

Homage to Imre A. Wiener

*Proceedings of the AIDP
Regional Conference
Celebrating 30 Years of Finnish
Hungarian Criminal Law Seminars
Gyarmatpuszta (Hungary)
30 April 2009 - May 2009*

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**ASSOCIATION INTERNATIONALE DE DROIT PÉNAL
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CURRENT ISSUES OF INTERNATIONAL AND EUROPEAN CRIMINAL LAW

LECTURES IN MEMORY OF IMRE A. WIENER

**KATALIN LIGETI (ed.)
SECRETARY GENERAL AIDP**

PROCEEDINGS OF THE AIDP REGIONAL CONFERENCE
CELEBRATING 30 YEARS OF FINNISH-HUNGARIAN CRIMINAL LAW SEMINARS

GYARMATPUSZTA (HUNGARY), 30 APRIL – 2 MAY 2009

PREFACE

by José Luis de la Cuesta
President of the AIDP

The promotion of academic activities and cooperation clearly constitutes the most important objective and the *raison d'être* of the International Association of Penal Law (AIDP-IAPL), which was created in 1924 as a platform designated to facilitate the contacts among academics and professionals. Besides the quinquennial Congresses of the Association, seminars and conferences traditionally played an important role in the life of the Association. They not only facilitated the improvement of the image and presence of the AIDP-IAPL in the different regions of the world, but also contributed to the enlargement of its membership base as well as to the development of cooperation with different institutions and associations.

The organisation of seminars and conferences not only on the national and international level, but also on a regional level, has been carried out for a long period of time by certain national groups. This is particularly the case with the Hungarian and Finnish National Groups, who have thirty years of experience in organising the Finnish-Hungarian Criminal Law Seminars. The AIDP-IAPL Regional Conference organised jointly by the Hungarian National Group and the Institute for Legal Studies of the Hungarian Academy of Sciences in Gyarmatpuszta between 30 April and 2 May 2009 aimed at celebrating that important anniversary of Hungarian-Finnish cooperation. At the same time, it also paid tribute to our dear colleague, the late Prof. Imre A. Wiener, who worked several decades in the service of the Association via the Hungarian National Group, the Executive Committee, and the Board of Directors. Prof. Wiener was also the chief organiser of the XVIth International Congress of Penal Law, which was held in Budapest in 1999. The resolutions adopted at this Congress on 'The criminal justice system facing the challenge of organized crime' continue to be of utmost relevance to the present date. In fact, Prof. Imre A. Wiener left us on 8 October 2008.

The present volume entitled *Current issues of European and international criminal law, Lectures in memory of Imre A. Wiener* constitutes the result of the works of the Regional Conference, which was also devoted to actual questions of the development of international criminal law and European criminal law.

The organisation of the Regional Conference, as well as the publication of this volume, was made possible thanks to the initiative of the Hungarian National Group of the AIDP-IAPL. My special thanks go to Professor Katalin Ligeti, now Secretary General of the AIDP, for the magnificent organisation of the Regional

Conference and for preparing this volume. On behalf of all of our members and colleagues, I would like to thank Katalin Ligeti for her ongoing and most valuable commitment to the *Association Internationale de Droit Pénal* (AIDP-IAPL).

San Sebastian, 30 July 2010

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I. HOMAGE TO IMRE A. WIENER

IN MEMORIAM: IMRE WIENER

*by Helmut Epp**

It was a shock when Judit Wiener called me last October to tell me that Imre Wiener had sadly passed away. As she told me, it was a slow and silent road during the last few months in which she accompanied her husband.

For me, personally, Imre Wiener was a friend who very much represented the AIDP. I cannot remember the time when Imre Wiener did not play an important role in the Association's history. He was the person who perfectly understood the functioning of the Association by way of personal contacts and friendship.

It was in the late 1970s, shortly after the creation of an Austrian National Group at the 1974 Congress in Budapest, that I met Imre for the first time. I had thought that it was one of many seminars organized by the Hungarian National Group in which I had the honour to participate. But Judit reminded me just a few minutes ago that it was in fact at the seminar of young penalists in Varna/Bulgaria in 1977. This was a time when contacts were not as easy as they are today because of different social systems, border controls etc. But contacts crossing such borders were of particular interest. All of us who participated in these seminars had the opportunity to open our minds to understand not only problems of penal law but to learn and understand the functioning of penal law in different societies. And it was an experience to call colleagues friends, notwithstanding our political differences and sometimes problems.

Taking into account Imre's organizational talent he soon became Vice-President of the Hungarian National Group. In this capacity he was not only important for the Hungarian National Group but also for the contacts between the two social systems which were also envisioned the Association: he was a sort of tie between those two areas and he was thus able to influence the politics of the AIDP and to improve the relationship between East and West at least in the field of criminal law.

I personally profited enormously from his friendship and his influence among penal law scholars in the Eastern hemisphere when I was first elected Assistant Secretary General at the congress in Vienna in September 1989, just a few weeks before the fall of the iron curtain. Without his influence and his lobbying on my behalf the result might well have been different.

And soon after the change and under completely different circumstances Imre Wiener dreamt of again organizing, after 1974, an International Congress of Penal Law. And he was successful: in 1999, 25 years after the first AIDP Congress hosted by our Hungarian friends and colleagues, the International

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Association of Penal Law celebrated its 16th International Congress in Budapest commemorating the centennial anniversary of the 6th Congress of the Union of Penal Law which took also place in Budapest.

This Congress was not only a scientific success: For the first time in the history of the AIDP the congress covered in its traditional four sections the problem of organized crime from different angles. It was also a social event and we enjoyed the well-known Hungarian hospitality. I am sure that the success of the Congress was also the reason why Imre became President of the Hungarian National Group of the AIDP.

From that time onwards we all had the opportunity to meet Imre and Judit Wiener more frequently because Imre was elected a member of the Board of Directors of the Association. So he travelled regularly to the Board meetings in Paris. He was never a person standing in the front line and pushing himself forward. But in his own quiet way and with his extensive experience he contributed to the further development of the AIDP.

It would be preposterous for me to speak of Imre's academic activities and all the achievements in his academic career in Hungary. I am sure that Kálmán Györgyi will touch upon this side of Imre Wiener's personality.

I would just like to mention the series of seminars Imre had organized: The Finnish-Hungarian Seminars on Criminal Law to which, in later years, even Austrians would be admitted even though they are certainly not members of the Finno-Ugric language family.

The last time that I met Imre Wiener personally was during a seminar in April 2005. This event was also devoted to celebrating Imre's 70th birthday. Imre Wiener had already passed on the presidency of the National Group to Dr. Barandy and could also rely on the experience of Katalin Ligeti who had already been President of the Young Penalists' Committee. In addition, I am sure that he was still involved, in his diplomatic behaviour, in the activities of the Hungarian National Group.

I have a very vivid recollection of this seminar in which many colleagues with whom Imre had collaborated over many decades were present. And it was typical of Imre that this seminar was primarily an academic event which was only marginally an occasion to celebrate his birthday. If I am not mistaken, Imre would have preferred the seminar to be purely academic.

When checking the internet I could even find a site covering this seminar on April 22, 2005: 'Status quo und Perspektiven der internationalen Strafgerichtsbarkeit - Strafverfolgung und Strafverteidigung vor den internationalen Strafgerichtshöfen.'

When we parted, none of us knew or imagined that we would not meet Imre again.

HOMAGE À IMRE A. WIENER

*par Reynald Ottenhof**

Permettez-moi, en premier lieu, de remercier vivement le Groupe national hongrois, son Président le docteur Peter Barandy, son Secrétaire général Katalin Ligeti, Monsieur le Procureur Général Kálmán Györgyi et les autres collègues hongrois, pour leur invitation à cet important séminaire. En m'invitant à prendre la parole au cours de cette session consacrée à célébrer la mémoire du cher Imre Wiener, vous me faites non seulement un grand honneur, mais vous me donnez aussi l'occasion d'exprimer envers cet ami disparu et le pays qu'il a si bien servi, ma reconnaissance et mon attachement.

Oui, comme notre Secrétaire général Helmut Epp, Imre et moi avons, tous les trois, accompli ensemble une longue marche au service de l'AIDP. Lorsque, jeune professeur, je participais en 1974 à mon premier Congrès de l'AIDP, j'eus le privilège de faire la connaissance d'Imre, en sa qualité de Secrétaire du Comité d'organisation du XI^e Congrès International. Ce Congrès fut pour moi, à tous points de vue, une révélation. Derrière la qualité et la générosité de l'accueil, en dépit des difficultés inhérentes à cette époque, il fallait déjà avoir le talent d'organisateur et la rigueur d'Imre. C'est cette année là que j'intégrais le Comité exécutif de l'Association, aux côtés, notamment, de Chérif Bassiouni et du regretté László Viski.

Dix ans plus tard, en 1986, Imre Wiener venait nous rejoindre au sein de ce Comité. Sa participation active à nos travaux, ses convictions parfois rigoureuses, mais toujours constructives, ont fait de lui un collaborateur estimé. Aussi est-ce avec enthousiasme que le Conseil de Direction de l'Association a accepté sa proposition de célébrer à nouveau son Congrès International, le XVI^e, en 1999, à Budapest. Pour la première fois l'Association choisissait de traiter d'un thème unique, la Criminalité organisée, déclinée dans les quatre sections traditionnelles des Congrès de l'Association. Par sa haute valeur scientifique, ce Congrès demeure un Congrès de référence, non seulement dans les travaux de l'Association, mais dans le domaine de la science pénale en général.

Ses talents d'organisateur, Imre Wiener les a exercés également au travers des Colloques régionaux qu'il a organisés avec la collaboration de divers groupes nationaux. Pour y avoir participé, mon collègue Helmut Epp en parlera mieux que moi. Ils ont contribué à faire d'Imre un animateur scientifique de cette région de l'Europe, qui fut et demeure, au sein de notre Association, un foyer scientifique majeur.

* Professeur émérite, Vice Président Honoraire de l'AIDP.

De son œuvre scientifique qu'il a réalisée au sein et hors de l'AIDP, je dirai peu de choses, M. le Procureur Général Kálmán Györgyi étant mieux placé que moi pour en témoigner. Je voudrais seulement souligner le rôle de promoteur de l'enseignement et de la recherche en Droit pénal international qu'Imre Wiener a joué non seulement dans son pays, mais aussi au sein de l'AIDP et de l'Institut de Syracuse. Le témoignage de ses disciples, au premier rang desquels je citerai Katalin Ligeti, saura perpétuer son œuvre, son travail exemplaire au service de l'Association et son désintéressement personnel.

Rendre hommage à Imre Wiener, c'est aussi rendre hommage à tout le Groupe national hongrois de l'AIDP, aux collègues que j'ai eu le plaisir de connaître au sein du Conseil de Direction, les Professeurs Tibor Király, Károly Bárd, Péter Bárándy.

A vous aussi, Monsieur le Procureur Général Györgyi, pour cette visite de Budapest, en votre compagnie, celle d'Helmut Epp et de Chérif Bassiouni, peu avant le XVI^e Congrès.

Permettez-moi, enfin, de vous associer à cet hommage, chère Judit. Je sais, pour en avoir été le témoin, quelle part vous avez prise aux côtés de votre mari, notamment dans la préparation du XVI^e Congrès. La chaleur de votre accueil, l'efficacité de votre participation dans la préparation logistique du Congrès, votre présence attentive aux côtés d'Imre, dans les moments difficiles qu'il a traversés, sont indissociables de la réussite de tout ce qu'Imre a entrepris.

Puisse le Groupe national hongrois rester fidèle à l'exemple d'Imre Wiener et conserver, au sein de l'Association, la place éminente qui a toujours été la sienne.

GEDÄCHTNISREDE ZUM ANDENKEN VON PROFESSOR IMRE WIENER

von *Kálmán Györgyi**

Im Jahre 2005 haben wir Professor Imre Wiener aus Anlass seines 70. Geburtstages begrüßt. Seine Schüler, seine Kollegen und seine Verehrer haben eine wahrhaft schöne und inhaltsreiche Festschrift mit namhaften Verfassern zusammengestellt und im Rahmen einer wissenschaftlichen Konferenz dem Jubilar überreicht. Das damals Imre Wiener begrüßende Publikum konnte mit Freude feststellen, dass der Jubilar sich guter Gesundheit erfreute und wissenschaftlich sehr aktiv war. Er hatte in den ersten Jahren des neuen Jahrtausends wichtige und interessante Bücher und Aufsätze veröffentlicht.

Zum 70. Geburtstag hat die Redakteurin der Wiener-Festschrift Katalin Ligeti mich gebeten, eine Laudatio zu schreiben. Mein erster Gedanke war, dass diese Lobrede dann zum 75. Geburtstag noch wesentlich ergänzt werden müsse.

Das Schicksal wollte es aber anders. Die böse Krankheit führte immer stärkere Attacken gegen die Gesundheit des Professors Wiener. Und trotz der liebevollen Pflege und Betreuung seiner Frau Judit hat ihn die Krankheit immer mehr überwältigt.

Ich freue mich sehr, dass ich auf dieser Konferenz über Imre Wiener sprechen kann. Wenn etwas überhaupt für Imre Wiener wichtig war, dann war es die AIDP. Wie glücklich wäre der Professor, wenn er die Liste der Teilnehmer dieser Konferenz lesen und mit den Teilnehmern dieser Konferenz Worte wechseln könnte!

Professor Wiener hat entscheidend dazu beigetragen, dass die ungarischen Kriminalisten im internationalen wissenschaftlichen Leben eine aktive Rolle spielen. Nach dem zweiten Weltkrieg herrschte für Ungarn 15 Jahre lang Stille in den wissenschaftlichen Kontakten. Den ersten Schritt zur Wiederbelebung der wissenschaftlichen Beziehungen hat Professor Miklós Kádár getan. Er nahm an den AIDP Kongressen in Lissabon und in Den Haag teil. Professor Kádár und Professor László Viski war zu danken, dass der das fünfzigjährige Bestehen der AIDP feiernde XI. Kongress im Jahre 1974 in Budapest veranstaltet wurde. An dem wissenschaftlichen Programm nahmen mehrere ungarische Strafrechtler teil.

Der Kongress selbst wurde neben László Viski größtenteils von Imre Wiener organisiert. Viski war der Vorsitzende des Organisationskomitees, sein Sekretär war Imre Wiener. Das war der erste AIDP Kongress nach dem Weltkrieg östlich des eisernen Vorhangs und brachte für die ungarische Strafrechtswissenschaft einen glanzvollen Erfolg. Durch diesen Akt konnte Ungarn seinen verdien-

* Generalstaatsanwalt der Republik Ungarn, A.D.

ten Platz in der internationalen strafrechtlich-wissenschaftlichen Zusammenarbeit einnehmen. Nach dem Budapester Kongress wurde László Viski zum stellvertretenden Generalsekretär der AIDP gewählt.

Imre Wiener hat im Leben der ungarischen Landesgruppe der AIDP immer wichtige Rolle gespielt. Er war zunächst Sekretär der Landesgruppe, dann wurde er zum Vizepräsidenten gewählt. Er hat sich insbesondere um die Organisation regionaler Konferenzen verdient gemacht. Die erste regionale Konferenz wurde im Jahre 1971 über die Entwicklung der Naturwissenschaften und das Strafrecht veranstaltet. Bedeutend war in 1978 in Szeged die Konferenz über die Wirtschaftskriminalität. 1981 veranstaltete Professor Wiener einen Sommerkurs über den – damals – neuen ungarischen Strafkodex. Wiener war der Vater des Gedankens regelmäßiger österreichisch-ungarischer Runder Tische, einmal in Österreich, das nächste Mal in Ungarn. Von österreichischer Seite waren vor allem Viktor Liebscher und nach seinem Tod Otto F. Müller Motor dieser Zusammenarbeit.

Professor Wiener spielte eine wichtige Rolle in der Führung der AIDP. Auf dem Kongress in Kairo wurde er zum stellvertretenden Generalsekretär der AIDP gewählt. Die ungarische Landesgruppe der AIDP hatte auch das erste und das zweite deutsch-ungarische Kolloquium für Strafrecht und Kriminologie organisiert. Bis zu seinem Tod war Professor Wiener – zusammen mit Professor Király – Ehrenpräsident der ungarische Landesgruppe.

Imre Wieners Ansehen in der AIDP war zu danken, dass im Jahre 1999 der XVI. AIDP Kongress in Budapest veranstaltet wurde – schon der zweite Kongress nach dem zweiten Weltkrieg. Auch dieser Kongress brachte Ungarn Erfolg. Die ältere Generation der Strafrechtler konnte sich gut an den AIDP Kongress im Jahr 1974 erinnern. Den Kongress im Jahre 1999 haben ganz andere Emotionen begleitet. In 1974 war es eine bahnbrechende Handlung, eine 'Heldentat,' einen strafrechtlichen Weltkongress in Ungarn zu veranstalten. Ganz anders war die politische Lage 1999. Der eiserne Vorhang war zerrissen, das Gefühl, etwas Pikantes oder Besonderes zu erleben, das alles war hin. Eine ganz normale mitteleuropäische Demokratie hat sich gemeldet, den nächsten Weltkongress der Strafrechtler zu veranstalten. Die Veranstaltung des AIDP Kongresses konnte ruhigen Herzens der ungarischen Landesgruppe zugesprochen werden, die guten Erfahrungen des Kongresses von 1974 waren noch lebendig.

Was die internationale Tätigkeit von Professor Wiener anbelangt, kann man ohne Übertreibung sagen, dass der AIDP Kongress 1999 die Krönung seiner internationalen Aktivitäten war. Der Kongress von 1999 war für ihn deshalb besonders wichtig, weil genau vor 100 Jahren in Budapest der VIII. Kongress der Internationalen Kriminalistischen Vereinigung (der berühmten IKV) abgehalten wurde. Ungarn war seinerzeit sehr aktiv in der IKV und Wiener wollte der ganzen Welt zeigen, dass Ungarn schon vor 100 Jahren Träger der fortschrittlichen

Bestrebungen im Strafrecht war. Mit Recht kann man sagen, dass der Kongress für Ungarn und ganz persönlich für Imre Wiener einen großen Erfolg brachte.

Für Professor Wiener war der Gedanke wichtig, dass die AIDP nicht nur eine Gesellschaft der nicht mehr so jungen Fachleute sein soll. Er spielte eine wichtige Rolle darin, dass die Jeunes Pénalistes eine selbständige organisatorische Form bilden konnten und seine Schülerin Katalin Ligeti dabei eine wichtige Rolle spielte.

Im Jahre 2003 wurde in Budapest der frühere ungarische Justizminister Péter Bárándy zum Präsidenten der Landesgruppe gewählt. Generalsekretär der Landesgruppe wurde Katalin Ligeti. Sie wurde dann in Peking zur stellvertretenden Generalsekretärin der AIDP gewählt. Sie hat sich immer als Schülerin von Imre Wiener gesehen. Als ich diese Zeilen zu Papier brachte, erreichte mich die Nachricht, dass Katalin Ligeti zur Generalsekretärin der AIDP gewählt wurde. Imre Wiener hätte sich sehr gefreut, dass seine Schülerin im internationalen wissenschaftlichen Leben eine derart wichtige Aufgabe bekommen hat.

Schön wäre für uns alle, wenn wir uns mit Imre Wiener zusammen über die neuesten Ereignisse freuen könnten. Da uns das nicht vergönnt ist, bietet der heutige Anlass die Möglichkeit, bedeutende Elemente der vielseitigen wissenschaftlichen Tätigkeit von Imre Wiener wachzurufen.

II. CELEBRATING 30 YEARS OF FINNISH-HUNGARIAN CRIMINAL LAW SEMINARS

**OPENING SPEECH ON OCCASION OF 30 YEARS
OF FINNISH-HUNGARIAN CRIMINAL LAW SEMINARS**

*by Péter Bárándy**

On behalf of the Hungarian National Group of the AIDP let me extend to you my warm welcome on the occasion of the AIDP Regional Conference celebrating 30 years of Finnish-Hungarian criminal law seminars. It is my special pleasure to welcome Professor Jose Luis de la Cuesta, the President of the International Association of Penal Law; Professor Reynald Ottenhof, the Vice-President of the International Association of Penal Law; and our old friend, Dr Helmut Epp, Secretary General of the International Association of Penal Law.

The scientific cooperation between Hungarian criminal law scholars and Finnish lawyers, on the one hand, and the activities of the Hungarian national group within the framework of the AIDP, on the other, have long-standing traditions. Please allow me to recall here the most important stages of that cooperation.

The major impulse in establishing close scientific relations between Hungarian and Finnish criminal lawyers goes back to the Hungarian-Finnish Scientific Days, a series of programmes launched by the Hungarian Academy of Sciences in 1979. As part of this programme the Institute for Legal Studies of the Hungarian Academy of Sciences organised the first Hungarian-Finnish seminar on criminal law. At that first seminar several outstanding Finnish scholars participated, among them was Inkeri Antilla, the well-known criminal lawyer and former Minister of Justice, a Professor at the University of Helsinki and a member of the Scientific Committee of the Finnish Academy and from those present today Raimo Lahti, the Vice-Dean and Professor at the University of Turku at that time. From the Hungarian speakers at the present seminar Professor Lenke Fehér took part on behalf of the Institute for Legal Studies of the Hungarian Academy of Sciences. Kálmán Györgyi, an associate professor at that time represented the Eötvös Loránd University. The fact that all participants are very distinguished experts guaranteed the outstanding academic record of the discussions. The scientific success of the seminar and the cordial and amicable atmosphere that developed among the scholars from the two countries turned this initiative into regular scientific exchanges. The Finnish-Hungarian seminars on criminal law were held every three years in Helsinki and in Budapest in turn. The major merit of those meetings is that they offered accurate and regular information to the participants from both countries on the latest developments in criminal legislation and adjudication which give rise to common problems and thereby enabling the

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deliberation of alternative solutions. My special thanks go out to Professor Lahti for his ongoing engagement and support in setting up this cooperation and making it flourish.

Similar to the Finnish-Hungarian academic cooperation, the events organised by the Hungarian national group of the International Association of Penal law also have long-standing traditions. Hungary hosted the World Congress of the Association three times: in 1899, 1974 and 1999. Moreover, the Hungarian national group has always been active in organising regional conferences. The choice of topics discussed within the framework of these regional conferences is so rich that a list thereof would already take several pages.

In view of these rich and important traditions I am particularly glad to have the honour to bring these two co-operations together. The present conference offers an excellent opportunity to doing so as it is devoted to issues of criminal law resulting from the internationalisation and the Europeanisation of criminal law. These issues are our common concern. The wide range of topics contained in the two-day conference programme indicate that both international and European criminal law give rise to a large number of questions and unresolved problems for criminal lawyers. These questions involve aspects of both substantive and procedural criminal law, they require a new way of thinking both from criminal law legislation and adjudication, and introduce new institutions into the practice of cooperation in criminal matters. The wide range of topics is a clear indicator that both international criminal law and European integration require several answers and solutions from criminal lawyers. I am convinced that this conference will take us a great step forward, and that we criminal lawyers are going to take on a share of this challenging task. I wish each speaker success and hope that each participant will be enthralled by the comprehensive and brainstorming lectures.

30 YEARS OF FINNISH–HUNGARIAN CRIMINAL LAW SEMINARS

*by Lenke Fehér**

It is a great honour and a pleasure for me to welcome all of you to the Finnish-Hungarian Criminal Law Seminar as well as the Regional Conference of the AIDP. It is not unusual that we are holding both events together, and I will refer to this fact later on.

Looking back at our history, dating back to the 1970s, closer academic relations and scientific cooperation started to develop between the University of Helsinki and the Institute for Legal Studies of the Hungarian Academy of Sciences. Several Hungarian lawyers visited Finland in order to become more acquainted with Finnish criminal law as well as with the constitutional and procedural questions of jurisdiction. Somewhat later, within the framework of the Hungarian and Finnish Academy, we agreed on long-term bilateral cooperation in the form of scientific cooperation and an exchange programme and, consequently, meetings were regularly organized in the field of constitutional law as well as substantive criminal law.

After a while, the seminars on constitutional law were discontinued for certain reasons, although we hope to be able to renew them in the future. The meetings on criminal law continued. Thanks to our Finnish colleagues, in particular Prof. Inkeri Anttila and Prof. Raimo Lahti, we were very successful in keeping this tradition until today. The discussions and results of the regular seminars were documented by both parties. During the first ten years, five of these seminars were reviewed in Hungarian law journals, while some of the last meetings have been published in specially edited versions, such as the seminar entitled: 'Towards a more harmonised criminal law in the EU' or the 'Criminal law theory in transition.'

As an overview we find that the problems addressed by the seminars very well mirror the huge and rapid changes in the world around us: the new social and economic developments; innovations and new technologies, including information and communications technologies; the interconnection between the law and society; the changing political regime in Central and Eastern Europe towards the triumph of democracy, respect for the rule of law and human rights; the new achievements of criminal law and criminal policy; the idea of a unified Europe; the tendencies towards modernisation and internationalisation as well as the Europeanization of criminal law, etc. All of these are new challenges for national laws as well as for international law. We can conclude that there is a specific line of development from the very different national laws towards an

* Professor, Institute for Legal Studies of the Hungarian Academy of Sciences.

unified Europe in the form of legislation which has been harmonized according to European standards.

It is certainly a great event that we can already celebrate the 30th anniversary of this very fruitful bilateral cooperation.

The first Hungarian-Finnish seminar on criminal law was held from April 24 to 26, 1979, in Budapest, where the following questions were discussed: criminal policy and criminal law in the development of Hungarian criminal legislation; criminal political disciplines of codification; the role of criminology in the development of criminal policy. According to my recollection, as well as the written review of the proceedings, a six-member Finnish delegation arrived and participated in this remarkable seminar, namely: Prof. Inkeri Anttila, Prof. Raimo Lahti, Prof. Pekka Koskinen, Dr. Lauri Lehtimaja, Prof. Eero Backman and Assistant Prof. Harri Palmén (who was the secretary of the Finnish National Group of the AIDP at that time).

The Hungarian delegation was made up of Prof. Tibor Horváth, Prof. András Szabó, Prof. Imre A. Wiener, Prof. Kálmán Györgyi and Dr. Lenke Fehér. Prof. Miklós Vermes unfortunately could not attend the meeting, so his lecture was briefly presented by Prof. Imre A. Wiener. Besides the above-mentioned participants, a number of very distinguished colleagues attended the meeting on behalf of the Legal Faculty of the ELTE University, the Institute for Legal Studies of the Hungarian Academy of Sciences, the Supreme Court, the Prosecutor General's Office, etc.

Referring to my opening remark, concerning the Finnish-Hungarian criminal law seminars and the role of the AIDP, I would like to underline that on the very first day of this conference the President of the Hungarian National Group of the AIDP, at that time, delivered a welcoming speech to the participants and outlined the plans and forthcoming tasks of the AIDP as well as the activities of the Hungarian National Group.

The second, excellently organised seminar was held in Helsinki in 1980, while the scene of the next meeting is again Budapest in 1983 (5-8 September). The special feature of this seminar, compared with the scenario of the former meetings, stands, that it was dedicated to a single topic, namely the administrative, criminological and penal law aspects of petty offences. According to the general opinion, it was a very high-level conference, with remarkable results. The discussion materials were published in English as well as in Hungarian, in two separate books, consisting of more than 200 pages each. I myself had the honour to be the editor of these publications and, in addition, I also reviewed the seminar in a Hungarian Law Journal, summarising the most important aspects and conclusions of the meeting.

During the past 30 years, we have been able to build up very good cooperation. The regular meetings have offered the opportunity for exchanging information, discussing problems and the results of different research fields, becoming

acquainted with the main features of as well as the developments in both legal systems from a historical perspective and from the point of view of aspects of comparative law, and discussing, in particular during the last 10 years, such important and topical questions as the problems of cross-border crime, transnational organized crime, the harmonization of legislation in the EU, fundamental questions relating to international penal law, the development of international cooperation in Europe and so forth.

It was specially interesting that during these years we have been able to gain a deeper insight into the legal history of Finland, so that we could follow the development of the Special Part of the Finnish Penal Code, the legal discussions and the main steps in the codification procedure.

In the following seminars, not only the changes in the selected topics for discussion, but also the partly constant and partly changing circle of participants had an inspiring effect. In that, there is a great merit of Prof. Imre Wiener who did his best in developing new agenda and involving new participants to the seminars. From the very beginning the cooperation was not limited to academic researchers, but university professors, judges, prosecutors and other legal practitioners were also invited to attend the meetings. Later on, seminars were organized not only in Budapest, but also at the Legal Faculty of the University of Miskolc. These were not only bilateral seminars, but trilateral seminars were also organized: for instance, the sixth very interesting Finnish-Estonian-Hungarian seminar held in Helsinki and a Hungarian-Austrian-Finnish seminar organized in Budapest in 2003 (1-3. September) and devoted to the topic 'Towards a more harmonized criminal law in the European Union.' The patron of this seminar was Dr. Péter Bárándy (the Minister of Justice).

In the success of this fruitful cooperation, from the very beginning Professor Raimo Lahti played a large part as he made great efforts in establishing and developing Finnish-Hungarian connections in the field of criminal law. Thank you very much Professor Lahti!

It should be mentioned that Professor Raimo Lahti was awarded an honorary diploma by the Hungarian National Group of the IAPL in 2003 and in his honour a Festschrift was edited (by Kimmo Nuotio) in 2007, containing contributions by 34 authors. The book is based on the International Colloquium on Criminal Law Theory in Transition, which was held in Helsinki in 2006. This event was arranged by the Finnish Criminalists' Association, the Department of Criminal Law and Judicial Procedure at the University of Helsinki, the Finnish Section of the AIDP, the Finnish Association of Criminal Law, the Finnish Academy, the Finnish Lawyers' Association and the Finnish Ministry of Justice. At the same time, the meeting was part of the long-term cooperation between the University of Helsinki and Berlin's Humboldt-University, as well as the Finnish-Hungarian collaboration under the auspices of the Finnish and the Hungarian Academy of Sciences. As can be seen, from time to time there is a very good cooperation between the

different countries and organisations, including the AIDP, which play an important role in this respect, too.

Thirty years of cooperation in an academic field is quite a long time. There have been several remarkable events to remember. Among others, in 1972 the codification of the Finnish Penal Code started and finished somewhat later, while the Hungarian codification process is only now nearing its completion. During this time we have all witnessed many important historical events in Europe.

The most relevant fact was the unexpected rapid fall of the Communist political regime in Hungary, and in Central Eastern Europe, in 1989-91. The intensive democratisation procedure, changing the whole political regime in a peaceful way, by a 'velvet revolution,' inevitably has a great historical importance. The political changes embodied in the law and other events were also mirrored in the rule of law. The social and political transformations had their effects in the legal system as a whole, including criminal law. It is however a very complex procedure in the field of economics, as well as in the social and political sphere, which do not necessarily coincide with each other, as regards the length of time of the reforms. There is a common view, that political system can be replaced, reformed usually much quicker than the economic or the social one.

On 6 November 1990, Hungary became the 24th member state of the Council of Europe. It is very interesting that one year sooner (on 5 May 1989) Finland became the 23rd Member State of the Council of Europe.

The EU was established in 1992 by the Maastricht Treaty (which entered into force on 1 November 1993). The accession of Finland dates back to 1995. Hungary became one of the 27 members of the European Union much later, in 2004.

All the above-mentioned events, namely the political-social-economic transition and membership of the European Union and other European bodies are very important steps for us. The European bodies declared, that 'among the conditions for a successful economic and political transition in Central and Eastern Europe, the setting up of appropriate legal structures and the training of administrative personnel were among the essential conditions for the success of economic and political transition in Central and Eastern Europe.' Applying to the European bodies for membership strongly supported this procedure. According to the preconditions for membership of the Council of Europe, it is essential that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights. Similarly, the conditions for EU membership include the stability of institutions guaranteeing democracy, the presence of the rule of law, respect for human rights and respect for and the protection of minorities.

Within the domain of penal law, there are certain phenomena (like corruption and terrorism) which can be a serious threat to the rule of law. These threats amount to a direct challenge for the state as they can gradually undermine the

authority and capacity of the state to uphold the law or its respect for 'rule of law' principles. For this reason it is extremely important to intensively prevent and combat, in particular economic crime, corruption, money-laundering, terrorism and cybercrime. Within the framework of the Finnish-Hungarian seminars many interesting legal problems have been discussed (including, some of the above-mentioned issues) among others: economic criminal law, protecting the financial interests of the European Communities, combating organised crime, trafficking in human beings, terrorism, and corruption.

It should be mentioned, that recently, unfortunately we all experience a negative phenomenon, a worldwide economic crisis which will have many-sided causes and multifaceted (social, material, structural, legal) consequences, transitionally or even in the long term. This gives a task for all of us to deal with these problems in theory and in practice, too. The following seminars maybe can put some of these questions to the agenda of the meetings.

On this occasion according to the agenda of the meeting, we will discuss the problems of international terrorism, the constitutional challenges of European criminal law and other very important questions. I do hope that in the years to come this Finnish-Hungarian cooperation will continue and contribute to the development of legal science, procedural and substantive criminal law, as well as to the level of European legal standards.

FROM COMPARATIVE CRIMINAL LAW TO THE EUROPEANIZATION AND INTERNATIONALIZATION OF CRIMINAL LAW

by Raimo Lahti *

1. Finnish-Hungarian criminal law seminars 1979-2009 and their topics

When celebrating the 30th anniversary of the Finnish-Hungarian criminal law seminars it is worth recalling the background to starting this bilateral scientific cooperation. This task of recalling these roots is for me a pleasant one, because I have been actively involved in all of them. In 1979, Hungary was under a socialist regime and had reformed its Penal Code one year earlier. Finland, identified as a Nordic welfare state, had in 1972 initiated a total reform of its Penal Code, which was enacted in 1889 under the strong influence of the classical criminal-law school. In her report on this first bilateral seminar Lenke Fehér summarized the results in the following way: 'The meeting proved to be fruitful for both parties. It offered useful information on the present trend of the law development, gave important details on the changes occurred in the criminal mentality, raised common problems and rendered possible the deliberation of the alternatives to solution.'¹

Lenke Fehér also expressed in her report the wish of both parties that a more intensive comparative analysis of the criminal justice systems of these two countries would be advisable. The fact that Finland and Hungary belong to the same linguistic family (i.e., Finnish and Hungarian are Finno-Ugric languages) has brought us closer to each other. Already Professor Brynolf Honkasalo (1889-1973), a grand old man in Finnish criminal sciences, had many connections with his Hungarian colleagues.² Then Professor Inkeri Anttila, the grand old lady in Finnish criminal sciences, was the key person in continuing the Finnish-Hungarian cooperation in criminal law, and she was also the leader of the Finnish delegation in 1979. The founding fathers on the Hungarian side were the scholars working at the Institute of Political and Legal Sciences of the Hungarian Academy of Sciences, Tibor Horváth, András Szabó and Imre A. Wiener.³

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¹ L. Fehér: Hungarian-Finnish seminary in Budapest on criminal law, 23 *Acta Juridica Academiae Scientiarum Hungaricae* 1-2 (1981), p. 225, 230. The papers of the Finnish participants were published separately; see E. Backman, P. Koskinen, R. Lahti, L. Lehtimaja: Finnish Criminal Policy in Transition. Publications of the Department of Criminal Law, University of Helsinki, 1979.

² In his memoirs (1967) Honkasalo mentions Professor Paul van Angyal as his good colleague. Honkasalo was even invited to be a foreign member of the Hungarian Academy of Sciences in 1938, and that nomination was confirmed by the reorganized Academy in 1960.

³ See the speech by Tibor Horváth in 1996, cited in: I.A. Wiener: Finnish-Hungarian Seminars on Criminal Law and Administrative Law, 37 *Acta Juridica Hungarica* 3-4 (1995/96), p. 125, 126.

In 1981, HEUNI (the Helsinki, later European Institute for Crime Prevention and Control, affiliated with the United Nations) was established and Professor Inkeri Anttila worked as its first director after her retirement as a university professor. Because several Hungarian researchers visited the institute as exchange scholars at the beginning of the 1980s, among them Károly Bárd and Imre A. Wiener, the activity of HEUNI and the personality of its first Director Inkeri Anttila were significant for the development of Finnish-Hungarian cooperation. During the cold war the HEUNI institute served as a bridge and offered a forum for dialogue between researchers and practitioners coming from both the socialist Eastern European countries and the market economies of the Western countries. Károly Bárd characterized the role of HEUNI and Inkeri Anttila's personality in his presentation at the HEUNI 25th Anniversary Symposium (2007) in the following way: The impact of the director's personality has in HEUNI been strong. HEUNI 'started with Inkeri Anttila, an emblematic figure in criminology, a proponent of a sober criminal policy and neo-classicism, a representative of 'European' criminal law.' ... 'During Inkeri's reign HEUNI became a European criminal policy center elaborating with the involvement of the most outstanding experts of the region the standards of a humane and rational criminal justice system.'⁴

Obviously much of the spirit that Károly Bárd described as distinctive of HEUNI's activity in its first years well fits our first bilateral seminars until the beginning of the 1990s. The programmes of the seminars were oriented towards a traditional comparison of legal cultures and solutions, i.e. our cooperation was directed towards comparative criminal law and criminal justice. Various topics on the reform trends of criminal law and on general criminal justice and sanction policy were dealt with in the seminars in 1979, 1983, 1990 in Hungary and in 1980, 1987 and 1993 in Finland. In 1993 the seminar organized in Helsinki was trilateral so that scholars and our linguistic relatives from Estonia participated, too. More comprehensive subjects covered comparative presentations on petty offences (1983)⁵ and on the decision-making and actors in criminal and sanction policy (1987). In 1990 an international research colloquium, 'Centenary of the Finnish Penal Code', was organized at the University of Helsinki, and Hungarian scholars had an active role in the discussions on the fundamental issues of criminal law theory.⁶

⁴ K. Bárd, in: K. Aromaa, T. Viljanen (ed.): Technical Assistance, Crime Prevention, Organised Crime, *HEUNI Papers* No. 28, 2008, pp. 13-14.

