assistance. Thus, in *Switzerland* the Federal Act on International Mutual Assistance provides for, among other grounds for refusal of mutual assistance, non-compliance of the foreign proceedings with the procedural principles of the ECHR and the ICCPR.[44] The considerable attention paid by Switzerland to individual rights protection in transnational procedures has led Swiss federal case law to adopt the practice of making judicial assistance dependent on a confirmation of the requesting state guaranteeing the respect of specific fundamental rights or the possibility for Switzerland to monitor the procedure.[45] The latter possibility shows a further development of mutual assistance system, which allows an unprecedented possibility for the requested state to supervise the procedure in the requesting country as precondition for providing assistance. Of course, compliance with the procedural principles of international charters of rights does not necessarily elevate the standards of human rights protection.

Another interesting solution is provided for in *France*. As noted above, a flexible mechanism allows domestic authorities, while receiving requests for assistance from abroad, to make compliance with *lex fori* procedures required by foreign authorities dependent on the fact that these do not reduce the rights of the parties or the procedural guarantees provided for by domestic law. The requested authority is thus empowered to carry out a concrete check of what rules provide the most appropriate protection of the rights and guarantees at stake. Unlike Switzerland, French case law does not, moreover, go so far as to verify, while receiving an overseas request for assistance, whether or not the requesting state respected fundamental rights and above all the principle of proportionality when ordering the request.[46]

A more rigid approach is instead adopted by *Germany* in its Law on Judicial Proceedings in International Criminal Matters, which makes German cross-border cooperation dependent on the fact that judicial proceedings do not significantly contradict the principles of the German legal system. In the field of evidence gathering German case law has acknowledged that the failure to meet the procedural principles of the requesting country, especially where the general standards of the rule of law are at stake, can lead to the inadmissibility of overseas evidence.[47]

3.2 The Mutual Recognition Model

3.2.1 Methodological Premise

A study of the mutual recognition model of collecting evidence, which clearly relates to the sole EU AFSJ, could appear to be out of place in this comparative

[44] Heine/Zürcher Rentsch, Report on Switzerland, § 3.1.
[45] *Ibid*., § 3.1.
[46] Lelieur, Report on France, § 3.1.
[47] Sinn, Report on Germany, § 3.1.

research, since the main EU legislative tool aimed to obtain evidence overseas—i.e., the FD EEW—has not yet been domesticated in any of the selected European legal orders.[48] An analysis of mutual recognition is important for this research for a number of reasons.

Like mutual assistance, the mutual recognition system has undergone significant changes in recent years. It is well known that mutual legal assistance and mutual recognition provide very different systems of obtaining overseas evidence since they are based on quite opposite procedural philosophy: a request and an order of assistance, respectively.[49] In the former, domestic authorities ask foreign authorities to provide judicial assistance, leaving them free as to whether and how assistance can be offered. In the latter, domestic authorities order foreign authorities to recognize a specific judicial product issued in the applicant state and to execute it as it had been issued in the host country.

The distinction between these two systems is clear while dealing with abstract models. In both cases, however, what is requested/ordered is an investigative or evidential activity that the authorities of the home state cannot carry out directly in the territory of the host state. Moreover, each of them have been enacted, both at international and domestic level, in very different fashions that have in great part attenuated most differences among them. In this context, the present study aims to ascertain whether and how new EU tools of cross-border cooperation have blurred the rigid mutual recognition logic, thus incorporating elements proceeding from the area of improved mutual assistance. On the other hand, some of the most advanced instruments of mutual assistance still contained typical elements of mutual recognition.[50]

I will analyse the steps of this development within the system of mutual recognition comparing two legislative texts and one legislative proposal, i.e., respectively the FD OFPE and the FD EEW, on one hand, and the PD EIO, on the other hand. The study of these texts proves, moreover, very interesting from the perspective of national legal systems for different reasons, however. Of them the FD OFPE is the only one that has been domesticated in countries such as *France* and *Spain*. None of the selected systems, as noted above, has until now implemented the FD EEW and the EIO is still a legislative proposal. Thus, the analysis of these texts will be carried out here from the perspective of the laws of the national legal orders selected.

3.2.2 Development of the Mutual Recognition Model

The comparative analysis of the three aforementioned texts leads to the following conclusions. At first sight, all of them appear to share the sole mutual recognition

[48] The only two EU countries that have until now implemented this Framework Decision are Scotland and Denmark.

[49] See, among others, Spencer (2010), p. 602; Gleß (2011), pp. 597 ff.

[50] For instance cf. Arts. 4(1) and 6(1) EUCMACM.

model[51] because of the imposition upon the executing authority of the duty to recognize and execute a (judicial) order without any further formality being required and ensure its execution in the same way as if the order had been issued in the executing state, unless this authority decides to invoke one of the grounds for non-recognition or non-execution or one of the grounds for postponement of execution.[52] This duty of recognition and execution of the order in the terms in which it was issued seems to be even strengthened by the PD EIO due to the fact that the investigation order must have specific contents [Art. 1(1)] and must be executed to the letter [Art. 8(1)]. Unlike this legislative proposal, both the freezing order and the EEW prove somehow indefinite as to their contents, thus giving the executing authority a considerable margin of discretion in choosing the "necessary measures" to ensure their execution.[53] The FD EEW clarifies that the choice of such measures falls under the responsibility of the executing authority, which is also free to decide whether it is necessary to use coercive measures to provide the requested assistance.

The issue of coercive measures is of decisive importance to ascertain the evolution of the mutual recognition model and its differences with mutual assistance. Since the freezing order is in itself intended to bring about coercion, the FD OFPE limits itself to stating that any *additional* coercive measures rendered necessary thereby must be taken pursuant to the procedural rules of the executing state. The FD EEW is unique among these texts, since it specifies, following the aforementioned mutual assistance models (CISA and UN MTMACM), that the executing authority is responsible for deciding whether or not coercive measures must be taken in the execution of the EEW.[54] The same freedom of decision applies also to the case in which the issuing authority sets specific requirements for the execution of the EEW (Art. 12), requirements that can therefore produce a coercive result, even if the chosen measure does not in itself entail any coercion pursuant to *lex loci* (*e.g.*, narcoanalysis). This wording disappears from the corresponding provision of the PD EIO [Art. 8(2)]. As noted above, the contents of the new order must be clarified in advance, since the approach of the new instrument is, unlike other EU legislative initiatives, to focus on the investigative measure to be carried out rather than on the evidence being collected. Therefore, the issuing authority is empowered to decide, on the basis of its knowledge of the ongoing investigation, what measure must be used.[55]

[51] See respectively Art. 1(2) FD EEW and Art. 1(2) PD EIO. The text of the FD OFPE contains no reference to mutual recognition, although it is repeatedly quoted in the *Consideranda*.

