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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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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