⁵ See L. Fehér (ed.): Hungarian-Finnish Penal Law Seminary on Petty Offences. Complex Development Research Programme in Public Administration, Budapest 1984.

⁶ In more detail, see R. Lahti, K. Nuotio (ed./Hrsg.): *Criminal Law Theory in Transition – Strafrechtstheorie im Umbruch*, Finnish Lawyers' Publishing Company, Helsinki, 1992; R. Lahti, K. Nuotio (eds.): *Towards a Total Reform of Finnish Criminal Law*, Helsinki, 1990; and R. Lahti, K. Nuotio, P. Minkinen (eds./Hrsg.): *Criminal Policy and Sentencing in Transition – Kriminalpolitik und Strafzumessung im Umbruch*, Helsinki, 1992.

A clear change in the orientation of Finnish-Hungarian cooperation took place from the 1990s onwards. It had to do with the collapse of the 'Iron Curtain' in 1989 and the following politico-economic changes in Europe and globally as well as the emergence of legal development which has often been described by the expression 'Europeanization and internationalization of criminal law'. In the seminars of 1990 and 1993 the presentations covered the following topics: constitutionalism in criminal law; the principles of international criminal law; and human rights in international cooperation in penal matters. These subjects indicated new priorities in the joint programmes. These seminars were followed by the seminar in 1996 in Miskolc with the general theme of 'The Rule of Law and Criminal Law'. As Tibor Horváth aptly pointed out in his opening speech at that seminar, the criminal law developments in the 1990s were both in Finland and Hungary 'influenced by the principle of a democratic constitutional state, and dependent upon the guarantee taken from the principle of *nullum crimen and nulla poena*, and the requirement of a penal system based on rationality and humanity'.⁷

In the last few years the general themes of the seminars have been fully in accordance with the new priorities: 'Internationalization and Europeanization of Criminal Law' in 2000 in Helsinki and Turku, and 'Towards More Harmonised Criminal Law in the European Union' in 2003 in Budapest. The last one was a trilateral seminar together with Austrian scholars.⁸ In addition, an international colloquium, which covered these major topics as well as the themes of criminal law theory and comparative criminal law, followed in 2006 in Helsinki. Hungarian criminal law scientists were also well represented in that arrangement.⁹

The rapid development of international criminal law and European criminal law since the 1990s has compelled one to reassess the role of comparative criminal law and to pay attention to the intensified interaction between regional and international (or global) legal regulations on the one hand, and the national legal orders, on the other. The topics of this celebratory seminar in 2009 are good examples of legal problems which we are now currently facing, and they illustrate the current new challenges of the Europeanization and internationalization of criminal law for criminal sciences and scientists. The fact that this seminar is also a regional conference of the International Association of Penal Law (AIDP) indicates the keen connection of certain national criminal law scientists with the larger scientific community and their organisation.

⁷ See the citation of the speech in the preface by I.A. Wiener *op. cit.*, 125, 127. This issue of the journal *Acta Juridica Hungarica* included the papers presented at the seminar.

⁸ See the compilation of the seminar papers: M. Hollán (ed.): *Towards More Harmonised Criminal Law in the European Union*, Hungarian Academy of Sciences, *Working Papers* No. 19, Budapest, 2004.

⁹ The contributions to that colloquium were published in: K. Nuoto (ed.): *Festschrift in Honour of Raimo Lahti*, Forum Iuris, Helsinki, 2007.

After this general outlook of the phases of Finnish-Hungarian scientific cooperation, I will, firstly, assess what kind of utilization or results it has had for both parties and for the larger scientific community. That survey provides material for a more general evaluation of the impact that legal experience and expertise in such small countries as Finland and Hungary and their scientists can have on furthering rational and humane criminal and sanctions policy. It must be kept in mind that the scientific community and cooperation do not recognize national frontiers. Secondly, I will outline some actual challenges for future multinational cooperation between criminal scientists when facing the intensified Europeanization and internationalization of criminal law.¹⁰

2. Examples of the exchange of comparative knowledge – experiences to be utilized in other European countries?

What could Finnish scholars offer as theoretical models or recommendable regulations to Hungarian colleagues and policy-makers for developing criminal justice system and what issues were topical from the Finnish point of view? What have we learned from our Hungarian colleagues and practitioners during these years of scientific cooperation? The following considerations are based on my personal impressions on and a reconstruction of the Finnish-Hungarian cooperation.

My paper for the first bilateral seminar in 1979 dealt with 'The role of criminology in the development of criminal policy'.¹¹ I advocated the utilization of systematic scientific knowledge in criminal policy and gave examples of the influence of this kind of thinking in the report of the Finnish Penal Law Committee (1976). In particular, I reported on the application of general methods of social development planning (such as a cost-benefit analysis) in criminal policy and its impact on the then newly commenced total reform of Finnish Penal Code: 1) it is only to a limited extent that the means of penal law can be resorted to in the prevention and control of criminality; 2) instead of aiming at the minimization of criminality as such, the overall objectives of criminal policy should be the minimization of the harmful effects of criminality and their just distribution among the various parties (offenders, victims and society at large). Other Finnish delegates delivered presentations on the development of Finnish penal policy and criminal law, especially the system of criminal sanctions. Among other things, the following tendencies in Finland since the 1960s were explained: research-based criticism of treatment ideology and an emphasis on neo-

¹⁰ See also my article *Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts*, in: Arnold, Jörg (Ed.), *Menschengerechtes Strafrecht – Festschrift für Albin Eser*, Verlag C.H. Beck, Munich, 2005, pp. 1393-1408.

¹¹ Published in: E. Backman, *op.cit.*, pp. 33-44.

classicism in sanctions policy as well as a cost-benefit analysis in general criminal policy. The comparison revealed certain differences in criminal policy. For instance, while the Hungarians continuously relied on the individualization of penal sanctions, the Finnish reform trend was towards a simple and homogeneous penal system with high predictability and relatively lenient punishments.¹²

In 1979, as a young university professor, I could not imagine that the new research-based ideology in Finnish criminal policy which reflected respect for human values and an emphasis on rational decision-making would gain such strong support in Finnish policy-making (i.e., in penal legislation and practice). The total reform of Finnish criminal law was in fact implemented in 1980-2003.¹³ The penal thinking which was adopted in this total reform (recodification) can be characterized by the demand for a more rational criminal justice system: i.e., for efficient, just and humane criminal justice.¹⁴ The penal system must be both rational concerning its goals (utility) and rational concerning its basic values (justice, humanity). To quote the travaux préparatoires of the recodification: 'Criminological research has demonstrated that the general preventive effect of punishment cannot be connected, in a one-sided manner, to the length of prison sentences. Imprisonment already has a considerable deterrent effect. Similarly, we have abandoned the view that the rehabilitative effect of prison would require a certain minimum custodial sentence. On the contrary, we know that custodial sentences always hamper the possibilities of readjustment to a normal social life. In addition, the enforcement of prison sentences is expensive for society.'¹⁵

A similar rational thinking was reflected in resolving the basic problem of criminal legislation: what behaviour is to be punishable and how severely. An important step in the criminalization process was to reassess the seriousness of the various types of offences and, accordingly, the penal scales. For instance, the typical harm caused by property crimes (their 'penal value') was regarded as being less than that of violent crimes, and other offences against the integrity of persons, and such modern crimes as economic and business offences, work safety offences and environmental offences, are regulated in the revised Penal

¹² See especially L. Lehtimaja: The Impact of Contemporary Criminal Policy on the Shaping of Penal Sanctions in Finland, in: E. Backman, *op.cit.*, pp. 20-32.

¹³ An unofficial translation of the revised Finnish Penal Code is electronically accessible at the website of the Ministry of Justice: www.finlex.fi/fi/laki/kaannokset/1889/en18890039.pdf.

¹⁴ In more detail, see R. Lahti: Recodifying the Finnish Criminal Code of 1889: Towards a More Efficient, Just and Humane Criminal Law, 27 *Israel Law Review* 1-2 (1993), pp. 100-117; R. Lahti: Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking, *Journal of Scandinavian Studies in Criminology and Crime Prevention* 1 (2000), pp. 141-155.

¹⁵ Government Bill 66/1988, detailed reasons, ch. 1.2.1.1.

Code and their penal scales are comparable with those of traditional property crimes.¹⁶

An important effect of the new criminal and sanctions policy can be seen in the reduced use of custodial sentences in Finland. Since the mid-1970s, the relative number of offenders sentenced to unconditional custodial sentences had been on the decrease until 1999: from 118 per 100,000 of the population in 1976 to 65 in 1999 (the level of the other Nordic countries). At the same time the development of registered criminality saw a similar trend in all of the Nordic countries so that a dramatic cut in the prison rate in Finland did not result in a proportionate increase in the incidence of crime compared with other Nordic countries where the prison rate remained fairly stable.¹⁷ In 2000-2005 the rate increased to 90 per 100,000 of the population in 2005, but in the last few years the level seems to have been a steady 65-70 per 100,000 of the population. For instance, in 2008 the prison rate in Finland was 64 per 100,000 of the population and the average time served in prison was 6.2 months, while the similar figures in Hungary were 149 and 16.9 months.¹⁸

It is questionable to what extent this kind of penal policy experience is possible to export to and utilize in other countries. For instance, John Pratt argues in his recent article on 'Scandinavian exceptionalism in an era of penal excess' that this exceptional quality emerges from the cultures of equality and more generally from the Scandinavian welfare state model.¹⁹ A more detailed comparative analysis has been made by Tapio Lappi-Seppälä. According to him, penal severity is closely associated with the extent of welfare provision, differences in income equality, trust and political and legal cultures. So the Scandinavian penal model has its roots in consensual and corporatist political culture, a high level of social trust and political legitimacy, as well as a strong welfare state. These different factors have both indirect and direct influences on the contents of penal policy.²⁰

¹⁶ See also R. Lahti: Das Wirtschaftsstrafrecht in der Gesamtreform des Strafrechts, in: Ulrich Sieber, Gerhard Dannecker, Urs Kindhäuser, Joachim Vogel, Tonio Walter (Eds.), *Strafrecht und Wirtschaftsstrafrecht – Festschrift für Klaus Tiedemann*, Carl Heymanns Verlag, Cologne, 2008, pp. 61-77.

¹⁷ In more detail, see P. Törmudd: Fifteen Years of Decreasing Prisoner Rates in Finland. National Research Institute of Legal Policy (NRILP), 1993; T. Lappi-Seppälä, *Regulating the Prison Population*, National Research Institute of Legal Policy (NRILP), 1998.

¹⁸ See Prisoner Rates in Europe 2007-2008, data source 'Greifswalder Inventar zum Strafvollzug', at www.rsf.uni-greifswald.de/duenkel/gis.html.

¹⁹ J. Pratt in: 48 *British Journal of Criminology* (2008), pp. 119-137 and 275-292.

²⁰ T. Lappi-Seppälä: Penal Policy and Prisoner Rates in Scandinavia, in: K. Nuotio, *op.cit.*, pp. 265-306. Cf. M. Cavadino, J. Dignan: Penal Policy and Political Economy, *Criminology and Criminal Justice* 6 (2006), pp. 435-456; D. Nelken, Comparative Criminal Justice: Beyond Ethnocentrism and Relativism, *European Journal of Criminology* 6 (2009), pp. 291-312.

Lappi-Seppälä's analysis indicates that a certain penal policy model – like the Scandinavian one – is not easily applicable to different social, political and cultural contexts. The example of Finnish criminal law reform, however, proves that a deliberated, research-based criminal policy is possible, at least when it is supported by a strong scientific community and enlightened professionals and the decision-making processes leave enough room for their influence. In Finland a special Task Force, consisting of professionals and researches, was established by the Ministry of Justice in 1980 to prepare the total reform of criminal law, and the work of the Task Force continued until 1999.²¹

As Katalin Ligeti writes, the reform of the criminal justice system has been an important part of the overall reform that commenced in Hungary after the political transition in 1989. The first 20 years after the transition amounted to an era of partial reforms, but since 1998 the ultimate purpose of the reform work has been to recodify criminal law, criminal procedural law and the law of the correction system; a new Code of Criminal Procedure was already adopted in 1998. According to Ligeti, the original vision (the Draft General Part) of the criminal law reform is to increase the efficiency of punishment, to widen the use of community sanctions, to reduce the prison population and to enhance crime prevention; she estimates that the Draft is only the beginning of a process which will last for several decades.²²

There is a clear parallel between the just described Hungarian vision and the aims of the Finnish criminal law reform. Since the 1990s, the bilateral criminal law seminars have revealed a strong common interest in criminal law theory and practice, which takes seriously the requirements of constitutionality and human rights. In the discussions at the 1996 bilateral seminar it became apparent how the model or contents of the Rechtsstaat differed between Finland and Hungary. In Finland, there is no special Constitutional Court like in Hungary. Traditionally, a preventive and an abstract control of norms during the legislative process have prevailed in Finland and also in other Nordic countries. However, the ratification of the European Convention on Human Rights (Treaty of Rome of 1950) and the reform of constitutional rights in the 1990s implied the direct applicability of individual fundamental (human and/or basic) rights in the courts. The new Finnish Constitution of 1999 even empowers and obliges the general courts to give

²¹ Belonging to the Steering Group of the Task Force or to the key drafters of the new Penal Code were many influential criminal scientists. Inkeri Anttila and Patrik Törnudd were already members of the Criminal Law Committee (1972-1976); as to their scientific results, see I. Anttila, *Ad ius criminale humanius*. Finnish Lawyers' Association, 2001, and P. Törnudd, *Facts, Values and Visions*. NRILP, 1996. The author was a member of the Steering Group.

²² K. Ligeti: *Criminal Law Reform in Hungary*, in: K. Nuotio, *op.cit.*, pp. 333-340. See also K. Györgyi: *Das ungarische Strafrecht nach dem Systemwechsel*, in: *Festschrift für Manfred Burgstaller*, NW-Verlag, Vienna 2004, pp. 375-391; F. Nagy: (Trans)Formation of Substantive Penal Law since the Political Transformation in Hungary, in: V. Lamm (ed.), *Transformation in Hungarian Law (1989-2006)*, Akadémiai Kiadó, Budapest 2007, pp. 174-208.

priority in their judicial decisions to the provisions of the Constitution over an ordinary Act of Parliament in the case of an 'obvious conflict'.

Due to different legal traditions, the exchange of information and scientific views about the significance of the rule of law and constitutionalism in relation to criminal law and procedure has been especially fruitful. For instance, the decisions of the Hungarian Constitutional Court on the abolition of the death penalty and on the reasoning as to how the principles of *ultima ratio* and *nullum crimen sine lege* limit the use of criminal law are highly interesting examples of 'constitutional penal law'.²³ It is worth noting that Imre A. Wiener advised separating problems affecting constitutional law and the internal systems of other branches of law (such as criminal and procedural law) in contrast to certain 'overconstitutionalism'.²⁴ I, for my part, emphasized that while the moral and political arguments of justice and humanity are now firmly attached to (although not exhaustively) human rights and constitutional law, criminal policy discourse should continuously be open to balancing different types of legal, political and moral arguments.²⁵

Finland joined the Council of Europe as late as in 1990, due to foreign policy reasons. Therefore, the ratification of the European Convention on Human Rights (ECHR) occurred in Finland and Hungary in 1990 and 1993, quite close to each other. Both countries and their authorities faced similar problems in changing their legislation and judicial practices to comply with the ECHR provisions and the Strasbourg case law. Károly Bárd, in his Inkeri Anttila Honorary Lecture in 1996, regarded the role of the ECHR and the case law thereon as a guarantor of the continuation of the Enlightenment idea of a rational, self-controlled criminal law free from excessive elements of repression.²⁶ Lauri Lehtimaja, a participant at the

²³ For a recent overview, see F. Nagy, *op.cit.*, pp. 176-179. The proceedings of the 1996 seminar include several relevant articles by Hungarian scholars, see especially Á. Farkas, E. Róth, The Constitutional Limits of the Efficiency of Criminal Justice, *Acta Juridica Hungarica* (1995/96), pp. 139-150; T. Horváth: The Problems of Constitutional Regulation of the Right to Life, *Acta Juridica Hungarica* (1995/96), pp. 231-242; M. Lévai: The Rule of Law and Criminalisation, *Acta Juridica Hungarica* (1995/96), pp. 259-272; I.A. Wiener: The Necessity Test Relevant to the Codification of Criminal Law, *Acta Juridica Hungarica* (1995/96), pp. 335-346. See also I.A. Wiener: Constitution and Criminal Law. 38 *Acta Juridica Hungarica* (1997), pp. 19-37. Cf. from a Finnish point of view especially K. Nuotio: The Difficult Task of Drafting Law on Principles, *Acta Juridica Hungarica* (1995/96), pp. 287-302; A.-M. Nuutila: The Reform of Fundamental Rights and the Criminal Justice System in Finland, *Acta Juridica Hungarica* (1995/96), pp. 303-314.

²⁴ I.A. Wiener, *Acta Juridica Hungarica* (1995/96), pp. 345-346; I.A. Wiener: *Acta Juridica Hungarica* (1997), pp. 27-37.

²⁵ R. Lahti: The Rule of Law and Finnish Criminal Law Reform, *Acta Juridica Hungarica* (1995/96), pp. 251-258, 257-258. See also generally A. Hirvonen: The Rule of Justice and the Ethical Limits of Criminal Law, *Acta Juridica Hungarica* (1995/96), pp. 221-230.

²⁶ K. Bárd, European Criminal Law?, in: R. Lahti (ed.): *Kohti rationaalista ja humaania rikminaalipolitiikkaa [Towards a rational and humane criminal policy]*, Helsingin yliopisto, Helsinki, 1996, p. 241, 252.

first bilateral seminar of 1979 and later an influential human rights specialist (as a Supreme Court Judge and a Parliamentary Ombudsman), has recently analyzed the influence of the ECHR on Finnish law and court decisions. While the Supreme Court annually publishes 100-200 judgments in its yearbook, in these judgments so far an express reference has been made to the ECHR in a total of 111 cases. Because the substance of the ECHR has been integrated into domestic legislation, there is only rarely a need for the direct application of the ECHR. 'The ECHR is used as a kind of litmus paper test as to whether the interpretations of domestic law are also in harmony with international human rights obligations.' A more general effect of the ECHR relates to a change in judicial thinking: the reasoning in court judgments has become more open and transparent.²⁷

3. Challenges of the Europeanization and internationalization of criminal law

The intensified Europeanization and internationalization of criminal law has changed the role of comparative law and criminal sciences in general. There is much more need for a comparison of legal orders due to the emergence of European criminal law and international criminal law and due to the interaction between European and global legal regulations and the national legal orders. This kind of interaction between international law and domestic law has been strongly emphasized by Mireille Delmas-Marty, who repudiates 'any binary vision that opposes the national to the supranational and the relative to the universal'.²⁸

Scientific cooperation should be, when possible, multinational. The significance of bilateral arrangements is diminishing, although I support the continuation of our Finnish-Hungarian seminars. Strengthening the activities of traditional organisations (like the AIDP) and various networks of scholars is advisable in order to produce ambitious scientific comparative works, such as the 'Corpus Juris' proposal and its implementation,²⁹ 'Economic criminal law in the European

²⁷ L. Lehtimaja: The View of the Finnish Supreme Court on the European Convention on Human Rights, Paper presented in a seminar on the ECHR, 6 June 2008; accessible at the website of the Supreme Court: www.kko.fi/44943.htm.

²⁸ M. Delmas-Marty: Comparative Criminal Law as a Necessary Tool for the Application of International Criminal Law, in: A. Cassese (ed.): *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 97-103.

²⁹ See M. Delmas-Marty et al.: *Corpus Juris*, Economica, 1997; M. Delmas-Marty & J.A.E. Vervaele (eds.): *The Implementation of the Corpus Juris in the Member States*, Vols I-IV, Intersentia, Antwerp 2000-2001.

Union³⁰ and 'A Programme for European Criminal Justice'.³¹ The importance of the studies on comparative criminology and criminal justice should not be forgotten either. For instance, empirical studies should increasingly be planned in research groups so that they can be repeated in various countries in order to strengthen their verification value and applicability in decision-making.³² We need more evidence-based criminological research to be utilized in criminal policy planning and as a foundation for rational criminal policy. This is particularly true in relation to the decision-making and actors within the European Union, where criminal policy has not so far been developed on the basis of coherent conceptions and by utilizing relevant criminological research.

In his recent monograph on 'European Criminal Law' André Klip includes 'a multi-layered patchwork of legislation and case law in which both national and European courts, European and national legislatures, and other authorities and bodies play a role'. The European criminal justice system is in transition, and much of its future is dependent on the enforcement of the Treaty of Lisbon (2008/C 115/01) which expands criminal law competence. Klip foresees the codification of the general part of criminal law within European Union law as one element in building a European criminal justice system, but, on the other hand, he emphasizes the recognition of fundamental aspects of the national criminal system in the emergency-brake procedure of the Lisbon Treaty.³³ The trend towards more harmonised criminal law in the European Union was marked in the title of the trilateral seminar of 2003 and in its proceedings. Ulrich Sieber has analyzed the trend to harmonize criminal law as one result of worldwide globalization and he explains this by four significant forces: the increasing development and international recognition of common legal positions for the protection of human rights and for political and economic aims; the growth in international security interests; the growing influence of actors other than nation states; and increasing international cooperation based on new institutions with new instruments of legal approximation.³⁴

To what extent can we speak of common legal positions in respect of the general part of criminal law, i.e. common legal principles and concepts? The general principles and concepts of criminal law have been developed since the 19th century primarily by the doctrines and practices of national criminal law and

³⁰ See K. Tiedemann (Hrsg.): *Wirtschaftsstrafrecht in der Europäischen Union*, Carl Heymanns Verlag, Cologne 2002.

³¹ See B. Schünemann (ed.): *Ein Gesamtkonzept für die europäische Strafrechtspflege*, Carl Heymanns Verlag, Cologne, 2006.

³² Cf. generally T. Newburn, R. Sparks (eds.): *Criminal Justice and Political Cultures*, Willan Publishing, 2004.

³³ A. Klip: *European Criminal Law*, Intersentia, Antwerp, 2009, especially p. 1, 425, 432.

³⁴ U. Sieber: The Forces Behind the Harmonization of Criminal Law, in: M. Delmas-Marty et al. (éd.), *Les chemins de l'harmonisation pénale*, Paris, 2008, p. 385, 387.

national criminal justice systems. Such concepts and principles have been mainly developed within two legal cultures, either under the civil law or common law tradition, and have therefore largely differed. It is certainly a cumbersome way to reach a common general part of European criminal law or harmonized general parts of national criminal laws.³⁵ In the 2003 seminar Norbert Kis demonstrated this difficulty by his analysis of the principle of culpability.³⁶ Although there is a common ground for the doctrines of intent in the Nordic countries, a unified 'Dolus nordicus' is lacking even in this sub-region of Europe where the countries have common legal traditions.³⁷ An outstanding comparative research project by the Max Planck Institute for Foreign and International Criminal Law on creating a universal metastructure for criminal law ('universale Metastruktur des Strafrechts') is an ambitious endeavour to develop international criminal law doctrines.³⁸

The diversification of certain areas of criminal law – typically Europeanized economic criminal law and internationalized humanitarian law – is reflected in the pluralism of general legal doctrines. Therefore, there is a need to develop a more dynamic conceptual and system form of thinking in order to control many parallel legal regulations and the diversity of the regulated phenomena.³⁹ For instance, there are cogent criminal policy reasons for a certain differentiation of traditional concepts and principles of criminal law in order to take into account the nature of macro-criminality and so-called organisational crimes. Nevertheless, there are limits to this differentiation, because the utilitarian (effectiveness) aims must be balanced with the considerations of fundamental rights and freedoms of the accused.⁴⁰

³⁵ See especially K. Ambos: Is the Development of a Common Substantive Criminal Law for Europe Possible?, *Maastricht Journal of European and Comparative Law* 12 (2005), pp. 173-191.

³⁶ N. Kis: The Principle of Culpability in European Criminal Law Systems, in: M. Hollán (ed.), *op.cit.*, pp. 107-117.

³⁷ See J. Matikkala, Nordic Intent, in: K. Nuotio, *op.cit.*, pp. 221-234.

³⁸ See the publications of the projects so far: U. Sieber, K. Cornils (Hrsg.): Nationales Strafrecht in rechtsvergleichender Darstellung. Allgemeiner Teil 2-3, Duncker & Humblot, Berlin, 2008. See also the G.P. Fletcher: *The Grammar of Criminal Law, American, Comparative, and International*, Vol. I. Oxford University Press, 2007.

³⁹ In more detail, see R. Lahti: Towards Harmonization of the General Principles of International Criminal Law, in: *International Criminal Law: Quo Vadis?* Association Internationale de Droit Pénal, èrés, 2004, pp. 345-351.

⁴⁰ Cf. generally S. Melander: The Differentiated Structure of Contemporary Criminal Law, in: K. Nuotio: *op.cit.*, pp. 189-206.

III. SELECTED ISSUES OF INTERNATIONAL CRIMINAL LAW

‘DIVISION OF JURISDICTION BETWEEN NATIONAL AND INTERNATIONAL COURTS’ – WHAT ROLE SHOULD THE EUROPEAN HUMAN RIGHTS COURT PLAY?¹

by Károly Bárd^{*}

1.

The title of our session ‘Division of jurisdiction between national and international courts’ suggests a discussion primarily on the issue of how to distribute the power of prosecuting international crimes when both national and international courts may legitimately claim jurisdiction. First, the question can be discussed on the level of law-making: what principles should law-makers follow when distributing the competencies between national and international courts? As we know, this question has been answered differently by the drafters of the Nuremberg Charter, the ICTY and the ICC Statutes.

The issue of how to distribute jurisdiction between national and international courts can also be raised after the adoption of principles on the abstract level when it comes to implementation. To take the example of the ICTY the Statute of the Tribunal opts for concurring jurisdiction with the ICTY having primary jurisdiction.² The decision, however, of under what conditions the Tribunal should exercise its primary jurisdiction and request national courts to transfer the proceedings ought also be made on the basis of principled rules.

Moreover, when speaking about the division of jurisdiction between national and international courts, there is a third actor that may enter the scene, namely an international human rights body, such as the European Court of Human Rights (ECtHR). In this context the question of the division of jurisdiction is of course formulated differently than in the relation between national and international criminal courts. In this case we do not speak about a national and an international court both having legitimate claims to prosecute and try international crimes. It is clearly within the exclusive competence of national courts to examine and assess the evidence and with this to ascertain the facts of the case and to apply and interpret the relevant laws. What the ECtHR is expected to do is to review whether Convention rights have been observed. Though in this respect, too, the subsidiarity principle applies in the sense as laid down in the preamble to the Convention: ‘governments (...) take the first steps for the *collective en-*

¹ This article constitutes a somewhat modified version of K. Bárd: The difficulties of Writing the Past through Law – Historical Trials Revisited at the European Court of Human Right, 81 *International Review of Penal Law* (2009), pp. 27-45.

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² Article 9 (2) of the Statute of the International Criminal Tribunal for the former Yugoslavia, Security Council Resolution 827, 25 May 1993.

forcement of certain rights' meaning that is primarily for them to oversee the observance of human rights. This is also the explanation for the margin of appreciation doctrine understood in a broad sense. The margin of appreciation, on the one hand, is a methodological tool by which the appropriate depth of the review to be exercised by the ECtHR is defined, and which varies – among other things – according to the Convention right and the question involved. But in addition to serving as a technical device, the margin of appreciation is a substantive concept linked closely to the subsidiarity principle and the doctrine according to which the ECtHR is not a 'fourth instance': it lies primarily in the competence of the national authorities to establish the facts of the case and assess them under their national law. It is not for the ECtHR to review the fact-finding activity of national agencies, nor is it authorized to rule on alleged errors of law. Thus the ECtHR, as a general rule, accepts the findings of fact as they were determined in the national arena and its jurisdiction is further limited by the fact that as a principle it does not extend to the interpretation of national law, nor to the examination of its application. Citing the case law of the ECtHR *Herbert Petzold* observes that '(i)t is (...) in the first place for the national authorities (...) to interpret and apply the domestic law, the national authorities being in the nature of things particularly qualified to settle the issues arising in this connection.'³ Formulated from the perspective of the ECtHR the subsidiarity principle calls for self-constraint: the ECtHR cannot assume the functions of national courts, its judgments cannot serve to replace the decisions rendered by domestic courts. In this sense the Court is not an additional instance in the appeals process that stands above the national legal fora. It therefore follows from the subsidiarity principle that the interpretation of national law – as a principal rule – is not the Strasbourg Court's responsibility, and neither is it to uncover potential factual or legal errors committed by the national authorities. The states that are party to the Convention did not assume any responsibility to render materially just decisions, that is to accurately determine the facts of a case and to apply the law correctly.

2.

Following this brief introduction to the subsidiarity principle which will have considerable importance in my further analysis, I wish to come to the subject of my contribution. In what follows I will examine the judgments of the ECtHR that concerned so-called historical trials conducted by national courts. These ECtHR judgments assessed domestic criminal proceedings in the course of which, in addition to national law, also international law, more specifically international

³ H. Petzold: The Convention and the Principle of Subsidiarity, in: R.St.J. Macdonald – F. Matscher – H. Petzold (eds.): *The European System for the Protection of Human Rights*, Martinus Nijhoff Publishers, Dordrecht – Boston – London, 1993, p. 51.

humanitarian law, was to be interpreted and applied. The two cases I selected are *Korbely v. Hungary*⁴ and *Kononov v. Latvia*.⁵ I note in advance that I will deal more extensively with the Hungarian case.

In *Kononov* the ECtHR pronounced judgment on the trial of the applicant who, as established by the Latvian courts, had been involved in 1944 in the killing of Latvian villagers in retaliation for their collaboration with the Germans. The question was basically whether the applicant's conviction had any basis either in international or national law at the time when the crime was perpetrated. The ECtHR came to the conclusion that there had been no such basis and found Latvia in breach of Article 7 (1) of the ECHR.⁶

Korbely v. Hungary concerned events during the 1956 Hungarian Revolution. In this case the Hungarian Supreme Court upheld the conviction of the applicant who at the time of the event served as a military commander. One of the central issues in this case was whether the person killed by the applicant or upon his order qualified – due to his surrender – as a person not taking part in the hostilities and therefore falling under the protection of common Article 3 of the Geneva Convention. The ECtHR concluded that the domestic courts had not established that the victim had expressed an intention to surrender and it therefore found Hungary to be in breach of Article 7 of the Convention.

In both *Kononov* and *Korbely* the Court was split and both judgments have already provoked heavy criticism.⁷ The minority claimed, among other things, that the majority had gone beyond their competence and while they formally reiterated the doctrine, in reality they had abandoned the 'NO FOURTH INSTANCE' concept. In the following I will try to give an answer to the question whether the Court went beyond its competence and in fact abandoned the doctrine derived from the subsidiarity principle. If the answer is in the affirmative – and let me note in advance, it will be – I will seek to identify the reason for the change in the jurisprudence and how this should be assessed.

As indicated above I agree with the minority that the Court in fact deviated from its earlier approach and in contrast to what it claimed in both judgments, it did in fact overrule the decisions of national courts both as regards the ascertaining of the facts and the interpretation of the law. Before submitting evidence in

⁴ *Korbely v. Hungary* [GC] 9174/02 (19/09/2008).

⁵ *Kononov v. Latvia* 36376/04 (24/07/2008).

⁶ Article 7 (1) of the Convention reads as follows: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.' The decision is not final as it has been referred to the Grand Chamber.

⁷ See e.g. G. Pinzauti: The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law. A Critical Discussion of *Kononov v. Latvia*, 6 *Journal of International Criminal Justice* (2008), pp. 1043-1060; C. Droegge: Elective affinities? Human rights and humanitarian law, 90 *International Review of the Red Cross* 871 (2008), p. 546.

support of my claim let me stress that the ECtHR judgments in *Kononov* and *Korbely* concerned so-called historical trials which, in addition to establishing the liability of individual defendants under national law, are expected to serve further ends, recording and writing history among them. Whether it is opportune to expect any criminal trial to serve ends other than establishing individual criminal responsibility is an open question. *Hannah Arendt's* ambivalent position clearly shows the difficulty of the problem. On the one hand, she seems to insist that criminal trials should be constrained to establishing individual criminal responsibility. That is why in the chapter in *Eichmann in Jerusalem* describing how evidence was presented and witnesses were heard, she expresses some discomfort with the fact that during the trial events that Eichmann had nothing to do with were discussed at length.⁸ However, even this woman of fascinating intelligence fails to provide robust arguments against the claim of the victims to have their day in court suggesting that she herself finds it just that survivors are given the opportunity to present their narrative of the Holocaust, irrespective of Eichmann's involvement in the particular events.

Whatever our assessment as to the desirability of writing and recording history through criminal trials, the fact remains that in proceedings for state-sponsored, state-induced or state-tolerated crimes, which by today have been formulated as international crimes, courts simply cannot avoid making inquiries into events that go beyond the conduct of the individual defendant. The crimes in question are bound within the broader social and political context and it is exactly the context that distinguishes the crimes against mankind from ordinary criminal offences.

Thus we simply have to accept that historical trials, in addition to ruling on individual guilt, are intended 'to produce a reliable historical record of the context of international crime' and to 'provide a venue for giving voice to international crime's many victims'.⁹ And if this is the case, then one could argue that the ECtHR should be even more cautious in observing the subsidiarity principle and what follows thereof since it seems to be beyond doubt that domestic instances are much better positioned for collective history making. Thus the ECtHR should exercise maximum self-constraint both as to the reassessment of the facts as ascertained and the interpretation of the laws applied by national courts.

However, if we take a closer look at the rationale that justifies the 'NO FOURTH INSTANCE' doctrine, the claim we made above becomes somewhat uncertain. The rationale behind the principle that the ECtHR should accept the facts as determined in the national arena is that it is the national courts that are

⁸ H. Arendt: *Eichmann in Jerusalem. A Report on the Banality of Evil*, Penguin Books, New York, 1994, pp. 220-233.

⁹ M. Damaska: What is the Point of International Criminal Justice?, 83 *Chicago-Kent Law Review* (2008), p. 329, 331.

closest both in terms of time and space to the events they have to rule upon and that it is them which may make use of or benefit from the epistemological advantages of the so-called immediacy principle or the principle of directness (*Unmittelbarkeitsprinzip*).

This, by the way, is also a principle accepted in the majority of national appeal systems: the 'higher' judicial fora are generally obliged to respect the facts of the case as determined by the 'lower courts', which enjoy the advantage of the immediacy principle. This is also what the principle of free proof requires: the facts of the case are arrived at by weighing the evidence and the lower court's freedom to evaluate the evidence is virtually worthless if its assessment can be set aside by the appeal court.

However, when courts have to determine what happened 60 or 50 years ago, when witness testimonies become relatively unreliable sources and it is primarily documentary evidence that is used in the course of the trial, then it is far less obvious that national courts are in a superior position for assessing the facts of the case. One could reasonably doubt that national courts are better positioned to determine what is contained in the documents than international fora.

As far as the interpretation of laws is concerned, it is obvious that national courts are better equipped to do this job correctly. This is why the ECtHR adopts an extremely cautious position in interpreting national laws even in cases when it is in fact authorized to do so. This is the case with so-called qualified rights. As a precondition for limiting numerous rights in a manner that is compatible with the Convention, the document itself establishes the rule that such limitations must be undertaken on grounds provided by national law. By referring to domestic law, the Convention observes that these laws are 'an integral part of the engagements undertaken by the state concerned'.¹⁰ If the national authorities disregard the 'incorporated' law, then, in addition to infringing domestic law, they at the same time violate the Convention.¹¹ However, even in these cases the ECtHR exercises considerable self-restraint since, as noted in the *Winterwerp* judgment, 'even in those fields where the Convention »incorporates« the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection.'¹²

However, the 'superiority' of national courts is again much less self-evident when, in addition to national law, also international law is to be applied and interpreted. Again, why should national courts be better positioned when it comes to determining the relevant international law as it stood at the time of the perpetration of the crime?

¹⁰ Petzold, *op.cit.*, p. 50.

¹¹ See *Winterwerp v. the Netherlands* 6301/73 (24/10/1979), A33, par. 46.

¹² *Ibid.*

From all I have outlined above, we may conclude that in reviewing historical trials the ECtHR may be justified in abandoning the '*NO FOURTH INSTANCE*' doctrine. However, the majority in *Kononov* and *Korbely* claimed to have followed the traditional approach. The question is why they thought they had to adhere to the principles they follow in 'ordinary cases'?

Perhaps the arguments I have given in support of setting aside the '*NO FOURTH INSTANCE*' doctrine are not strong enough. I have argued that in historical trials it is primarily documentary evidence that is available. But as we saw in *Korbely* or in *Kononov* also witnesses had been heard even if we may entertain certain doubts concerning their capacity to recall the events with absolute accuracy. But the cognitive advantages of the immediacy principle have still not been abandoned completely. And my argument regarding the interpretation of international law may also appear somewhat weak. One could argue, against my claim, that ascertaining the facts may not be completely separated from their legal characterization and the interpretation of laws, therefore if national courts are better positioned to ascertain the facts then the same applies to the interpretation of laws, be they national or international. And, finally, one could argue that authoritative judgment about the past is the privilege of national fora and international bodies should abstain from interfering with the nation's collective history making through domestic trials.

Without elaborating any further on the particularities of historical trials and on the question whether the '*NO FOURTH INSTANCE*' doctrine should be observed by the ECtHR when reviewing domestic historical trials, I simply claim that in both *Kononov* and *Korbely* the ECtHR failed to follow its traditional approach, without however overtly admitting it. The Court in fact made a reassessment of the facts and deviated from the interpretation which municipal courts gave to the provisions of international law. In *Korbely*, for instance, the ECtHR reprimanded the Hungarian courts for not realizing that for common Article 3 to be applicable, in addition to whether at the given time there was an armed conflict of an international character, they should have examined whether 'the particular act committed by the applicant was to be regarded as forming part of [the] State policy, such as to bring it within the sphere of crimes against humanity, as this notion was to be understood in 1956.'¹³ The domestic courts, in the view of the ECtHR, also failed to consider that 'it is widely accepted in international legal opinion that in order to produce legal effects such as the protection of common Article 3, any intention to surrender in circumstances such as those in issue in the present case needs to be signalled in a clear and unequivocal manner.'¹⁴

¹³ *Korbely* judgment, par. 84.