[52] See respectively Art. 5(1) FD OFPE, 11(1) FD EEW and Art. 8(1) PD EIO.

[53] See respectively Art. 5(1) FD OFPE and Art. 11(1) FD EEW.

[54] The only exception relates to the case in which measures, including search and seizure, are needed in respect of those offences for which the dual criminality requirement is not requested under Art. 14(2) [Art. 11(3)(ii)], unless the requested coercive measure is not provided for under *lex loci*. See Gleß (2011), p. 604.

[55] See point 10 of the *Consideranda*.

Nevertheless, this proposal is the first mutual recognition instrument that not only allows but also even requires the executing authority to use a different investigative measure than that requested (Art. 9), unless the latter falls under the list of Article 10(1a) and generally has no coercive character. This possibility/duty for the executing authority to change the type of measure has led to seeing the new instrument as a tool of mutual assistance rather than of mutual recognition.[56] In my view, however, this provision cannot be assessed without considering the entire development of mutual recognition. This has led, along with the widening of the scope of application of the various devices for evidence gathering, to a progressive shift back of the mutual recognition logic to the flexibility of mutual assistance. This result, which is one of the aims pursued through the PD EIO,[57] testifies to a new model of transnational inquiries showing up in the AFSJ, a model that encompasses elements belonging both to the mutual recognition and mutual assistance cultures.

3.2.3 Functional Assessment

The functional assessment of whether mutual recognition tools have improved legal assistance while preventing sovereignty violations and elevating human rights protection must follow the development of the mutual recognition system.

A) The first EU initiatives were very cautious in intervening in the field of transnational evidence. The FD OFPE is a clear example thereof. The possibilities for this Framework Decision, which was the second EU legislative text based on mutual recognition, to speed up mutual assistance were considerably reduced due to its limited scope of application. Unlike what happened with the FD EAW, which aimed to replace the extradition system within the EU, the FD OFPE was not intended to regulate the transfer of evidence to the issuing authority, a limit that was respected by the countries that have implemented this legislative instrument, such as *Spain* and *France*. Moreover, this EU intervention provided a very strict application of the mutual recognition logic, reducing drastically the grounds for refusal of recognition and dropping grounds classically reflecting sovereignty and human rights concerns, such as extraterritoriality, national security interests, *in absentia judgments*.[58] As noted above, the fact that the provision allowing the issuing authority to set certain formalities to be followed in the execution of the freezing order does not contain any specification should lead to concluding that the executing authority is also obliged to the *coercive* procedures imposed upon by the issuing authority unless they infringe the fundamental principles of its own law. On the other hand, the issuing authority is allowed to require only the formalities that are necessary to ensure the valid use of the overseas evidence in the home state.

[56] Gleß (2011), p. 610.

[57] Cf. Ruggeri, above, § 3.2.1.

[58] Peers (2011), p. 720.

This provision does not seem to allow for those formalities to be requested, which, although not jeopardizing the admissibility of evidence, are aimed to improve human rights protection in the gathering of evidence (*e.g.*, permitting a more active role of the defence in the freezing procedure than that provided for in the executing state). Significantly, moreover, the provision relating to the combination of *lex loci* with *lex fori* is not accompanied by the possibility for officials and interested parties to take part in the execution of the freezing order.

B) Obtaining and transferring overseas evidence became the focus of the FD EEW, which, despite of invoking explicitly mutual recognition as the basis for this initiative, constitutes, however, a significant step in the development of the mutual recognition system. According to the widening of EU intervention in the field of evidence gathering, mutual recognition has become considerably less rigid. This phenomenon has had unquestionable influence both on national sovereignty and the respect for fundamental guarantees of the persons affected by the collection and use of overseas evidence. This result is very clear from the coercive measures exception, which brings about a considerable approximation of the mutual recognition and the request model. Another important novelty is the re-expansion of the list of grounds for refusal (Art. 13), which encompasses grounds relating to the territoriality requirement, essential national security interests, the impossibility of using any measure available in the specific case and the failure to validate the EEW whenever requested by the executing state. There is no doubt that the two latter provisions would have a strong influence on the sphere of fundamental rights, insofar as they allow the executing authority not to renounce to specific guarantees of its own law, concerned, *e.g.*, with certain sentence thresholds for using the measure available to execute the evidence warrant or guarantees, such as the judicial control, aimed to control police intervention. A further significant novelty is the introduction of the obligation of the issuing authority to carry out a previous check of the proportionality and necessity of the requested evidence to reduce the risk of inadmissibility of overseas evidence in the home country (Art. 7). Finally, taking into account the risks for the rights of suspects and third parties deriving from the EEW, the Framework Decision requires Member States to put in place all the necessary measures to ensure that any interested party, including third parties, have access to legal remedies, an obligation that cannot significantly be waived in case of coercive measures (Art. 18).

Notwithstanding these provisions, the FD EEW, viewed from a human rights perspective, presents significant limits and dangerous legislative loopholes. The executing authority is not entitled to challenge, from its own viewpoint, the check of proportionality and necessity carried out by the issuing authority.[59] On the other hand, the limitation of the scope of application of this legislative intervention to

[59] To be sure, point 12 of the *Consideranda* requires from the executing authority the use of the least intrusive means to obtain the documents, objects and data sought. This obligation entails the application of the subsidiarity check to the investigative means aimed at obtaining evidence, which entails an assessment typically belonging to the sphere of proportionality.

documents, objects and data does not in itself prevent incompatibilities with the law of the issuing state, where founded on adversarial basis. Indeed, due to the wide concept of "document" adopted by this Framework Decision, human rights concerns as to the respect for the procedural rules of the issuing state, arise from the possibility both of obtaining the non-documentary evidence already collected overseas and taking statements of persons present during the execution of the EEW.[60] I deal with the first provision above, at § 4.2. As to the latter, does the previous request of the issuing authority suffice to ensure the admissibility of these statements, where, *e.g.*, the persons are co-defendants? The strict application of *lex loci* to this case implies that, whenever *lex loci* does not allow for the defendant's lawyer to be present, the statements taken in the execution of the EEW could run counter basic procedural rules of *lex fori*. This leads to the following unsatisfactory alternatives: the inadmissibility of the evidence taken abroad pursuant to procedural rules conflicting with the provisions of *lex fori* on the conditions for the use of evidence[61]; or the admission of overseas evidence, a result which in itself can jeopardize the defence rights of the accused against whom the statement is used.

