Transnational Inquiries in Criminal Matters and Respect for Fair Trial Guarantees

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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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