¹⁴ *Ibid.*, par. 90.

3.

Still we have not answered the question why the ECtHR departed from its traditional approach without openly admitting it. Identifying the tension between the functions that historical trials are expected to perform primarily if the event occurred five or six decades ago and the facts of which now have to be ascertained may bring us closer to the answer. We do accept that historical trials, in addition to ruling on individual guilt, are meant to provide a forum for collective history making. However, the 'professed goals' of historical trials 'do not constitute a harmonious whole; rather they pull in different directions, diminishing each other's power and creating tensions.'¹⁵ There is a real danger that the function of producing history in trials is accomplished at the expense of reliable fact finding in and the fair assessment of the cases in question.

The difficulty in bringing these two functions into harmony was overtly admitted in *Kononov* by the Latvian government which, as we can read in the ECtHR's judgment, 'stressed the importance of such trials in restoring democracy, establishing the historical truth and guaranteeing justice for the victims of crimes against humanity and war crimes' and argued that 'despite all the practical problems with which the Latvian authorities were faced, these trials were very important as they helped to make up for the inadequacies of the Nuremberg trial, a trial that had to a large extent been an example of justice for the victors, punishing crimes perpetrated by the Nazis, while allowing notorious criminal acts by the Allies to go unpunished.'¹⁶

Thus also the Government admitted the practical problems that the courts in historical trials are faced with. The first problem, of course, is to find a case which is a good candidate for presenting a new narrative. The time factor in this context is crucial. For a trial we need a defendant, a defendant who is obviously still alive. There are not many of them and if the pool is limited the possibility of finding the ideal wrongdoer and the ideal victim for rewriting history is rather slim. *Kononov* and his victims were perhaps not the ideal players for construing a new historical narrative and this applies to those involved in the *Korbely* case, too.

However, the main problem is that if courts stick to the idea that they have to contribute to the emergence of the new narrative, they may be tempted to loosen the requirements of fairness when it comes to ascertaining the facts and interpreting the law. In brief, there is a risk of political justice: history is construed at the expense of the primary function of criminal trials, namely the establishment of individual responsibility in fair proceedings.

For external observers, the ECtHR among them, it must have been certainly disquieting to see that the courts, including the highest court of Hungary, trying

¹⁵ Damaska, *op.cit.*, p. 331.

¹⁶ *Kononov* judgment, par. 92.

the case of *Korbely* at different times came to completely opposite conclusions as to the applicability of the Geneva law to the events in 1956.¹⁷ Similar discomfort must have been provoked by the fact that in 1993 the Constitutional Court, though pointing to the technical imperfections of the law adopted by Parliament that served as the basis for the conviction of the applicant, refrained from abrogating that law as unconstitutional,¹⁸ and then subsequently changed its position in 1996: it held that due to incorrect references to various provisions of the 1949 Geneva Conventions the law was unconstitutional.¹⁹

The zealous effort of the Hungarian courts to convict the applicant sometimes resulted in a slip of the tongue, or rather the pen, thereby revealing their bias. As indicated earlier, one of the key issues in *Korbely* was whether the victim whom the applicant had killed had surrendered or whether he intended to use his gun. In its guilty verdict the Military Bench of the Regional Court held: 'On the basis of the testimonies, it has not been possible to determine beyond reasonable doubt that Tamás Kaszás (the victim) was already holding the pistol in his hand in the course of the argument.'²⁰ From this it follows that the opposite, *i.e.* that the victim was holding the pistol in his hand, may not be ruled out either. And it is a fundamental principle of fair criminal justice that it is the defendant who benefits from any doubt. The judgment of the Regional Court also stated that 'the defendant – presumably misunderstanding the motion of Tamás Kaszás or because of fear or shock – gave a resolute order to fire.'²¹ However, if the court assumed that the applicant was mistaken or acted in a state of mental disorganization then it should have applied the relevant sections of the Penal Code on mistake in facts or diminished mental capacity resulting in an acquittal or the mitigation of the sentence which it failed to do. The Supreme Court was sufficiently observant to discover what would have followed from the quoted finding of the Regional Court and omitted it by stating that from the facts ascertained by the Regional Court the correct conclusion was 'that [the applicant] knew that the victim intended to hand over the gun, rather than attack with it.'²²

4.

I do not list the disquieting irregularities of the trial in *Korbely's* case. Without further elaborating on the issue I claim the following: *Korbely* and *Kononov* should have been dealt with under Article 6 rather than under Article 7. This is

¹⁷ Also in *Kononov* the Latvian courts trying the case came to different conclusions. See par. 37-46 of the judgment.

¹⁸ Constitutional Court Decision no. 53/1993 (X. 13.).

¹⁹ Constitutional Court Decision no. 36/1996 (IX. 4.).

²⁰ See *Korbely* judgment, par. 42.

²¹ *Ibid.*, par. 42.

²² *Ibid.*, par. 44.

also the view taken by the minority in *Korbely*: 'Admittedly, the domestic courts' decisions may have left certain questions unanswered regarding the victim's conduct and the applicant's interpretation of it. However, the possible insufficiency of the reasoning of the Supreme Court's judgment could have raised an issue under Article 6 of the Convention but not, in the circumstances of the case, under Article 7.²³ In fact, in *Korbely* the applicant, in addition to claiming a violation of Article 7, also complained of the unfairness of the proceedings.²⁴ The ECtHR considered this complaint to be also admissible; however, in the light of finding a violation of Article 7 it found that it was unnecessary to examine the complaint under Article 6.

The question now is why the ECtHR gave preference to examining the case under Article 7 and refrained from entertaining the complaint under Article 6. One plausible explanation is that the applicant did not specify the violation of any component of the right to fair trial as set forth in Article 6; instead he submitted, in rather general terms, that the proceedings had not been fair.²⁵ Therefore the ECtHR would have been forced to assess the fairness of the *overall* proceedings. Had the ECtHR found in this particular case a violation of Article 6 due to the unfairness of the overall proceedings, this – given the delicate nature of the trial – could also have been interpreted as a serious criticism of the entire judicial system and an expression of concerns as to the integrity of the national administration of justice.

Examining the complaint under Article 7 therefore seemed to be safer. The principle of legality embodied in Article 7 prohibits a conviction in the absence of legislation to that effect at the time of the commission of the crime (the prohibition of retrospective legislation). In addition, the legality principle also requires that the legislation be accessible and formulated with sufficient precision. All these components are meant to guarantee that individuals can foresee for what type of acts they may be held criminally liable. Under 'ordinary' conditions, by finding a violation of Article 7 the ECtHR simply proclaims that at the time of perpetration there was no law under which the individual's conduct could be subsumed, *i.e.* a law was applied retroactively or that the law in question was not accessible or was formulated with insufficient precision. The judgment, except when the ECtHR concludes that the law was given an extensive interpretation by analogy, makes an assessment of the law but not of the manner in which it was applied by the

²³ *Ibid.*, Joint dissenting opinion of Judges Lorenzen, Tulkens, Zagrebelsky, Fura-Sandström and Popović, par. 2.

²⁴ Also *Kononov's* complaint alleged a violation of Article 6 (1). However, this part of the application was declared inadmissible. See the admissibility decision of 20 September 20, 2007.

²⁵ The judgment also states that the applicant complained in general terms that Article 6(1) had been breached. The Court noted that this complaint was also admissible but concluded that in the light of finding a breach of Article 7 it was unnecessary to examine the complaint under 6(1). See *Korbely* judgment, par. 96-98.

national courts. That is why the 'NO FOURTH INSTANCE' doctrine can be easily observed at least as concerns the establishment of the facts: the ECtHR can accept the facts as ascertained by the national fora.

However, it turned out that in *Korbely* the standard methodology review only works if Article 7 is given an extremely narrow interpretation, thereby providing almost no protection. The 'NO FOURTH INSTANCE' doctrine could only have been observed if the question was put in a very simple formulation: at the time of the fatal event (October 26, 1956) was there a rule in force which was accessible to the applicant and informed him that the killing of an insurgent who had laid down his arms was illegal and may have entailed consequences under criminal law? It seems to me that the question once formulated in such a simple manner would have been answered in the affirmative by the ECtHR. The Hungarian Penal Code which was effective at the time of the event prohibited the killing of a person who had ceased to be an attacker. Further, the ECtHR shared the Government's position that since a brochure containing the text of the Convention was officially published in 1955, the relevant Geneva law was sufficiently accessible to the applicant.²⁶ There remains, of course, the additional question as to the statute of limitations: is the prosecution of the individual who at the time of the commission was properly instructed on the unlawfulness of his/her action acceptable after the expiration of the prescription period? The answer depends on how the fair warning principle is interpreted. Clearly, the principle formulates each individual's right to know 'what the 'law' is at the time that they supposedly violate it.'²⁷ But the question is 'how much of the 'law' is included in this principle?'²⁸ The ECtHR could have adopted the view held by *George P. Fletcher*, who claims that according to the proper reading of the principle 'individuals have a right to know that which could make a moral difference in their choosing to engage in the action or not.'²⁹ And since the statute of limitations is certainly not meant to provide guidance as to the individual's moral choice, it is not covered by the *nullum crimen* principle.

In sum, had the ECtHR limited its review to the question whether there was a rule in October 1956 warning the applicant that the killing of a person who was no longer an attacker may have entailed a sanction under penal law, it could have easily exercised self-constraint as required by the subsidiarity principle. It could have relied on the facts as established by the Hungarian courts and it would not therefore have been forced to review the manner in which they applied the relevant laws.

²⁶ *Ibid.*, par. 75.

²⁷ G.P. Fletcher: *Basic Concepts of Criminal Law*, Oxford University Press, New York – Oxford, 1999, p. 12.

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 14.

However, it is exactly the statute of limitations mentioned above that may bring us closer to identifying the reason why the 'NO FOURTH INSTANCE' doctrine could not be followed in *Korbely*. Let us recall that the applicant was convicted of murder constituting a crime against humanity.³⁰ Crimes against humanity make up one category of international crimes. Through the formulation of international crimes it is intended to protect values 'considered important by the whole international community'.³¹ This is the explanation for the particular jurisdictional rules, the establishment of *ad-hoc* tribunals by the Security Council and the setting up of the International Criminal Court as well as for the fact that, at least as far as genocide, crimes against humanity and torture are concerned, international custom renders statutes of limitations inapplicable.³²

Due to the particular nature of international crimes, due to the specific values that these crimes are intended to protect, the ECtHR was simply not in a position to constrain the review to the question whether there had been a rule of whatever type warning the applicant that what he did was punishable.

There is agreement that, unlike war crimes, 'crimes against humanity require a context of widespread or systematic commission'.³³ True, the Nuremberg Charter or the 1968 New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity did not explicitly mention the 'widespread or systematic' threshold. However, we may reasonably assume that the drafters thought that this feature is a 'necessary ingredient of the objective element of the crimes'³⁴ and therefore simply did not find it necessary to specifically refer to the systematic nature of these crimes. Thus the 'widespread or systematic attack' formulation emerging in the case law of international tribunals in the 1990s is to be interpreted as an authentic recording and clarification of one of the definitional elements of crimes against humanity. From this it follows that in the absence of 'a widespread or systematic attack' the author may not be held liable for a crime against humanity: the killing, if an isolated act, may eventually constitute a war crime, but not a crime against humanity.³⁵ But even if it can be established that at the time of the perpetration of the individual offence

³⁰ In fact *Korbely* was convicted of a crime against mankind (*emberiség elleni bűntett/Verbrechen gegen die Menschheit*) as formulated in the Hungarian Penal Code. Crimes against mankind cover two separate groups: crimes against the peace (such as incitement to war, genocide or apartheid) and war crimes. The term crimes against humanity is unknown.

³¹ A. Cassese: *International Criminal Law*, Oxford University Press, Oxford – New York, 2003, p.23.

³² *Ibid.*, p. 319. The UN Convention of 1968 and the 1974 European Convention extend the non-applicability of the statutes of limitation also to war crimes, but these treaties have been ratified by relatively few states. See Cassese, *op.cit.*, p. 317.

³³ R. Cryer, H. Friman, D. Robinson, E. Wilmshurst: *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2007, p. 190.

³⁴ Cassese, *op.cit.*, p. 65.

³⁵ Cryer, *op.cit.*, p. 190.

inhumane acts were being committed on a wide scale or systematically for holding an individual liable for a crime against humanity, it must be proven that the agent was '*cognisant of the link* between his misconduct and a policy or systematic practice.'³⁶

In the ECtHR's view the Hungarian courts confined their inquiry to determining the level of intensity of conflicts that make the Geneva Conventions applicable without, however, examining the existence of further 'international law elements inherent in the notion of crimes against humanity', among them 'the requirement that the crime should not be an isolated or sporadic act but should form part of 'State action or policy' or of a widespread and systematic attack on the civilian population.'³⁷ In other words the ECtHR's position is that the Hungarian courts erroneously believed that for establishing criminal liability for a crime against humanity under common Article 3 it is sufficient if it is proven that the intensity of the hostilities in October 1956 had reached the level of an armed conflict.

The '*NO FOURTH INSTANCE*' doctrine states that it is not the task of the ECtHR to substitute itself for domestic jurisdictions, *i.e.* it is for national courts to ascertain the facts as well as to resolve problems arising in the course of interpreting legislation. The Court's role is confined to assessing if the way national courts established the facts and interpreted the law was compatible with the Convention. The Court's task is to listen to the music played by the national orchestra, reading the score and deciding if the performance was above the acceptable level. What it should not do is to play the piece itself and then compare its own performance with that of the national orchestra. However, in order for the Court to ascertain whether the national court's performance was satisfactory, they both have to read the same music. If the national orchestra plays a Vivaldi concerto whereas it is expected to play a Beethoven symphony then the ECtHR has no other choice than to grade the performance sub-standard. And in order to convince the audience of the correctness of its decision it must play the piece which the national orchestra was expected to perform. It seems that this was what has happened in *Korbely*. The domestic courts promised that they would ascertain that the applicant had committed a crime against humanity, but failed to extend their inquiry to those elements that make up a crime against humanity. And the ECtHR explained what the national courts should have done.

One could argue that the ECtHR should have left it to the national courts to determine what conduct qualifies as crime against humanity. In fact the ECtHR stated that even if domestic law makes reference to international law, it is for national courts to resolve problems of interpretation.³⁸ However, as I claimed

³⁶ Cassese, *op.cit.*, pp 81-82.

³⁷ *Korbely* judgment, par. 82-83.

³⁸ *Ibid.*, par. 72.

earlier, the 'superiority' of national courts in interpreting legislation is much less self-evident when, in addition to national law, also international law is to be applied and interpreted. It is far from obvious why national courts should be better positioned to determine the content of the relevant international law as it stood at the time of the perpetration of the crime.

The judgment of the ECtHR implicitly declares that the national courts were not aware of what transforms an 'ordinary crime' into a crime against humanity. Though the judgment found Hungary to be in breach of Article 7, what the Court established was that the facts as established by the Hungarian Supreme Court did not qualify as a crime against humanity. Therefore it is unfortunate to speak of a violation of Article 7 since this suggests that law adopted subsequent to the commission of the crime was applied retroactively. But as is clear from the sources invoked by the ECtHR, the 'contextual threshold' has not been abandoned today, and similarly the rule that in order to qualify as a person *hors de combat* that person must clearly express an intention to surrender is still valid. Thus we could hardly state that any law was applied *retroactively*. Certainly Article 7 is violated also if the defendant is convicted for conduct that neither at the time of the 'perpetration' nor at the time of the verdict constituted a criminal offence. But this, again, was not the case in *Korbely*: in October 1956 the category of crimes against humanity did of course exist but the conduct with which the applicant was charged did not fit into that category. Thus it was the erroneous legal characterization of the facts that rendered the judgment of the Hungarian Supreme Court deficient.

The ECtHR should not be blamed for substituting its own position for the legal assessment by the Supreme Court; as I argued in the case of interpreting international law the national authorities are certainly not better positioned to make a correct assessment. In addition, respect for the legal characterization made by national fora has its limits: if the assessment is devoid of any reasoning, if it is clearly arbitrary the ECtHR has to overrule it. This was also the case in *Lukanov*³⁹ where the Court had to determine whether the conduct, which served as the basis of the applicant's detention, constituted a criminal offence. Contrary to what had been found by the domestic authorities the ECtHR concluded that 'there was not even the slightest possibility that [the] conduct could have constituted an offence'⁴⁰ and found a breach of Article 5. Whereas in *Lukanov* the incorrect classification of the conduct as a criminal offence was a result of 'a clear abuse of power',⁴¹ in *Korbely* it was the misinterpretation of the concept of crimes

³⁹ *Lukanov v. Bulgaria* 21915/93 (20/03/1997), Reports 1997-II.

⁴⁰ S. Trechsel: *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2006, p. 426.

⁴¹ *Ibid.*

against humanity that induced the ECtHR to overrule the conclusion drawn by the Hungarian Supreme Court.

Some argue that through its judgment in *Korbely* the ECtHR nullified the efforts of the Hungarian State to punish crimes committed under the communist regime.⁴² By this it has unintentionally questioned the official narrative of the 1956 events in Hungary. I would argue that *Korbely* rather shows the difficulties involved in accomplishing multiple functions in so-called historical trials. I am inclined to assume that in the period between October 23 and November 4, 1956, there were atrocities that could qualify as crimes against humanity. There have been cases where the link between a central policy to commit crimes against humanity and the conduct of identifiable individuals could have been established.⁴³ The ECtHR ruled that *Korbely* did not fall under this category. The judgment of the Court demonstrates once more the difficulties involved in finding a proper candidate for presenting a new account of history through trials conducted five decades after the events have taken place.

⁴² M. Varjú: Transition as a Concept of European Human Rights Law, p. 15. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329978&download=yes (Last visited: 22 July 2009).

⁴³ See T. Hoffmann: Individual Criminal Responsibility for Crimes Committed in: Non-international Armed Conflicts - The Hungarian Jurisprudence on the Volley Cases, in: S. Manacorda, A. Nieto (eds.): *Criminal Law Between War and Peace: Justice and Cooperation in Criminal Matters in International Military Interventions*, Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2009, pp. 735-753.

THE INTERNATIONALIZATION OF CRIMINAL JUSTICE AS POLYCENTRIC GOVERNANCE: SOME INITIAL THOUGHTS¹

by Christoph Burchard*

1. New Challenges: Narratives of internationalized criminal justice

As a prologue, an anecdote may best illustrate the object of my forthcoming analysis, that is: the challenges we – as criminal lawyers, both as academics and practitioners – already do and will increasingly face when conceptualizing the internationalization of criminal justice. Last weekend, I was given the opportunity to attend a seminar on comparative criminal law at the University of Würzburg, Germany. What truly struck me was the presentation of one student who had to compare the fight against corruption in Germany and Russia, and who started off with juxtaposing the Transparency International ‘Corruption Perception Index’ in both countries, only then to comment: ‘Germany ranks very well, at place 14, but we want and need to get better.’ The widespread and instantaneous agreement combined with the apparent lack of reflection, on the part of the presenter as well as the audience, makes me believe that the competitive benchmarking of and between criminal justice systems induces a certain ‘improvement pull’ – to modify Thomas Franck’s famous concept of the ‘compliance pull’ of (legitimate) international law.

I am far from developing this narrative into a full-blown social psychological or political theory; and of course the fight against corruption is peculiar in its international architecture, with international conventions and respective implementation monitoring being operated by international organizations as diverse as the OECD, the Council of Europe (GRECO), or the United Nations, as well as by ‘global civil society organisation[s]’ like Transparency International.

Nevertheless, an ‘improvement pull’ hypothesis may – at least partially – explain the current efforts to establish a far more comprehensive benchmark regime in Europe. These efforts aim at developing indicators and parameters which allow for an evaluation of the effectiveness of defence and of access to justice in all member states of the European Union. Such evaluations would clearly intervene in integral parts of the sovereign administration of criminal justice, and yet their design is co-financed by the European Commission.

¹ Manuscript of the author’s presentation at the AIDP Regional Conference – International Conference on Current Issues of International and European Criminal Law (Budapest, Hungary, 2 May 2009). The oral style of the presentation has not been altered; footnotes and references have only been sparsely added.

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2. Three research interests

Let me stop right here with providing anecdotal evidence of the new phenomena that the internationalization of criminal justice brings with it, and let me move on to my three research interests – research that is still very much in progress so that I am indeed very much looking forward to your comments, suggestions, and critique.

First of all, I am interested in the politics (that is: the processes), the polities (that is: the institutional frameworks), and the policies (that is: the contents) that inspire, drive, shape, and determine the modern administration of criminal justice.² In this respect, I suggest going beyond positivism and its focus on the ‘mere’ application and interpretation of a given – hard – law. This is not to say that this is not important; on the contrary. It is merely to say that the application and interpretation of law is but one aspect of the modern evolution – be it progressive or atavistic – of internationalized criminal justice. That is why I posit that a more holistic analytical approach is needed, one that analyzes criminal policies in light of insights of political science and law & society research. In order to both causally explain the consequences of this evolution and to interpretively understand them (*Max Weber*), I suggest an analytical differentiation between four prototypical phases: policy initiation, decision making, implementation, and enforcement. These phases are, of course, not structured in a linear manner.

Second, and continuing at this sociological vantage point, traditional and state-centred criminal law is predominantly about institutions whose primary function is to directly coordinate (and here I use coordination in a wide sense) human activity and to master – however crudely – their interdependence. Yet I find that the internationalization of criminal justice is predominantly – with the notable exception e.g. of direct criminal proceedings before the International Criminal Court – concerned not so much with direct or first-order coordination, but with ‘second-order coordination’ between criminal justice systems or legal orders,³ e.g. by giving precedence to one of several criminal justice systems which all have jurisdiction over one crime. It is in the problems and solutions of this second-order coordination that I am particularly interested in, and how these problems and solutions of second-order coordination are common or distinct in the various areas of internationalized criminal justice:

- This includes the diverse issue-specific fields like the international core or cyber-crime regime, or the fight against terrorism, corruption, or doping etc.

² See J. Vogel: Europäische Kriminalpolitik, paper presented at the ‘Kriminologisch-Kriminalpolitischer Arbeitskreis’, University of Tübingen, 21 November 2008, on file with the author.

³ L. Hooghe and G. Marks: Unraveling the Central State, but How? Types of Multi-level Governance, 97 *American Political Science Review* (2003) p. 233, 239 (emphasis in the original).

- And internationalized criminal justice thus also pertains to territorially bracketed areas like the European Union or multilevel federal systems like in the United States.

To build an analytical framework, it would appear to me that we can draw inspiration from our colleagues from international, constitutional, and administrative law as well as from political science. For these disciplines seem acutely aware of what lies at the heart of second-order coordination:

- the fall of the *Weberian* state and its monopoly of legitimate force;
- the destabilization of traditional hierarchies of regulatory regimes;
- the diffusion and, at the same time, proliferation of authority, which no longer rests solely with 'the' sovereign;
- and ever increasing spillovers (e.g. in the form of negative or positive externalities) between partially integrated but far from consolidated and thus fragmented (or to use James N. Rosenau's term of art: 'fragmegrated') penal regimes (be they local or municipal, regional, national, or supranational in nature).

This advent of something 'new' (others would rather say, in reminiscence of the Holy Roman Empire, the renaissance of something old) has created much conceptual noise and dictates terminological caution, modesty, and humility. I thus suggest drawing on established concepts to analyze the modes and instruments of second-order coordination, and thus posit an analysis of 'The Internationalization of Criminal Justice as *Polycentric Governance*':

- The polycentricity of our internationalized administration of justice is to capture that *for one set of facts* all too often a multitude of legal regimes claim jurisdiction, or more metaphorically: that internationalized criminal justice is fishing not only with one, but with several nets, be it in parallel or consecutively.
- Polycentricity also implies that *one legal question* – e.g. When does the 'average' defence right to consult with counsel start? Or: Does an 'extraordinary' historical trial violate the *nullum crimen* principle? – may be *influenced* by several legal orders, e.g. a national code of criminal procedure which is to be interpreted in light of the European Convention on Human Rights or the Vienna Convention on Consular Rights, and – according to the German Constitutional Court – also in the light of the specific jurisprudence of the ECtHR or the International Court of Justice.
- Finally, polycentricity also connotes that this very legal question may find different answers in different fora applying different methodologies, fora that are competent and empowered to answer to differing degrees – e.g. the ECtHR, as an international court, maybe being more competent to review the national interpretation of international humanitarian law – and indeed fora

that are related to each other by highly diverse modes of coordination. Modes of coordination such as organized hierarchy, dynamic hierarchy,⁴ mutual recognition and respect,⁵ or competition.⁶

My focus on governance brings me to my final and *third* research interest which is aptly enunciated by the slogan that governance is wider and not synonymous with government or governing. This is to signal that modern internationalized criminal justice knows a multitude of actors that clearly transcend the limited scope of traditional analyses, namely:

- principals, agents, and trustees;
- public, private, and societal actors;
- intranational, transnational, international, and supranational actors;
- and, finally, hybrid actors in all their facets.

I therefore posit that we can only aptly conceptualize the internationalization of criminal justice if we do not develop blind spots with regard to the various players on the field – this is vividly illustrated by my opening example of Transparency International, which commentators deem to be of vital importance in the initiation, facilitation, and implementation of anti-corruption conventions and laws around the globe.

As a preliminary summary, I thus aim to explain and understand, as neutrally as possible,

- governance modes and instruments that are pertinent to second-order coordination problems
- as they are employed by and as they affect various (traditional as well as 'new') actors (regulatory subjects and objects, if you want) in all phases of the evolution of internationalized criminal justice.

Before adding some flesh to these bones, let me point out that my approach, which is inspired by political and social science, has good academic and personal company (the latter, of course, being the most conventional validation of my approach): *Sieber* has just offered a 'new approach' to European criminal law

⁴ As is now the case with regard to transnational *ne bis in idem* in Europe, which – according to the jurisprudence of the European Court of Justice – gives precedence to the first jurisdiction reaching a verdict under Art. 54 Schengen Agreement.

⁵ As the *Bosphorus* case now seems to define the mutual relationship between the ECJ and the ECtHR.

⁶ As one might interpret the consequences of the jurisprudence of the ECJ in the UN-determined, so-called 'smart sanction', terrorist lists.

which focuses on 'regulatory contents' rather than on sources of law.⁷ And Vogel recently articulated: 'whoever is academically dealing with the politics of criminal law [Kriminalpolitik], is practicing political science'⁸ – I cannot agree more, and would like to add that whoever is academically dealing with the internationalization of criminal law is to study international law, too.

2.1 Policy initiation: Solving the (anticipated) national veto player problem

Let me now offer some – however brief – glimpses into the analytical potentials that an actor-open, polycentric-governance approach promises, and let me start with the first prototypical phase: Policy Initiation, that is: norm entrepreneurship and the putting of regulatory change onto the political agenda. I would now like to turn your attention to two seemingly contradictory developments: the strengthening and the weakening of state actors as norm entrepreneurs. These developments are characterized by a redistribution of agenda-setting powers:

The weakening of national actors, for example, becomes apparent in how the General Assembly mandated UNODC to lobby for the ratification of the UN Conventions against Terrorism – and thus how the GA mandated UNODC to effectively enter into national political agenda setting.

As to the strengthening of national actor, I would only like to raise the issue of 'policy laundering' – a phenomenon that might shed some light on where the problems of the internationalization of criminal justice originate from, namely not from the international but from the national level.

Or, as a further case study, it is conventional wisdom (if not 'consensus'⁹) that the European integration has rearranged – indeed unbalanced and perverted, as some would argue – the national agenda-setting and decision-making frameworks, and therein strengthened the executive (that is: a specific national actor) vis-à-vis other constitutional (that is: national) actors, especially institutional veto players (like parliaments, local governments, or constitutional courts) or partisan veto players (like the democratic opposition). Moravcsik's seminal identification of the following four causal mechanisms is of importance not only for the Europeanization but also more generally for the internationalization of criminal justice: 'By transforming issues traditionally defined as 'domestic policy' into 'foreign policy,' international engagement can open and close channels for domestic actors to influence the initiation of policy (initiative); alter the domestic

⁷ U. Sieber: Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems, 121 *Zeitschrift für die Gesamten Strafrechtswissenschaften* (ZStW) (2009), p. 1, 2.

⁸ J. Vogel, *op.cit.*

⁹ W. Phelan: Does the European Union Strengthen the State? Democracy, Executive Power and International Cooperation, *Center for European Studies, Working Paper No. 95*. Available online at www.ces.fas.harvard.edu/publications/docs/pdfs/Phelan95.pdf (last visited 29 April 2009).

constitutional and statutory procedures under which policy decisions are ratified and implemented (institutions); create or redress asymmetries in knowledge (information); and reshape the possibilities for domestic actors to justify policies (ideas).¹⁰

To integrate this observation into an analysis of the policy initiation phase in general, let me undertake one intermediate step: While the first three theorems – that Europeanization and internationalization processes strengthen the initiative powers, the autonomy, and the informational advance of the executive – face the plausible objection that these processes only add(ed) marginally to the already strong powers of the executive,¹¹ the last theorem warrants closer inspection and, perchance, some minor amendments:

For at least in the countries that are – to use a quip – from Venus (while countries from Mars, like the United States, are a wholly different subject-matter), traditional institutional veto players are all too often quashed by internationally procured obligations, especially where international efforts to curb transnational crime radiate legitimacy and commitment to a common cause (like the formidable, yet vague and thus exploitable European idea of a common area of security, freedom and justice). Moreover, these institutional veto players all too often do not and cannot consider the option of breaking away as reasonable and realistic, especially where path dependencies attach or where breaking away in one instance would cause too many negative externalities for the institutional superstructure.

To give an example, this proved true with regard to the German implementation of the European Arrest Warrant, where German parliamentarians – in the first round of implementation in 2004 – explicitly stated that they felt disempowered and unable to disagree with the European specification as they were developed by their own government in the European Council. Although this first round of implementation was invalidated by the German Constitutional Court, also this national veto player did not stand up against Europe, and thus refrained from – at least openly – jeopardizing overall European integration.

One might be wondering, and rightly so, why I address these apparent changes of national decision-making processes in this section about policy initiation: But please do not forget that a rational executive will anticipate the limited possibilities (whether felt or real) of their veto players at home. In this respect, it is safe to hypothesize, and find empirical examples aplenty, that this executive will play their policy initiatives via the international or European level where they fear national resistance. Let me only refer to the notorious multilateral

¹⁰ A. Moravcsik: Why the European Community Strengthens the State: Domestic Politics and International Cooperation, *Center for European Studies, Working Paper No. 52*. Available online at <http://www.ces.fas.harvard.edu/publications/docs/pdfs/Moravcsik52.pdf> (last visited 29 April 2009).

¹¹ Phelan, *op.cit.*

Prüm Decision, which was sponsored by the German Minister of the Interior, Wolfgang Schäuble, and which foresees far-reaching infringements of the 'German *Datenschutz*', infringements that the German *Bundestag* is unlikely to have passed unilaterally.

The introduction of a new internationalized level for policy initiation thus brings with it the risk of so-called '*policy laundering*' which represents an international strategic solution for a specific national actor, the executive, to confine its national veto players, like parliaments or courts. This strengthens the executive in their successfully initiating policy change (which might be good in terms of effectiveness or outcome legitimacy) while of course at the same time corrupting and eroding the very basis of the national constitutional arrangements (which might be bad in terms of democratic or input legitimacy, and which might thus require compensation, e.g. by increased participation on the part of the European Parliament).

Upon reflection, then, this analytical glimpse into the intricacies of internationalized policy initiation and agenda setting reveals that the internationalization of criminal justice must not be, from a normative vantage point, disqualified per se. What becomes apparent is that the internationalization problems might actually lie at the national arena, in the transformation of 'domestic policy' into 'foreign policy' by a power-seeking national executive.

2.2 Decision-making: Solving the legalization problem

The second prototypical phase that I suggest exploring by means of polycentric governance is the decision-making phase. One could address decision-making pertaining to second-order coordination in terms of the degrees of legalization that international decisions are bound to have – degrees of legalization as can be operationalized in terms of the degrees of obligation, precision (the term constructive ambiguity comes to mind), and delegation (e.g. to third actors which are either to clarify the original decision – as exemplified by the Commission fleshing out the ICC's Elements of Crime – or to provide an institutionalized conflict solution).

Another good case study is the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceeding and the decisions that will flow from the decision-making processes prescribed therein, decisions to give precedence to one over another jurisdiction where both apply to one potential (!) crime: For what the Framework Decision effectively does is to formalize and institutionalize the 'Open Method of Coordination'. The concept of the 'Open Method of Coordination' was introduced in the European Council of Lisbon in March 2000, and now seems to have found its way from its origin in Employment and Economic Policy to European criminal matters. The 'Open Method of Coordination' (or OMC)

is – *inter alia* – characterized by mere intergovernmental consultations and deliberations, as it holds true with regard to the Framework Decision in question. These consultations and deliberations are highly non-transparent, which raises problems of accountability, which in turn finds verification in the Framework Decision in that there is no hierarchy of criteria for selecting ‘the best suited’ jurisdiction. Finally, the decisions reached by the OMC are soft law at best, and are not open to any judicial review, as it again holds true for our Framework Decision. The Framework Decision is – other than, for example, the ‘Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union’ – obviously not inspired by affording to the defendant the right to a legally determined jurisdiction (to play with the [in]famous German ‘*Recht auf den gesetzlichen Richter*’); rather, the Framework Decision is evidently striving for a predominantly cost-minimizing (monetary or political) settlement of inter-jurisdictional conflicts.

2.3 Implementation: Solving the free rider & prisoner’s dilemma problem

The third of my prototypical phases is the implementation phase, where the institutional basis is to be laid to enforce a decision, especially as law in books and (!) in action.

One problem is the vagueness problem, and the potential but also the threat of international organizations like UNODC to define ambiguous decisions in the course of providing legal technical assistance, for example by drafting implementation legislation and tailoring it to the needs of a ‘needy’ – for whatever reasons – country. That this is yet again an ‘outsourcing’ of integral parts of sovereignty to an international centre of activity needs no explanation.

Another polycentric governance instrument that I would like to briefly address is evaluation: It would appear that until the mid-1990s, implementation was not of particular concern for international lawyers and policy makers. Indeed, the ‘acquisition’ of a state party to an international agreement was often already considered the big success for the overall policy goal, e.g. the upholding of humanitarian standards in times of armed conflict, so that international decision-making in turn led to this policy goal falling on the importance scale of the political agenda. Follow-up mechanisms supervising whether a state party had only paid lip service or whether it had actually effectuated its international commitments nationally also faced the impermeability of the sovereign borders of a legal order so that effective implementation supervision was rare at best.

The problems following and flowing from this lack of consideration of implementation are evident: States were invited to free ride, they were invited to be protected by the same common resource – the international fight against corruption, for example –, even though they did not ‘pay’ for their fair share of this resource – e.g. by ensuring that corruption was effectively prosecuted; even

worse, their evasion could even completely unbalance the whole (unlevelled) playing field – e.g. because subnational actors of the defecting party (transnationally operating corporations, for example) were effectively shielded from the criminal prosecution of bribery abroad, which left these subnational actors with a strategic advantage. Connecting free riding with the prisoner's dilemma theorem, states as rational actors had low incentives to implement their international obligations without any instruments of compliance governance in place.

The modern mainstream solution to both problems was interestingly enough not found in a possible adjudicative approach, were violations of implementation obligations be brought before an international court or chamber, but in various types of evaluation processes, be they mutual¹² (like under GRECO's anti-corruption regime) or centralized (like under the OECD anti-corruption regime). Again, we must keep an open eye to the nature of the actors involved when analyzing the effects of such implementation evaluation as polycentric governance. For first of all, evaluation delegations are far from only comprising public officials, and epistemic communities, especially academics, are introduced into the equation. These epistemic communities – from time to time also individuals, like Marc Pieth, the chair of the OECD's Working Group on Bribery – can influence the evolution of the administration of justice with their analyses, recommendations, and conclusions. Why negative evaluation is indeed, as it is a veritable stick to drive sovereign states towards compliance, has not yet been fully determined: interstate naming & shaming, indeed pejorative interstate labelling, is one possible answer; but equally important seems to be – and this is where everything truly becomes difficult – the domestic impact of negative evaluations, e.g. once partisan subnational actors, like the democratic opposition, are enabled to use them to their own ends.

2.4 Enforcement: Solving the collision problem

The last and maybe most pressing of my prototypical analytical phases is enforcement. From my point of view, the enforcement of partially integrated, but essentially still fragmented legal regimes, raises two theoretical problems: availability and collision. The latter we already saw with regard to the 'Council

¹² GRECO evaluation procedures involve the collection of information through questionnaire(s), on-site country visits enabling evaluation teams to solicit further information during high-level discussions with domestic key players, and drafting of evaluation reports. These reports, which are examined and adopted by GRECO, contain recommendations to the evaluated countries in order to improve their level of compliance with the provisions under consideration. Measures taken to implement recommendations are subsequently assessed by GRECO under a separate compliance procedure. http://www.coe.int/t/dghl/monitoring/greco/evaluations/intro_EN.asp (last visited 2 May 2009).

Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings’.

A prominent case study for the former availability problem is the European Arrest Warrant, which is essentially to remedy the fact that the law enforcement agencies of EU Member States are not yet allowed to venture beyond their sovereign borders to get hold of a suspect. What needs closer scrutiny, however, is the role or position of the law enforcement agencies of the enforcing (that is in classical terminology: the requested) state that execute the ‘extradition warrant’ (that is in classical terminology: the extradition request) – are they still agents of the enforcing state, or are they also (!) becoming agents of the issuing (that is in classical terminology: the requesting) state, or are they actually becoming transnational agents of the overarching European criminal justice system of a common area of freedom, security and justice? The more we slightly tend towards the latter of the two options, the more we need to challenge the traditional cooperation or legal assistance interpretation of the execution of an EAW, and the more we would need to reinterpret it as original administration of justice, with intricate consequences, e.g. for deleting double criminality.¹³

The European Evidence Warrant (EEW) also exemplifies the availability problem, one concerning evidence. The EEW is a governance instrument that raises legal theoretical and political questions that are of the most intricate nature. Indeed I think that it challenges our very understanding of territorially-bracketed sovereignty, for the domestic gathering of evidence in Europe could be developed into having transnational effects.