Such drawbacks are accentuated by the fact that the FD EEW fails to lay down in advance procedural guarantees to be followed in order to ensure full respect especially for the subsidiarity and the *nemo tenetur* principles.[62] Also, the FD EEW has not followed the amendments suggested in 2004 by the European Parliament, which proposed further grounds for refusal, which were undoubtedly aimed to enhance both the sovereignty and fundamental rights protection, such as: a) where the execution of the EEW would prevent the executing state from applying its constitutional rules relating to due process, privacy and the protection of personal data, freedom of association, freedom of the press and freedom of expression in other media; and b) where the execution of the EEW would undermine the obligation to respect the fundamental rights and fundamental legal principles enshrined in Article 6 TEU, in particular regarding the right to a fair trial or the right to respect for private life, including data protection.[63] These grounds for refusal had been strengthened by the European Parliament Resolution through a further amendment aimed at the introduction of a new provision relating to "Subsequent use of evidence" (Art. 19a). This provision—smoothening the strict mutual recognition logic of the Tampere conclusions according to which the evidence collected in one Member State should be admissible in another Member State, taking into account the standards that apply there—was aimed to avoid the use of the evidence collected through the EEW prejudicing the defence's rights in

[60] See Art. 4(1) and (6).

[61] See Belfiore (2009), pp. 5 f.

[62] In this sense the Proposal for a Framework Decision on the European Evidence Warrant of 14 November 2003, Art. 12(1)(a) and (a). COM(2003) 688 final. See Gleß 2011, p. 606.

[63] See the European Parliament Legislative Resolution on the Proposal for a Framework Decision on the European Evidence Warrant of 22 March 2004, Amendment 11. P5_TA(2004)0243. See Gleß 2011, pp. 606 f.

the home proceedings with particular regard to the admissibility of evidence, the obligation to disclose that evidence to the defence, and the ability of the defence to challenge that evidence.

C) As noted above, the PD EIO constitutes a significant development of the strict mutual recognition logic. From both a sovereignty and human rights perspective, this phenomenon is not simply highlighted by the re-expansion of the list of grounds for refusal and mostly by the re-introduction of grounds concerned with the territoriality requirement and the *ne bis in idem* principle. The unprecedented provision allowing for the executing authority to use a different measure than that requested relates to requirements—the existence of legal basis for overseas enquiries, the availability of the requested measure in the concrete case and the respect for the subsidiarity principle—aims to safeguard both the procedural rules of *lex loci* and some fundamental guarantees of the person.

This important provision is closely linked to two further, no less significant novelties incorporated into the PD EIO in the course of the Council discussions: the introduction of the check of proportionality, necessity and availability of the measure [Art. 5a(1)(a) and (b)] and the introduction of a two-level procedure of refusing the recognition and execution of the investigation order [Art. 10(1a) and (1b)].

The preventive control of proportionality and necessity and the check of availability, however, do not pursue the same target. The control of proportionality and necessity is aimed to avoid disproportionate and arbitrary investigative interventions overseas, whilst the check of availability in a similar case in the home state prevents from the risk of circumventing domestic procedural limits to the collection of evidence, relating, *e.g.*, to certain levels of suspicion, certain sentence thresholds, etc.[64] Furthermore, the two controls are not on the same plane. Although Article 5a(2) requires both controls to be carried out by the sole issuing authority, the availability requirement must also be assessed by the executing state and can lead it to changing the investigative means and in cases of the measures provided for in Article 10(1b), even going so far as to refuse recognition and execution. It is noteworthy that in *US* case-law, in order to encourage reciprocal behaviour, a court may issue a letter rogatory concerned with foreign proceedings even when the information requested would not be discoverable under the same circumstances in US criminal proceeding and even when the country requesting the letter rogatory would not allow discovery under the same circumstances in its own courts.[65] At first sight, there is instead no room in the PD EIO for the necessity and proportionality of the investigative measure to be challenged by the executing authority from the perspective of its own legal system. Yet, this conclusion, which would raise several human rights concerns whenever the judicial order aims at the execution of measures impinging on fundamental rights of the parties, is not entirely correct. Indeed, the executing authority is required to check the possibility of using a less intrusive measure, a check that is certainly aimed at preventing the risk of using a measure that would result in being disproportionate pursuant to *lex loci*.

[64] In this sense see point 10 of the *Consideranda*.

[65] Thaman, Report on USA, § 2.1.1.

The second novelty is the introduction of two levels of grounds for refusal. The main distinguishing criterion is, at first sight, based on the coercive nature of the requested measure. However, the list of Article 10(1a) contains very heterogeneous measures: some certainly entail the use of coercion (*e.g.*, search and seizure), whereas other measures, though in principle equally non-coercive, may be carried out by coercive means or through coercive procedures (*e.g.*, statements by witnesses). This conclusion is confirmed by the reference to the sole Article 5a(1) made by Article 10(1a), which implies that the executing authority must verify the possibility of using less intrusive measures also in the cases listed in the latter provision, a possibility that would have no meaning if such measures had no coercive nature. From a human rights perspective, the distinction between the two lists of grounds of refusal, taking into account the coercive nature of some of the measures listed in paragraph 1a, raises serious concerns. May the judicial order be executed even if the measure entails the use of coercion, where the fact does not constitute an offence under both *lex loci* and *lex fori*, where there is no legal basis for the investigative measure or this is not in anyway available under *lex loci*, which limits it, *e.g.*, to specific offences or specific levels of suspicion? And what measures can be deemed as coercive pursuant to this legislative proposal? Which principles should apply to those measures that, albeit not being coercive, entail the use of coercion? May the executing authority refuse recognition where the requested procedures entail the use of coercion?

Certainly any coercion used cannot be applied in a way that runs counter to the principles of necessity and proportionality pursuant to *lex loci*, even if it passed the same control under *lex fori*.[66] The main problem is, however, that this check cannot be carried out outside the scope of Article 5a(1a) in the executing state, notwithstanding that is where the coercion will take place. From this perspective, serious concerns arise from the drop of the dual criminality requirement also in respect of the list of the thirty-two offences laid down in the Annex X over the threshold of a maximum of at least three years of custodial sentence or detention order pursuant to *lex fori*. Doubtless, the waiver of dual criminality with regard to these offences plays a very different role where the execution of the judicial order contributes to strengthening the right to freedom through the adoption of alternatives to remand detention[67] and in the cases in which the judicial order is aimed to carry out *in the executing state* a measure that impinge on the fundamental rights of the parties. Indeed, dual criminality constitutes another fundamental pre-condition for any coercion to be used in the executing state.[68]

The issue of coercive measures raises equally serious human rights concerns as to the way of executing the investigative order. Certainly, the application of the procedural rules of foreign law, while encroaching on the fundamental rights

[66] In the same sense Bachmaier Winter, above, § 4.2.1.

[67] See the Framework Decision 2009/829/JHA on the application of the mutual recognition principle to supervision measures as an alternative to provisional detention.

