Report on France

Juliette Lelieur

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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.

This report was translated into English by Naomi Norberg.

J. Lelieur (✉)
Faculty of Law, University of Strasbow, place d'Athènes, BP 66, 67045 STRASBOURG cedex, France
e-mail: juliette.lelieur@unistra.fr

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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.

[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.

References

Aubert B (2004) Les recours en matière d'entraide judiciaire pénale. In: Apprendre à douter. Questions de droit, questions sur le droit. Etudes offertes à Claude Lombois. Limoges, Pulim, pp 621–638

Desessard L (2003) Le contrôle des demandes d'entraide judiciaire et de leur exécution (A propos des dispositions générales sur l'entraide judiciaire internationale du projet de loi Perben II). Revue pénitentiaire et de droit penal 573–581

Desportes F (1999) Coopération judiciaire en matière pénale. Panorama de la jurisprudence de la Chambre criminelle. In: Rapport de la Cour de cassation http://www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_1999_91/etudes_documents_93/frederic_desportes_5791.html

[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.