3. Outlook

Let me finally come to an end – we started in a student seminar in Würzburg only to arrive at possible new concepts of sovereign statehood. The examples and the governance structures that I drew on in my presentation are to incur the wrath of eclecticism; yet if this is a call for more examples, for deeper and for broader structuring, for explaining and understanding the internationalization as polycentric governance more thoroughly – well then I would indeed find myself on the right course.

¹³ I nevertheless support the deletion of the double-criminality requirement because an open *ordre public* test also serves the purposes. That we delete institutionalized international political comity, one of the main rationales of the double-criminality requirement, and thus have extradition courts spell out the ‘truth’ about why they do not comply with an EAW, might even be a better catalyst for legal reform or ideological change across Europe.

**AUT DEDERE AUT JUDICARE AND UNIVERSAL JURISDICTION:
DIFFERENT INTERPRETATIONS**

*by Minna Kimpimäki**

Universal jurisdiction was one of the topics of the 18th International Congress of Penal Law, held in Istanbul in September 2009. At the congress, it became fairly evident that scholars have no common understanding of the content, legitimacy or desirability of this type of jurisdiction. This is regrettable, because universal jurisdiction necessarily involves international connections; it can never be a merely national matter.

By way of background, I would like to point out that I come from Finland, a country where universal jurisdiction has been very widely adopted in legislation, but hardly ever used in practice. According to chapter 1, section 7 of the Finnish Penal Code and the decree regulating the application of the section, Finnish law applies to more than 20 different types of offences regardless of the law of the place of commission. These 'international offences' are listed in the decree. The list contains a wide selection of different offences, such as counterfeiting, war crimes, genocide, narcotics offences, offences committed against aircraft or internationally protected persons, hostage taking, and torture. Common to all of the offences is that they are regulated in one or more international agreements.

Chapter 1, section 7 of the Finnish Penal Code states that the main legal rationale for the adoption of universal jurisdiction is an international obligation assumed by the state: 'Finnish law applies to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or a regulation which is internationally binding on Finland'. This is a somewhat problematic statement in that there is no general consensus on how the jurisdictional rules of international agreements should be interpreted.

In international treaties, articles concerning jurisdiction are usually formulated so that the states parties are obliged to establish jurisdiction over certain acts, for example offences committed in their territory or onboard a vessel that is flying their flag. Offences committed by a national of a state party are also often – but not always – mentioned on the compulsory lists. Usually, articles regulating jurisdiction also contain some forms of jurisdiction that are available to the states parties, but are not compulsory.¹

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¹ See e.g. The International Convention for the Suppression of Terrorist Bombings, 25 November 1997, U.N. Doc. A/52/49 (1998), Art. 6, par. 1-2: '1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when: (a) the offence is committed in the territory of that State; or (b) the offence is committed on board

The lists vary from treaty to treaty, but one feature that they share is that neither the compulsory nor the optional lists mention any forms of jurisdiction that would entail the exercise of universal jurisdiction. However, the lists are not exhaustive; this is made clear by the fact that most treaties include a rule stating that they do not exclude any criminal jurisdiction exercised in accordance with the domestic law of a state party. Some treaties add that this kind of domestic jurisdiction should comply with the norms of general international law.

The determination of the extent of domestic jurisdiction is for the most part a national matter; some limits are set in any event. One basic point of departure where criminal jurisdiction is concerned is that a link is required between the criminal act and the state that exercises jurisdiction. The principle of universality is an exception to this rule in that it requires no such link: it allows a state to extend its jurisdiction over certain offences regardless of where they have been committed, and regardless of the nationality of the offender and the legislation of the state in which they are committed. Accordingly, the principle of universality is the only basis for jurisdiction that could, at least in theory, make criminal jurisdiction wholly unlimited. In giving a state jurisdiction over all offences committed anywhere the principle of universality would render all the other principles of jurisdiction unnecessary. Yet, the principle of universality has not been applied this broadly in practice: it has complemented the other principles of jurisdiction as a principle whose scope is restricted to certain serious offences, for example offences that violate common 'legal goods' and that states are committed to preventing.

In the resolution of the 18th International Congress of Penal Law, the scope of universal jurisdiction was limited to 'the most serious crimes of concern to the international community as a whole and particularly those defined in the Statute of the International Criminal Court'.² This phrase leaves a great deal of room for different interpretations. It is fairly generally accepted that states have a right to exercise universal jurisdiction over core international crimes on the basis of customary international law. In some cases, states may even have an obligation to do so. Core international crimes are not, however, the focus of this presenta-

of a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or (c) the offence is committed by a national of that State. 2. A State Party may also establish its jurisdiction over any such offence when: (a) the offence is committed against a national of that State; or (b) the offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or (c) the offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or (d) the offence is committed in an attempt to compel that State to do or abstain from doing any act; or (e) the offence is committed on board an aircraft which is operated by the Government of that State'.

² International Association of Penal Law (AIDP), Resolutions of the 18th International Congress of Penal Law, Section IV – International Criminal Law, Universal Jurisdiction, Chapter I, section 2.

tion. My principal interest here lies in what are known as common international crimes. The main question is to what extent states are allowed – or, indeed, required – to apply universal jurisdiction in the case of such offences. Because international agreements do not usually lay down clear provisions on universal jurisdiction, the right or obligation to exercise such jurisdiction depends on how one interprets the obligation '*aut dedere aut judicare*'.

The *aut dedere aut judicare* obligation is included in almost all modern international treaties that deal with international crimes. It imposes on the states parties an obligation to establish jurisdiction over the offences set out in the treaty if the alleged offender is present in the territory of a state and it does not extradite him or her to another state that is willing and able to prosecute.³

These provisions have been incorporated into treaties as a compromise designed to reconcile views promoting wide international jurisdiction and views favouring the extensive use of extradition. This kind of regulation allows a state to choose between extradition and exercising its own jurisdiction. States parties may either extradite the alleged offender or initiate proceedings under their own legal systems as long as the actions of the states are taken in good faith and do not entail an abuse of rights.

Aut dedere aut judicare provisions do not necessarily oblige states to establish universal jurisdiction, but at least in some cases universal jurisdiction may in practice be the only way to fulfil the obligations in the provisions. All the other principles of jurisdiction are limited in one way or another, and states are not always willing or able to extradite. In practice, this means that the exercise of universal jurisdiction should be allowed to some extent; if it were not accepted, the implementation of the obligations set by international conventions would become difficult, at least in certain special situations. The obligation to extradite or prosecute requires that a state has legislation setting out a jurisdictional model that makes it possible to bring proceedings if the offender is in the territory of the state and will not be extradited to another state for prosecution. In many cases, proceedings may be brought on the basis of other principles of jurisdiction, but universal jurisdiction should also be available for states if they find it necessary.

Questions relating to *aut dedere aut judicare* obligations and jurisdiction are made more complicated by the fact that the provisions of the treaties setting out the obligations are not identical. There are not only differences in linguistic expression, but also significant differences in substance. Most agreements that deal with terrorism-related offences include a general formulation of the *aut dedere aut judicare* obligation. The comparable provisions in agreements dealing

³ See e.g. The International Convention for the Suppression of Terrorist Bombings, Art. 6, par. 4: 'Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.'

with organised crime differ from these general provisions in that they often have a twofold structure: they oblige member states to establish jurisdiction if they deny extradition on certain grounds, for example the fact that the alleged offender is a national of the state. In other situations, prosecution is not an obligation for the states but just an option that is available to them.⁴

Today, most Western states seem to apply universal jurisdiction not only to core international crimes, but also to at least some common international crimes. In most states, the extent of universal jurisdiction is not quite as wide as in Finland, where it is connected to essentially all common international crimes that are regulated in international agreements to which Finland is a party. In many states, however, universal jurisdiction applies to at least some terrorism-related offences as well as to certain forms of organised crime.⁵ Domestic rules are formulated in different ways and the extent of universal jurisdiction varies accordingly. There are several reasons for this variation. One is that international criminal law is evolving very quickly indeed and domestic legislation is not always up to date. Secondly, states have interpreted their international obligations in different ways and differ in the extent to which they have taken advantage of the options that international law has given them. It is also important to remember that universal jurisdiction is only one part of the jurisdiction adopted by a state. If, for instance, a state makes extensive use of extradition or of what is known as vicarious administration of justice, a wide scope of universal jurisdiction might not be particularly necessary. At the moment, international law allows a great deal of variation. Since there are no exact international law rules regulating the scope and exercise of universal jurisdiction, the establishment of universal jurisdiction can hardly be considered an abuse of criminal jurisdiction, at least in cases where that jurisdiction is based on an international agreement containing an *aut dedere aut judicare* obligation.

Yet, it is not only the scope of universal jurisdiction that differs in different states; the prerequisites for exercising this jurisdiction are also understood and applied in different ways. One important question, for example, is whether the exercise of universal jurisdiction presupposes the presence of the alleged offender in the territory of the state. Here, I should point out that I am not speak-

⁴ See e.g. The United Nations Convention against Transnational Organized Crime, 15 November 2000, Doc. A/55/383, Art. 15, par. 3-4: '3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals. 4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.'

⁵ See I. Blanco Cordero, Universal Jurisdiction. General report, *Revue Internationale de Droit Pénal* 1-2 (2008); Universal Jurisdiction, National reports, *Revue Internationale de Droit Pénal* 1-2 (2008), CD-ROM Annex.

ing about *in absentia* trials but about *in absentia* jurisdiction. Some states exercise universal jurisdiction only when the alleged offender is present in the state, whereas others take a broader approach allowing them to request extradition on the basis of universal jurisdiction. International law does not, strictly speaking, forbid investigations or requests for extradition on the basis of universal jurisdiction even when the suspect is not in the territory of the state seeking to prosecute. In practice, however, there might be good reason to restrict the exercise of universal jurisdiction to cases where the alleged offender is present in the area of the state concerned. Otherwise, a state's jurisdiction would include a large group of crimes that it would have a poor possibility of prosecuting. And even if prosecution were possible, a state with no link whatsoever to the offence or the alleged offender would rarely be the best place to deal with the case. I would nevertheless be hesitant to absolutely forbid the unconditional exercise of universal jurisdiction. The exercise of universal jurisdiction is in most cases a better option than a total failure to bring charges against a person who has committed a serious international offence. It is clear, however, that the *aut dedere aut judicare* obligations in international treaties only apply if the alleged offender is present in the territory of the state concerned.

Even if we consider that universal jurisdiction may be applied to crimes for which states have a right or an obligation to extradite or prosecute, this does not mean that it would be possible or practical to apply it in all potential cases. In many situations, extradition may be a better option than prosecution on the basis of universal jurisdiction. The 18th International Congress of Penal Law accepted this point of view, stating in its resolution that universal jurisdiction should be exercised with self-restraint.⁶ To date, states have in any event had quite extensive discretion to decide if and when they exercise their jurisdiction.

In January 2009, the Council of the European Union prepared a proposal for a framework decision on the prevention and settlement of conflicts of jurisdiction in criminal proceedings.⁷ The aim of the proposal was to set up a new consultation mechanism for situations where an offence being investigated in one member state has a significant link to one or more other member states. The adoption of the proposed decision would have meant a positive development, as it aimed to prevent and settle conflicts of jurisdiction; then again, the wording of the final document proves that the European states are still not ready to accept international rules that would considerably limit their power to determine the range of their criminal jurisdiction.

⁶ International Association of Penal Law (AIDP), Resolutions of the 18th International Congress of Penal Law, Section IV – International Criminal Law, Universal Jurisdiction, Chapter II, section 1.

⁷ Proposal for a framework decision on the prevention and settlement of conflicts of jurisdiction in criminal proceedings, EU doc. 5208/09 COPEN 7.

What was interesting in the draft framework decision was that according to it the decision whether a certain link is regarded as significant was not to be made solely on the basis of traditional principles of jurisdiction but on a case-by-case assessment taking many different factors into account. Traditional considerations were mentioned, such as the place where the offence has occurred, the nationality or residence of the accused person and the place where most of the damage was sustained, but additional, more practical factors were also included, such as the interests of the victims, the interests of the accused persons, the location of important evidence, the residence of the most important witnesses and the economy of the proceedings. If the framework decision had been accepted in this proposed form, it might have meant that formal principles of jurisdiction would have lost some of their importance, as the aim was to conduct criminal proceedings in the state that is the most appropriate for each particular case. This new mechanism might have somewhat restricted the use of universal jurisdiction: On the one hand, it might have encouraged a state proceeding on the basis of universal jurisdiction to surrender or extradite the alleged offender to a state that is considered more appropriate; on the other, a state willing to prosecute solely on the basis of universal jurisdiction would rarely have been considered as having the most significant link to the case.

Unfortunately, Council Framework Decision 2009/948/JHA of 30 November 2009 on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings has much less ambitious objectives than the proposal. The document adopted only aims to prevent situations where a person is subjected to parallel criminal proceedings in different member states in respect of the same facts. In other words, the framework decision seeks to prevent an infringement of the principle of *ne bis in idem*. The main aim of the framework decision is not to seek agreement on the best-placed jurisdiction for conducting criminal proceedings, but to reach consensus on an effective solution aimed at avoiding the adverse consequences arising from parallel proceedings. The wording of the framework decision reveals that the European states were not able or willing to take the opportunity to make the choices regarding criminal jurisdiction more objective, transparent and uniform.

It seems that, to date, most states have not been very eager to exercise universal jurisdiction. After the establishment of the ICTY and ICTR, European states and their national courts seemed to become somewhat more active in implementing international criminal law and universal jurisdiction was exercised more often than before. Most of the cases have dealt with core international crimes committed in Rwanda or on the territory of the former Yugoslavia. Considering how many common international crimes are committed, the application of universal jurisdiction for such offences seems to be a rare occurrence. States do not have enough interest in prosecuting, or practical possibilities to prosecute, all the offences they would be entitled to. Finland is quite an extreme example

of this: Even though the scope of universal jurisdiction is very wide in Finnish legislation, it has had practical importance only twice. In 2000, the Prosecutor General issued a prosecution order on the basis of universal jurisdiction in a case that dealt with certain drug-related offences committed in the Netherlands. This case was not the most straightforward example of the exercise of universal jurisdiction, however, because the alleged offenders were nationals or at least permanent residents of Finland, and the case thus had a clear link to the country. Another Finnish case based on universal jurisdiction dealt with core international crimes committed in Rwanda in 1994. In this case, a Rwandan citizen living in Finland was prosecuted for genocide or, alternatively, on fifteen counts of murder/incitement to murder. The district court of Itä-Uusimaa sentenced the defendant to life imprisonment for genocide in June 2010.⁸ Where genocide was concerned, the court based its jurisdiction on legal provisions dealing with universal jurisdiction.

For obvious reasons, states seem to have only a limited interest in prosecuting offences committed abroad unless these crimes harm their specific interests. This might be a problem in that an excessively narrow use of universal jurisdiction hardly promotes international accountability. It is important to remember that, unlike in the case of core international crimes, no international criminal tribunals are available for common international crimes. Therefore, the choice is not between national and international courts but between national courts of different states and sometimes even between impunity for the offender and the exercise of jurisdiction in a state that has no link to the crime. As decisions on whether universal jurisdiction is exercised or not are made on a case-by-case basis, this approach might lead to a selective and unpredictable use of such jurisdiction. On the other hand, an excessive exercise of universal jurisdiction may cause problems and controversies as well. Universal jurisdiction carries the risk of politically motivated charges, and even when a state acts in good faith, implementing the legal process may involve diplomatic conflicts between states and problems in obtaining evidence. The most efficient and fairest approach is often to deal with a case where the offence has occurred, but this solution is not always available. States that have the closest link to the offence are not necessarily willing or able to prosecute the alleged offender. Extradition to the state that has the closest link is not always possible either, for example because that state cannot guarantee a fair trial or other human rights for the accused. This is why universal jurisdiction is needed. This is especially evident in situations where the alleged offender is present in the territory of the state. The mere presence in a state of a person suspected of serious international offences jeopardises the interests of that state. In such instances, the state has a clear interest in exercising its jurisdiction, because states do not, as a rule, want to become havens for international

⁸ The district court of Itä-Uusimaa, Case R 09/404. The decision is subject to an appeal.

criminals. The exercise of universal jurisdiction should, however, be restricted to situations in which prosecution in the state where the offence was committed or in the home state of the offender is not a fairer and more reasonable alternative.

When dealing with core international crimes, the need for universal jurisdiction is usually justified by the serious nature of the offences, by the need to protect the most elementary human rights and by the fact that states where such offences are committed have often, in one way or another, been involved in the offences. Some of these reasons also apply in the context of common international crimes. Some terrorism-related offences, for example, may in many respects resemble core international crimes. The need for wide extraterritorial jurisdiction may also be justified by the transnational nature of international offences, but it is important to note that very often universal jurisdiction is neither the sole nor the best option in such cases. Where the prevention and prosecution of transnational offences are concerned, international co-operation is often a better option than the extensive exercise of universal jurisdiction.

Universal jurisdiction is hardly ever the best imaginable option, but in practice it might very well be the only option available in certain situations. In this world that is far from ideal, universal jurisdiction is therefore needed. A comparative analysis of domestic laws reveals that states have considered this kind of jurisdiction to be necessary not only for core international crimes but also for at least some common international crimes. Different interpretations and applications have been inevitable, as rules and principles concerning universal jurisdiction have for the most part been created by individual states and scholars. It would be desirable to elaborate a more comprehensive approach that takes into account the international nature of universal jurisdiction. International efforts to define and regulate universal jurisdiction are therefore extremely important.

THE IMPLEMENTATION OF THE ICC STATUTE IN GERMANY

by Thomas Weigend*

1. Introduction

In the 1990s, international criminal law experienced a surprising renaissance after a long period of stagnation. The institution of the *ad hoc* tribunals for the former Yugoslavia and Rwanda followed by the adoption of the Statute of the International Criminal Court in 1998 introduced a new dawn for the ancient idea of a supranational jurisdiction for the most serious crimes against international law.¹ Germany supported this development and was one of the 'like-minded' States at the Rome Conference of 1998, favouring the creation of a strong and independent court.

But how did Germany's national law reflect the new situation? It soon became evident that Germany was not quite ready for the new era of combating the impunity of perpetrators of crimes against humanity and war crimes. Germany did provide for the punishment of genocide² in accordance with the Genocide Convention,³ and §§ 80 and 80a of the Penal Code prohibited the acts of preparing and inciting aggressive war. But there existed no specific legal rules on war crimes and crimes against humanity. Of course, most acts⁴ constituting such offences under international law were also punishable under German law. But they were only covered as 'ordinary' offences, e.g., as manslaughter, deprivation of liberty, coercion or assault. The specific international dimension of these offenses – the violation of the peace and security of mankind – was not reflected in the penal law.⁵

When Germany decided to ratify the ICC Statute it thus not only became necessary to enact legislation enabling the German authorities to cooperate with

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¹ On the formation of the International Criminal Court, see *Bassiouni*, *The Legislative History of the International Criminal Court*, 2005; *Cassese, Gaeta and Jones*, *The Rome Statute of the International Criminal Court. A Commentary*, vol. I, 2002, sec. 1: 'The path to Rome and beyond'.

² § 220a Penal Code in the version of the Code which was valid at the time. In 2002, the crime of genocide was transferred from the Penal Code to § 6 of the new International Crimes Code (*Völkerstrafgesetzbuch*, *Bundesgesetzblatt* 2002, vol. I, p. 2254); see below.

³ Convention on the Prevention and Punishment of the Crime of Genocide, U.N. GA Res. 260 (III) A of Dec. 9, 1948.

⁴ There arguably existed a few lacunae. For example, 'utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations' or transferring parts of the civilian population of an occupying power into occupied territory (war crimes according to Art. 8 (2) (b) (xxiii) and (2) (b) (viii) ICC Statute) may not have been crimes under domestic German law as it then existed.

⁵ See *Kreß*, *Vom Nutzen eines deutschen Völkerstrafgesetzbuchs*, 2000, pp. 9-17.

the ICC in individual investigations and prosecutions (2.1); Germany also faced the question of whether and how to transform the substance of international crimes into its domestic law (2.2). Finally, Germany had to deal with the question of jurisdiction: should national courts be limited to adjudicating offences committed in Germany or by German nationals, or should the principle of universal jurisdiction apply, making the German courts competent to deal with international crimes wherever and by whomever they were committed (2.3)? In seeking answers to these questions, the German legislature sought to support the general purpose of international criminal law, that is, to do everything in its power to bring perpetrators to justice, to avoid impunity and to adjudicate suspects in accordance with general standards of fairness.

2. Adapting German law

2.1 Cooperation

In 2002, Germany passed a special statute on cooperation with the ICC.⁶ Under this statute, German courts and government agencies are obliged to honour requests made by the organs of the ICC, generally following the model of cooperation in criminal matters as laid down in Germany's statute on international legal assistance (*Gesetz über Internationale Rechtshilfe in Strafsachen*, IRG⁷). Cooperation with the ICC is, however, unconditional, and certain exceptions frequently recognized in international cooperation, e.g., immunities and the political offence exception, are not applicable in this context. Most importantly, the ICC cooperation statute permits the rendering of German nationals to the jurisdiction of the ICC. Since Art. 16 of the German Basic Law (Constitution) had ruled out the extradition of any German citizen to a foreign state it was regarded as necessary to amend the Constitution and to introduce a special clause permitting the rendering of German nationals to international criminal tribunals as well as to member states of the EU.⁸ § 53 ICC of the cooperation statute even goes beyond the obligation of member states under Art. 93 (1) (e) ICC Statute by providing for the *enforcement*⁹ of witnesses' obligation to testify before the ICC by means of domestic law.

⁶ Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof (ISTGH-Gesetz), *Bundesgesetzblatt* 2002, vol. I, p. 2144.

⁷ Latest publication in *Bundesgesetzblatt* 1994, vol. 1, p. 1537 (June 27, 1994).

⁸ See Art. 16 sec. 2 Basic Law: 'No German national must be extradited to a foreign state. A statute can provide for exceptions with regard to extradition to a member state of the European Union or to an international court as long as the principles of due process (*rechtsstaatliche Grundsätze*) are guaranteed.'

⁹ Art. 93 (1) (e) ICC Statute only requires states parties to *facilitate* the voluntary appearance of persons as witnesses before the ICC.

2.2 Substantive law

As mentioned above, Germany had created provisions against genocide (§ 220a Penal Code) and preparing for a war of aggression (§ 80 Penal Code) but had not otherwise adapted its substantive criminal law to the emergence of international crimes. Although the ICC Statute does not explicitly oblige member states to mirror the Statute's substantive crime provisions in their domestic laws, the regime of complementarity (Art. 17 ICC Statute) provides a strong incentive to do so, and the general aim of avoiding the impunity of international crime adds an impetus to adapt national law to the standards embodied in Arts. 5 to 8 ICC Statute.

The German government initially considered resolving this mandate by a mere amendment of the Penal Code but eventually opted, for practical as well as symbolic reasons,¹⁰ for special legislation. The Ministry of Justice established a working group composed of scholars and representatives of various government ministries and requested this group to draft an International Crimes Code (*Völkerstrafgesetzbuch*) comprising definitions of the core international crimes as well as the requisite rules of the 'general part'. After little more than a year, the working group submitted a draft law, which was – with slight changes – unanimously adopted by the German legislature and entered into force on July 1, 2002.

The purpose of the International Crimes Code was to fit into German criminal law the body of international criminal law as it had developed since the Nuremberg trial and was embodied especially in the ICC Statute.¹¹ In order to avoid the risk that Germany could be found to be unable to prosecute international crimes (with the possible consequence of 'German' cases being brought before the ICC), the drafters sought to translate as faithfully as possible the substantive provisions of the ICC Statute. But the legislative style of the ICC Statute and especially the precision of its norms differ to a surprisingly large extent from the structure and language of German criminal provisions. Art. 103 sec. 2 German Basic Law specifically demands that an act's punishability be precisely defined by statute and the German Constitutional Court tends to strictly enforce this requirement.¹² The task of drafting an International Crimes Code was thus far

¹⁰ The government wished to demonstrate to the world that Germany takes international crime seriously enough to devote a special statute to the matter. It also turned out that even the small number of 'general rules' specifically required for international offences would have made it necessary to introduce complicated exceptions to the tersely formulated general rules of the Penal Code. See *Bundestagsdrucksache* 14/8524, p. 12 (for an English translation of this text, see <http://www.mpicc.de/ww/de/pub/forschung/publikationen/onlinepub.htm>).

¹¹ *Bundestagsdrucksache* 14/8524, p. 12.

¹² See, e.g., *Entscheidungen des Bundesverfassungsgerichts* vol. 73, 206 (Nov. 11, 1986); vol. 78, 374 (June 22, 1988); vol. 92, p. 1 (Jan 10, 1995); vol. 105 p. 135 (March 20, 2002).

from easy and required the finding of compromise solutions between retaining the substance of internationally agreed crime definitions and adhering to German standards of legislative precision.

With respect to the definition of crimes, the German drafting group tended to follow, to the extent reasonably possible, the wording of the ICC crime definitions, taking into account, where applicable, the Elements of Crimes as well as the jurisprudence of the ICTY and the ICTR. In some instances, translating the text of the relevant provision of the ICC Statute into a German criminal prohibition did not present great difficulties. But even seemingly straightforward prohibitions such as 'rape' as a crime against humanity (Art. 7 (1) (g) ICC Statute) made it necessary to take into account the domestic law on sexual offences: under present German law, rape (*Vergewaltigung*), meaning the forcible performance of coitus or of a similar act involving the penetration of another person's body, is not an independent offence but an aggravated form of the general offence of sexual coercion (*Sexuelle Nötigung*, § 177 German Penal Code). In order to translate 'rape' as an international crime against humanity into the system and language of German law, it was thus necessary to refer to 'sexual coercion' as well as 'rape',¹³ thereby possibly extending the definition of the crime beyond what has been defined as 'rape' in international jurisprudence.¹⁴

Other problems were raised by complex offence descriptions, for example, enforced disappearance as a crime against humanity (Art. 7 (2) (i) ICC Statute¹⁵). This offence, defined to reflect the phenomenon of the abduction of persons 'without a trace' as committed frequently in Latin America in the 1970s and 1980s, combines the act of kidnapping with withholding information on the fate and whereabouts of the abducted person. Although it is not clear whether there has to be a relationship between the persons involved in both parts of the offence and, if so, what that relationship should be, the German legislature has refrained from any serious attempt at disentangling the offence description of the ICC Statute. The German International Crimes Code has thus inherited the contradictions and ambiguities that plague the offence description of Art. 7 (2) (i) ICC

¹³ Cf. Werle and Burchards in: Lagodny (ed.), *Münchener Kommentar Strafgesetzbuch*, vol. 6.2, 2009, § 7 VStGB note 77.

¹⁴ For a discussion of various definitions of rape in national legislation, see *Pros. v. Kunarac*, ICTY, Trial Chamber, Judgment of Feb. 22, 2001, paras. 441-459. The ICTR had previously emphasized the necessity of an element of force or coercion (*Pros. v. Akayesu*, ICTR, Trial Chamber, Judgment of Sept. 2, 1998, paras. 598, 688), whereas the ICTY (*ibid.*) defined rape as any sexual act of penetration against the will of the person affected.

¹⁵ According to Art. 7 (2) (i) ICC Statute, 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Statute.¹⁶ For example, it is unclear to what extent the person who abducts the victim must also be responsible for the failure to subsequently provide information about the victim's fate;¹⁷ it is unclear what is meant by the required special intent ('*Absicht*') of removing the victim from the protection of the law for a prolonged period of time;¹⁸ and it is unclear, as a matter of policy, whether a person's mere 'refusal'¹⁹ to provide information without delay (§ 7 sec. 1 no. 7 (b) International Crimes Code) really deserves the same punishment as the act of abduction itself when the person in possession of the information had not been involved in the abduction. With respect to this provision, the German legislature has chosen to remain faithful to the wording of the relevant provision of the ICC Statute,²⁰ probably hoping that the German courts may never have to deal with an actual case that makes it necessary to apply this problematic norm.²¹

¹⁶ For an overview, see Hall in: Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. 2008, Art. 7 notes 128-134.

¹⁷ The German text of § 7 no. 7 (a) International Crimes Code („Wer... einen Menschen dadurch zwangsweise verschwinden lässt, dass er in der Absicht, ihn für längere Zeit dem Schutz des Gesetzes zu entziehen, ihn ... entführt oder sonst in schwerwiegender Weise der körperlichen Freiheit beraubt, ohne dass im Weiteren auf Nachfrage unverzüglich wahrheitsgemäß Auskunft über sein Schicksal und seinen Verbleib erteilt wird ...“) puts the second part (lack of information) in the passive voice without indicating who the subject responsible for the lack of information is supposed to be. For an attempt at interpretation see Werle and Burchards (supra n. 13), § 7 VStGB notes 89, 90.

¹⁸ Again, the German statute ('*Absicht, ihn für längere Zeit dem Schutz des Gesetzes zu entziehen*') has been translated *verbatim* from Art. 7 (2) (i) ICC Statute. Since the 'law' does not stop to protect a person even when he or she has been abducted it is not clear what the perpetrator must have in mind (possibly the protection of courts? But how do courts 'protect' citizens? Or protection by the police? But what if members of the police are themselves perpetrators of the offence?). Nor is it clear to what extent the removal from the protection of the 'law' must be the offender's main intent, or whether it is sufficient that he is aware of the fact that the victim will be unprotected. According to Art. 30 (2) (b) ICC Statute, knowledge that the lack of protection will occur 'in the ordinary course of events' should be sufficient for intent; the German term '*Absicht*', however, ordinarily means that the offender must be motivated by the element in question. Cf. Vogel in: Laufhütte/Rissing-van Saan/Tiedemann (eds.), *Leipziger Kommentar*, vol. 1, 12th ed. 2007, § 15 note 81.

¹⁹ In accordance with the definition in Art. 7 (2) (i) ICC Statute, § 7 no.7 (b) German International Crimes Code requires that the perpetrator 'refuses' ('*sich weigert*') to provide information without delay, which presupposes that a relevant request has been made. Mere passivity is thus not punishable even when a person has information about the victim's whereabouts and knows who might be vitally interested in obtaining this information.

²⁰ Cf. *Bundestagsdrucksache* 14/8524, p. 21 on § 7 sec. 1 no. 7 International Crimes Code.

²¹ The fact that cases of the 'enforced disappearance' of persons have not occurred in Germany in the more recent past does not preclude the applicability of the norm in German courts - § 1 International Crimes Code makes German law applicable to serious international crimes wherever they may have been committed, thus extending the jurisdiction of the German courts to incidents in Latin America, Africa and Asia; see (C) *infra*.

Other provisions of the ICC Statute raise serious issues of vagueness.²² One such instance is Art. 7 (1) (k) ICC Statute, which declares 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' to be crimes against humanity. The words 'acts of a similar character' do not refer to a particular modality of the crime against humanity but to all of the preceding sub-paragraphs of Art. 7 (1) ICC Statute,²³ ranging from murder and rape to 'the crime of apartheid'. Evidently, there exists no pattern by comparison to which the 'similar character' of 'other inhumane acts' could be determined. The principle of legality as embodied in Art. 103 sec. 2 of the German Constitution precludes the legislature from enacting such catch-all criminal provisions by demanding that criminal conduct must be precisely defined ('*bestimmt*') by statute.²⁴ The German legislature consequently refrained from simply copying this provision but turned it into an incrimination of inflicting 'serious bodily or mental harm' (§ 7 no. 8 International Crimes Code), thus reducing the crime of committing 'other inhumane acts' to its core and affording the criminal prohibition a well-defined area of application.²⁵

The legislature fared less well with the international crime of persecution (Art. 7 (2) (g) ICC Statute). Because the gist of that crime, referring to historical occurrences such as the persecution of the Jewish population in Germany and occupied areas in the 1930s and 1940s, is so difficult to put into precise terms,²⁶ the German legislature opted for a literal translation, thus leaving it to the courts to eventually define what are fundamental human rights ('*grundlegende Menschenrechte*'), what it means to significantly restrict ('*wesentlich einschränkt*') such rights and what general rules of international law may define such restrictions as impermissible. It is very doubtful that this fatally imprecise crime 'defini-

²² Cf. Gropengießer in: Eser and Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, 2003, pp. 134, 137; Werle, *Völkerstrafrecht*, 2nd. ed. 2007, note 367; Wirth, *Journal of International Criminal Justice* 2003, p. 150, 153.

²³ See Elements of Crimes, Art. 7 (1) (k), no. 2.

²⁴ The German Federal Constitutional Court has explained that the principle of precision obliges the legislature to describe the requirements of criminal liability precisely enough as to enable the citizen to broadly determine the scope of punishability by reading the statutory definition of the offence; *Entscheidungen des Bundesverfassungsgerichts* vol. 92, p. 1 at 12 (Jan. 10, 1995).

²⁵ *Bundestagsdrucksache* 14/8524, p. 22 on § 7 sec. 1 no. 8 International Crimes Code. In order to provide courts with additional guidance, the legislature added a reference ('in particular of the kind defined in § 226 Penal Code') to certain kinds of grave bodily harm such as loss of hearing or sight or of an important limb. The term 'in particular' leaves open, however, the possibility of applying the norm to the infliction of other serious and long-lasting physical or mental injury.

²⁶ According to the definition in Art. 7 (2) (g) ICC Statute, 'persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity to which the victims belong. This definition raises several obvious questions, especially what should be understood by a 'deprivation of fundamental rights' and what 'rules of international law' may permit or prohibit a deprivation of fundamental rights.

tion' would pass constitutional muster if the issue were presented to the German Federal Constitutional Court.²⁷

The 'General Part' of the ICC Statute (Arts. 22-33 ICC Statute) raised similar questions of adaptation. For the first time a legislative document on international criminal law contained general rules on such issues as the principle of legality and its consequences, the applicability of the Statute *ratione personae*, *mens rea*, and grounds for excluding responsibility. It has been one of the surprising achievements of the Rome Conference and the work preceding it that a consensus could be reached on matters which are as sensitive and contested as forms of perpetratorship and accessory liability (Art. 25 ICC Statute), command responsibility (Art. 28 ICC Statute), duress and necessity (Art. 31 (1) (d) ICC Statute).²⁸ Many of these rules were novel products of compromise among the delegates from different legal systems, and in some cases the rules clearly reflect notions rooted in common law. The German legislature proved to be reticent when it came to the question whether to transfer general rules of the ICC Statute into domestic law. Several reasons prompted that attitude. First, the rules adopted by the 'founding fathers' of the ICC were sometimes at odds with longstanding German doctrine; second, adopting new concepts of the General Part even for a small group of international offences would create frictions between the 'general' General Part and the 'special' General Part for these crimes; third, deviating from the general rules established by the ICC Statute creates a much lesser risk of being 'unable' to prosecute international crime than failing to transform one of the core crimes into domestic law. Based on these considerations, Germany opted to generally retain the general rules of domestic law wherever possible²⁹ and to adapt domestic law to the model of the ICC Statute only where that seemed indispensable in order to avoid serious *lacunae*.³⁰

In a few instances, the German legislature acknowledged that the rules embodied in the ICC Statute differ from German law but did not find it necessary to adapt domestic law because the differences were slight or could be resolved by the courts. One example is self-defence, where Art. 31 (1) (c) ICC Statute limits the defence to force 'in a manner proportionate to the degree of danger' – a limitation that is not reflected in German statutory law.³¹ Yet since the German courts have long rejected the defence of self-defence when the actor reacted

²⁷ Cf. Gropengießer (supra n. 22) p. 134.

²⁸ For the negotiating history of these provisions, see Saland, International Criminal Law Principles, in: Lee (ed.), *The International Criminal Court*, 1999, p. 189.

²⁹ According to § 2 International Crimes Code, 'general criminal law' (meaning the general rules of domestic criminal law) is applicable to the offences regulated in the International Crimes Code unless that Code specifically provides otherwise.

³⁰ *Bundestagsdrucksache* 14/8524, p. 12, 14.

³¹ § 32 sec. 2 German Penal Code defines self-defence as the defence that is necessary to divert a present unlawful attack from oneself or another person.

with deadly force to a harmless assault,³² the legislature did not find it necessary to introduce a special provision on self-defence in the area of international crime.³³

For different reasons, Germany decided not to adopt the solution accepted in Art. 32 (2) ICC Statute for mistakes of law. Since Germany has since the early 1950s regarded an 'unavoidable' mistake of law as a valid excuse³⁴ and has deemed that this rule is a corollary of the general principle that criminal punishment requires personal blameworthiness, the legislature preferred to risk Germany's 'inability' to prosecute (rather exceptional) cases of an honest and unavoidable mistake of law about international criminal prohibitions rather than to give up its long-standing rule of exculpation for mistakes that the actor was in no position to avoid.³⁵

Given these various reasons for not following the example of the ICC Statute's general rules, the International Crimes Code contains only three distinct provisions concerning the general part: § 3 on superior orders as grounds of exculpation (transposing Art. 33 ICC Statute), § 4 on superior responsibility (relating to Art. 28 ICC Statute) and § 5 on the lack of a temporal limitation of prosecution and execution of sentences (transposing Art. 29 ICC Statute). While the Statute's provisions on superior orders and on the exclusion of temporal limitations were more or less exactly³⁶ transferred into German law, the German legislature considered the ICC Statute's rules on superior responsibility to sweep too broadly. Art. 28 ICC Statute holds a military or civilian superior responsible for offences committed by his subordinates if he knew or could have known about these offences and either did not do everything in his power to prevent their commission or failed to report them for prosecution. The German legislature objected to the equal treatment of cases where the superior had actual prior knowledge of impending offences and failed to prevent them and those cases where he was only negligent in his duties to control his subordinates and therefore was unaware of their plans to commit offences. In the latter situation, the German legislature deemed it unfair to hold the superior liable for the intentional

³² See the discussion by Rönna and Hohn in: Laufhütte, Rissing-van Saan and Tiedemann (eds.), *Leipziger Kommentar StGB*, vol. 2, 12th ed. 2006, § 32 notes 230-234.