[68] In this sense Bachmaier Winter (2010), p. 585.

sphere, is very problematic.[69] Yet the PD EIO provides for a more active role of issuing authorities than that allowed in any mutual assistance text, a role that is aimed to support the authorities of the host state in the execution of the investigative order and which can lead, upon agreement with the latter, to the transfer of enforcement powers to the home authorities. This participation can certainly contribute to ensuring the proper application of the requested procedural formalities especially whenever coercive measures are at stake. Nevertheless, the PD EIO does not contain any reference, unlike any instrument of mutual assistance, to the possibility for interested parties to assist and participate in the execution of the judicial order. Nor is there any room for the defendant and the parties affected by the requested measure to take part in the decision on the availability of all grounds for recognition, as well as in the decision on the possibility of using another measure and on the choice of that measure. The failure to involve subjects other than the authorities of the issuing state is consistent with Article 8(4), which requires both authorities to consult each other to ensure the most efficient execution of the investigation order. This lacuna makes the lack of procedural safeguards in this legislative proposal even more unbearable than in the FD EEW. Nor can the sole reference to Article 6 TEU contained in Article 1(3) compensate for this vacuum. Indeed, even if the entry into force of the EU FRCh has ensured an equivalent level of protection to that provided by the ECHR with regard to corresponding guarantees,[70] this reference cannot suffice to guarantee that both recognition and the choice of the investigative measure, especially if of a coercive nature, are consistent with the due process requirements.

3.3 The Availability Model

3.3.1 Exchange of Information and Obtaining Evidence from Abroad

Over recent years a new model of gathering evidence abroad has gained increasing importance: the availability model. This principle, which allows for judicial and law enforcement authorities to have direct access to information available in another state, has since many years appeared in several multilateral and bilateral international agreements both inside and outside Europe. The scope and aims of this principle are structured very differently, however. Of the first multilateral agreements that applied it in Europe, the CISA significantly included the availability model in the field of police cooperation, thus focusing on the importance of the requested information in helping the requesting authority combat future crime and prevent offences against or threats to public policy and public security (Art. 46). Among the bilateral agreements signed by the legal

[69] See Gleß (2008), p. 619.

[70] Art. 52(3) EU GRCh.

orders analysed in this study, the Swiss-Italian agreement of 1998 was the first to include the exchange of information in the area of judicial cooperation, while relating to information pertaining to criminal offences with the aim of assisting the requesting state in initiating or carrying out investigations or proceedings.[71] A very similar approach was adopted by the EUCMACM and the SAP ECMACM, which significantly classified this exchange of information as "spontaneous."[72]

In recent years this mode of exchange of information has shifted towards the field of obtaining evidence. This phenomenon is not new outside Europe, as is apparent from the UN MTMACM and the IACMACM. Significantly, these international texts regulate the transmission of information and evidence together, also providing for specific limitations to the disclosure and use of that information and evidence in the home state.[73] In Europe this mode of obtaining criminal evidence has grown in importance in the most recent legislative initiatives at EU level. Thus, the FD EEW has widened the concept of "document" including dynamic evidence already obtained in the host state prior to the issuing of the evidence warrant [Art. 4(4)]. A similar approach has been adopted by the PD EIO, which sets the collection of evidence already in the possession of the executing authority as one of the general aims of the proposed new instrument [Art. 1(1)]. At the domestic level, the recourse to this mode of obtaining overseas evidence has become increasingly frequent in European countries, thus replacing in great part the letters rogatory system. *Italy* provides clear confirmation of this tendency aimed to reduce the area of inadmissibility of evidence laid down in Article 729(1) CCP.[74]

3.3.2 Informal Procedures and Human Rights Concerns

In general terms, the reasons for the spread of this model are linked to the speedy and almost automatic character of this form of obtaining evidence.[75] These facilities do not, however, ensure unconditional admissibility of evidence. Since evidence must have been obtained before the request for transmittal of the documents, foreign authorities will have followed only their own procedural law, which can be different and even incompatible with the requirements of *lex fori*. It is understandable, therefore, that in countries such as *Italy* the evidence obtained abroad through this mode has to pass anyway the check of admissibility pursuant to Article 78 of the CCP implementing rules and subsequently pursuant to Article 238 it. CCP.[76]

[71] See Caprioli, Report on Italy, § 6.

[72] See respectively Art. 7 EUCMACM and Art. 11 SAP ECMACM.

[73] See respectively Arts. 1(1)(f) and 8 UN MTMACM and Arts. 24–25 IACMACM.

[74] Caprioli, Report on Italy, § 6.

[75] See Klip (2012), p. 357.

[76] Caprioli, Report on Italy, § 6.

Regardless of the issue of admissibility of overseas evidence, this form of cross-border cooperation raises several human rights concerns about the protection of the rights of the individuals involved in the evidence gathering abroad,[77] especially if these are third parties. First, the strict application of *lex loci* leaves no room for the possibility, laid down both in the FD EEW and the PD EIO, of requesting that formalities of *lex fori* be followed,[78] even if they are able to elevate the standards of protection of individual rights in the collection of evidence. Moreover, neither of these legislative texts lays down any possibility for the defence to participate in the evidence gathering abroad.[79] Nor does the informal nature of this procedure provide for any possibility for the individuals affected by overseas investigations to challenge the lawfulness of the collection of evidence or to have access to legal remedies.[80] Doubtless, these new forms of cooperation are "played on a field that is [...] hidden *a posteriori* from the eyes of the defence."[81] Consequently, whichever the results of the overseas investigations are, foreign authorities will have full discretion as regards the selection of the elements that can be forwarded to the requesting authority.[82]

The main concern, however, arises where this informal procedure is intentionally used to bypass the difficulties of legal assistance, by requesting foreign authorities to initiate a proceeding with the aim of collect specific pieces of evidence. Despite of what the EUCMACM and the SAP ECMACM provide for, this cooperation cannot clearly be deemed spontaneous.[83] But what appears to be the most worrying issue is that investigations commenced for the purpose of provide cooperation to a foreign authority instead of, or prior to, charging someone with a specific offence.[84] Furthermore, where cooperation by the host state aims to assist domestic authorities in *initiating investigations* [Art. 11(1) SAP ECMACM], on what basis and within what limits does the entire procedure take place? In these cases, the availability model shows a very dangerous phenomenon consisting of entirely suspicionless procedures which are often addressed to the collection of evidence abroad through the adoption of measures seriously impinging on the sphere of individual rights (*e.g.*, interception of communications).

[77] Klip (2012), p. 358.

[78] In this sense Belfiore (2009), p. 5.

[79] The FD EEW links the possibility for the issuing authority to participate in the execution of the activity sought to the existence of a legal source in force allowing it [Art. 9(2)]. However, there is no room in the FD EEW for a participation of the defendant or individuals from the home state.