³³ *Bundestagsdrucksache* 14/8524, p. 15 on § 2 International Crimes Code.

³⁴ Cf. § 17 German Penal Code: 'If the actor lacks the insight to do wrong when he commits the offence he acts without culpability if he was unable to avoid that mistake.'

³⁵ Cf. Gropengießer (supra n. 22), p. 279; Weigend in: Lagodny (ed.) *Münchener Kommentar Strafgesetzbuch*, vol. 6.2, 2009, § 2 VStGB note 12.

³⁶ The International Crimes Code has introduced a time limitation for the prosecution of lesser offences (*Vergehen*), relating to the violation of duties to supervise and report subordinates when they may commit or have committed international crimes (§§ 13 and 14 International Crimes Code).

crime (e.g., murder or rape) that his subordinates committed.³⁷ In order to comply with the principle of culpability, which obliges the state to calibrate punishment to the actor's individual responsibility, the German legislature decided to split up the ICC Statute's monistic provision on superior responsibility into three separate provisions. § 4 International Crimes Code covers the intentional failure to prevent a subordinate's crime; in that situation, the superior will be held liable like a principal for the crime committed. § 13 International Crimes Code treats as a distinct offence an intentional or negligent failure to supervise properly, with the consequence that the subordinate commits an international crime which the superior could have prevented. In that situation, the maximum punishment for the superior is five years imprisonment if he intentionally violated his duty to supervise, and three years imprisonment if he did so negligently. Finally, § 14 International Crimes Code makes it an offence punishable by a maximum of five years imprisonment to (intentionally) fail to report a subordinate's offence to the proper prosecuting authorities. The definition of this offence presupposes that the superior was aware of the offence previously committed by his subordinate; mere negligence in that respect does not give rise to criminal liability under German law.³⁸

On the whole, one can conclude that Germany's legislative tight-rope walk has been fairly successful. In many areas, viable compromise solutions have been found between full adherence to the (sometimes strange or unwise) provisions of the ICC Statute and adherence to the domestic rules and traditions of criminal legislation.

2.3 Jurisdiction

Whereas the jurisdiction of the ICC is limited to crimes committed on the territory of a state party or by one of its nationals (Arts. 12 (2) and 13 ICC Statute), Germany has decided to claim universal jurisdiction over the international 'core crimes' of genocide, crimes against humanity and war crimes. § 1 International Crimes Code explicitly dispenses with any necessity that a serious crime has any relation to Germany.³⁹ Claiming such broad jurisdiction may generally be pro-

³⁷ Cf. *Bundestagsdrucksache* 14/8524, p. 36 on § 13 International Crimes Code; Weigend (supra n. 35) § 4 VStGB note 7.

³⁸ In a negligence situation (e.g., if a military commander negligently fails to learn about a rape committed by one of his soldiers in occupied territory and therefore sees no reason to report that incident), the ICC might hold Germany legally 'unable' to institute a prosecution and claim its jurisdiction under Art. 17 ICC Statute. Yet the German legislature has preferred to run this (slight) risk rather than to make punishable negligent behaviour which it did not deem sufficiently serious. Cf. Weigend (supra n. 35) § 14 VStGB note 17.

³⁹ § 1 International Crimes Code: 'This law applies to all offences against international law designated herein, to felonies (*Verbrechen*) designated herein also when the act was committed abroad and has no relation to the interior [i.e., Germany].'

blematic because punishing or even incriminating acts committed abroad by foreign nationals against other foreign nationals will often imply an unwarranted interference with other states' internal affairs and thus conflict with the principle of non-intervention.⁴⁰ Yet, core crimes affect the peace and security of mankind, thus creating a common interest of all nations in prosecuting them and in punishing offenders. Germany has therefore deemed it acceptable to extend its jurisdiction over such crimes worldwide, arguing that it is entitled to do so as a representative of the community of nations.⁴¹ It remains to be seen whether other countries will accept this far-reaching claim when German prosecutors and courts set out to adjudicate foreign nationals for acts committed outside German territory. That possibility exists even with respect to persons who do not reside in Germany – German law does not require a suspect's presence in Germany in order to initiate a prosecution.

In practice, however, it is unlikely that Germany will extravagantly extend its jurisdiction to situations that have no relation to German territory, citizens or its national interest. According to § 153f German Code of Criminal Procedure, prosecutors have broad discretion to refrain from investigating and prosecuting cases of international crime when there is no factual link to Germany, especially when a suspect does not reside in Germany and is not expected to enter German territory. Only when there is a genuine link to Germany (the crime has been committed on German territory, or the suspect or the victim is a German national) is the prosecutor obliged to initiate an investigation. The same provision, while leaving German prosecutors the option to investigate and prosecute even when there is no link to Germany, indicates a preference for prosecution by a state with territorial or personal jurisdiction or an international criminal tribunal.⁴²

The German Federal Prosecutor General (*Generalbundesanwalt*) has interpreted this provision as reflecting a concept of double subsidiarity. He is willing to initiate a formal investigation only when neither a state with jurisdiction based on the territoriality or personality principles nor a relevant international tribunal can be expected to investigate the matter. For that reason, criminal complaints against Donald Rumsfeld and other political and military leaders with

⁴⁰ For overviews on the universality principle from a German perspective, see Ambos in Lagodny (ed.) *Münchener Kommentar Strafgesetzbuch*, vol. 6.2, 2009, § 1 VStGB notes 4-17; Werle and Jessberger in: Laufhütte, Rissing-van Saan and Tiedemann (eds.) *Leipziger Kommentar StGB*, vol. 1, 2007, § 6 notes 9-26; Weigend in: Arnold et al. (eds.), *Festschrift für Albin Eser*, 2005, p. 955.

⁴¹ See Ambos (supra n. 40), § 1 VStGB notes 10-14.

⁴² According to § 153f sec. 2 no. 4 Code of Criminal Procedure, the prosecutor can 'in particular' refrain from prosecution when the crime has been committed abroad and is being prosecuted by an international tribunal or by a state on whose territory the crime has been committed, whose national is suspected of having committed the crime or whose national has been a victim of the crime.

respect to possible war crimes in Iraq and Guantanamo Bay have been dismissed without even starting an investigation.⁴³

2.4 Conclusion

Germany has tried its best to faithfully transform the relevant substantive parts of the ICC Statute into national law and has achieved a workable balance between adhering to the spirit of the Statute and German legal principles. Fortunately, there have not yet been any cases where the German courts have had to adjudicate international crimes committed in Germany or by German nationals, and the Federal Attorney General has resisted all efforts to get herself entangled in cases based on the universality principle. The German International Crimes Code has thus largely remained a 'law on the books', and this is not the worst state of affairs.

⁴³ *Generalbundesanwalt Juristenzeitung* 2005, p. 311 (press release); see also *Oberlandesgericht Stuttgart, Neue Zeitschrift für Strafrecht* 2006, p. 117. For further cases and references see Ambos (supra n. 40), § 1 VStGB notes 28-32.

INTERNATIONAL TERRORISM – COMMENTS FROM A GERMAN PERSPECTIVE

by Bettina Weisser*

1. Introduction

The attacks of 9/11 in the USA have completely changed the world. The threat of terrorism seems to overshadow our lives almost every day. The numerous articles, comments and opinions concerning this topic are certainly not in urgent need of a further contribution. Nevertheless, addressing the subject of International Terrorism from a German perspective may serve to illustrate the intricate problems arising when criminal law is used as a means of preventing imminent terrorist attacks.

First, a general overview of the main features of German criminal law as it relates to terrorism will be provided, followed by a description of the recent developments in this field of the law. The German legislator is about to introduce some new provisions concerning terrorist crimes in the Penal Code. The planned provisions are strongly influenced by a new Framework Decision on Terrorism which the European Union adopted in December 2008.¹ Finally, some conclusions on the future of the so-called 'combat of terrorism' will be drawn from the analysis of the planned and partly already implemented changes.

2. Present German criminal law relating to terrorism

The current German criminal law on terrorism can be outlined as follows: The only offence explicitly addressing terrorism is § 129a² of the Penal Code (herein-

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¹ Council Framework Decision 2008/919/JHA; *Official Journal* L 330, 9.12.2008, p. 21.

² § 129a PC Forming terrorist organisations

(1) Whosoever forms an organisation whose aims or activities are directed at the commission of

1. murder under specific aggravating circumstances (§ 211), murder (§ 212) or genocide (§ 6 of the Code of International Criminal Law) or a crime against humanity (§ 7 of the Code of International Criminal Law) or a war crime (§ 8, § 9, § 10, § 11 or § 12 of the Code of International Criminal Law); or

2. Crimes against personal liberty under § 239a or § 239b or whosoever participates in such a group as a member shall be liable to imprisonment from one to ten years.

(2) The same penalty shall be incurred by any person who forms an organisation whose aims or activities are directed at

1. causing serious physical or mental harm to another person, namely within the ambit of § 226,

2. committing offences under § 303b, § 305, § 305a or offences endangering the general public under §§ 306 to 306c.(...)

after: 'PC'). The offence penalises the founding of, membership of, and support for a terrorist organisation.

This provision criminalises four modes of criminal conduct. Members of a terrorist organisation may be pursued for the forming or for their membership of a terrorist organisation.³ Membership is defined as active participation in the association,⁴ for example, by renting an apartment or providing a hiding place for association members who are wanted by the police.⁵ Perpetrators who are not members of the association can be punished for supporting it, or for recruiting new members or supporters for it. The support requires an act of assistance which has to be of some benefit to the association.⁶

Even if a non-member⁷ incites a third person to become a member of the association or to support the association, he is punishable for promoting it according to § 129a subsection 5 PC.⁸ It is not required that somebody actually

3. committing offences against the environment under § 330a (1) to (3),

(...)

or by any person who participates in such a group as a member, if one of the offences stipulated in Nos 1 to 5 is intended to seriously intimidate the population, to unlawfully coerce a public authority or an international organisation through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organisation, and which, given the nature or consequences of such offences, may seriously damage a state or an international organisation. (3) If the aims or activities of the group are directed at threatening the commission of one of the offences listed in subsection (1) or (2) above, the penalty shall be imprisonment from six months to five years.

(...)

(5) Whosoever supports a group as described in subsections (1), (2) or (3) above shall be liable to imprisonment from six months to ten years in cases under subsections (1) and (2), and to imprisonment of not more than five years or a fine in cases under subsection (3). Whosoever recruits members or supporters for a group as described in subsection (1) or subsection (2) above shall be liable to imprisonment from six months to five years.

³ Judgements of the Federal Criminal Court ('*Entscheidungen des Bundesgerichtshofs in Strafsachen*', hereinafter: BGHSt) 29, 114 at 119-121; 29, 288 at 294; BGH, in: *Neue Zeitschrift für Strafrecht* (hereinafter: 'NStZ') 2002, pp. 328 at 330.

⁴ All active contributions to support for the forming, continuance or the action of the organisation fulfil the *actus reus* of membership of a terrorist organisation; BGHSt 29, 288 at 291, 294; BGH NStZ 2002, pp. 328 at 330; *Fischer*, StGB, 56. ed. 2008 (hereinafter: '*Fischer*') § 129 a marginal no. 20, § 129 marginal no. 24.

⁵ Cp. BGHSt 29, 288 at 294.

⁶ Miebach/Schäfer, in: *Münchener Kommentar zum StGB*, Volume 2/2, 2005 (hereinafter: 'MK-StGB'), § 129 a marginal no. 74; § 129 marginal no. 104; Ostendorf, in: *Nomos Kommentar*, 2005 (hereinafter: 'NK'), § 129 marginal no. 20; Weisser, Über den Umgang des Strafrechts mit terroristischen Bedrohungslagen, in: *Zeitschrift für die gesamte Strafrechtswissenschaft* (hereinafter: 'ZStW') 121 (2009), pp. 131 (138-140).

⁷ BGHSt 20, 89-90.

⁸ The so-called sympathy promotion, which is supposed to create mere sympathy with the association instead of new membership or a supporting action is no longer included; cp. *Fischer*, § 129 a marginal no. 20, § 129 marginal no. 25.

becomes a member or supporter of the association, due to his or her 'recruitment'⁹ – the act of promotion itself amounts to the offence of recruitment.

A definition of terrorism can only indirectly be derived from the description of the offence.¹⁰ An association of at least three persons¹¹ is a terrorist organisation if its purpose is the commission of certain very serious crimes.¹² If the organisation's goals are the commission of murder, genocide, crimes against humanity, war crimes, kidnapping or hostage-taking, this very fact is sufficient for it to constitute a terrorist organisation.¹³

A second type of terrorist association is characterised by the will of its members to commit one of an enumerated number of specified, less serious crimes, for example, the causing of grievous bodily harm or offences against the environment.¹⁴ In order to be considered terrorism, these crimes must be determined to intimidate people or to compel a public authority or an international organisation to do or refrain from a specific act. Moreover, the execution of the planned crime must be able to significantly damage a state or an international organisation.

According to § 129a subsection 3 PC it is even sufficient if an association confines itself to the threat of committing one of the offences listed in subsection 1 or 2.

The main feature of § 129a PC is that the listed offences need only be intended. This does not presuppose any overt act toward committing one of the crimes. The offence thus incriminates a very preliminary stage of the enumerated

⁹ BGHSt 20, 89 at 90; Altwater, Das 34. Strafrechtsänderungsgesetz - § 139b StGB, in: NStZ 2003, pp. 179 at 179; Miebach/Schäfer, in: MK-StGB, § 129a marginal no. 74; Ostendorf, in: NK, § 129 marginal no. 19; Rudolphi/Stein, in: *Systematischer Kommentar StGB*, (hereinafter: SK-StGB), § 129 marginal no. 18 a; Fischer, § 129 marginal no. 29.

¹⁰ Cp. Griesbaum, Zum Verhältnis von Strafverfolgung und Gefahrenabwehr vor dem Hintergrund der Bedrohung durch den internationalen islamistischen Terrorismus, in: Rainer Griesbaum, Rolf Hannich, Karl Heinz Schnarr (eds.), *Festschrift Nehm*, 2006, pp. 125 at 128, 129.

¹¹ BGHSt 28, 147; v. Bubnoff, in: *Leipziger Kommentar zum StGB*, 11th ed. (hereinafter: 'LK'), § 129 marginal no. 12; v. Heintschel-Heinegg, Gemeinschaftsrechtskonforme Auslegung des Vereinigungsbegriffs in den §§ 129 ff StGB, in: Andreas Hoyer, Henning E. Müller, Michael Pawlik (eds.), *Festschrift Schroeder*, 2006, pp. 799 at 801; Kress, Das Strafrecht in der Europäischen Union vor der Herausforderung durch organisierte Kriminalität und Terrorismus, in: *Juristische Arbeitsblätter* (hereinafter: 'JA') 2005, pp. 220 at 223; Lenckner/Sternberg-Lieben, in: Schönke/Schröder, StGB, 27th ed. 2006 (hereinafter: 'Schönke/Schröder') § 129 marginal no 4; Miebach/Schäfer, in: MK-StGB, § 129a marginal no. 21; Fischer, § 129 marginal no. 6.

¹² The union of these persons must be meant to last for a certain period of time (BGHSt 31, 239 at 240-241; v. Bubnoff, in: LK, § 129 marginal no. 13; Miebach/Schäfer, in: MK-StGB, § 129a marginal no. 34); and have a minimum of organisational consolidation (v. Bubnoff, in: LK, § 129 marginal no. 10; Fischer, § 129 marginal no. 7) which is shown in a coordinated and labour-sharing course of conduct (Kress, JA 2005, pp. 220 at 223; Miebach/Schäfer, in: MK-StGB, § 129a marginal no. 23).

¹³ Cp. Miebach/Schäfer, in: MK-StGB, § 129a marginal no. 44.

¹⁴ Furthermore, computer sabotage, crimes of arson, altogether more than 20 catalogued crimes.

crimes. According to this organisational approach,¹⁵ the existence of a group with certain goals, in itself, is deemed reprehensible.

It should also be noted that under the German definition of a terrorist organisation, it is not necessary that this organisation pursues any particular political goal¹⁶ – although in the international debate the pursuance of political purposes has often been named as the characteristic element of terrorism.¹⁷

The suspicion of an offence, according to § 129a PC, allows law enforcement authorities to employ certain special means of investigation.¹⁸ The most controversial investigative measures are the secret acoustic surveillance of both telecommunications,¹⁹ and of conversations in private premises.²⁰

In fact, the main objective of § 129a PC is to permit the use of these special means of investigation in order to prevent terrorist actions already at a preliminary stage. Convictions of the crimes defined in § 129a PC are rare.²¹ Thus, the offence under § 129a PC serves not so much as a means to prosecute the actual forming of a terrorist organisation, but rather to allow the monitoring of the organisation in order to prevent imminent crimes.

3. Forthcoming changes: the EU Framework Decision on Terrorism of December 2008 and the German draft bill on the prosecution of the criminal preparation of serious acts of violence endangering a state

The following section concentrates on the latest developments relating to the combat of terrorism. These developments have been strongly influenced by a new Framework Decision of the European Union on the combat of terrorism,²² which came into force on 9 December 2008. The Framework Decision aims at

¹⁵ Federle, Racketeer Influenced and Corrupt Organizations Act der USA (RICO) – Übertragbarkeit auf deutsche Verhältnisse? – Ein Rechtsvergleich, in: ZStW 110 (1998), pp. 767 at 792; Miebach/Schäfer, in: MK-StGB, § 129 marginal no. 5.

¹⁶ Miebach/Schäfer, in: MK-StGB, § 129a marginal no. 44; Rudolphi/Stein, in: SK-StGB, § 129a marginal no. 7, § 129 marginal no. 11. This is criticized by Weigend, Terrorismus als Rechtsproblem, in: *Festschrift Nehm*, pp. 151 at 163.

¹⁷ Schmalenbach, Der internationale Terrorismus, in: *Neue Zeitschrift für Wehrrecht* (hereinafter: NZWehrR) 2000, pp. 15 at 19; Tomuschat, Der 11. September 2001 und seine rechtlichen Konsequenzen, in: *Europäische Grundrechte-Zeitschrift* (hereinafter: EuGRZ) 2002, 535 at 536; Weigend, in: *Festschrift Nehm*, pp. 151 at 162-163.

¹⁸ v. Bubnoff, in: LK, Vor § 129 note 2; Federle, ZStW 110 (1998), pp. 767 at 794; Maurach/Schroeder/Maiwald, Besonderer Teil II, 9th ed. 2005 (hereinafter: 'Maurach/Schröder/Maiwald, BT II'), § 95 note 2; Fischer, § 129a note 3; Weigend, in: *Festschrift Nehm*, pp. 151 at 152, 167; Weigend, in: JICJ (4) 2006, pp. 912-932 at 925.

¹⁹ § 100a subsec. 1 no. 1c Code of Criminal Procedure.

²⁰ § 100c subsec. 1 Code of Criminal Procedure.

²¹ The organisational crime itself is only punished when no crime has been attempted or committed in furtherance of the terrorist goal.

²² Council Framework Decision 2008/919/JHA; Official Journal L 330, 9.12.2008, p. 21.

criminalising the preliminary stage of terrorist crimes. The Member States of the European Union are obliged to take necessary measures to adapt their national laws so as to be in conformity with these guidelines by December 2011.

Germany has already drafted a bill concerning the prevention of the criminal preparation of very serious crimes.²³ This bill is meant to transpose the provisions of the Framework Decision into national criminal law and has been under discussion since September 2008.²⁴ So Germany seems to be reacting extraordinarily quickly in this matter. This has to be seen in the context of the present situation in Germany, i.e., Germany has fortunately not been the target of a real terrorist attack in recent times. Nonetheless, state and law enforcement authorities, politics, the intelligence services, the press, and practically all of civil society seem to fear that a terrorist attack might strike Germany in the near future.

Given that the federal elections will take place this September, the fear of terrorist attacks seems omnipresent. It is suspected that terrorist groups might plan serious attacks against Germany to influence people's voting decisions. A plan like this worked – as is well known – in Spain in 2004. Accordingly, Germany seems to be seriously concerned about the overall endangerment of its citizens and institutions by similar terrorist activities. Therefore, the German legislative bodies are trying to do their very best to enhance the effectiveness of criminal law in preventing terrorist attacks.

Another explanation for Germany's eagerness to implement the European guidelines into national law may be the fact that the attacks of 9/11 in the USA were planned and masterminded mainly in Hamburg, Germany.

Back to the draft: It was passed by the German Parliament on 28 May 2009. Now the Federal Council (which is the assembly of the members of the governments of the Federal States) has to approve the bill. It seems very likely that this will happen in the near future.²⁵

If the current version of the drafted provisions comes into force, the German Criminal Code will distinguish between – roughly speaking – two main lines of crimes: First, there is the organisational approach of § 129a PC relating to terrorist organisations which has just been described. The second and new

²³ Bundestags-Drucksache 16/11735, 27.1.2009.

²⁴ See Weisser, ZStW 121 (2009), pp. 131 (146-152).

²⁵ A public hearing took place on 22nd April at the legal committee of Parliament. Most of the consulted experts were of the opinion that the drafted offences are in urgent need of clarification in order to delimit their ambit (the statements of the experts are available on http://www.bundestag.de/ausschuesse/a06/anhoerungen/51_Staatsgef__hrdene_Gewalttaten/04_Stellungnahmen/index.html). Yet hearings at this stage of the legislative process are very unlikely to bring about any remarkable effects concerning the bill. Accordingly, the bill passed the final step through Parliament ('Dritte Lesung') despite the experts' opinions. Although the bill still needs the consent of the Federal Council ('Zustimmungsgesetz'), it seems very likely that it will finally come into force. However, should the bill not be enacted before September, its enforceability would be most questionable due to the federal elections in September.

approach envisaged in the draft focuses on the individual: The draft contains three new offences which criminalise the preliminary stage of terrorist offences without connecting the criminalised behaviour to a terrorist organisation. The new offences deal with the individual who plans or organises a terrorist crime on his own or at least not in the context of an organisation. The goal of the legislator is to catch the so-called 'sleepers'. This catchword describes a potential perpetrator who seems to be a perfectly integrated citizen whereas he has become radicalised, and is surreptitiously planning to commit serious crimes.

The drafted offences themselves can be delineated as follows: The new § 89a and § 89b PC criminalise the preparatory stage of serious acts of violence which seem apt to endanger the state as a whole. § 91 PC criminalises the dissemination of suitable instructions for the commission of such acts.

3.1 The drafted § 89a PC: The criminal preparation of a serious act of violence endangering a state

§ 89a PC stipulates the crime of preparing a serious act of violence which is directed at threatening the social fabric.²⁶ The law does not refer to the preparation of a specific terrorist crime, but exclusively names the serious acts of violence: They are murder, extortionate kidnapping and hostage taking.

Four forms of criminal conduct are specified: the provision or receiving of training as well as the instruction to commit one of the three mentioned serious acts of violence; furthermore, the provision, production or storage of equipment or materials for these serious acts of violence; and, finally, the financing of the

²⁶ § 89a Preparation of a serious act of violence endangering a state

(1) Whosoever prepares a serious act of violence endangering the state shall be liable to imprisonment from six months to ten years. A serious act of violence endangering the state is murder under § 211 or under § 212 or a crime against personal liberty under § 239a or § 239b, if the crime is apt and intended to impair the existence or the security of a state or an international organisation or to eliminate, to overrule or to undermine the fundamental constitutional principles of Germany.

(2) Subsection (1) is to be applied only if the perpetrator prepared a serious act of violence endangering a state by

1. instructing another person or receiving instruction concerning the production or handling of firearms, explosives, explosive or combustion devices, reactor fuel or other radio-active material, materials containing or bearing poison, other harmful materials, special devices required for the commission of the offence or skills serving the commission of one of the offences of subsection (1)
2. producing, receiving or procuring, storing or leaving to another person weapons, materials or devices listed in no. 1,
3. procuring or storing items that are essential for the production of weapons, materials or devices listed in no. 1, or
4. collecting, accepting or providing not inconsiderable assets for their commission.

(3) (...)

commission of those crimes.²⁷ The planning of the serious act of violence does not need to be very detailed – it is sufficient that the overall aim is to commit one of the listed crimes. To restrict the ambit of the definition, the intended crimes must be appropriate to function as a means of endangering a state in its very existence or of undermining the fundamental constitutional principles of Germany as a whole. This component reflects the specific severity of the imminent acts of violence.

It may seem that this precondition raises the threshold for the incriminated preliminary acts fairly high: If one thinks of the terrorist attacks in London in 2005 and in Madrid in 2004: horrible as they were – did they really endanger the existence of a state in itself or of the social fabric as a whole? This is most questionable. Nevertheless, nobody would hesitate to call for the applicability of the new offences for the preparatory stages of exactly such acts. The legislator achieves this goal by giving a broad definition to the precondition of a threat to society. The security of the inner state shall be endangered if the planned crime is likely to disturb the inner structure of a state. This aptitude consists of the capacity of the planned crime to shake the citizen's confidence in the state's ability to provide security for its population. And this is the crucial point: We have to admit that every single serious act of violence is perfectly capable of shaking our confidence in the state's ability to ensure our security. Therefore, the restrictive precondition of a specifically dangerous preparation emerges as nothing more than an empty phrase. In fact, the preparation of one of the listed serious acts of violence will amount, in the majority of cases, to an offence under § 89a PC.

As for the penalised acts themselves, only three aspects shall be addressed. First, the act of training or receiving training is defined very extensively as it covers each and every act of receiving or providing knowledge about the handling of weapons or explosives or other harmful substances. Furthermore, it is punishable under § 89a subsection 2 no. 3 PC to simply procure or stock such materials. This regulation must be seen in the context of certain events that took place in Germany in September 2007: The public authorities at that time prevented imminent terrorist attacks. Four men were arrested. They had stored 12 barrels of explosives in a garage and are suspected of having planned attacks

²⁷ The tenth recital of the Framework Decision states that 'the definition of terrorist offences (...) should be further approximated in all Member States, so that it covers public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism, when committed intentionally'.

As for this mentioned goal of the Framework Decision – claiming the need for a general definition of terrorism in the European Union – it has to be noted that in Germany no explicit definition of terrorism exists. Nevertheless, the German legislator is of the opinion that German criminal law has sufficiently implemented the European definition of terrorism as it was first laid down in the Framework Decision on Terrorism in 2002 and amended in the recent Framework Decision on this topic in late 2008. No modifications are to be expected.

against US facilities in Germany.²⁸ The legislature has defined the new offence of criminal preparation by the storage of materials to cover the facts of that very incident.

In that respect, the proposed German bill exceeds the guidelines of the Framework Decision. The Framework Decision calls for the punishment of public provocation, recruitment, and training related to terrorist offences – but not a word is mentioned about the storage of materials.

It seems problematic to punish mere storage because that, by itself, does not suggest any imminent harm to others. Storing such materials can, in fact, be perfectly legitimate – just think of the enthusiastic gardener who stores specific weed-killers in his little paradise. If, however, one stores the very same materials in order to contaminate groundwater then storing can already amount to the offence of preparing a very serious act of violence.

So it has to be defined how to differentiate between the law-abiding gardener and the suspected terrorist. In fact, in some cases the difference will only lie in the actor's intent. Yet this seems to contradict one of the basic principles of criminal law: a criminal offence should depend upon the wrongfulness of the incriminated actions, not upon the perpetrator's thoughts.

3.2 The drafted § 89b PC: The establishment of contacts for the commission of a serious act of violence endangering a state

Bearing this in mind, the second offence to be commented upon is § 89b PC.²⁹ It penalises the establishment of contacts in order to prepare the commission of serious acts of violence. In detail the punishable conduct comprises the contacting of terrorist associations for the purpose of receiving instructions directed at committing serious acts of violence. Again, the intention to commit such acts in the future is the main element of the offence. It may already be a punishable act if a young man phones members of a terrorist association in order to gain information on future terrorist training. The *actus reus* of this crime will lie in the phone call itself. Thus the specific harm involved in the perpetrator's conduct depends almost exclusively on the future act of violence in his mind. The problem

²⁸ Namely in Stuttgart, Munich, Cologne, Dusseldorf, Dortmund, at the airport at Frankfurt/Main or the US airbase in Ramstein.

²⁹ § 89b Establishment of connections for the commission of a serious act of violence endangering a state

(1) Whosoever with the intention to be instructed about the commission of a serious act of violence endangering the state under § 89a subsec. 2 no. 1, contacts or maintains a relationship to a terrorist association named in § 129a as well as named in § 129a in connection with § 129b, shall be liable to imprisonment of not more than three years or to a fine.

(...)

of whether the actor is to be punished for actual wrongful behaviour or for mere thoughts comes up once again.

Moreover, contacting members of a terrorist group in order to gain information is part of the preliminary stage of the preparatory offence defined in § 89a PC. § 89b PC thus punishes the preparation of a preparation – a further extension of the criminalisation far into the preliminaries of any terrorist act.

Again it should be noted that not even the Framework Decision calls for the punishment of the establishment of connections to terrorist groups. The German draft extends punishability further into the preliminary stage than the European guidelines require.

3.3 The draft § 91 PC: The instruction for the commission of a serious act of violence endangering the state

The last of the new offences is defined in § 91 PC.³⁰ This paragraph punishes the act of publicly providing instructions on the commission of serious acts of violence that pose a risk to the social fabric.

The incriminated conduct consists of providing the public or another person with material which is suitable to incite the commission of a serious act of violence. It is also punishable to receive such material. The criminal act will normally be committed by the use of the internet. It is not necessary that the actor actually incites anyone to commit a crime – the general aptitude of the provided material and of its distribution to incite is sufficient to constitute the crime. Needless to say, for criminality under § 91 PC it is totally irrelevant whether anyone actually commits a terrorist act.

Without going further into the details of the different modes of criminal conduct under these new provisions, it should already have become evident that the new offences deal with the very preliminary stages of possible future crimes. The link between these preparatory offences and any terrorist action is very tenuous. There need not even exist any concrete project for a terrorist act. The new provisions at least become very close to punishing mere thoughts concerning a future terrorist attack.

³⁰ § 91 Instruction for the commission of a serious act of violence endangering the state

(1) Liable to imprisonment of not more than three years or a fine shall be whosoever

1. promotes or makes accessible to another person a text containing information suitable as instruction for the commission of a serious act of violence endangering the state (§ 89a subsec.

1), if the circumstances of its dissemination are apt to enhance or bring about the inclination of others to commit a very serious act of violence endangering the state,

2. procures a text of the type mentioned in no.1 for the purpose of the commission of a very serious act of violence endangering the state.

(...)

4. Investigative instruments relating to terrorist offences (the amendment of the statute on the German Federal Police Agency of January 2009)

Whenever law enforcement authorities suspect someone of having committed one of the preparatory offences, they have a wide range of investigation instruments at their disposal. Again³¹ the suspicion of a terrorist-related offence serves not so much as a means of punishing the preparatory stage, but rather as the key toward instituting surreptitious detective work. In that respect, the very broad definitions of the offences in the draft do not so much serve the prosecution of crimes already committed, but are geared towards preventing future crimes through the gathering of information leading to terrorist groups.

Politicians and law enforcement officials have advocated even more extensive investigative instruments. One of the most controversial methods in this context is secret online computer surveillance.³² Since January of 2009, this measure has been available for the prevention of crime under an amended version of a statute on the German Federal Police Agency.³³ The amended law extends the scope of the Agency's authority to the prevention of crime,³⁴ whereas it had previously been involved exclusively in crime detection.

As a consequence of abuses during Nazi times, after World War II Germany established a strict separation between the police and intelligence services. Only the intelligence services³⁵ were allowed to investigate *before* a crime had been committed, and information they obtained was not to be passed on to law enforcement agencies. Information gathering for the purpose of detecting and prosecuting crime was to follow separate, stricter rules.³⁶

Under the new law, by contrast, the Federal Police Agency has been given the authority to use various means, including secret surveillance and other serious infringements of privacy,³⁷ in order to prevent terrorist crimes under § 129a PC. This authority will be extended to the preparatory crimes envisaged by

³¹ As has already been described regarding § 129a PC, see *supra* 2.

³² See BGHSt 51, 211; BVerfG NJW 2008, 822 and *Cornelius*, Anmerkung zum Beschluss des BGH zur verdeckten Online-Durchsuchung v. 31.1.2007 – StB 18/06, in: *Juristen-Zeitung* (hereinafter: 'JZ') 2007, pp. 798; Sachs/Krings, 'Das neue 'Grundrecht auf Gewährleistung der Vertraulichkeit und Integrität informationstechnischer Systeme'', in: *Juristische Schulung* 2008, pp. 481 at 483.

³³ Statute on the Federal Criminal Police Institution, *Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten*, amended on December 25, 2008, BGBl I, p. 3083.

³⁴ § 4a BKAG Abwehr von Gefahren des internationalen Terrorismus.

³⁵ The *Bundesnachrichtendienst*, the *Verfassungsschutz* and the *Militärischer Abschirmdienst*.

³⁶ Zöller, 'Der Rechtsrahmen der Nachrichtendienste bei der 'Bekämpfung' des internationalen Terrorismus', in: JZ 2007, pp. 763 at 767.

³⁷ §§ 20a – 20t BKAG.

the draft law. The separation of the prosecution of committed crimes and the prevention of suspected future crimes is thereby abandoned in some way.³⁸

Critics have deplored this development.³⁹ But given the understandable aim of minimising the risk of terrorist attacks, it seems sensible that public agencies share information that one of them has acquired with respect to terrorism.

Yet, government authorities tend to overprotect society due to their understandable intention to prevent terrorist attacks at any cost.⁴⁰ This tendency jeopardises civil liberties. But the present public opinion in Germany seems to be fairly tolerant of interventions by the state into the private lives of its citizens. For example, the public has accepted the fact that since January 2009 each and every telecommunication connection is being recorded and all the relevant data are being stored by telecommunication providers for six months, even without any suspicion of any wrongdoing.⁴¹ Under certain conditions,⁴² public authorities can access the stored data for use in criminal investigations.

This shows that there indeed exists an imminent danger. Yet this danger is not only the risk of a terrorist attack, but also the risk of a total screening of society. From the perspective of the government, the main concern is to prevent the commission of serious crimes by terrorists. This preventive concern cannot

³⁸ Roggan/Bergemann, Die 'neue Sicherheitsarchitektur' der Bundesrepublik Deutschland, in: *Neue Juristische Wochenschrift* 2007, pp. 876 at 877; Sokol, Auf der Rutschbahn in die Überwachbarkeit, in: Regina Michalke, Wolfgang Köberer, Jürgen Pauly, Stefan Kirsch (eds.), *Festschrift Hamm* (2008), pp. 719 at 719. See also Zöller, (*op.cit. note 36*), *JZ* 2007, pp. 763 at 767 and Sandkuhl, Die Befugnisse von Nachrichtendiensten und Polizei: faktischer Tod dem Trennungsgebot?, in: *Festschrift Hamm* (2008), pp. 615 at 617.

³⁹ Baum/Schantz, Die Novelle des BKA-Gesetzes – Eine rechtspolitische und verfassungsrechtliche Kritik, in: *Zeitschrift für Rechtspolitik* 2008, p. 137.

⁴⁰ Cp. Cancio Meliá, Internationalisierung der Kriminalpolitik: Überlegungen zum strafrechtlichen Kampf gegen den Terrorismus, in: Ulrich Sieber, Gerhard Dannecker, Urs Kindhäuser, Joachim Vogel, Tonio Walter (eds.), *Festschrift Tiedemann*, 2008, pp. 1489 at 1502; Gierhake, Zur geplanten Einführung neuer Straftatbestände wegen der Vorbereitung terroristischer Straftaten, in: *ZIS* 2008, pp. 397 at 403, 405; Ogorek, Wie wehrhaft ist der Staat? Zum Problem präventiver Terrorismusbekämpfung, in: Graulich/Simon (eds.), *Terrorismus und Rechtsstaatlichkeit*, Berlin 2007, pp. 203 ff. at 217-218; Radtke/Steinsiek, Bekämpfung des internationalen Terrorismus durch Kriminalisierung von Vorbereitungshandlungen? – Zum Entwurf eines Gesetzes zur Verfolgung der Vorbereitung schwerer Gewalttaten, in: *ZIS* 2008, pp. 383 at 386; Weisser, Der 'Kampf gegen den Terrorismus' – Prävention durch Strafrecht?, in: *JZ* 2008, p. 388; Zöller, Heimlichkeit als System, in: *Strafverteidiger Forum* 2008, pp. 15 at 18.

⁴¹ Graulich, Telekommunikationsgesetz und Vorratsdatenspeicherung, in: *Neue Zeitschrift für Verwaltungsrecht* (hereinafter: 'NVwZ') 2008, pp. 485 at 489; Puscke/Singelstein, Telekommunikationsüberwachung, Vorratsdatenspeicherung und (sonstige) Ermittlungsmaßnahmen der StPO nach der Neuregelung zum 1.1.2008, in: *NJW* 2008, p. 113; Sokol, in: *Festschrift Hamm* (2008), pp. 719 at 721.

⁴² See the court order of the Federal Constitutional Court, Beschluss des Bundesverfassungsgerichts, 1 BvR 256/08, 28th Oct. 2008, available on www.bundesverfassungsgericht.de. See also Graulich, NVwZ 2008, pp. 485 at 490; and Hoeren, Die Umsetzung der Richtlinie zur Vorratsdatenspeicherung – Konsequenzen für die Privatwirtschaft, in: *JZ* 2008, pp. 668 at 672.

easily be squared with the genuine purpose of the criminal process, namely to prosecute offenders for criminal acts they have committed.

The same conflict also exists on the level of substantive criminal law. Normally, the state can punish a person only when he has already committed or at least has attempted to commit a harmful act. In the combat of terrorism, criminal law has been extended to situations that are far removed from actual harmful activities. The question arises whether the purpose of efficient crime prevention lends legitimacy to the prosecution of preparatory acts which would otherwise not fall within the purview of criminal law.

This question is one of the greatest challenges of today's criminal law theory. It is definitely time to recall the basic principles of criminal law: the rule of law demands that some harm must have occurred *before* anyone can be punished. The rule of law also demands that perpetrators are punished for their acts and not for their mere thoughts. And, finally, the rule of law demands that the use of investigative methods is based on a reasonable suspicion that a crime has already been committed.

We should not abandon these traditional guidelines of criminal law; otherwise we would jeopardise the rule of law itself. This is nothing but a simple truth. We need to uphold it even in the face of the threat of terrorism.

IV. SELECTED ISSUES OF EUROPEAN CRIMINAL LAW

THE URGENT PROCEDURE FROM A FINNISH PERSPECTIVE ¹

by *Dan Frände* *

1. Introduction

The length of proceedings is an essential challenge for the courts today. This challenge can be solved in many ways. Many surveys in Finland show that cases involving economic criminality usually tend to take a long time, as it is not uncommon that the process in these cases lasts for 5-10 years. In several of these cases the European Court of Human Rights has held Finland responsible for breaches of the European Convention on Human Rights. This has resulted in a new Act that will automatically reimburse any person who, without culpability, has been subjected to proceedings which are too lengthy.

Not even the ECJ has been free of this problem of lengthy procedures. Measures have been taken to speed up the procedures and already in 2001 the Rules of Procedure were amended and article 104a inserted. According to this article the President of the ECJ may decide that an accelerated procedure is to be applied in a request for a preliminary ruling, based either on article 234 TEC or article 35 TEU, if the circumstances of the case are a matter of exceptional urgency. Before the urgent procedure was adopted on 1 March 2008 the accelerated procedure had been used on three occasions.²

The accelerated procedure clearly did not adequately take the nature of the criminal procedure into account, especially its far-reaching interference with the fundamental rights and freedoms of the individual. It is in the interest of a person who has lost his freedom due to criminal proceedings to have his case processed as soon as possible. As is well known, all Member States are bound by the ECHR, which requires court proceedings to take place within a reasonable time. When the interests of the state and the person in custody are combined, it becomes difficult to justify a request for a preliminary ruling from the ECJ when the person is being deprived of his liberty. In a certain sense one could say that the principle of legal protection outweighs the aim of clarifying the content of EU law.

¹ This text has been translated into English by PhD student Annika Suominen (University of Bergen) who also has commented on the draft. Any possible errors are nevertheless the authors.

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² In cases C-189/01 (Jippis and others), C-66/08 (Kozłowski) and C-127/08 (Metock and others). It should be noted that other cases besides requests for preliminary rulings can be subjected to an expedited procedure according to article 62a of the Rules of Procedure. See cases C 39/03 P (Aragon and others) and C 27/04 (Commission vs. Council) on this.

The Lisbon Treaty also takes this problem into account, article 267(4) TFEU thereby stating: 'If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.' The same provision could be found in the failed Treaty establishing a Constitution for Europe in 2004.³

From 1 March 2008 onwards, the requirements of the above-mentioned treaties can be seen as having been fulfilled regarding the urgent procedure.⁴ In this paper I will analyse certain situations when interpretations are needed when the urgent procedure could be applied from a Finnish perspective.⁵ The Finnish perspective implies that the national legislation constitutes my starting point, while my point of view will at the same time be directed towards EU law.

2. What are the requirements for using the urgent procedure?

According to article 23a(1) of the Statute of the Court of Justice, an urgent procedure exists for cases concerning the area of freedom, security and justice. The procedural rules of the ECJ concerning this urgent procedure are found in article 104b of the Rules of Procedure of the ECJ. It is stated, in addition, that these matters should be covered by Title VI of the Union Treaty.⁶ This seems *prima facie* to imply that the references that can be dealt with by the urgent procedure are those matters encompassed by articles 29-42 of the above-mentioned Treaty.

What is missing is an actual description of how the case should look for the urgent procedure to be applied. A somewhat semi-authoritative definition can be found in the 'Information Note on references from national courts for a preliminary ruling', a supplement by the ECJ in 2008. In its seventh point it is stated that the urgent procedure will only be used when this is absolutely necessary. The ECJ states that it is not possible to provide an exhaustive list 'particularly because of the varied and evolving nature of Community rules governing the area of freedom, security and justice'. Despite this, a national court may consider submitting a request for an urgent procedure 'in the case of a person detained or deprived

³ See article III-369(4): 'If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay.'

⁴ R. Crowe: *The Treaty of Lisbon*, *ERA Forum* (2008), p. 163, 185.

⁵ As Prof. John Vervaele will specifically deal with *ne bis in idem* cases, I will omit these from my presentation.

⁶ The urgent procedure can also be used for matters covered by Title IV of Part Three of the EC Treaty, meaning articles 61-69, which concern especially asylum cases and co-operation in civil matters.

of his liberty, where the answer to the question raised is decisive as to the assessment of the person's legal situation.'

As regards the special procedural measures which the urgent procedure acquires, accompanied with the problems for the other pending processes at the ECJ, one can conclude, without further hesitation, that the procedure will mainly be used in situations where the prosecuted person is being detained. As the cited text shows, the question posed in the reference should furthermore be essential as far as continuing the person's deprivation of liberty is concerned. This can also be read from case C-388/08 (Leymann and Pustovarov). For one of the detained persons the interpretation of the EAW and the Finnish implementing Act had an effect on the length of the sentence imposed. One possible interpretation of the EAW and the implementing act as regards the speciality rule would have led to part of the indictment not being tried. This would have meant that the detained person would have been subjected to a more lenient sentence, which would then have meant an earlier release. It is possible to come up with the following rule of thumb: for the interpretation to be decisive for the assessment of the detained person's legal situation, one possible interpretation should entail that the deprivation of liberty will be discontinued or clearly shortened. For more minor adjustments to the sentence the urgent procedure is not necessary.

It is not however possible to simultaneously preclude that other interferences with the person's legal situation cannot justify the use of the urgent procedure. What first comes to mind are measures taken based on the framework decision on the freezing of assets or evidence (2003/577/JHA) and the framework decision on a European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (2008/978/JHA). These framework decisions regulate matters that can completely eliminate a person's economic freedom. In such a situation the freezing or obtaining of evidence can depend on the interpretation of the framework decision in question. It can also be noted that the fact that the reference concerns a case which has precedential value in the national setting does not as such constitute a ground for the use of the urgent procedure. This is clear from case C-403/08 (Football Association, Premier League and Others): 'As to the argument based on the number of similar cases pending before the English courts, the Court's case-law shows that the large number of persons or legal situations potentially concerned by the decision to be made by the national court after making a reference to the Court for a preliminary ruling is not capable as such of constituting an exceptional circumstance that could justify the application of an accelerated procedure (see, inter alia, the orders of the President of the Court of 21 November 2005 in Case C-385/05 *Confédération générale du travail and Others*, paragraph 13; of 21 September 2006 in Cases C-283/06 and C-312/06 *KÖGÁZ and Others*, paragraph 9; of 25 September 2006 in Case C-368/06 *Cedilac*, paragraph 7; and of 3 July 2008 in Case C-201/08 *Plantanol*, paragraph 10). The requests for the

accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure to be applied to Cases C-403/08 and C-429/08 must therefore be rejected.⁷

3. Which references can be subject to the urgent procedure?

The fundamental question as regards the scope of the urgent procedure is the meaning of article 104b(1) in the Rules of Procedure, which concerns 'questions in the areas covered by Title VI of the TEU'. Does this mean that the often-debated question whether a national criminalisation is in conflict with Community law (today Union law) falls outside the scope of this special remedy? This could be the case, as in such cases the persons involved are in most cases not deprived of their liberty. One exception to this is the Finnish conditions concerning undeclared imports of alcohol from another Member State. As in two cases,⁷ the Finnish Supreme Court has clarified which criminal provisions should be applied, there should be no infringements of the person's legal situation concerning these types of offences. The question should nevertheless be without practical importance, as the accelerated procedure can be used in any case. Case C-189/01 (Jippis and others) took only 76 days to be decided.

As regards instruments based on articles 29-42 TEU, they do not result in any problems. The presumption that a detained person should be involved naturally means that the EAW is the instrument which in most cases will be the subject of the urgent procedure. Both of the two criminal cases which were decided upon with the urgent procedure concerned the EAW. These were C-296/08 PPU (Goicoechea) and C-388/08 PPU (Leymann and Pustovarov).

4. The legality principle in criminal law and the need for preliminary rulings

In Finland the framework decisions belonging to the area that can loosely be referred to as criminal procedural law (especially when the execution of sentences is covered here) have been implemented in two different ways. The EAW and the freezing framework decision have been transposed into valid Finnish law through independent acts. The application of these acts can in principle take place without comparing the framework decisions on which the acts are based. The second method, which has become more common, involves the Finnish legislator providing only a few provisions and through a kind of 'reference implementation' incorporating the framework decisions into Finnish law. The provisions of the framework decisions are therefore applicable as such. As the Kozłowski

⁷ See HD 2004:86 and HD 2007:11. In the latter case the preliminary ruling of the ECJ was also requested.

case shows, the ECJ does not stop with the national implementation of the framework decision. The formulation of the framework decision is the object of the interpretation by the ECJ and the Member States shall comply with this, regardless of whether the national implementing legislation differs from this especially when it is a question of terms requiring uniform interpretation. No difference ought however to be found as regards the interests of the person involved. My conclusion is hence that not even clear differences between the framework decision and the implementing legislation shall inhibit a national court from requesting a preliminary ruling. The interpretative effect also applies to Member States not having applied the court's competence according to article 35 TEU.

In the Pupino case (C-105/03) the situation was different, as Italian criminal procedural law had not adequately implemented the framework decision. In its judgment the ECJ concluded that the Member States shall interpret the national provisions as far as possible in the light of the applicable framework decisions. At the same time, such an interpretation cannot lead to an interpretation *contra legem*, where the framework decision would be the sole basis for the sentence or the increase in the severity of the sentence. This means that interpretation in light of the framework decision is to be made within the limits of the national interpretation.

There is consequently an apparent difference between substantive criminal law and criminal procedural law. When it comes to the basis for criminal liability the national interpretation must be observed, which means that the need for preliminary rulings is clearly less than in criminal procedural law. This also has an influence on the urgent procedure. Only in exceptional cases should there be a need to request a preliminary ruling on the interpretation of a framework decision that has led to a specific national criminal provision.

**ABOLITION OF DOUBLE CRIMINALITY AND THE PRINCIPLE OF
NULLUM CRIMEN SINE LEGE – REMARKS ON THE RESOLUTION
OF THE HUNGARIAN CONSTITUTIONAL COURT**

by Miklos Hollán *

1. Introduction

Both international and constitutional aspects of criminal law have been the focus of Professor Wiener's research activity during the last few decades.¹ This study, dedicated to his memory, guides the reader towards a crossroads of four fields of law, namely international law, European Union law, constitutional law and criminal law. The Article aims to review Decision No. 32/2008 (III 12) (hereinafter: the Decision) delivered by the Hungarian Constitutional Court (hereinafter: the Court).² The analysis focuses on whether the abolition of double criminality, which is a traditional requirement of international legal assistance in criminal matters, violates the constitutional principle of *nullum crimen sine lege*.

2. Preliminaries and procedural questions of constitutional review

The procedure for constitutional review was initiated by the current President of the Republic (László Sólyom), who had been the first President of the Hungarian Constitutional Court between 1990 and 1998. His initiative was based on Article 36 (4) of the Hungarian Constitution (hereinafter: the Constitution), according to which if the President of the Republic deems any legal provision adopted by Parliament to be unconstitutional, he or she shall initiate the procedure before the Constitutional Court prior to its promulgation. This competence of the Court is regulated by Article 1 (a) of Act XXXII of 1989 on the Constitutional Court, according to which the competence of the Court includes an 'ex ante examination of the unconstitutionality of statutes adopted but not yet promulgated [...] and of international treaties'.

The President claimed that two provisions of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the

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¹ See, e.g., I.A. Wiener: New elements of international co-operation in criminal matters, 41 *Acta juridica Hungarica* 3-4 (2000), pp. 171-180; Constitution and criminal law, 38 *Acta juridica Hungarica* 1-2 (1997); 19-37, Criminal jurisdiction and international crimes, 35 *Acta juridica Hungarica* 1-2 (1993), 33-51.

² See, also, P. Bárd: Constitutional and Judicial Review of Surrender? The Fate of the European Arrest Warrant in Hungary, in: E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* 2, Wolf, Nijmegen, 2009 (submitted manuscript), pp. 209-228.

surrender procedure between the Member States of the European Union and Iceland and Norway (the so-called EUN agreement, hereinafter the Agreement) infringed the Constitution. The Agreement adopted by the Council does not bind Hungary, since its representative, in line with Article 24 (5) of the Treaty on the European Union,³ stated that it had to comply with the requirements of its own constitutional procedure. According to the Constitution and the relevant act on international treaties, it is the competence of the President to express the consent of Hungary to be bound by international treaties.⁴ The constitutional review procedure is thus regulated by Article 36 (1) of the Act on the Constitutional Court, according to which the President of the Republic may request a constitutional review of the provisions of an international treaty before expressing the consent of Hungary to be bound by that treaty.

The Court was also requested by the President to ascertain whether one provision of the Hungarian Act ratifying and promulgating the Agreement adopted on 11 June 2007 infringed the Constitution. In this regard the procedure is regulated by Article 35 (1), according to which the Constitutional Court, upon a petition by the President, will examine provisions adopted by Parliament prior to their promulgation.

3. The reasoning of the president's motion

The President maintained that both Article 3 (3) of the Agreement⁵ and Section 4 of the Act⁶ violated the Constitution by allowing the surrender of persons

³ According to Article 38 of the Treaty on the European Union, agreements referred to in Article 24 may cover matters falling under Title VI.

⁴ Section 30/A (1) b) of the Constitution and Section 8 (2) of Act L of 2005.

⁵ In pursuance of Article 3 paragraph (3) of the Agreement subject to certain grounds for non-execution of the arrest warrant, in no case shall a State refuse to execute an arrest warrant issued in relation to the behaviour of any person who contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism and Articles 1, 2, 3 and 4 of the Framework Decision of 13 June 2002 on combating terrorism, illicit trafficking in narcotic drugs and psychotropic substances, or murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking and rape, punishable by deprivation of liberty or a detention order of a maximum of at least 12 months, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution shall be intentional and made with the further knowledge that his or her participation will contribute to the achievement of the organisation's criminal activities.

⁶ It contains a declaration in which Hungary accepts the possibility provided by Article 3 (4) of the Agreement. According to this provision 'Norway and Iceland, on the one hand, and the EU, on behalf of any of its Member States, on the other hand, may make a declaration to the effect that, on the basis of reciprocity, the condition of double criminality referred to in paragraph 2 shall not be applied under the conditions set out hereafter. The following offences, if they are punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing State, shall, under the terms

suspected of committing certain criminal offences (certain types of criminality) without the verification of double incrimination.⁷ The initiative relied on Section 57 (4) of the Constitution, according to which 'no one shall be declared guilty or subjected to punishment for conduct which does not constitute a criminal offence under Hungarian law at the time when it was committed'.

The President interpreted this paragraph as a constitutional prohibition related to not only conviction and the imposition of punishment, but also to 'any official action pursuing the establishment of the criminal liability of a person' when the conduct does not correspond to the relevant Hungarian description of the offence. To support this broad interpretation, a previous decision by the Court, in which the scope of Section 57 (4) of the Constitution had been extended, was referred to by the President.⁸

In line with this broad interpretation, it was deduced by the President that Article 3 (3) of the Agreement and Section 4 of the Act plainly contradicted the Constitution. It was demonstrated that surrender was an official action in pursuance of the establishment of criminal liability and the relevant provisions of the Agreement and the Act explicitly authorized the surrender of a person without verification as to whether the conduct was criminalized under Hungarian law.⁹

The President noted that Section 57 (4) of the Constitution would have been interpreted differently if certain general provisions of the Constitution had been applicable in the present case. Nonetheless, as the President pointed out, none of these general provisions of the Constitution were applicable with regard to the Agreement or to the Act. The Agreement is based on an international treaty, the binding force of which is not recognised by Hungary, and therefore the absence of a 'generally recognized principle [...] of international law' (or an 'obligation [...] assumed under international law') renders Section 7 (1) of the Constitution inapplicable.¹⁰ The declaration set out in Section 4 of the Act is far beyond the scope of Section 7 (1) of the Constitution,¹¹ since this unilateral Hungarian act is

of this Agreement and without verification of the double criminality of the act, give rise to surrender pursuant to an arrest warrant:

- participation in a criminal organisation,
- terrorism,
- trafficking in human beings,
- computer-related crime, [...]
- illicit trafficking in hormonal substances and other growth promoters, [...]

⁷ The President challenged Art 3 (2) of the Agreement which contains a restrictive interpretation of the requirement of double incrimination. Legal questions associated with this provision are not reviewed in this article.

⁸ Initiative of the President on 27 June 2007 addressed to the Constitutional Court, point 4.

⁹ *Ibid.*, point 6.

¹⁰ *Ibid.*, point 5.

¹¹ According to this provision '[t]he legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law'.

plainly not a necessary consequence of the fulfilment of international obligations. Neither is Section 2/A of the Constitution¹² applicable to the present case as the Agreement and the Act are not necessary consequences of the law of the European Union.¹³

4. The decision of the court and the reasoning of the majority

The Court ruled that both Article 3 (3) of the Agreement and Section 4 of the Act contradicted the Constitution. Thus, according to Section 36 (2) of the Act on the Constitutional Court, the consent of Hungary to be bound by the Agreement shall not be expressed by the President. Moreover, in line with the Section 35 (2), the President shall not promulgate the Act.

The Court noted that a broad interpretation of Section 57 (4) of the Constitution was supported by the growing importance of international judicial cooperation in criminal matters, especially by the automatism included in the system of surrender.¹⁴ It was also ascertained that the requirement of double criminality was connected to the *nullum crimen sine lege* principle in the constitutional tradition of certain foreign states.¹⁵ The Court explicitly accepted the President's interpretation by concluding that Section 57 (4) of the Constitution prohibited any official conduct pursuing the establishment of the criminal liability of a person without any prior Hungarian criminalisation of the act in question.¹⁶ It can be deduced from this conclusion that even extradition (or surrender) from Hungary is prohibited if the conduct does not constitute a criminal offence under Hungarian law.

The Court concluded that Article 3 (3) of the Agreement infringed, *inter alia*, Section 57 (4) of the Constitution. The relevant provision of the Agreement dispenses with the requirement of double incrimination if the arrest warrant is issued in relation to the behaviour of a person who has intentionally contributed to the commission of certain criminal offences (e.g. terrorism) by a group of persons acting with a common purpose, even where that person does not take part in the actual execution of the offence concerned. It was established by the Court that the notion of 'contribution' could not have been necessarily identified with the concepts of participation and organised criminal activities in the Hungarian Criminal Code, and especially a person whose actions had 'contributed' to

¹² In pursuance of this provision '[b]y virtue of a treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities.'

¹³ *Ibid.*, point 5.

¹⁴ Decision, point IV.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

the realisation of a criminal offence should not necessarily be regarded as an 'accomplice'. Taking into account the imperative nature of the provision, it was pointed out by the Court that Article 3 (3) of the Agreement was unconstitutional, since it contained a phrase that could have been interpreted too widely and did not correspond to the conceptual framework of Hungarian criminal law. It was stressed that the vagueness of the provisions could not have been eliminated by referring to the existence of exceptions provided by Article 5 (1) b-g) and Articles 6, 7, and 8 of the Agreement.¹⁷

The Court ascertained that the Hungarian declaration in Section 4 of the Act infringed Section 57 (4) of the Constitution, but only with regard to the offence of illicit trafficking in hormonal substances and other growth promoters. Among the thirty-two listed categories in Article 2 (4) of the Agreement it is the only one that has no counterpart in the Hungarian Criminal Code.¹⁸ The Court therefore held that Section 4 of the Act (in connection with Article 2 (4) of the Agreement) was unconstitutional, since it allows the surrender of persons *sine leg*, namely without criminalisation under Hungarian law.¹⁹ Nevertheless, from this reasoning by the majority it can be deduced that lifting the legal restriction of double criminality with regard to other (categories of) offences does not infringe Section 57 (4) of the Constitution.

5. Concurring opinion of the four justices

Constitutional judge Péter Paczolay attached a concurring opinion to the Decision, which was joined by three constitutional judges, namely András Holló, István Kukorelli and László Trócsányi. The four justices maintained that Article 3 (3) of the Agreement and Section 4 of the Act were unconstitutional, but for different reasons.

The four justices emphasized that Section 57 (4) of the Hungarian Constitution enshrined a fundamental right which allowed no restrictive interpretation. The concurring opinion interpreted the relevant constitutional provision as requiring more than the traditional principle of *nullum crimen sine lege*. Moreover, according to the Court, constitutional provisions have to be interpreted independently, namely no reference should be made to human rights guarantees enshrined in Hungarian criminal statutes or virtually identical foreign constitutional provisions.²⁰

¹⁷ *Ibid.*, point VIII.

¹⁸ The relevant description of the offence, which was introduced in the Hungarian Criminal Code in 1998, was previously abolished by Decision No. 47/2000 (XII. 14) due to a lack of legal certainty.

¹⁹ Decision, point IX.

²⁰ Concurring opinion of Péter Paczolay, joined by András Holló, István Kukorelli and László Trócsányi attached to the Decision, point 3.

The starting point of the concurring opinion is the interpretation of the President (the prohibition of any official conduct pursuing the establishment of criminal liability), but this statement, compared to the majority, was utilised differently by the four justices. They did not scrutinize the vagueness of the Agreement, and did not contrast its provisions with Hungarian criminal law. They asserted that the mere abolition of double criminality was unconstitutional, since it made the act of surrender solely dependent on foreign (e.g. Norwegian) law. Thus, the constitutionality of Section 4 of the Act was denied with regard to all offences referred to in Article 3 (4) of the Agreement.²¹

It was explicitly acknowledged in the concurring opinion that Sections 7 (1) and 2/A of the Constitution established exceptions to the rule set out in Section 57 (4). The four justices pointed out, however, that these provisions were not applicable, since the Agreement did not constitute a generally recognized principle of international law, and did not belong to EU law which had binding force in Hungary.²² As was established by the four justices, the Agreement was neither a founding treaty nor a piece of secondary legislation.²³

6. Dissenting opinion of András Bragyova²⁴

Constitutional judge András Bragyova disagreed with the majority by claiming that Section 57 (4) of the Constitution had not been violated in the present case. He asserted that this section of the Constitution was not applicable, since extradition and surrender were tantamount to neither conviction nor the imposition of punishment. The dissenting justice argued that there had been no historical link between the requirement of double criminality and the principle *nullum crimen sine lege*.²⁵ He also maintained that extradition and surrender did not belong to the realm of criminal law, but only to administrative procedures connected thereto.²⁶ He also noted extradition and surrender could have infringed other constitutional standards, but these questions, without a request from the President, could not to be decided in this procedure before the Court.²⁷

²¹ *Ibid.*, point 5.

²² *Ibid.*, point 7.

²³ *Ibid.*, point 2.

²⁴ The dissenting opinion of Lévy Miklós attached to the Decision is not reviewed, since it only concerns Article 3 (2) of the Agreement. See *supra* footnote 6.

²⁵ Dissenting opinion of András Bragyova attached to the Decision, point 1.

²⁶ *Ibid.*, point 2.

²⁷ *Ibid.*, point 4.

7. An Evaluation of the Decision²⁸

As has been said, the text of Section 57 (4) of the Constitution prohibits only a conviction or the imposition of punishment without prior Hungarian legislation criminalising the offence in question. This constitutional provision, since it safeguards a fundamental right, can be extensively interpreted, at least in certain cases. Nevertheless, the Court actually overstepped the limits of constitutional interpretation by substituting the precise constitutional concepts of conviction and imposition of punishment with the vague term of 'any act of criminal procedure which is aimed the establishment of criminal liability'. This very phrase is a novelty in the present Decision; it is not mentioned in previous decisions which were referred by the Court to support its conclusion.

Without this clandestine reformulation, it should have been evident that the prohibition under Section 57 (4) of the Constitution is not applicable to extradition (or to surrender). These forms of international judicial co-operation, as was correctly pointed out by Justice Bragyova, are tantamount to neither a conviction nor the imposition of punishment, but are only preconditions thereof.

It should be noted, however, that extradition and surrender do not purely belong to administrative law; these forms of international judicial assistance are an integral part of criminal law, namely of criminal procedure.²⁹ This classification is not only of theoretical importance, but could ensure that extradition (and surrender) proceedings are subjected to the application of certain fundamental rights.³⁰

As is explicitly regulated by Section 8 (4) of the Constitution, the right set out in Section 57 (4) shall never be infringed or limited, including in times of war or other public emergency which may threaten the existence of the nation. Considering this absolute nature of the constitutional principle of *nullum crimen sine lege*, no other provision of the Constitution could be regarded as being an implicit exception to this prohibition. Moreover, in the light of the preferable interpretation elucidated in this part of the study, there is no practical need to acknowledge any exception to Section 57 (4) of the Constitution in cases of extradition and surrender.

²⁸ The Decision has invoked harsh criticism amongst legal scholars. See, above all, the criticism expressed by K. Karsai and K. Ligeti: *Magyar alkotmányosság a bünyügyi jogsegélyjog útvesztőiben*, (Hungarian constitutionalism in the labyrinth of legal assistance in criminal matters), 6 *Magyar Jog* (2008), pp. 399-408.

²⁹ This connection is explicitly acknowledged by Section 10 of the Act XXXVIII of 1996 on international legal assistance in criminal matters. It provides that 'in absence of a regulation to the contrary, in cases of international legal assistance the Act on criminal procedure should be applied accordingly'.

³⁰ The Hungarian Constitution explicitly links the rights of the defence to criminal procedure. According to 57 (3) of the Constitution '[p]ersons subjected to criminal proceedings are entitled to the right of defence in every phase of the procedure'.

HOW TO RETURN THE SUPRANATIONAL ADMINISTRATIVE-TYPE COUNTERTERRORIST SANCTIONS TO THE CRIMINAL JUSTICE SYSTEM?

by Norbert Kis^{*}

1. Introduction

In the past few years, fair trial implications with regard to the EU counterterrorist sanctioning regime incorporating blacklists by the UN Security Council (SC) have been repeatedly highlighted by academics,¹ committees of the Council of Europe² as well as NGOs. In Europe, opposition to the blacklists has centred on what critics claim is a lack of due process (see part 2) and the potential for political abuse. The 47-nation Council of Europe concluded that the UN and EU blacklists were totally arbitrary and had no credibility whatsoever. The European Court of Justice also declared that the blacklist violated the 'fundamental rights' of those targeted and made it almost impossible for people to challenge their inclusion (see part 4). Several national courts have also questioned whether European countries can enforce the UN sanctions and other blacklists without violating local laws, including a defendant's right to see the evidence against him (see part 3). I assume that addressing legal challenges became inevitable otherwise European governments would stop enforcing the blacklist because of local court decisions and would abandon the programme.

The aim of this analysis is to reconsider the way in which blacklist-based restricting measures can comply with due process standards and to rethink the role and the possible rehabilitation of criminal justice in the international counterterrorist sanctioning process. It needs to scrutinize the lack of an effective judicial review of the counterterrorist sanctions imposed by the EU bodies with special attention to the ambiguities of its implementation at the national level. The objective is to put careful proposals on the table, some as to how to ensure the judicial remedy of EU sanctions at the international level and then to explore the way of returning EU and UN counterterrorist sanctions from the administrative-labelled area to the criminal justice system.

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¹ For an excellent summary of opposing opinions, see G. Vermeulen, W. De Bondt: European report: Listing Terrorists. Finding the right balance between effective measures and fundamental rights guarantees, *Revue Internationale de Droit Penal* 3-4 (2008), pp. 379-482.

² Report of the Committee on Legal Affairs and Human Rights (Council of Europe) on UN Security Council and European Union blacklists (Rapporteur: Mr Dick Marty, CE).

2. Some general characteristics of the UNSC and EU counterterrorist blacklists

The so-called 'blacklisting' mechanism has been creating lists of individuals or organizations suspected of involvement in terrorism-related offences and imposing financial sanctions against them, such as freezing funds or other economic resources and travel restrictions. In 1999 UNSC passed the first Resolution 1267 which provided for sanctions against the Taliban regime in Afghanistan. The Resolution was followed by a series of resolutions expanding the list of sanctioned individuals.³

In 2001 the Council of the European Union (hereinafter «the Council») adopted Common Positions 2001/930/CFSP and 2001/931/CFSP on specific sanctions to combat terrorism. In order to implement the measures described in the aforementioned Common Position, the Council adopted Council Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. Regulation No. 2580/2001 empowered the EU Council itself, and not just the UNSC, to maintain its own list of people and entities against whom sanctions could be applied. The UNSC lists (UNSC Resolutions 1267 (1999) and 1333 (2000)) were implemented under Regulation (EC) No. 467/2001. The Council has adopted several common positions and decisions updating both sets of lists (hereinafter, references to EU measures will also include UNSC lists).

The UNSC and EU counterterrorist sanctioning decisions oblige states to freeze the funds and other financial assets or economic resources, including funds derived from property owned or controlled directly or indirectly, prevent the entry into or the transit through their territories; prevent the direct or indirect supply, sale, or transfer of arms and related material, including military and paramilitary equipment, technical advice, assistance or training related to military activities, with regard to the individuals, groups, undertakings and entities placed on the Consolidated List. Those sanctions restrict a large number of fundamental human rights. The comprehensive travel restrictions found in the blacklist regimes potentially violate individuals' rights to life, to health, to private and family life, to reputation, to freedom of movement and to freedom of religion. The financial sanctions which freeze funds and other economic resources impact on the right to property and the right to work.

³ Resolutions 1267 (1999), 1333 (2000), 1390 (2002), as reiterated in resolutions 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008).

3. Legal nature and human rights criteria of the sanctioning process

These sanctions are generally seen as an administrative-labelled sanctioning system which aims at discarding and excluding international as well as national criminal justice review.

The reasons and justification for taking this counterterrorist sanction policy out of the criminal justice system are due to the need for efficiency, urgency, and the surprise effect in the enforcement of sanctions, therefore priority is given to proactive sanctioning intervention rather than deterrent responses after the criminal event. Before we plead for supranational administrative-type counterterrorist sanctions to be transferred to the criminal justice system, we must take into account the weaknesses and efficiency problems of international and national criminal justice systems in relation to 'the transnational war on terrorism'. Through administrative labelling the international administrative-type special bodies qualify themselves as a more efficient and more responsive vehicle to address terrorism, and the criminal justice system is seen as an old-fashioned, inefficient way to impose, enforce or control counterterrorist sanctions. By creating pseudo-criminal sanctions, the efficiency problems of the criminal regime are placed into a more uncertain sphere which opens the door to sanctions applied without proper judicial guarantees and due process standards.

The resolution of the 14th International Congress of the AIDP (1989) stated that administrative labelling, efficiency and proactive reasoning cannot justify the lack of fair trial standards: *administrative-type retributive sanctions require application of the basic principles of criminal law and of due process. Special emphasis was put on the defendant's right to be informed of the charges and evidence brought against him, the right to be heard, including the right to present evidence and the recourse to the judiciary and to adversary proceedings should be possible.*

In terms of the legal nature of UN and EU sanctions, the autonomous concept of a 'criminal charge' and a sanction in the case law of ECtHR requires fair trial standards to apply.⁴ The ECtHR commented in Engel: '[t]he very nature of the offence and the degree of severity of the penalty that the person concerned risks incurring are of great importance in the meaning of that Article 6'. In the Öztürk case the ECtHR declared that the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature. In terms of the sanction test of the ECtHR, UN and EU sanctions would seem to have a criminal element (terrorism-related activity) and the impact of some of the

⁴ See more about the ECtHR's definition of the nature of charges in N. Kis: Problems of Administrative (Non-Criminal) Punitive Systems in the European Union, in: *Studies on European Administrative Penal Law*, HVG-Orac Budapest, 2004, pp. 28-65.

measures imposed rises to the level of criminal sanctions. It is obvious that penalties under criminal law are the only sanctions which are criminal in nature.

In our view, irrespective of the criminal/civil or administrative legal nature of the suspicious terrorism-related offence as the substantive basis of the sanction and the sanction itself, the point is that behind the administrative label, the EU counterterrorist measures (freezing and travel sanctions) are seriously restricting fundamental rights, such as the right to property, the right to work and the freedom of movement. Some analyses stress that freezing assets and economic resources for an uncertain period of time are neither criminal punishments nor based on criminal charges.⁵ However, most assessments recognize that the effect of these preventive measures is *de facto* punitive. The debate as to the criminal or non-criminal nature of sanctions has no great importance in determining the scope of fair trial standards, since Article 6 ECHR guarantees a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' in the case of both civil and criminal charges. If the charges are not civil or criminal then Article 13 ECHR, providing an 'effective remedy', still applies. Article 14 ICCPR provides a similar set of fair trial guarantees. However, the Court of First Instance (hereinafter CFI) verdict in *Sison v. Council* of the EU has been an important point in this debate since Sison arguments concerning the criminal character of sanctions were accepted. The conclusion is that the very nature of the offences concerned and the purpose and the degree of severity of the sanctions bring these sanctioning regimes within the scope of fair trial standards and the judicial system: the person blacklisted by the EU Council, including UNSC lists, shall be given the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal with a view to modifying or annulling the charges and the sanctions, that would obviously require a clear definition of the grounds for the imposition of sanctions and the applicable evidentiary requirements determined by law. The applicant shall be entitled to a judicial remedy.

Some proponents of the current system say that even if the fair trial standards of the ECtHR shall apply to the counterterrorist sanctions, the right of access to an independent court can be reasonably restricted. The CFI concluded similarly declaring that it is not improper to place limitations on the right to judicial access due to the nature of UNSC resolutions or the UN's legitimate objective of protect-

⁵ However, the Third Report of the 1526 Sanctions Monitoring Team (UN) is contrary to the sanction concept of the ECtHR. The report stated without proper reasoning that '[a]lthough many of those on the List have been convicted of terrorist offences, and others indicted or criminally charged, the List is not a criminal list...the sanctions do not impose a criminal punishment of procedure...but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales'.

ing international peace and security.⁶ The restriction of the right of the person concerned to contest any allegation before the listing⁷ or certain pre-trial restricting measures can be acceptable and justifiable in proportion to security or efficiency concerns.

In our view considering the EU and UNSC counterterrorist sanctioning regime as a limitation of due process is a seriously misleading approach. As the further analysis is going to show, with regard to the above-mentioned process the right of access to an effective remedy before a judicial body is not simply restricted, but is totally excluded and disregarded. As the ECtHR held in *Chahal v. United Kingdom* concerning blacklists, the restrictions on fair trial rights for security reasons do not justify the complete absence of such rights.⁸

4. The lack of an effective legal remedy concerning EU sanctions at the national level⁹

National systems are in a controversial situation since member states of the UN and of the EU are obliged to execute sanctions imposed by those organizations; meanwhile they are not required to enforce supranational sanctions which infringe fundamental rights. While an effective judicial review might contravene UNSC resolutions, it justifies its measures with its national and international human rights obligations. The double jeopardy situation and the different national attempts at proper enforcement can be illustrated by the Hungarian and some other European cases.

⁶ ECtHR (and ECJ) case law generally determines that for limitations on court access or fair trial rights based on national security concerns, there must be 'a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicants' right of access to a court or tribunal'.

⁷ In *Sison v. Council* the CFI annulled Council Decision 2006/379/EC of 29 May 2006, The Court found that if a statement of reasons is not supplied to individuals or entities at the time of listing, the right of defence and the right to effective judicial protection are disregarded.

⁸ In *Chahal v. United Kingdom* the Court stated: 'The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved.' This case demonstrates that even national security considerations do not permit a complete negation of individuals' fair trial rights under Article 6 ECHR, and especially not a complete denial of access to a court or tribunal. While the EU courts have declined to address the underlying question of the lawfulness of the UNSC resolutions, under a proportionality test as applied in *Tinnelly and Chahal* access to a court or some type of decision-making body is necessary even in cases involving national security and terrorism. This court or body would also need to be informed of a reasonable amount of the evidence supporting the charges. Yet, individuals or entities on an UNSC blacklist are not allowed such access in clear violation of their fair trial rights and the proportionality test.

⁹ See more in N. Kis, P. Nyitrai: Financing of Terrorism, 79 *International Review of Penal Law* (2008), pp. 157-178.

4.1 *The implementation of counterterrorist sanctions in Hungarian law*

In Hungarian law, the administrative-type enforcement of freezing and seizing assets has been first established due to the implementation of the UNSC and EU sanctioning regime. This system has been fully separated from criminal proceedings as the verification or a review of those sanctions in criminal proceedings is excluded. A domestic blacklisting and sanctioning mechanism similar to the EU or the US regime has not been established. The only exception is a transitory administrative sanctioning process which allows the Hungarian Financial Intelligence Unit (HFIU), managed by the National Customs Authority, to take provisional restricting measures on the basis of suspicious money-laundering or terrorism-related offences. Measures suspending or withholding consent to a transaction can have effect for one day (in the case of domestic transactions) or two days (non-domestic transactions). After this transitory period, only sanctioning measures taken in a criminal investigation can suspend or freeze financial transaction or assets.

In Hungary, there were several ambiguities in the first period of the implementation of UN and EU counterterrorist administrative restrictive measures (2001-2004) due to the unconstitutionality of enforcement by government decrees instead of Acts of Parliament.¹⁰ Due to the lack of a proper implementation of international restrictions, the criminalization of their non-application was also out of order.

Some legal uncertainties were resolved by Hungary's accession to the EU (in 2004), since EU regulations became directly applicable in Hungary, so the general legislative framework of counterterrorist sanctions was put in place. However, the direct application of generally formulated sanctioning measures, i.e. in financial services, gave rise to several ambiguities. From 2004 to 2008 the necessary domestic regulation of the application of EU sanctions was lacking. Due to this fact, national enforcement had not really worked.