[80] Klip (2012), p. 358.

[81] Caprioli, Report on Italy, § 6.

[82] Melillo (2009), pp. 103 f.

[83] Caprioli, Report on Italy, § 6.

[84] Melillo (2009), pp. 107 ff.; Caprioli, Report on Italy, § 6.

4 Transnational Inquiries in a Narrow Sense: The Model of Overseas Investigations

4.1 Development of Extraterritorial Investigations

As noted above, extraterritorial enquiries constitute a relatively recent form of cross-border cooperation in the field of evidence gathering. The strong sovereignty approach that traditionally has governed mutual assistance never allowed for domestic law enforcement to conduct investigations in the territory of other countries, thus limiting their participation to a vague presence in the execution of requests for assistance. Moreover, it is worth noting that the first forms of extraterritorial investigations were laid down at international level in the same period in which revolutionary changes occurred in the traditional request model. In Europe the CISA was the first international agreement to provide legal basis for conducting criminal investigations overseas. This possibility was, however, provided for in the context of mutual assistance, since it was subject to the prior authorisation of specific investigative measures (surveillance, hot pursuit) by the host state in response to a request for legal assistance.[85] An exceptional power to continue such investigations overseas without the previous consent of the host country was strictly linked to emergency situations only in proceedings for specific types of serious offences (murder, manslaughter, etc.) [Art. 40(2)].

This approach was overcome by the EUCMACM, which introduced "a new generation of extra-territorial investigations,"[86] fully unrelated to the requirement of urgency and aimed to fulfil the need to enhance horizontal cooperation in the fight of specific crimes having cross-border cooperation. These new techniques were controlled delivery, covert investigations and the setting up of joint investigation teams,[87] which was consequently regulated by the Framework Decision 2002/465/JHA. The SAP ECMACM adopted a more complex approach by coupling these new forms of extraterritorial investigations to the traditional cross-border observation.[88]

At domestic level, the comparative analysis of the selected countries shows that those which have enacted such international instruments have developed different practices of extraterritorial investigations. Moreover, some countries have introduced national regulations specifically addressed to extraterritorial investigations. For instance, *France* has, additionally to incorporating the EUCMACM as general international instrument governing cross-border cooperation at EU level, enacted specific rules on JIT (arts. 695–2 and 605–3 CCP), which have allowed for several inquiries to be conducted through this scheme.[89] Also, *Hungary* offers multilevel

[85] See respectively Arts. 40(1) and 41(1) CISA.

[86] See Klip (2012), p. 361.

[87] See Arts. 12–14 EUCMACM.

[88] See Arts. 17–20 SAP ECMACM.

[89] Lelieur, Report on France, § 2.

practices in extraterritorial inquiries (cross-border surveillance, hot pursuit) based on different agreements signed with its neighbouring countries.[90] By contrast, in *Italy* the incorporation of this EU legislation has until now found great resistance and due to the failure to ratify both the EUCMACM and the SAP ECMACM and the lack of implementation of the FD JIT, there is no general legal basis for conducting investigations overseas through joint investigation teams.[91]

4.2 *Functional Assessment*

Certainly, the development of extraterritorial investigations reflects the search for enhancing cross-border cooperation. It might appear surprising that in Europe the great weight attached to free movement of judgements and judicial products has not yet led to establishing a free flow of law enforcement officials from one Member State to another.[92] But conducting investigations in the territory of another state still raises serious sovereignty concerns. This can explain the cautious wording of Article 89 TFEU, which requires a special future legislative procedure to lay down both the conditions and limitations of extraterritorial inquiries, investigations that must, moreover, be conducted in liaison and in agreement with the host authorities. Significantly, all forms of extraterritorial investigations share the common feature of requiring, unlike both instruments of improved mutual assistance and mutual recognition, the strict application of *lex loci*[93] and, in cases of joint investigation teams, the application of the domestic law of the state in whose territory the team operates.[94] The regulation of both the criminal and civil liability on the basis of the assimilation principle[95] is a reflection of this procedural regulation.

With particular regard to joint investigation teams, the application of the *lex loci* rule does not necessarily render the evidence gathered by the team admissible in every Member State that participated in the joint investigation.[96] It is noteworthy that the greatest resistance in *Italy* to the implementation of the FD JIT was due to the concerns relating to the use at trial of the results of overseas investigations

[90] Karsai, Report on Hungary, § 1.4.

[91] To be sure, Italy has ratified some international agreements, such as the Swiss-Italian Agreement and the UN CTOC, providing for the setting up of joint investigation teams for specific purposes. On this topic see Scella (2012), pp. 221 ff.

[92] See Klip (2012), p. 361.

[93] See respectively Arts. 12(3), 14(3) EUCMACM and Arts. 18(3), 19(3) SAP ECMACM. Karsai, Report on Hungary, § 1.4.1.

[94] See respectively Art. 13(3)(b) EUCMACM and Art. 20(3)(b) SAP ECMACM.

[95] See Hecker (2010), pp. 227 ff.; Karsai, Report on Hungary, § 1.4.3.

[96] In a different sense Lelieur, Report on France, § 2.

carried out by the team.[97] Moreover, the fact that the joint investigation team can operate in the territory of various Member States multiplies the number of procedural laws applicable to the investigation and thus the risk of incompatibility of the evidence collected abroad with *lex fori*. Nor do international texts clarify whether and how the conditions set by the authorities setting up the team, which the respective members of the team must take into account,[98] can be made compatible with *lex loci*, a lacuna that the FD JIT has not filled.[99]

As noted with regard to mutual assistance, the problems with the application of *lex fori* are not confined to the use of overseas evidence. Indeed, *lex fori* will not necessarily ensure a proper protection of the fundamental rights of the parties involved in the extraterritorial investigations. This has led some European countries to lay down further procedural requirements in bilateral agreements governing overseas investigations. *Hungary* gives, in the complex framework of bilateral agreements with its neighbouring countries subject to different international regulations, a clear example of this approach, thus lying down, *e.g.*, the respect for the dual criminality requirement in the agreement with Romania in respect of cross-border surveillance[100] and the application of the proportionality principle to coercive measures in further agreements.[101]

Outside Europe, the *USA* has developed extensive case-law on overseas investigations conducted by foreign officials in a "joint venture" with US authorities. In principle, if US law enforcement officials have "substantially participated" in conducting investigations overseas, US courts require US law governing the gathering of evidence to be applied. This doctrine has allowed for the application of the Fourth Amendment to overseas searches,[102] the "Miranda warnings" to extraterritorial interrogations[103] and the Sixth Amendment to depositions of witnesses abroad.[104] Nevertheless, even in these cases US courts have adapted these principles to the characteristics of extraterritorial investigations, *e.g.*, due to the lack of magistrates abroad who have authority to issue a search warrant.[105] It is significant, moreover, that whereas US case law has loosened the standards of protection laid down in respect of extraterritorial interrogations taking into account the difficulties overseas in obtaining counsel for prisoners,[106] a rather rigorous approach has been maintained with regard to investigative activities involving third parties in the pre-trial stages. For instance, the USSC has held that when the government conducts overseas depositions to preserve testimony in criminal cases

[97] Caprioli, Report on Italy, § 6.

[98] See respectively Art. 13(3)(b) EUCMACM and Art. 20(3)(b) SAP ECMACM.

[99] See Art. 1(3)(b) FD JIT.

[100] Karsai, Report on Hungary, § 1.4.1.

[101] *Ibid.*, § 1.4.3.

[102] Thaman, Report on USA, §§ 3.3.1 and 4.3.1.

[103] *Ibid.*, § 3.2.1.

[104] *Ibid.*, § 3.5.

[105] *Ibid.*, § 3.3.2.

[106] *Ibid.*, § 3.2.1.

with the aim of introducing it in a US criminal trial, "the Sixth Amendment requires, at a minimum, that the government undertake diligent efforts to facilitate the defendant's presence at the deposition and the witness's presence at trial."[107]

However, a strong limitation applies to several types of overseas evidence gathered by US officials, a limitation which reflects an extremely nationalist approach of US case law. Thus, the USSC has, starting from the assumption that the Fourth Amendment protects "the People," held that this fundamental guarantee does not apply when the target of the search is a foreign citizen without ties with the USA.[108] Significantly, this limitation applies also to wiretaps conducted abroad in violation of the FISA provisions, which has, as a result, restricted the scope of application of 18 USC § 2515, one of the broadest statutory exclusionary rules of US law.[109] But what is perhaps the most worrying aspect of the way the USA conducts extraterritorial inquiries is the lack, in most cases, of either international legal basis or *ad hoc* agreements, which remain fundamental pre-conditions for investigative interventions to be conducted overseas.[110] Indeed, the USA provide a unique example, amongst the countries analysed in the present study, of how domestic provisions, such as the amendments to FISA of 2008, can be applied for using highly intrusive means of investigations (*e.g.*, wiretaps) abroad against foreigners.[111]

5 Comparison of the Models of Collecting Evidence Overseas

Comparing the models of obtaining overseas evidence analysed above could appear an impossible and improper task. Indeed, viewed in abstract terms, these models reflect very heterogeneous forms of cross-border cooperation, inspired by different, if not even incompatible, conceptions of transnational inquiries: the request model *versus* the logic of order/warrant, requesting/ordering a foreign state to provide mutual assistance *versus* integrated forms of conducting extraterritorial investigations, collecting overseas evidence in response to a request/order *versus* transferring the information of the evidence already obtained overseas. Once one abandons this abstract perspective, however, there emerge some good reasons for conducting a comparative analysis of them in light of the functional question of this research.

As noted above, all these models have undergone significant changes over the years. In Europe, not only has each of them been enacted in very different forms in the international instruments analysed here, but also the same international instruments have incorporated elements typically pertaining to another (in abstract

[107] *Ibid.*, § 3.5.
[108] *Ibid.*, § 3.3.2.
[109] *Ibid.*, § 4.4.1.
[110] See Klip (2012), p. 361.
[111] Thaman, Report on USA, § 3.4.2.

terms, even opposite) system of evidence gathering. These phenomena have shown a significant historical development both of the mutual assistance and the mutual recognition models, which has led the former to anticipate elements that would come up in the latter (*e.g.*, direct contacts between the competent judicial authorities) and the latter to incorporating elements that had already shown up in the former (*e.g.*, the duty for the requested authority to comply with the formalities and procedures set by the requesting authority). The lines of this development are, at least for mutual recognition, still unclear, but it certainly testifies to a considerable approximation of the rigid system of mutual recognition to the flexibility of legal assistance, as is apparent from the PD EIO. Another significant change has occurred through the reduction of the distances between mutual assistance and extraterritorial investigations. Especially in the *USA,* the respect for US procedural law to ensure full use in domestic trials of overseas evidence is required only in cases of "joint venture," a rather vague criterion that has given US courts a considerable margin of discretion in assessing whether US officials have substantially participated in conducting investigations overseas.

Along with these developments in the sphere of the request and mutual recognition models and the field of mutual assistance and extraterritorial investigations, we can observe two further interesting phenomena, which pertain to the mutual relationships between the aforementioned models as different forms of obtaining evidence overseas. As seen above, the first forms of extraterritorial inquiries were regulated in the context of mutual assistance instruments either as response of a previous request of assistance or as temporary interventions of domestic authorities in the territory of another contracting state in emergency situations. This approach was reproduced both by the EUCMACM and the SAP ECMACM, which introduced new investigative powers fully unrelated to emergency situations. These international instruments incorporated, furthermore, another mode of mutual assistance: the exchange of information obtained within domestic inquiries. Though it was embodied in the same international texts, this system differed, due to the "spontaneous" character of the exchange of information, from the request model in that assistance could be provided without a previous request.

It is significant that when the new mutual recognition model began to take over in the field of obtaining evidence abroad, EU legislation chose a new approach. In the FD JIT the gathering of evidence through joint investigation teams was fully uncoupled from the logic of mutual recognition and was held to stand on autonomous basis as alternative means of conducting transnational inquiries. By contrast, the transmittal of evidence already obtained overseas has, since the proposal for a Framework Decision on EEW of 2003, been incorporated in the mutual recognition model as an alternative means of collecting dynamic evidence. This approach had been anticipated by a progressive shift within the area of mutual assistance of the exchange of information from preventive aims (CISA) or aims relating to enforcement of criminal sentences (EUCMACM) to purposes concerned with the initiating or carrying out investigations or proceedings (SAP ECMACM).

Both of these approaches are apparent in the PD EIO and it is worth noting that whereas the availability model has, since its first draft, formed part of this

legislative proposal, this text has, despite the progressive enlargement of its scope of application, always left out the gathering of evidence through joint investigation teams. From a domestic viewpoint, the comparative analysis of the selected countries leads to a rather unexpected conclusion. In general terms, whereas those countries that have enacted both the most advanced instruments of mutual assistance and many mutual recognition tools (for instance, *France* and *Hungary*) show more trust in the model of extraterritorial investigations rather than in the collection of evidence pursuant to mutual recognition, a large abuse of the availability model has taken place in *Italy*, notwithstanding it keeps on basing its cross-border cooperation even with other EU countries on traditional mutual assistance.