The domestic procedural rules which are necessary for the enforcement of EU economic and financial restrictive measures entered into force with Act CLXXX

¹⁰ The implementation of UN and EU counterterrorist administrative restrictive measures started with Act No. LXXXIII of 2001 [on Combating Terrorism, on Tightening up the Provisions on the Impeding of Money Laundering and on the Ordering of Restrictive Measures]. The Act authorized the government to issue decrees which can enforce and impose financial and economic sanctions imposed by the UN Security Council or EU Council to persons blacklisted by the UN and EU respective bodies. Only one Government decree (No. 56/2002. (III. 29) on restrictive measures based on international obligations in the fight against terrorism) had been approved which had not provided the major part of UN and EU designation lists. The government recognized that an Act of Parliament would have been the desirable medium for implementation, nevertheless the system of implementation was not modified. Therefore from 2001 to 2004 a large number of UNSC and EU Council restrictive measures were neither implemented nor enforced in any way in Hungary.

of 2007 on the enforcement of the economic and financial restrictive measures of the EU (EFR Act) in 2008.

In the current system, there are two stages in the administrative enforcement of sanctions: HFIU has *ex officio* authority to suspend the transfer or to block the account, or service providers are obliged to suspend transactions for two working days (when there are suspicions of ML and FT) and to immediately report suspicious transactions to the HFIU (Provisional/preparatory stage).

In the case of provisional freezing, the HFIU shall promptly inform the competent County Court which shall order the freezing of assets in a non-trial civil procedure on the basis of the notice of the HFIU in full compliance with the EU resolution concerned. This non-trial process is completely formal by nature, since the respective EU measure is completely binding. Neither the mere basis of the charges nor the compliance of EU restrictions with domestic constitutional or legal standards can be reviewed. The pure formality of this process is shown by the fact that the civil court is seen to be better placed to enforce counterterrorist restricting measure than a criminal court.

In this process, the right to claim a non-trial so-called 'exemption' procedure (delisting, unfreezing) cannot be taken as an efficient legal remedy since the court's decision shall be based entirely on exemption criteria laid down in the given EU sanctioning measure.¹¹

It is important to add that the HFIU does not necessarily investigate the grounds for the counterterrorist sanctioning measures either during or after the enforcement of sanctions. The purely technical enforcement results in the uncertainty and the irrelevance of substantive criminal law standards. This shows that the necessary legal grounds and the evidentiary requirements for the imposition of those sanctions are lacking.

Moreover, the lack of any follow-up re-examination within a criminal investigation concerning the grounds for the 'blacklisting' sanction may give rise to the problem of the unlimited time during which these restrictions are to apply (for years, there is no evidence against them, only the 'statement of the case' provided by a state submitting names for inclusion on the blacklist is taken as evidence).

¹¹ The EFR contains provisions on the exemption procedure and unfreezing. If the EU act imposing restrictions allows for an exemption, an individual petition addressed to the court shall be submitted to HFIU. If the financial restriction imposed by the EU is based on a UNSCR, the HFIU initiates and conducts the required consultation procedure with the competent UNSC sanction committee. The HFIU shall inform the court of the result of the consultation procedure concerning the exemption (art. 6).

4.2 *Legal challenges in other countries*

Some national court decisions have shown that human rights concerns have led national systems to embark on an effective review regarding the implementation of sanctions. Several academics and NGOs encourage ECHR and UN states parties to fulfill their human rights obligations by judicially controlling counterterrorist sanctions. However, the resolutions of the Security Council at issue generally fall outside the ambit of the national courts' judicial review and national courts have no authority to call into question, even indirectly, their lawfulness in the light of Community law or national legal standards.

A special procedure in Switzerland is often referred to as being positive step towards an effective national review system. Before the freezing of funds and assets, the authorities inform the party concerned and give them thirty days to address the decision; the party can then apply for an exemption or even appeal to Switzerland's federal court. Despite those developments, in the Kadi case, a Switzerland-related lawsuit, the European Court of Justice ruled that Kadi's right to a fair hearing had been violated by the EU (European Court of Justice in Cases C-402/05 P and C-415/05 P).

In the Kadi case the Swiss Attorney General dropped an inquiry into Kadi's finances after finding no evidence of criminal acts; his assets remain frozen in Switzerland, however, because the United Nations has not removed him from its blacklist. It is general policy that national prosecutors terminate criminal investigations against blacklisted persons after failing to find evidence, but the UN and the EU constantly refuse to remove those individuals from the blacklists and the national enforcement of these sanctions must be retained. The double jeopardy at the national level can be illustrated by the Nada case (he has been on the UN blacklist since 2001) in which the Swiss federal prosecutor, after a long investigation, found no evidence that Nada had broken any laws; however, Switzerland has said that it is being compelled to keep Nada's assets frozen because of its legal obligation towards the UN blacklist.

The US Treasury maintains its own blacklist of suspected terrorism financiers. Although it overlaps with the UN blacklist, the Treasury cannot compel other countries to enforce it. Under the terms of the executive order authorizing the blacklist, the Treasury needs to show that it acted with 'reasonable cause' in adding a name; it does not need to prove guilt.

The assessment of the situation can lead us to the conclusion that the national review of supranational blacklists cannot overcome the difficulties arising from the international obligation of the UN and EU member states. Moreover, the need for an EU-wide uniform sanctioning policy and uniform enforcement and the immunity of UNSC resolutions (art. 105 UN Charter) can justify the reasons for excluding judicial control over EU sanctions under different national substantive and evidentiary standards before national criminal justice. The different interpre-

tation of international obligations would lead to different national implementation which would reduce the effectiveness of anti-terrorist actions. Therefore, in our view the national judiciary would not be the proper vehicle for an effective review of EU (UNSC) sanctions, so the way out of this double jeopardy would be to resort to a review system set up at the international level.

5. The efficient legal remedy concerning UNSC and EU counterterrorist sanctions at the supranational level

The efficient legal remedy concerning UNSC and EU counterterrorist sanctions at the supranational level seems to be the reasonable option. However, the conclusion to which we are going to come, currently, is that at the supranational level there is no room for an effective review of charging and sanctioning decisions taken by the UN or the EU respective bodies.

In Cases C-402/05 P and C-415/05 P (Yassin Abdullah Kadi and Al Barakaat I. F. v Council and Commission) the ECJ ruled that the Community judicature had jurisdiction to review measures adopted by the Community giving effect to resolutions of the UNSC. In exercising that jurisdiction, it considered that the regulation infringed Mr Kadi's and Mr Al Barakaat's fundamental rights under Community law. In the revised decision the Court of First Instance ruled that the Community courts had no jurisdiction to review the internal lawfulness of the contested regulation. The ECJ declared that the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which may not be prejudiced by an international agreement. The Court concluded that the Community courts must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including a review of Community measures which, like the contested regulation, are designed to give effect to resolutions adopted by the Security Council. Council decisions/measures can also be challenged by an annulment action under Article 230 EC before the CFI and (in the Yusuf case) the CFI considers itself empowered to check the lawfulness of UN SC resolutions with regard to *jus cogens*. In Case T-228/02 of 12 December 2006 the Court of First Instance quashed a preceding Council decision due to a number of violations of the applicant's procedural guarantees. The Court also annulled a later Council decision (Case T-256/07 of 23 October 2008) because it did not take into account the judgment of a competent judicial authority, according to which the PMOI (Organisation des Modjahedines du peuple d'Iran) should be removed from the national blacklist. In *Sison v. Council* the CFI annulled Council Decision 2006/379/EC of 29 May 2006 in so far as it concerned Sison. The applicant had been included on a blacklist issued by the

United States Treasury Department covered by Executive Order No. 13224, The Court found that a statement of reasons must be supplied to individuals or entities at the time of listing as required by Article 253 EC, and while the right to effective judicial protection is typically satisfied by the parties' right to bring an action before the Court of First Instance pursuant to the fourth paragraph of Article 230 EC, Sison, in this case, was not able to make effective use of this right since his rights of defence had been disregarded.

However, the effectiveness of these recent judgments is questionable due to the Council's unwillingness to remove the persons concerned from the blacklist. In the OMPI case, while the Court had annulled the Community Decision, the Council argued that it had been replaced by a subsequent Decision, 2006/379/EC of 29 May 2006, and therefore the OMPI still legally remains on the list and its assets remain frozen.

As has been seen, the ECJ's jurisdiction to review counterterrorist measures is limited to procedural aspects, in particular the fair trial deficiencies of listing mechanisms. However, individuals or entities listed under the UNSC/EU sanctions regime are unable to appeal against the mere factual or legal basis of their listing, and have no access to any type of independent and impartial review mechanism in this respect.

In the current delisting procedures, no judicial body can seriously address the unlawfulness of the underlying UNSC resolutions and EU regulations. The current listing and delisting procedures of the UN and EU sanction regimes, although they have been improved, still fail to provide satisfactory protection of fundamental human rights, including both procedural and substantive rights. The UN delisting procedure allows listed parties to submit a request through either the focal point process, permitting direct individual involvement in the sanctions process, or through their state to the Sanctions Committee to review the case. Humanitarian exemptions can also be requested through states, but not directly, although the guidelines for what constitutes a humanitarian exemption are not always clear. Every year, the Security Council circulates all listings that have not been updated for four or more years, and any member of the Sanctions Committee has the option of proposing a review aimed at delisting.

In the EU regime, if the unfreezing conditions of the Community act are met, EU member states may grant a specific authorization to unfreeze funds after consultation with the EU Council and Commission. These types of more developed delisting procedures do not comply with either fair trial requirements or with the right to an effective remedy.

The question which remains is how and at what level the UNSC/EU counterterrorist sanctioning measures should be effectively relocated from the current legal vacuum into the criminal justice system at the international level through establishing an international mechanism to provide for a judicial remedy.

6. A proposal for a judicial review of counterterrorist sanctions at the UN level

Recently more and more governments have been urging the United Nations to create an effective review mechanism at the universal level. There are recommendations for the Security Council to establish an advisory panel of terrorism-financing experts that could review requests by individuals to have their names removed from the list. I think that any organizational solution can be accepted if criteria of independence and impartiality are met.

It is clear that instead of a regionally-limited European review mechanism, a universal and independent judicial review would be advisable for both international counterterrorist sanctioning regimes. This would be feasible within the international criminal justice system under international jurisdiction. Compared to this, a special European review would lead to serious legal ambiguities due to the immunity of UNSC decisions implemented in EU regulations on the one hand. On the other hand, the competences of the existing supranational Courts in Europe (ECtHR and ECJ) are not really appropriate for an effective and substantive process challenging the mostly criminal allegations which justify the restrictive measures. I assume that the United Nations would never agree to allow a European court or a regional independent panel to review its decisions since such a move could infringe powers granted under the UN charter.

There are many aspects to creating such an international review process including organizational, jurisdictional, substantive and procedural issues. Discussing and considering all of them would be an unfeasible undertaking; I merely place on the table some personal *de lege ferenda* thoughts for discussion.

From an organizational aspect, a listing and delisting Sanctions Committee at the UN cannot be seen as an impartial review body. In our view, the existing universal courts should be considered as the judicial body for a review rather than setting up a new *ad-hoc* judicial body. The establishment of a special chamber to review UNSC/EU counterterrorist preventive sanctions at the International Criminal Court may seem to be appropriate to ensure a judicial review of UN, EU and even other supranational blacklisting and sanctioning measures. The ICC is currently the only capable international institution that could fill the current gap and serve as an ideal tool for reviewing counterterrorist sanctions by upholding justice.

From a substantive law aspect, the effective remedy should be based on a clear substantive legal definition of terrorism-related offences which are supposedly the factual basis for listing in a confidential process. Currently, as the Draft report of section 2 of the 18th International Congress of Penal Law (The Cleveland Report) concluded, the listing and the imposition of sanctions are not based on criminal charges and transparent criteria so there are no means for determining the guilt or innocence of the sanctioned persons. Extending the

jurisdiction *ratione materiae* of the ICC in this direction will necessitate the qualification and definition of terrorism-related offences as an international crime. At the Rome Conference,¹² there was significant interest in including terrorism in the Court's mandate, and there was a proposal in a draft statute to this effect. The upcoming review conferences with respect to the revision of the ICC's subject-matter jurisdiction and the *travaux préparatoires* of comprehensive convention against terrorism are opportunities to establish a special jurisdiction and to develop the necessary substantive norms for a judicial review of counterterrorist international sanctions. As Prof. Bassiouni stressed, to establish a universal definition, the development of new international norms is not needed, but the refinement of existing norms and their consistent application are advisable (in 2001, the EU Council adopted a common EU definition of terrorism).

As far as jurisdictional and procedural aspects are concerned, the judicial body would be expected to

- effectively review individual allegations, the necessity and proportionality of sanctioning measures taken by the UN and the EU respective bodies,
- ensure for the person listed and sanctioned the right to be heard and to adequately defend him/herself against terrorism-related charges;
- make a decision with a view to modifying or annulling UN or EU sanctioning decisions.

This judicial body should also be in charge of a *proprio motu* periodic review of sanctioning measures. According to the current jurisdictional rules, a review chamber of the ICC would exercise its jurisdiction if the UN, EU and other supra-national bodies have accepted it in this matter.

7. Closing remark

More and more states, NGOs and scholars say that in the last 7-8 years disregarding due process in sanctioning systems has undermined the credibility of the international fight against terrorism and produced counterproductive effects. It is time to return UN and EU counterterrorist sanctions to the criminal justice system and to rehabilitate the principles of criminal law and criminal justice in this field. Reconsidering and extending the jurisdiction of the ICC would be a possible road in this direction.

¹² The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

THE USE OF CRIMINAL LAW IN COMBATING TERRORISM – A NORDIC PERSPECTIVE

by Sakari Melander*

1. Some basic assumptions in Finnish criminal justice policy and criminal law

Terrorism has not been a big issue in the Nordic countries, including Finland. There are only a few incidents in the history of Finland that could possibly be described as terrorist offences. Basically the history of these acts relates to the politically sensitive era before and after Finland's independence in 1917.¹ There have been no acts of international terrorism in Finland. Before 2001 international terrorism also appeared as a somewhat distant phenomenon in Finland – and it must be noted that the threat of an international terrorist act is not even today among the highest in Finland. Although organized criminality as such is not a phenomenon which is comparable to international terrorism it could be noted that also the level of organized criminality has traditionally been low in the Nordic countries. Organized crime groups have however been on the increase in recent decades. It has been estimated that the number of organized crime groups is between 70-80 in Finland.² The situation in other Nordic countries is quite similar. This illustrates that the situation in the Nordic countries has slightly changed. Despite these changes the number of terrorist attacks is zero and the number of suspected terrorists is remarkably low. There have been some cases relating to the financing of terrorism from Sweden.³ It could be estimated that activities linked to international terrorist groups and terrorist activity is conceivable in the Nordic countries today. Also according to security officials the threat of international terrorist acts in the Nordic countries is at least considerable, albeit not very probable.

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¹ See K. Nuotio: Umsetzung internationalrechtlicher Vorgaben zur Terrorismusbekämpfung in Finnland, in Jürgen Swarze (ed.): *Globalisierung und Entstaatlichung des Rechts*. Ergebnisse der 31. Tagung der Gesellschaft für Rechtsvergleichung vom 20. bis 22. September in Halle. Teilband 1: Beiträge zum Öffentlichen Recht, Europarecht, Arbeits- und Sozialrecht und Strafrecht, Mohr Siebeck, 2008, p. 233, 249.

² See Sanna Heikinheimo: Keskusrikospoliisin rooli muuttuvassa toimintaympäristössä (The Role of National Bureau of Investigation in the Changing Environment), in: *Rikostorjunnan etulinjassa. Keskusrikospoliisi 80 vuotta* (In the Front Line of Crime Prevention. 80th anniversary of the National Bureau of Investigation), Helsinki, 2008, p. 10, 15.

³ See <http://www.sakerhetspolisen.se/terrorism/terrorhotetieuropaoschverige.4.7671d7bb110e3dcb1fd80002808.html> (Webpage of the Swedish Security Service (Säkerhetspolisen) visited 18.8.2009) according to which two persons were convicted of that offence in 2005.

However, it seems that the Nordic view of crime and criminality has certain difficulties in relating itself to organized criminality and terrorism. Therefore some basic assumptions in Finnish criminal justice and criminal justice policy need to be examined in order to illustrate the ideological background of the Finnish system and the difficulties in adapting oneself to the conceivably changing operational environment.

Personal liability. The basic assumption in considering the use of criminal law or criminal legislation has been the single offender acting alone. Criminal statutes have been drafted in line with this basic assumption. The foundation of criminal law provisions – both provisions belonging to the general part⁴ and the special part of criminal law – is based on this assumption. Provisions belonging to the Finnish Penal Code even use the language that reveals this assumption. Single criminalizations (offences) are formulated by using language that clearly indicates a single person. The provisions speak of ‘A person, who deliberately or through negligence’ does something that fulfils the substantive requirements laid down in the provision.

Moreover, criminal enterprises have not been at the heart of Nordic criminal law. This has been the traditional view and this view has dominated criminal law textbooks, criminal statutes, and criminal justice policy. Even the liability of legal persons (corporate criminal liability, Chapter 9 of the Finnish Penal Code) is basically based on the criminal responsibility of an individual who acts or neglects to act in the activity of the corporation; it is even required that the person belongs to a statutory body or other management or exercises actual decision-making powers in the corporation. The possibility of corporate criminal liability was enacted in Finland as late as 1995 and after the new provisions came into force there were only a few cases involving corporate criminal liability. The provisions were slightly amended in the early 2000s in order to make corporate criminal liability more effective. This seemed to have a certain effect, since we now have a few landmark decisions from the Finnish Supreme Court concerning corporate criminal liability – mostly relating to environmental crimes.

Anyhow, the basic assumption even in corporate criminal liability is still personal liability as described above. This surely relates to the strong role of the prohibition of strict liability offences in Finnish criminal law. Although the role of this prohibition is somewhat relative – we have some offences that could be considered highly questionable with regard to the prohibition – the prohibition is

⁴ It must be remembered that the general doctrines of criminal law are not always explicitly enacted in criminal legislation. Typically, these doctrines evolve in case law and in the criminal law literature. In Finland, however, provisions on certain general doctrines have been included in the Finnish Penal Code. The intention was to be as neutral as possible when it comes to different and perhaps divergent doctrines in legal science. In spite of this, certain major provisions were considered necessary mainly because of the principle of legality. See Government Bill 44/2002.

strongly supported by the Finnish Constitution. Section 1 paragraph 2 of the Finnish Constitution states that the Constitution shall guarantee the inviolability of human dignity. When the traditional understanding of human dignity relates to the protection of a person's autonomy and his/her freedom of choice strict liability offences would constitute a breach of human dignity.⁵ When strict liability offences are basically applicable without proof of intention, recklessness or negligence, they breach a person's autonomy and his/her freedom of choice.⁶ Under strict liability offences a person could be convicted despite his/her inability – due to a lack of capability or opportunity – to act otherwise.⁷

However, certain new provisions recently enacted have perhaps slightly changed this foundation. At least some of these provisions have been considered as problematic with regard to strict liability. These provisions relate to terrorism and organized crime. Provisions such as directing a terrorist group and participation in a criminal organization are slightly dubious in this regard, as will be described below. It can also be noted that the total reform of the Finnish Penal Code (1972-1999) has been criticized because it paid inadequate attention to criminal organizations and organized criminality. Provisions mentioned above were added to the Finnish Penal Code shortly after the Total Reform under which there were no adequate criteria assessing such provisions and such criminality was not examined.

Reluctance towards preparation and conspiracy. Finnish criminal legislation and criminal law doctrine have traditionally been pretty much reserved towards preparation offences. There are a few preparation offences in the Finnish Penal Code, such as the preparation of high treason (Chapter 13, Section 3), the preparation of an armed breach of public order (Chapter 17, Section 5), the preparation of eavesdropping or illicit observation (Chapter 24, Section 7), the preparation of endangerment (Chapter 34, Section 9), the preparation of counterfeiting (Chapter 37, Section 4), the preparation of means of payment by fraud (Chapter 37, Section 11), and the preparation of a narcotics offence (Chapter 50, Section 3). These sections are examples of a situation where the legislator has considered it necessary and legitimate to criminalize an offence of preparation. These preparation offences mostly result from the importance of the interest protected (such as in high treason or an armed breach of public order), from practical reasons (such as in counterfeiting or payment by fraud) or from international obligations (such as in narcotics offences). In any case preparation offences are or have traditionally been uncommon in Finnish criminal law. Prepara-

⁵ On the role of human dignity see D. Feldman: Human Dignity as a Legal Value, Part I, *Public Law* (1999), pp. 682-702.

⁶ On the definition of strict liability see e.g. A. Ashworth: *Principles of Criminal Law*, Oxford University Press, Oxford - New York, 2006, pp. 164-165.

⁷ On 'He could have acted otherwise' see e.g. A. Ross: *On Guilt, Responsibility and Punishment*, University of California Press, Berkeley, 1975, pp. 167-173.

tion offences are individual offences and the nature of those offences could be described as being situation-specific; in other words, we have no general preparation offence applicable to all offences or even to 'serious' offences.

The situation is very similar with regard to conspiracy offences. The number of conspiracy offences in the Finnish Penal Code is possibly even fewer than preparation offences. The conspiracy offences include treasonable conspiracy (Chapter 12, Section 11), conspiracy to commit aggravated money laundering (Chapter 32, Section 8) and conspiracy to commit a dangerous military offence (Chapter 45, Section 24). The first is based on the historically important character of the offence of high treason, the second is due to international obligations concerning money laundering and the third belongs to the realm of, in a sense, a specific criminal justice system within the more general criminal justice system. Conspiracy offences are therefore very uncommon in Finland. It is interesting that the view in the early 1970s was that planning an offence and especially with another person or persons as such can be an indication of guilt that surpasses the level of guilt of an individual offender. Despite this, the criminalization of conspiracy offences has been seen as problematic, mainly due to practical uncertainty relating to these offences when they are applied in real cases.⁸ Acting as part of an organized group or acting in a particular methodical manner could, however, be taken into account in sentencing as aggravating factors.

The question concerning the acceptability of a conspiracy offence was raised fairly recently in Finland when an EU instrument was implemented. The implementation of the Joint Action on making it a criminal offence to participate in a criminal organization⁹ was somewhat problematic in Finland. Basically, Article 2 of the Joint Action allows Member States to choose between two alternative models of criminalization. The first alternative criminalizes membership of a criminal organization – and requires that a person actively takes part in the organization's activities – and the second alternative introduces a conspiracy offence. The possibility to choose between two alternatives was clearly a compromise, and the second alternative was the outcome of the reaction by the United Kingdom where conspiracy offences are used.¹⁰ Under the second alternative liability is not tied to the requirement that the offender must take part in the actual execution of the criminal activity of the organization.

⁸ See Committee Report 1976: 72, p. 122. This Committee Report was the starting point of the total reform of the Finnish Penal Code.

⁹ Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organization in the Member States of the European Union, 98/733/JHA, OJ L 351, 29 December 1998, p. 1.

¹⁰ V. Mitsilegas: Defining organised crime in the European Union, 26 *European Law Review* (2001), p. 565, 571.

The first alternative was adopted in Finland. The reason behind this solution was, firstly, that conspiracy offences are remarkably uncommon in the Finnish Penal Code and in Finnish criminal law thinking. Conspiracy offences are even more uncommon than preparation offences. A general conspiracy offence relating to organized crime was considered to be undesirable. Secondly, the conspiracy alternative was dropped because of its distant connection to the main act – here the actual criminal activity of a criminal organization. A comparison was made with participation in crime where the requirement of being an accessory has a crucial role.¹¹ This means that participation in a crime can only be punishable if the main act or a punishable attempt at the main act is actually committed. If planning an offence – which is considered less blameworthy than participation – was criminalized without the requirement of being an accessory, the situation would be unbalanced and thus the conspiracy offence was dropped.¹²

The alleged national character of criminal law. Criminal law has traditionally been seen as a highly national branch of law. This has recently materialized especially in EU criminal law. The traditional view of EU criminal law is that there is in fact no such thing as ‘European criminal law’. ‘European criminal law’ has been seen as a technical concept rather than a legal concept. It was considered that it could only be possible to technically cover certain European developments that had an influence on national criminal justice systems under the concept of ‘European criminal law’.¹³ This traditional view illustrates that the national character of criminal law has been considered to be a vital part of criminal law and criminal justice systems as such. In short, criminal law was considered to be closely related to national sovereignty.

The relation between national sovereignty and criminal law has had an influence on international criminal law and EU criminal law. In the regime of international criminal law a convention is the main instrument of cooperation. Conventions represent a system of intergovernmental cooperation and this system of international conventions traditionally does not entail any supranational institutions or organs that have, for example, strict supervisory powers toward countries that have ratified the conventions. International criminal law could thus be described as soft cooperation. It must be noted that the majority of both international and regional legal efforts to combat international or regional terrorism belong to this soft cooperation group.

¹¹ On the Nordic views on participation see K. Nuotio: Participation in Crime in Nordic Criminal Laws: Variations on a Theme, in: J. Husa, K. Nuotio, H. Pihlajamäki (eds.): *Nordic Law – Between Tradition and Dynamism*, Intersentia, 2007, pp. 127-152.

¹² See Government Bill 183/1999.

¹³ P.-A. Albrecht, S. Braum: Deficiencies in the Development of European Criminal Law, 5 *European Law Journal* (1999), p. 293, 297.

Criminal law cooperation in the EU in turn has partly an intergovernmental and partly a supranational character. Criminal law cooperation in the former Third Pillar of the EU was basically intergovernmental cooperation. This cooperation enjoys certain special arrangements that have been adopted mainly because the Member States wanted to retain control over national criminal legislation. Therefore certain special arrangements were adopted. First, the main instrument in criminal law cooperation during the Amsterdam Era, the framework decision, had some special features that highlighted the relation between criminal law and national sovereignty. Framework decisions needed to be adopted unanimously, unlike directives that can be adopted with a qualified majority. In addition, and again unlike directives, framework decisions did not entail direct effect.¹⁴ The role of the Union's supranational institutions was fairly limited in the criminal law cooperation within the Third Pillar, and this limited role could be seen as inefficiency – if the viewpoint of the Commission is adopted. The Treaty of Lisbon brought along significant changes that had relocated the criminal law cooperation as part of a more 'normal' EU policy without special arrangements, although the Lisbon Treaty still contains a few special arrangements and again due to national sovereignty.

The importance of national sovereignty was nicely illustrated in the landmark cases C-176/03, *Commission v. Council*, and C-440/05, *Commission v. Council*. The cases are extremely important as they transfer limited criminal law competence to the First Pillar. After these cases it was possible under the former First Pillar instrument to demand that Member States use criminal law means, with certain qualifications of course. The court required that two criteria must be fulfilled. First, the application of criminal law measures must be an essential measure for combating the serious offence in question. Secondly, the use of the criminal law measure must be considered necessary in order to ensure the effectiveness of the goal pursued (the goal in the cases was environmental protection).¹⁵ In short, the main question in these cases was the location of the criminal law competence which in practice means either the Third or the First Pillar. The Court was of the opinion that when the criteria described above are fulfilled, criminal law measures can be provided within the First Pillar. The sensitive link between national sovereignty and criminal law was evident in these cases when numerous Member States were of the opinion that criminal law competence belonged solely to the Third Pillar.¹⁶ In case C-440/05 the role of national sovereignty in criminal law matters was also highly evident when the

¹⁴ As is generally known, these are explicitly laid down in TEU Art. 34.

¹⁵ C-176/03, *Commission v. Council*, para. 48.

¹⁶ *Ibid.*, paras 26-37; C-440/05, *Commission v. Council*, paras 42-51.

Court held that the determination of the type and level of the criminal penalties does not fall within the competence of the EC.¹⁷

2. Terrorism in Finnish criminal law

Terrorism as such was not included in Finnish criminal law until 2002. Finland had of course implemented numerous international conventions on terrorism and these conventions had resulted in changes to the Finnish Penal Code. However, the dominant view was that there is no need for separate provisions on terrorism. The traditional Finnish view – which was also represented in the Finnish Penal Code – combines terrorism mostly with the category of crimes of endangerment ('yleisvaaralliset rikokset', Chapter 34). International terrorism conventions on hijacking an aircraft or maritime security have been implemented by slightly changing the provisions on endangerment offences, such as criminal mischief, criminal traffic mischief or hijacking.¹⁸ The title 'Terrorism' was invisible in the Finnish Penal Code since the international law on terrorism was in a sense hidden within provisions that had their origins in mostly national law. The main reasons behind this solution were the national character of criminal law and the minor role of terrorism in Finland—two reasons that are connected with each other.

There have only been a few incidents in Finnish history that could possibly be described as terrorist acts and basically the history of these acts relates to the politically sensitive era before and after Finland's independence in 1917.¹⁹ There have been no acts of international terrorism in Finland. Before 2001 international terrorism also appeared as a somewhat distant phenomenon for the Finnish legislator. International conventions on terrorism had been nationally implemented, but the practical meaning of those offences was something other than international terrorism. The practical scope of the criminalization under which terrorism conventions were implemented was national. For example, the main practical scope of the penal provision on criminal mischief is fire-raising or arson that could relate to terrorism, but that in practice is a purely national form of criminality that has no connection to terrorism whatsoever.

The implementation of international obligations mostly relating to terrorism, but also instruments more generally relating to international criminal law, has been fairly adequate at the formal level of legislation, but the practical side of this criminalization has not been adequately analyzed. Obligations to criminalize a certain act deriving from international conventions and relating to international

¹⁷ C-440/05, *Ibid.*, para. 70. See also the Opinion of Advocate General Mazák, paras 104-108.

¹⁸ See also K. Nuotio: Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law, 4 *Journal of International Criminal Justice* (2006), p. 998, 1001.

¹⁹ K. Nuotio: Terrorism, *op.cit.*, p. 1001. See also K. Nuotio, *op.cit.*, p. 233.

criminal law – terrorism or otherwise – have traditionally been considered to have an almost non-existent practical meaning. Sometimes new criminalization or amendments to existing provisions are even justified by merely stating that the new criminalization or an amendment to an existing offence is necessary in order to fulfil the requirements of an international instrument – no reference to the actual need for and the actual application of the provision is made. Therefore the implementation of these international obligations is distinctively ‘minimum implementation’. These international obligations have possibly been considered as ‘legal irritants’ that do not fit very well within the structure of the Finnish Penal Code or that they somehow breach the allegedly consistent and coherent national system of criminal justice. This was evident with the offences against international criminal law (Chapter 11 of the Finnish Penal Code that contains provisions on war crimes, offences against humanity etc.). The Chapter had its origins in the mid 1990s when the provisions were amended as part of the total reform of Finnish criminal legislation. However, the provisions were strongly criticized as they were seen as problematic with regard to international obligations. For example, the Finnish Penal Code contained no explicit provision on crimes against humanity. It was considered that this contradicted the Rome Statute that had already been implemented in 2000.²⁰ Interestingly, when the Rome Statute was implemented, minor differences and inadequacies were not considered problematic since the provisions practically, but not completely, fulfilled the requirements of the Rome Statute.²¹ Perhaps the reason behind this view that total correspondence with the international instrument is not required is that it was considered to be almost certain that in Finland there will be no cases on crimes against humanity, on genocide etc. These crimes were considered to be so uncommon in these latitudes that the need for accurate criminal legislation on crimes against humanity was not seen as topical. Therefore a ‘minimum implementation’ where the actual and practical meaning of the offences does not need to be thoroughly described was chosen. The line of ‘minimum implementation’ also included tolerance towards some differences between national legislation and international instruments. This means that implementation is fulfilled and perhaps also within a reasonable time, but the contents of this implementation – or more specifically the contents of the national offences that are thought to fulfil the substantive requirements laid down in an international instrument – could be more or less inadequate. This is due to the alleged national character of criminal law that somehow allows us to prefer

²⁰ M. Heikkilä: Ett folkrättsligt perspektiv på kriminaliseringen av krigsförbrytelser, folk mord och brott mot mänskligheten i Finland, *Tidskrift utgiven af Juridiska föreningen i Finland* 2003, pp. 455-479.

²¹ Government Bill 161/2000, pp. 15-16. However, the Law Committee of the Finnish Parliament reiterated that the government should prepare itself to draft new provisions that really would fulfil the requirements of the Rome Statute. See the Report of the Law Committee 16/2000, at p. 3.

national solutions to instruments of international law. In other words the margin of discretion in implementation is traditionally considered to be quite wide-ranging. The situation today has greatly improved as the provisions on offences against international law have recently been amended – the new provisions came into force in 2008. The explicitly mentioned purpose of the recent amendment was to meet the requirements laid down in the Rome Statute.²²

As has been mentioned, in Finland there was no criminal legislation explicitly relating to terrorism before 2002. Within the same year, however, a new chapter (Chapter 34 a) on terrorist offences was added to the Finnish Penal Code. This was mainly due to the Council Framework Decision on combating terrorism (Council Framework Decision 2002/475/JHA on combating terrorism, OJ L 164, 22.6.2002, at p. 3), but also Security Council Resolution 1373(2001) and the UN Convention for the suppression of the financing of terrorism (1999) as well as the recommendations of the Financial Action Task Force (FATF) were relevant and partly formed the international basis for the Finnish legislation.

The new chapter contains provisions on crimes committed with terrorist intent, the preparation of such a crime, directing a terrorist group, furthering the actions of a terrorist group, and the financing of terrorism. The main basis of the provisions is the Framework Decision on combating terrorism, except for the financing of terrorism which is mainly the result of the implementation of the UN Convention for the suppression of the financing of terrorism – although the framework decision was also relevant. Recruitment for terrorism as well as training for terrorism was criminalized with the implementation of the Council of Europe Convention on the Prevention of Terrorism (2005), and new provisions were added to Chapter 34 a in 2007.²³

The use of criminal legislation in combating terrorism was not considered unproblematic. Most crucially the new, or at the time proposed, provisions needed to be reviewed with regard to the requirements set by the principle of legality. This especially related to offences that somehow exceeded the limits of 'conventional' complicity offences, i.e. the furtherance of actions of a terrorist group that could be described as a terrorist offence. When the proposed provision was discussed in Parliament it was required that punishability be tied to the requirement that the main act (the terrorist offence) was also being committed.²⁴ This was because of the principle of being an accessory that demands a relation between an act of complicity and the main act. This was considered necessary in order to keep the provisions sufficiently foreseeable.

²² Government Bill 55/2007, at p. 12.

²³ A more detailed view of the changes is offered by Kimmo Nuotio, *op.cit.*, pp. 242-244.

²⁴ Report of the Constitutional Committee of the Finnish Parliament 48/2002 and the Report of the Law Committee of the Finnish Parliament 24/2002.

However, Article 8 of the CoE Convention on the Prevention of Terrorism requires that the punishability of acts of public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism shall take place regardless of the actual commission of a terrorist offence.²⁵ When the Convention explicitly demanded that the principle of being an accessory needed to be abandoned in these situations, the Law Committee of the Parliament now stated that the proposed provisions that contained no accessory clause were sufficiently foreseeable.²⁶ In other words the requirements of the principle of legality had, according to Parliament, been fulfilled. The new and amended provisions were compared to the provision on the financing of terrorism, which as such is punishable without a link to the actual terrorist offence. In any case, the link or the non-existence of such a link between these new kinds of pre-stage offences and actual terrorist offences are considered problematic in Finland. The main reason behind the abolition of the clause on the requirement of being an accessory was the international obligation which could be interpreted to mean that the former view that led to 'minimum implementation' is now at least sometimes abandoned. The international obligations are taken seriously or at least literally.

Another problem that related to terrorist offences was the relation between fundamental rights and the new terrorist offences. As already noted in the Framework Decision on Combating Terrorism the use of fundamental rights could be relevant with regard to the essential elements of a terrorist offence. When the Framework Decision was implemented several questions emerged relating to fundamental rights. For example, the right to express one's opinion contains a right to demonstrate and during a demonstration certain punishable acts could take place that could possibly appear to be terrorist-like acts without them actually being so. Also a right to strike could relate to acts that could resemble terrorist acts, but are really something else. Of course it was also recognized that offences carried out within the basically acceptable sphere of fundamental rights could also be considered as terrorist offences. In other words the possibility that a certain act actually belongs to the protected sphere of a certain fundamental right does not generally preclude the possibility to assess that act as a terrorist offence.²⁷ What is important is that the possible conflicts between fundamental rights and terrorist offences were recognized when the provisions were drafted.²⁸ It was admitted that practical cases relating to terrorism could include the weigh-

²⁵ A somewhat similar formulation can be found in the International Convention for the Suppression of the Financing of Terrorism, Resolution 54/109 of 9 December 1999, Art. 2(3).

²⁶ Report of the Law Committee of the Finnish Parliament 9/2007.

²⁷ Government Bill 188/2002.

²⁸ See generally J. Lindstedt: Terrorismpuitepäätös ja suomalaiset terrorismia koskevat rangaistussäännökset (The Framework Decision on Combating Terrorism and the Finnish Penal Provisions on Terrorism) in: *Rikosoikeudellisia kirjoituksia VIII. Raimo Lahdelle 12.1.2006 omistettu*, Helsinki, 2006, pp. 231-250.

ing of fundamental rights and criminal law. At the same time this means that applying the provisions on terrorist offences in real cases could be very difficult and involve a wide range of discretion and the weighing of different principles. Therefore a special arrangement on the right to institute criminal proceedings was adopted. Section 7 of Chapter 34 a of the Finnish Penal Code explicitly states that the Prosecutor General of Finland must press possible charges on terrorist crimes. The main reason behind this arrangement was expressly the possibility that questions relating to the legitimate use of fundamental rights might emerge within these crimes. At the same time this special arrangement exemplifies that different areas of criminal law could have different substantive or procedural rules – in this case the substantive and procedural rules in a sense interact.