In light of these premises, the question as to whether and how new models of collecting evidence abroad can enhance bilateral cross-border cooperation while ensuring a high level of protection of national sovereignty and human rights can be answered as follows:

A) *Mutual recognition and mutual assistance as methodological frames for conducting different forms of transnational investigations*—Mutual recognition and mutual assistance, far from being two of the several forms of obtaining evidence abroad, constitutes the general methodological frames for conducting different forms of transnational investigations. Mutual recognition provides the technical tool for collecting overseas evidence through an order aimed either at an investigative activity being carried out by the executing authority or at obtaining the document certifying the activities already carried out abroad. Extraterritorial inquiries still remain linked to the logic of the request model, and this justifies the fact that the joint investigation teams are remained extraneous to the PD EIO, except the case in which the team needs legal assistance from Member States other than those involved in the investigations, in which case legal assistance will be *requested* as well.[112]

Significantly, however, this approach has been maintained even in the area of mutual recognition. This is very clear from the same PD EIO, which while regulating another form of extraterritorial inquiries—i.e., convert investigations—states that the EIO will be issued with the purpose of *requesting* the executing authority to assist the issuing state in conducting these activities (Art. 27a). The order model is here in clear contrast with the procedure, which reflects all the characteristics of the request model. This is also confirmed by the introduction, in addition to the ordinary grounds for refusal laid down in Article 10, of two further grounds relating 1) to the failure to reach an agreement between the competent authorities on the arrangements for the covert investigations and 2) to the failure to authorize them in a similar national case. Both grounds clearly expand the margin of discretion of the executing authority. Moreover, the latter entails a hypothetical assessment that should ordinarily pertain to the sole issuing authority pursuant to Article 5a PD EIO, an assessment that here allows the executing authority to ascertain whether the requested measure exists and could have been authorised

[112] See respectively Art. 13(8) EUCMACM and Art. 1(8) FD JIT.

under the same conditions according to its national law. The fact that the same assessment has been required in the PD EIO in respect of another mode of extraterritorial inquiries—i.e., controlled delivery [Art. 27(1)]—demonstrates that the perspective of the executing state also here blurs the rigid logic of the order model. This lead to concluding that the PD EIO, far from basing the execution of the judicial order on sole mutual recognition [Art. 1(2)], aims to enact a new means that would allow for obtaining evidence abroad in three different ways: 1) an investigative activity addressed to collect either documental or dynamic evidence, 2) an order aimed at transferring the evidence available in the executing state and 3) certain forms of extraterritorial investigations. The first two means fall within the scope of mutual recognition, whereby the request model keeps on inspiring in great part the third. However, the inclusion of this third mode into the sphere of mutual recognition does not remain without consequences, as we will see while dealing the issue of efficiency of transnational procedures.

B) *Efficiency and usefulness of the overseas procedure*—In this complex framework, which forms of transnational inquiries can be deemed as providing an efficient mode of collecting evidence overseas? Efficiency has of course different meanings. If we focus solely on the need to avoid unjustified delays in cross-border cooperation and risks of disappearance of requests for assistance, and we generically look at the speediness of transnational procedures, the mutual recognition framework offers unquestionable advantages, especially taking into account the strict deadlines imposed by this procedure. This might be one of the main reasons for which even instruments that are still inspired by mutual assistance have been incorporated into the mutual recognition framework. Of all the modes of obtaining evidence on the basis of mutual recognition, the availability system undoubtedly offers, from this perspective, the most efficient solution. Since the piece of evidence is already available in the executing state, no time will be lost for gathering evidence abroad. Where the *order* for transferring evidence was anticipated by an informal *request* aimed at obtaining the same piece of evidence overseas, it is to be expected that the issuing authority will not consider the collection of evidence following *lex loci* as an obstacle for admitting evidence at trial. But what happens if the procedures of *lex loci* applied for gathering that piece of evidence are incompatible with *lex fori*?

This question shows another significance of "efficiency," which is the usefulness of the entire procedure: even the most rapid procedure will lead to an unsatisfactory result where the evidential result gathered overseas cannot be admitted in the proceedings in the home state. In this light, notwithstanding the pragmatic availability of the requesting authority, the inadmissibility of that evidence will inevitably follow the existence of exclusionary rules, especially if construed in rigid terms as happens in Italy with "*non-usability*."[113] This conclusion also applies, due to the rigid application of *lex loci*, to extraterritorial investigations conducted in joint venture with local authorities: the involvement of home authorities in investigative

[113] See, among others, Daniele (2008), pp. 392 ff.

activities abroad cannot ensure unconditional use of the results of such enquiries. This is the main reason for which first mutual assistance and then mutual recognition developed towards preventive solutions. The most innovative has been setting in advance the necessary requirements to ensure the validity of the requested evidence in the home proceedings, as is very clearly formulated in the FD OFPE.

But will these formalities suffice to solve the problem of admissibility of evidence? In principle, the answer should be affirmative under the two following conditions: 1) that the procedures of *lex fori* pass the check of the executing authority and 2) that the executing authority has an adequate knowledge of the law and practice of the home country. These two conditions are strictly linked to each other. In the frame of the UN MTMACM, the criterion of consistency with the law and practice of the host state, despite of imposing strict scrutiny upon the requested authority, facilitated the application of foreign rules in executing the request, since these rules will be necessarily familiar to *lex loci*. That criterion instead rendered the task of the requesting authority extremely difficult, since the selection of the formalities consistent with *lex loci* presupposed a high knowledge of the law and practice of the host state by the requesting authority. The introduction, within the frame of the improved mutual assistance, of a wider limit of consistency tailored to non-contrariety to the fundamental principles of *lex loci* changed this situation. It restricted the possibilities for the requested authority to reject foreign formalities, thus obliging it to carry out the request even pursuant to procedural rules that are unfamiliar to its law or practice (*e.g.*, a certain procedure on transcription of the results of interceptions of telecommunications). Clearly, this approach shifts the task of learning foreign procedural law to the executing state. However, the necessary means do not always exist for the executing state to carry out this task properly. A useful tool to help avoid incorrect application of *lex fori* could be found in the intervention of authorities and interested parties or persons from the home state. Unfortunately the latter possibility has been dropped in the PD EIO, which while debilitating the right to a defence deprives the new instrument of an indispensable means for ensuring the proper application of *lex fori* in view of reducing the risk of inadmissibility of overseas evidence.

C) *The protection of national sovereignty and the rights of the individuals involved in criminal proceedings*—In both contexts, that of mutual assistance and of mutual recognition, the possibility of integrating *lex loci* with certain procedures of *lex fori* constitutes a solution that in the perspective of efficiency, respect for national sovereignty and human guarantees is unquestionably preferable to the mere application of *lex loci*. This is a great drawback of those extraterritorial inquiries that allow for complex investigations to be carried out in "joint venture," especially where investigations take place in various countries. Despite the character of these inquiries, each domestic authority will have to handle with many pieces of evidence collected with different techniques and according to different, even opposite, procedural rules, a conclusion that cannot be tolerated in a common AFSJ.

Moreover, we have seen that a proper application of the integrated system of procedures implies a higher level of knowledge of foreign law and practice than that

required in the systems inspired by the sole *lex loci*. The threshold of this knowledge varies according to the way this integration takes place, which moreover impinges in different manner on the respect both for the sphere of national sovereignty of the requested state. A high level of integration, such as that required by the UN MTMACM, allows only for those rules of *lex fori* to be applied abroad, which can pass a check of strict compatibility with the foreign procedures. This test, albeit exigent, permits an adequate integration in advance, which does not undermine the procedural identity of the requested state. Paradoxically, the possibility of requesting any formalities of *lex fori* that are not contrary to the fundamental principles of *lex loci* creates, even within the area of mutual assistance, a serious conflict for the requested authority, in that it is obliged to tolerate even rules that, albeit not contrary, can be unfamiliar and rarely compatible with its own law. The procedural integration takes place here at a minimum level and obliges the host state to make a considerable effort to familiarize itself with foreign law and practice in order to apply properly procedural rules that are unfamiliar to its own law. Taking into account these drawbacks, the solution adopted in *France* by the CCP appears preferable, in that it allows domestic authorities to control whether the requested procedures are able to lower the standards of protection of defence rights laid down at national level.

Furthermore, essential precondition for adequate application of any system of integration of *lex fori* with *lex loci* is that authorities and private parties of the home state can be admitted to take part in the collection of evidence abroad. The integration of procedural rules must thus be combined with a dynamic integration, which will be of decisive importance for guaranteeing full compliance with *lex fori* and the respect both for the procedural identity of the home country and the right of defence of the parties that are involved in the gathering of evidence as well as the parties against whom overseas evidence will be used. Both these levels of integration are, however, totally missing where evidence has already been gathered abroad and the request/order aims only at the transfer of the results of overseas investigations to the home state. In the context of the PD EIO, the question arises as to whether the evidence gathered by coercive means prior to the request for assistance must be subject to the same grounds for refusal laid down in respect of coercive measures (*e.g.*, the dual criminality requirement). In general terms, the dynamic level of integration has been only partially realized in this legislative proposal, which leaves no room for any possibility for the defence to take part in the execution of the judicial order. Nor is there any role for the defence in the ascertainment of the level of intrusiveness of the requested measure or the requested procedures where the executing authority decides to use another measure. From a human rights perspective, mutual confidence between the states leaves room only for dialogues between the competent prosecuting authorities. The perspective of private parties appears to be of no importance. Surprisingly, this approach has been applied by the PD EIO to coercive measures such as interception of telecommunications as well, where the decision on the form of execution (transmitting telecommunications or intercepting, recording and transmitting) depends solely on an agreement between the competent authorities, as if it were a neutral issue for the defence. But if we acknowledge that

the contribution of the defence is of essential importance for proper application of its own national law, can we assume that only an infringement of defence rights is at stake?

6 Concluding Remarks

The present research has shown a considerable variety of solutions in conducting transnational inquiries. In this context we have witnessed not only a significant development of the models of taking evidence abroad but also the introduction of new investigative powers and new practical means of obtaining evidential materials from abroad. These phenomena have led to a corresponding evolution in the domestic legal systems analysed in this study, which has significantly taken place both in the countries that have enacted some of the aforementioned international and supranational instruments and in the countries that have until now shown a considerable backwardness. This evolution requires delicate balancing and serious efforts to reach satisfactory solutions.

Significantly, however, all the analysed forms of evidence gathering—no matter whether laid down at international, national or supranational law—move from the application of domestic law. This methodology, even if extended to *lex fori*, leads to a confusing plethora of evidentiary rules, which constitutes neither an efficient nor a proper solution in a common AFSJ.[114] From a human rights perspective, the target of sharing common standards of protection, repeatedly invoked by national case law while assessing overseas evidence, cannot be properly achieved through either *ad hoc* combinations of *lex fori* and *lex loci* or *ad hoc* agreements between the competent authorities. The need for common procedural guarantees is unavoidable where evidence must be gathered by coercive means or measures that impinge on the rights of the defendant or third parties. Significantly, even in the frame of mutual assistance, hearings in videoconference, where the right to confrontation is at stake, not only are subject to the non-contrariety with the fundamental principles of *lex loci* but they must also be conducted in compliance with specific rules clearly aimed at ensuring a proper balance with not less fundamental rights of the examined individual and the respect for the fundamental principles of *lex loci* (*e.g.*, the presence of a judicial authority from the host state assisted by an interpreter, the duty of informing the examined person of his or her right not to testify against himself or herself, etc.).[115] The PD EIO has adopted a similar approach with regard to hearings in videoconference (Art. 21), although the procedural guarantees relating to other investigative measures impinging on individual rights are significantly more scant in comparison with the corresponding ones laid down in some instruments of mutual assistance. Thus, the provision on interception of communications, despite being in large part inspired by the EUCMACM, does

[114] In the same sense Klip (2012), p. 392.

[115] See respectively Art. 10(5) EUCMACM and Art. 9(5) ECMACM.

not reproduce some fundamental guarantees laid down by this international text, such as a confirmation that a lawful interception order has been issued in connection with a criminal investigation and an indication of the criminal conduct under investigation [Art. 18(3)].

Such a two-level approach, limited to investigative measures relevant to fundamental rights, might provide a proper starting point to achieve an acceptable balance between the investigativative needs of the domestic laws at stake and the protection of individual rights in the EU area.[116] Of course, this solution presupposes a clear definition of what must be understood by coercive means and intrusive measures in the European multilingual context. A significant contribution can derive, due to the crosscutting nature of European criminal law,[117] from comparative law. Furthermore, the general theory of procedural law has already underlined the limitations of the concept of "coercion" in respect of modern investigative means that are not perceived as coercive by the affected persons, although they seriously impinge on fundamental rights of the parties and of third subjects especially in a secret and massive manner.[118] In light of the wide use of new intrusive techniques in transnational criminal inquiries and the frequent references to coercive means in EU tools of cross-border cooperation, the definition of the scope and limits of procedural coercion is one of the challenges EU legislators can no longer avoid.[119]

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[116] See, however, the proposal exposed above in Ruggeri, § 6.

[117] Hecker (2010), pp. 7 ff.

[118] See, among others, Kühne (2010), p. 248.

[119] On the shortcomings of the distinction drawn by the PD EIO in this respect see Ruggeri, above, § 5.1.2.2.

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