Legislation enacted after serious terrorist attacks is often criticized on different grounds that could of course be related. The first line of this criticism advocates that the new legislation grants too much power to the executive while the second line argues that the legislation has been too hasty, not well deliberated or poorly informed. Critique of this kind presumes that the new legislation is driven by urgency (something must be done and soon) and fear (fearing that something bad will occur which results in too much executive powers without deliberation) rather than rationality and long-term discretion concerning the best legislative solutions. This kind of legislative action is called *emergency lawmaking*.²⁹ The Finnish legislation on terrorism and especially on terrorist offences was not drafted outstandingly quickly. Of course the Framework Decision on Combating Terrorism was adopted quite rapidly within the EU and the time determined to implement it could have been somewhat longer.³⁰ I would say that the national legislative proceedings were quite thorough and, as discussed above, the parliamentary proceedings concerning the Government's Bill on terrorist offences (188/2002) were anything but uncritical. In fact several improvements were made in Parliament. Also in the drafting process carried out at the Finnish Ministry of Justice the fundamental rights principles were taken into account when the new offences were drafted. It must also be noted that no special powers were granted to the executive at the same time as the new legislation on terrorist offences. In sum it could be said that the Finnish legislation on terrorism does not represent emergency lawmaking. Different problems do exist, however.

²⁹ Generally on emergency lawmaking and its central features see Adrian Vermeule: *Emergency Lawmaking after 9/11 and 7/7*, 75 *University of Chicago Law Review* (2008), pp. 1155-1171.

³⁰ Article 11(1) of the Framework Decision stated that the Member States needed to implement the instrument by the end of 2002. Practically this meant that after the final adoption of the framework decision there was about six months to implement it. Of course, the implementation procedures often begin before a final agreement is reached on the instrument. Nevertheless, the time could have been somewhat lengthier.

3. Proactive criminal law and its fragmentation

In classical criminal law the role of the state which is subject to the rule of law was regarded as a factor that defined the character of criminal law. The main task of the criminal justice system was to defend and protect individual fundamental interests that, according to the social contract, belonged to equal and free individuals who acted as rational agents. Therefore the task of the criminal justice system and criminal law was to protect individuals and to set certain limits on individual and state action rather than to give orders to and obligations for individuals. Criminal law functioned in a punctuated way and the criminal justice system had a certain state of stability that operated in order to ensure that individuals would enjoy certain ethical minimum levels where the criminal justice system only began to function in cases where rights were being infringed.³¹

The Swedish criminal law scholar Nils Jareborg has used the term defensive criminal law policy in order to describe the classical position of criminal law introduced above. In defensive criminal law policy the criminal justice system protects individuals against the arbitrary use and misuse of power. The criminal justice system operates in these situations only when interests that are explicitly protected in (penal) legislation are specifically infringed or threatened. The limitations on the use of state punishment and the legal protection of individuals set constraints upon the use of criminal law and generally on the criminal justice system.³² The criminal law system concentrates mainly on the so-called core crimes: murder, manslaughter, robbery, arson, assault etc. In other words, acts or omissions that are criminalized protect mainly traditional civil rights or traditionally protected interests (*die traditionellen Rechtsgüter*).

However, in recent decades criminal law has begun to cover more different interests, especially interests that are no longer directly connected to individuals. Instead of being used sparingly to protect individuals, the state now believes that criminal law and the criminal justice system in general is a good option to choose when solutions to different societal problems are needed. At the same time, criminal law has begun to protect new areas such as the economy, the stock market, the environment etc. On the other hand, the operative action of the criminal law system no longer requires that certain interests are directly infringed in a concrete manner. Criminal law also protects some interests that are 'only' endangered.³³ Also Nils Jareborg has noted this development in the nature and character of criminal law and has introduced the concept of offensive criminal law

³¹ See e.g. W. Hassemer: *Symbolisches Strafrecht und Rechtsgüterschutz*, *Neue Zeitschrift für Strafrecht* (1989), p. 553.

³² N. Jareborg: *What Kind of Criminal Law We Want? On Defensive and Offensive Criminal Law Policy*, in A. Snare (ed.): *Beware of Punishment: On the Utility and Futility of Criminal Law*, Oslo, 1995, pp. 17-36.

³³ See e.g. Hassemer, *op.cit.*, p. 31.

policy contrary to the abovementioned traditional defensive criminal law policy. Among the crucial features of offensive criminal law policy are the following: the use of the criminal justice system to solve societal problems, the goal-oriented use of the criminal justice system, the system's quick intervention in phenomena that the state considers to be harmful, and the increase of endangerment offences in criminal codes and also crimes that protect not only individual but public interests.³⁴ One could also speak of the dynamic evolution of criminal law.

The dynamics of the evolution or development of criminal law has not, however, ended in recent years. When the abovementioned development took place in Finland from the 1970s to the 1990s, it could be said that criminal law was not in a state of stability. This dynamic evolution of criminal law has continued.

The Norwegian criminal law scholar Erling Johannes Husabø has recently used the term 'proactive criminal law' in order to describe the current developments in criminal law, especially relating to combating terrorism and, more generally, organised crime. Husabø's point is that criminal law has traditionally acted in reactive manner, which is for example illustrated by the fact that a pre-trial investigation usually takes place before a trial in court and the fact that criminal law normally criminalises acts that imply doing something.³⁵ Contemporary criminal law is in turn labelled by proactive operation. The criminal justice system seeks to intervene in criminal behaviour before the result of the criminal act has occurred. This has inter alia meant that a greater number of preparatory offences and attempts are criminalised.³⁶

One field of criminal law that is particularly labelled by proactiveness is the criminal law concerning one of today's most combated enemies, terrorism. International obligations that contain obligations to criminalize acts relating to international terrorism often contain obligations that mean broadening the scope of the criminalized behaviour in a proactive manner. For example, the Convention on the suppression of the financing of terrorism obliges states to criminalize the financing of certain terrorist acts. Financing certain crimes is indeed an act that can be said to be preparatory by nature. However, the financing of terrorism is considered to be a crime in itself.

In Finland the new terrorist offences (Chapter 34 a of the Finnish Penal Code) contain several provisions that are proactive by nature: provisions on the preparation of terrorist offences, participating in a terrorist group and the financing of terrorism. This has caused some problems in relation to differentiation in the law. In Finland there has traditionally been opposition towards the broad use of preparatory offences, as mentioned above. Preparatory offences are consid-

³⁴ Jareborg, *op.cit.*, 32.

³⁵ E.J. Husabø, Pre-aktiv strafferett, 1 *Tidskrift for strafferett* (2003), pp. 97-98.

³⁶ *Ibid.*, pp. 98-99.

ered to be exceptions. Independent offences that are in the nature of preparatory offences are also seen as problematic in relation to the general doctrines of criminal law. The financing of terrorism or organised crimes could in some situations be considered as participation in or incitement to commit certain crimes. However, when there is independent criminalization concerning, *inter alia*, financing, certain action could be criminalised many times over and these problems must be resolved when the law is applied to the actual situations in question.

The development that has widened the scope of criminal law and criminalization has been mainly the development of criminal law outside the so-called core crimes. The American criminal law scholar William J. Stuntz has noted that criminal law is not one story, but rather two. The first story consists of the so-called core crimes. The second consists of everything else. While the criminal law literature focuses largely on the first, criminal codes in turn are dominated by the second group. The central feature of the history of American criminal law has been the growth in the second group.³⁷ Stuntz notices that the consequence of this substantial growth has been that criminal law is both broad and deep. By the breadth and the depth of criminal law Stuntz means that criminal law criminalises a considerable amount of conduct and that a great deal of this conduct is criminalised many times over.³⁸ The range of criminalization is wide and in many instances criminalization even overlaps.

While Stuntz examines only criminal law in the US, his account is also familiar to Europeans. First, the tendency to criminalize in general does not at the same time necessarily include a counter-tendency to decriminalise. In fact, decriminalisation is indeed quite rare. Second, the tendency to broaden or deepen criminal law means in fact that the existing criminal law is broadened or deepened. This often takes place so that the scope of the existing criminal provision is widened or so that a certain new criminalization that broadens the scope is linked to existing criminalisation. In the latter example there is often a question of criminalizing an attempt to or the preparation of a certain existing crime or criminalizing conduct that is *de facto* in the 'pre-phase' of certain existing criminalization. This is perfectly illustrated by the new offences relating to terrorism: recruiting for terrorism and educating a terrorist group. These are offences that try to prevent or combat terrorism by restricting this activity at its pre-stages or even before the pre-stage. This leads to fragmentation in criminal law when certain areas of criminality have different kinds of general doctrines, e.g. concerning participation and preparation.

³⁷ W.J. Stuntz: *The Pathological Politics of Criminal Law*, 100 *Michigan Law Review* (2001), p. 505, 512.

³⁸ *Ibid.*, pp. 512-519.

4. The fragmentation of criminal justice policy

The use of criminal law in the fight against terrorism also creates deeper problems with regard to fragmentation. When different offences have different backgrounds this could mean that the ideology behind the provisions also differs. It is often concluded that the Nordic countries share somewhat similar ideas and ideologies on criminal justice policy. The phrase which is often used is that the idea(l) of rational and humane criminal justice policy is common to all Nordic countries. Of course there are similarities and differences when basic assumptions and solutions in the Nordic countries are compared. Nordic cooperation in criminal law matters has in the past been active and the countries share some basic assumptions relating to fundamental issues on criminal justice policy even if it could be impossible to speak of a truly common Nordic criminal justice policy.³⁹

Perhaps the possibly common Nordic view is best illustrated with the requirement of humaneness in criminal justice. Nowadays the requirement can be connected to the inviolability of human dignity that is recognized in human rights instruments and national fundamental rights provisions. The requirement of humaneness is based on the idea that if the criminal justice system is used to influence the formation and the maintenance of morals in society and to influence the morality of its citizens,⁴⁰ the criminal justice system must at the same time be generally considered to be just and legitimate. This is also related to the principles of justice, such as equality and proportionality.⁴¹ In other words, people must feel that the system works in an acceptable way.⁴² The system is based on the idea that when self-respect for the system is necessary to secure its functioning, this respect is to be won through respect for one's fellow people rather than through oppression and ideas of the system's superiority. The fact that the criminal justice system will demonstrate respect for the people is the basis of a humane criminal justice policy.⁴³

³⁹ Generally see S. Melander: Nordic Criminal Justice Policy—Single Path or Separate Ways?, in: J. Husa, K. Nuotio, H. Pihlajamäki (eds.): *Nordic Law—Between Tradition and Dynamism*, Intersentia, 2007, pp. 109-125.

⁴⁰ These are the views expressed by influential Nordic criminal law scholars who have favoured 'indirect general prevention' over deterrence models. See e.g. A. V. Lundstedt: *Legal Thinking Revised: My Views on Law*, Uppsala, 1956, p. 229 and J. Andenaes: *Punishment and Deterrence*, University of Michigan Press, 1974.

⁴¹ On recent developments toward unequal justice in the US see W. J. Stuntz, *Unequal Justice*, 121 *Harvard Law Review* (2008), pp. 1969-2040.

⁴² R. Lahti, *Current Trends in Criminal Policy in the Scandinavian Countries*, in: Norman Bishop (ed.) *Scandinavian Criminal Policy and Criminology 1980-1985*, Scandinavian Research Council for Criminology, Copenhagen, 1985, p. 59, 68.

⁴³ N. Jareborg: *Humanity and Sentencing*, in N. Jareborg, *Scraps of Penal Theory*, Uppsala, 2002, pp. 107-108.

The aim of humaneness seeks also to avoid the separation of 'us' and 'them'. As noted above, this view seeks to win the respect of fellow citizens. This idea is based on the notion of equality and respect for human dignity. At the bottom, there seems to be an assumption of criminality in general which approximates the ideas of Émile Durkheim, who famously argued that a certain level of criminality is actually necessary in society, which suggests that a certain level of criminality is actually normal.⁴⁴ In the Nordic countries this led to the formulation of criminal policy goals that are or have been different from law and order criminal justice policy goals. Whilst it is perhaps impossible to reconstruct explicitly formulated criminal justice policy goals that are or have been common to all Nordic countries, I would say that an underlying assumption of the futility and the inhumanity of the general fight against crime approach has been recognized in several Nordic countries – with drug offences being the most notable exception. This Nordic view presupposes an assumption that every citizen is a potential offender.⁴⁵ The system should treat offenders as fellow citizens. Moreover, this also presupposes that crime and criminality must not be prevented at any cost, but only to the extent found to be necessary once the societal costs and benefits of different approaches are compared.⁴⁶ If criminality was to be considered as something evil and if the offender was to be considered to belong to 'them' instead of 'us', the approach would be quite different. The role of the fellow citizen has been crucial in Nordic countries. The criminal justice system has been designed in a way that has respected fellow citizens and their possible withdrawal from the rules of the system, and indeed also our own. This gives Nordic criminal law a somewhat communitarian shade.

The fight against terrorism does not fit the picture. The Framework Decision on Combating Terrorism explicitly emphasizes the fight against terrorism approach that does not well fit the Nordic view described above. The criminal justice policy view behind the framework decision must necessarily be taken into account when the offences that implement the framework decision are applied. This is clear after *Pupino*⁴⁷ when national courts need to interpret the legislation that implements the framework decision as far as possible in the light of the wording and purpose of that framework decision. The purpose of the EU instrument is to express the criminal justice policy goals that possibly differ drastically

⁴⁴ É. Durkheim: *The Rules of Sociological Method* (translated by S.A. Solovay and J.H. Mueller, edited by G.E.G. Catlin), New York, 1966.

⁴⁵ Jareborg, *op.cit.*, p. 108.

⁴⁶ Lahti, *op.cit.*, p. 64. For more detail on the theme see P. Törnudd: In Defense of General Prevention, in: P. Törnudd: *Facts, Values and Visions. Essays in Criminology and Crime Policy*, Helsinki, 1996, pp. 11-22.

⁴⁷ C-105/03, *Pupino*, Rec.2005, p. I-5285.

from national criminal justice policy goals – as might be the case in the Nordic countries.⁴⁸

It could also be argued that terrorism and especially international terrorism differs greatly from traditional criminality and that traditional principles and assumptions behind the legitimate use of the criminal justice system are no longer applicable.⁴⁹ It is clear that terrorism violates some interest that surpasses national concerns. Terrorism is particularly an international problem – this is illustrated by the numerous international conventions on terrorism. When certain areas of criminality or undesirable behaviour are selected as a subject of international or regional criminal law cooperation there must be some dimension of that type of criminality that elevates it to something more than purely a national matter of concern. In my opinion, terrorism is indeed such a problem that surpasses national boundaries and therefore the interest that is protected from terrorist offences perhaps gains somewhat additional weight. However, this cannot lead to a situation where basic principles of criminal law and criminal justice policy are undermined. The international and regional legal efforts to fight terrorism face problems with regard to the instruments' vagueness, breadth and ideological background.⁵⁰ As we have seen, these problems have reflections on national criminal legislation and criminal justice policy. When national criminal law thinking already has problems in relating to something other than national criminal law and broadening prerequisites of criminal liability (within criminal organizations and enterprises) the situation is somewhat perplexing. Basic principles and criminal justice policy goals could be at least partly in transition and may be leading towards a more differentiated structure of criminal law.

⁴⁸ It must be noted that 'law and order' views have also been on the increase in the Nordic countries. See Melander, *op.cit.*, pp. 120-125.

⁴⁹ On the different character of terrorism see G.P. Fletcher: The Indefinable Concept of Terrorism, 4 *Journal of International Criminal Justice* (2006), pp. 894-911.

⁵⁰ See also T. Weigend: The Universal Terrorist. The International Community Grappling with a Definition, 4 *Journal of International Criminal Justice* (2006), pp. 912-932.

THE EUROPEAN ARREST WARRANT – A THREAT TO HUMAN RIGHTS OR AN EFFICIENT TOOL IN COMBATING CRIME?¹

by *Ritva Sahavirta* *

The purpose of this paper is to discuss the European arrest warrant and related issues that have arisen in practice and therefore need to be resolved. So far, these questions have received less attention in the judicial literature than some constitutional issues which have had less practical significance. This article represents my personal findings on the topic, and thus I take responsibility for the opinions presented herein.

1. Community rights and responsibilities

In addition to the representatives of the legal economy, the deregulation of economic activities within the European Union also benefits criminals. Similarly, the removal of business barriers, such as the freedom of movement and the uncontrolled flow of capital within the EU, benefit all those who wish to abuse such freedoms that are given to them.

The concept of the free movement of goods together with the Community's temporary VAT system has enabled serious frauds to be committed, thereby affecting national VAT systems and, therefore, the budget of the European Union. The temporary excise duty system has had a similar effect as it enables the tax-free conveyance of alcohol and tobacco – typical products which are prone to tax frauds – in the Community area with certain preconditions. In fact, these systems entice criminals to take advantage of them. It is indeed argued that organised crime in Europe is moving towards financial crime and specifically tax fraud to an increasing extent because it is relatively easy, the risk of being caught is minimal and punishments are not severe when compared to convictions for drug offences, for example.

On the other hand, the concept of the free movement of people is abused by organised crime that specialises in trafficking in drugs and human beings. In addition to the suffering of human beings, this type of criminality causes considerable harm to the legal economy. Drug abuse is almost always associated with other types of crime, and the illegal immigration of labour distorts competition. Those cases in which trafficking in human beings can be assessed as a new

¹ This text has been translated into English by Jenni Kouri, M.A. Any possible errors are nevertheless the author's.

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form of slavery violate the constituent human rights respected by all Member States.

The later utilization of the proceeds of crime gained through organised criminal acts requires that the assets obtained should at least partially be returned to the legal economy. The free mobility of assets in the Community and in the world enables the exploitation of the financial system for the purpose of extensive and professional money laundering. This may lead to serious negative impacts on the financial system itself, but more importantly, the exploitation of the financial system virtually ensures that the proceeds of crime gained through organized criminal activity are generally impossible to confiscate. If and when the seizure of the proceeds of crime and, at a later stage, the confiscation of the assets, is prevented, organized crime will continue to operate in ever improving conditions.

Counterbalancing the situation within the Community, the Community must efficiently prevent the disadvantages resulting from these advantages. Malpractices are also prevented by means of crime prevention. EAW is a tool which has been specifically created for this battle.

2. EAW and crime prevention in the European Union

As a counterbalance to the advantages in the economic region utilized by the legal and illegal economy, the Community has strived to pay more attention to the rights and advantages of people working and living in the area, the citizens of the Community. It is known as an area of freedom, security and justice. In practice, the development has been said to have focused on ensuring security, which has also meant strengthening supranational crime prevention measures. With regard to protecting human rights, in particular of those suspected of criminal acts, it is alleged that this issue has received little attention.

The prevention of cross-border organized crime is impossible without cooperation that is independent from borders and limitations. Moreover, cooperation is focused on ensuring prompt and efficient criminal investigations and solving conflicts of jurisdiction. For example, the solving and judicial condemnation of the above-mentioned VAT carousel frauds is extremely difficult unless criminal investigations are simultaneously carried out in different Member States, and unless prosecution and conviction measures are carried out in one Member State. If this is not possible, those benefiting from criminal acts will not be charged as criminally liable and will be able to retain the assets gained through criminal activity in their entirety. Naturally, this provides incentives for criminal activity.

In practice, efficient crime prevention in the European Union would require the harmonization of both substantive and procedural criminal laws, as well as laws concerning extradition, evidence, seizure and confiscation. Politically the

Union is not ready to take these steps. Many legal experts and some constitutional courts have taken an even more negative approach to this possibility.

However, the Union has reached an understanding on the partial harmonization of mutual cooperation in surrender and execution in the Community. For the first time in 2002, the Framework Decision 2002/584/JHA on the European Arrest Warrant recognized the mutual recognition of judicial decisions with regard to certain listed offences. The principle of mutual recognition included in the Framework Decision means that, in principle, Member States must acknowledge, for those listed offences, judicial decisions on bringing charges and executing punishments by other Member States. Further, the principle of mutual recognition embedded in the Framework Decision provides for the surrender of a person who has been convicted of a listed offence or is being prosecuted for one of them. For listed offences, the Member States thus surrender without any verification of double criminality. Also for those offences for which the verification of double criminality is required, grounds for rejection are more restricted than in proceedings concerning requests for legal assistance in general.

3. Mutual recognition and the rights of the accused

The acceptance of the principle of mutual recognition is seen as problematic for several reasons. I will now highlight just a few of them.

3.1 Surrendering citizens of a Member State in the EU

The judicial literature has extensively discussed those constitutional issues that some Member States have had to resolve when passing national laws in relation to the EAW. The present article does not seek to take a stance in this debate.

Also in Finland, surrendering one's own citizens was considered problematic. Therefore, a new provision was added to the EAW law which allows Finnish citizens, after a conviction in another Member State, to serve their imprisonment in Finland if they so request. This provision is always included in decisions concerning the procedures to surrender Finnish citizens.

In practice, Finland has surrendered its own citizens to other countries for prosecution, but nearly all of those convicted have requested that their sentences can be served in Finland. Basic or human rights infringements in connection with these cases have not been claimed in practice.

3.2 Listed offences

The Council Framework Decision on the EAW lists the offences which give rise to surrender without the verification of double criminality. The fact that the

offences are ambiguously described has been alleged to violate the principle of legality.

In the Framework Decision, a total of 32 different categories of offences are listed, all of which have been criminalized in all Member States. The categorization includes more traditional offences, such as violent offences, offences against property and those offences that are criminalized based on international conventions and EU instruments. The description with regard to certain offences is so general that it has attracted criticism. Admittedly, categories such as fraud, swindling and racketeering are open to interpretation as to which offences are so-called listed offences. In practice, however, the authorities in the extraditing country receive a detailed description of the offence because the EAW form requires this as well as a reference to the applicable national legislation on which the request is based.

The definitions of the listed offences entail that the scope of application with regard to the offences in different Member States may vary. In Finland, for example, the drafting of legislation concerning the EAW has proceeded on the supposition that aggravated tax fraud constitutes fraud which is included in the list. Therefore, a failure to submit a tax return constitutes aggravated tax fraud, which is not punishable everywhere in the Community. Because tax offences are not excluded from the listed offences in the Framework Decision, there should be no obstacles to Finland requesting the surrender of a suspect who has failed to submit a tax return concerning his/her businesses in Finland. In such a case, the alleged party may be taken as meeting the constituent elements of an aggravated tax fraud, although the act would not be punishable in the executing country. Anyone conducting a business activity in Finland is obliged to discover his/her responsibilities regarding tax and criminal law.

From the point of view of the legality principle, the position of the person to be extradited based on the EAW is the same as a person suspected of or sentenced for the same crime in a situation such as described above. In approving an EAW request, a Member State thus relies on the issuing country's criminal legislation against which the decision to surrender is made. The issuing country's criminal legislation can be taken as satisfying the requirements of the legality principle and abiding by the fundamental rights of the surrendered person, which are mutually accepted within the EU, in particular those concerning criminal procedure. The Court of Justice of the European Communities (ECJ) has stated this in its decision of 3 May 2007 (C-303/05). It is exactly this mutual trust between the Member States towards each other's legal systems which enables the free movement of judicial decisions in criminal matters. For the listed offences the Community area can therefore be regarded as one single judicial area.

In practice, in the offences referred to in EAW requests to Finland the nature of the crime was often clear to the offender at the time when the offence was

committed and therefore intent is established. Typically, these crimes are violent offences and/or offences against property.

3.3 Diminution of defence rights

The principle of mutual recognition has sometimes been alleged to violate the rights of the suspect even though it was clearly not the intention of the Framework Decision to violate fundamental rights and the other important legal principles. Regardless of this, the suspect's right to defend himself/herself has been claimed to have been weakened. The claim cannot be based upon the fact that the suspect could not have anticipated the perceived threat of punishment for an offence. In theory at least, an extradited person has the opportunity to learn about the content and substance of the law, and the legislation of a Member State can therefore be expected to fulfil the requirement of precision and transparency as included in the principle of legality.

The principle of legality should also not have a great significance when evaluating national EAW laws as provisions of criminal procedure. In criminal procedure, the right to a fair trial often reduces the significance of the legality principle.

The EAW Framework Decision exhaustively covers the right to a fair trial and a suspect's rights. In the majority of the Member States, the basis for the EAW is the detention order issued by a national court of law or a final imputable court decision. Therefore, the suspect's rights have already been taken into consideration during the hearing of the case before issuing/sending the request.

During the execution of an EAW, the defendant's rights are safeguarded in many ways. In connection with the listed offences, the defendant is:

- informed about the crime,
- informed about the circumstances of the crime,
- informed about the time and place of the crime, and
- given a description of his/her involvement in the crime immediately after his/her arrest and in a preliminary hearing, which is subsequent to the actual 'surrender hearing'.

In addition, the defendant is informed about the issuing country's legal provision(s) describing the offence on which the request is founded. The information is either given to the defendant in his/her native language or in a language that the defendant can understand. An interpreter is also present at the hearing, and the defendant has a right to the assistance of a lawyer. The defendant has similar rights also during the court hearing with regard to the actual surrender. The defendant is therefore aware of the details of the offence of which he or she is accused immediately after arrest, and the defendant has the opportunity to appeal against all the necessary facts during the surrender hearing.

Recently in Finland, legal decisions by the Supreme Court have specifically paid attention to how much the final description of the charges can differ from the account of the criminal act charged in connection with the request for surrender without a new approval/consent from the executing country as is required in the rule of speciality. Interestingly enough, the Finnish Supreme Court asked for a preliminary ruling from the ECJ concerning the interpretation of the EAW Framework Decision.

In its statement the ECJ mentioned that it is crucial that the most essential elements of the criminal offence remain unchanged. This means that the criminal offence on which the EAW is based must not have changed into a different offence, for example because the quality of a drug has changed (into something less dangerous) or that the time when the crime was committed has significantly changed (e.g. from more than one year to 12 days).

This interpretation therefore corresponds to the interpretation of the *res judicata* effect and not to that of the much stricter binding effect of the charge which applies in Finland, and thus corresponds to the *ne bis idem* interpretation. The identity of the crime may have more importance in connection with the surrender, but practical situations require that the interpretation of the crime should not be too strict.

The ECJ has also stated that in a situation in which the new consent/approval of the executing country is needed, a trial may continue, but no restrictions on the defendant's freedoms can be based upon this charge prior to the consent/approval. This can be interpreted in such a way that if there are no grounds for keeping the defendant in custody, he or she must be released. It is clear that the principle of mutual recognition would not be fulfilled if a new consent/approval from the executing country would be needed with regard to minor changes to the identity of the crime.

In the trial organised in the issuing country, the defendant is entitled to the minimum rights recognised within the EU. The rights of surrendered persons are therefore quite exhaustive.

In addition, the Framework Decision on the EAW allows Member States to include grounds for an (optional) refusal in their national laws or the possibility to request guarantees from the issuing Member State. The differences between the legal systems in the different countries are therefore taken into consideration by allowing for certain conditions to be set with regard to the age of the person who is the subject of the EAW, the nature of the punishment (life imprisonment) and procedural matters (punishment for failing to appear).

Particularly the possibility to flatly refuse surrender based on the fact that there is reason to believe that the defendant's human rights would be violated in the issuing country is an important point in guaranteeing the rights of the accused. At the same time, it proves that the trust between countries concerning their legal systems is not entirely unconditional.

4. Conclusions

Based on the above remarks, it can be discerned that crime prevention can be effective without the human rights of the defendant being violated. The experiences gained in practice from applying the principle of mutual recognition are mainly positive. The alleged negative impacts are in my opinion somewhat exaggerated.

FUNDAMENTAL RIGHTS IN THE EUROPEAN SPACE FOR FREEDOM, SECURITY AND JUSTICE: THE PRÆTORIAN *NE BIS IN IDEM* PRINCIPLE OF THE EUROPEAN COURT OF JUSTICE¹

by John A.E. Vervaele *

1. Introduction

For some years the Court of Justice of the European Communities (ECJ) has developed a complete series of general principles of Community law that also covers criminal law and criminal procedure law.² With the entry into force of cooperation in the field of Justice and Home Affairs (JHA) around the third pillar, as set out by the Treaty of Maastricht, and the extension of the jurisdiction of the Court of Justice to third pillar matters introduced by the Treaty of Amsterdam, the ECJ has had the opportunity of extending the scope of application of these general principles to new policy areas more directly related to the principle of due process and fundamental rights.

Prior to the entry into force of cooperation in the field of JHA in accordance with the third pillar, the Member States drew up *ad hoc* agreements on cooperation in criminal matters in the framework of European Political Cooperation.³ But the breakthrough came in the form of the Schengen Agreement in 1985. France, Germany and the three Benelux countries agreed on closer cooperation between them in the field of migration, police cooperation and judicial cooperation in criminal matters, and the creation of a Schengen Information System (SIS). Schengen cooperation was very successful and many Member States of the European Union (EU) joined it. The Schengen intergovernmental agreements of 1985 and 1990 and the Schengen Area have been incorporated into the structure of the EU through a Protocol annexed to the Treaty on European Union (TEU) and to the Treaty of Amsterdam. The provisions relating to asylum, immigration policy, etc. were integrated into the first pillar (which is to say, into the Treaty establishing the European Community: Title IV), the rules on police cooperation and judicial cooperation in criminal matters around the third pillar. However,

¹ This article constitutes a modified and updated (on 1.05.2009) version of J.A.E. Vervaele, Fundamental rights in the European space for freedom, security and justice: the praetorian *ne bis in idem* principle of the Court of Justice, in: M. de Hoyos Sancha (ed.), *Criminal Proceedings in the European Union: essential safeguards*, Editorial Lex Nova, Valladolid, 2008, pp. 78-101.
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² See for example Case 80/86, *Kolpinghuis*, [1987] ECR 3969 and the commentary thereon by Sevenster: 'Criminal Law and EC Law', 29 *Common Market Law Review* (1992), pp. 29-70.

³ J. Vervaele: Fraud against the Community. The need for European fraud legislation, Deventer, 1992, p. 345 and J. Vervaele, A. Klip (eds.): *European Cooperation between Tax, Customs and Judicial Authorities*, Kluwer Law International, The Hague, 2002.

special legal arrangements have been agreed for the United Kingdom and Ireland (which are not subject to the Schengen Area) on the possibility of opting to join this agreement, for Denmark in the case of abandoning it, and for Iceland and Norway, countries that are not within the Union, but that are part of the Schengen structure.

The incorporation of Schengen into Community law also included articles 54 to 58 of the 1990 Convention implementing the Schengen Agreement of 1985 (CISA) on the application of the *ne bis in idem* principle. These articles are set out under Title VI of the TEU (third pillar regulations) upheld in law in articles 34 TUE and 31 TUE.⁴ Article 54 states that: 'A person whose trial has been finally disposed of in one contracting party may not be prosecuted in another contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party'. Article 55 contains exceptions to the rule of *ne bis in idem*, but they must be formally presented at the time of signing or ratifying the Convention. One of the possible exceptions is that the acts took place either wholly or partially in their own territory. Another important article in this context is article 58 that points out that national regulations can be wider and go beyond the provisions of the Schengen *acquis* on *ne bis in idem*, thereby providing greater protection.

Article 2 of the Schengen Protocol states that the Court of Justice of the European Communities will exercise the powers conferred upon it by the relevant applicable provisions of the Treaties. The Treaty of Amsterdam has broadened the jurisdiction of the EJC to questions relating to the third pillar, so that it may rule amongst other matters on the validity and the interpretation of the framework and other decisions as well as the measures taken to apply them. Member States must accept this jurisdiction in accordance with article 35(2) TUE and when they accept, according to article 35(3) TUE, they can choose to confer the power to request a preliminary ruling from the ECJ on any jurisdictional organ or only on those jurisdictional organs against whose decisions no appeal may be lodged. Unfortunately, some states (including Spain) have opted for the second option and the majority of the new Member States have not recognised any such competence. However, the interpretation of the ECJ is valid across the Union, even in those countries which have not recognised its competence.

⁴ Council Decision 1999/436/CE of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* of 20th May, 1999, OJ L 176, 10 July 1999, pp. 17-30.

2. The *ne bis in idem* principle

The *ne bis in idem* principle is a general principle of (criminal) law in many national legal orders, sometimes even codified as a constitutional right such as the clause relating to *ne bis in idem* (prohibiting dual punishment – *double jeopardy*) of the Fifth Amendment of the Constitution of the United States of America. Historically it has been considered that the principle of *ne bis in idem* only applies nationally and is limited to criminal justice. Concerning the substance of the principle, a distinction is traditionally made between *nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (no one should be punished twice for the same offence). Some countries limit the principle to the prohibition of double punishment.⁵ On the subject of double prosecution, there is great debate over the meaning of prosecution. Does it also include the judicial investigation or is it limited to the judgment of the charges laid before the Courts? In the latter case, some States have *una via* provisions in national law, which oblige the authorities to choose at a certain stage of the investigation between either the criminal or administrative procedure.

The rationale of the *ne bis in idem* principle is manifold. Traditionally it was very much linked to the sovereignty and the legitimacy of the state and its legal system and respect for the *res judicata* (*pro veritate habitur*) of final judgments.⁶ In the last couple of centuries it became also and mainly a principle of judicial protection for the citizen against the *ius puniendi* of the state and as such forms part of the principles of due process and fair trial, in other words it converted into a human rights principle guaranteeing against cumulative criminal punishment.⁷

The *ne bis in idem* principle raises many questions. The greater part of the case law of the States refers to the definition of *idem* and of *bis*. In order to consider the meaning of the same/*idem*, it may be asked whether the legal definition of the offences should be considered as the basis of the definition of the term the same (*idem*), or should it be the set of facts (*idem factum*)? Does it depend on the judicial rights protected by the legal provisions and their scope? Are natural and legal persons different with regard to the application of the principle? Is the reach of the principle limited to double punishment under criminal law or does it include other punitive sanctions that may be imposed under private law or administrative law? What is a firm and final sentence? Does

⁵ In that case, a double prosecution can still be recognized as a violation of the principles of a fair administration of justice.

⁶ *Interest reipublice ut sit finis litium, bis de eadem re ne sit actio.* ('it is in the public interest that there be an end to litigation, there will be no action twice on the same matter').

⁷ See the excellent PhD thesis by J. Lelieur-Fischer: *La règle ne bis in idem. Du principe de l'autorité de la chose jugée au principe d'unicité d'action répressive*, Université Panthéon-Sorbonne (Paris I), Paris, 2005.

it include having no case to answer or the dismissal of the proceedings? What does the execution of a firm judgment mean? Does it include settlements with the public prosecutor or with other judicial authorities? Are proceedings or an additional sanction (*Erledigingsprinzip*) prevented out of respect for the *ne bis in idem* principle, or can the authority, taking account of the first punishment (*Anrechnungsprinzip*), impose a second one?

The *ne bis in idem* principle is also established as an individual right in international human rights treaties, such as the International Covenant on Civil and Political Rights of 19 December 1966 (Article 14 (7)).⁸ The European Convention on Human Rights (ECHR) does not contain such a provision and the former European Commission on Human Rights⁹ denied the existence of the principle as such under Article 6 of the ECHR, without however precluding in absolute terms that certain double prosecutions might violate the fair trial rights under Article 6 ECHR. The provision has meanwhile been elaborated in the Seventh Protocol to the ECHR (Article 4), but only a minority of the 25 EU Member States have ratified Protocol no. 7. For Belgium, Germany and the Netherlands the Seventh Protocol is not binding. However, case law might serve as an inspiration here. The majority of the cases refer to the definition of *idem*. After some contradictory judgments on the application of article 4 of the Seventh Protocol, based either on *idem factum* in *Gradinger v. Austria* or on the concept that the same conduct may constitute several offences (*concoirs ideal d'infractions*) in *Oliveira v. Switzerland*,¹⁰ the ECtHR elaborated in the case of *Franz Fischer v. Austria*¹¹ an *idem factum* concept based on 'essential elements' of the

⁸ The Human Rights Committee ruled that Article 14 (7) does not apply to foreign *res judicata*, UN Human Rights Committee 2 November 1987. The Netherlands has formulated the following reservation:

'Article 14, paragraph 7

The Kingdom of the Netherlands accepts this provision only insofar as no obligations arise from it further to those set out in article 68 of the Criminal Code of the Netherlands and article 70 of the Criminal Code of the Netherlands Antilles as they now apply. They read:

1. Except in cases where court decisions are eligible for review, no person may be prosecuted again for an offence in respect of which a court in the Netherlands or the Netherlands Antilles has delivered an irrevocable judgment.

2. If the judgment has been delivered by some other court, the same person may not be prosecuted for the same offence in the case of (I) acquittal or withdrawal of proceedings or (II) conviction followed by complete execution, remission or lapse of the sentence.'

⁹ European Commission on Human Rights, 13 July 1970, Application 4212/69, CDR 35, 151.

¹⁰ *Gradinger v. Austria*, judgment of 23 October 1995, Series A no 328-C and *Oliveira v. Switzerland*, judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, p. 1990. See <http://www.echr.coe.int> for these decisions.

¹¹ *Franz Fischer v. Austria* of 29 May 2001, Series A no. 312 (C), confirmed in *W.F. v. Austria*, judgment of 30 May 2002 and *Sailer v. Austria*, judgment of 6 June 2002. The same approach was applied in *Sailer v. Austria*, judgment of 6 June 2002.

two offences, although in the case of *Götktan v. France*¹² the Court seemed to place its trust once again in the legal *idem*. In recent years the Court has again used the *idem factum* concept based on 'essential elements' of the offences, as in the *Bachmaier v. Austria* case,¹³ the *Hauser-Sporn* case¹⁴ and the *Garretta v. France* case.¹⁵ In a recent case before the Grand Chamber, the case of *Sergey Zolotukhin v. Russia*,¹⁶ the Court referred very extensively to relevant comparative international law sources, including the ECJ's case law on *ne bis in idem* in the field of competition law and in the field of Justice and Home Affairs, as well as the case law of the US Supreme Court on double jeopardy. The Court also admits that: '...the body of case-law that has been accumulated throughout the history of application of Article 4 of Protocol No. 7 by the Court demonstrates the existence of several approaches to the question whether the offences for which an applicant was prosecuted were the same'.¹⁷ The Court underlines the necessity of a harmonised interpretation of the *idem* element of the *ne bis in idem* principle, in the light of the variety of approaches in the case law of the Court in order to guarantee legal certainty, foreseeability and equality. The Court has chosen definitely for the *idem factum* approach: 'Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same (...). The Court's inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings'.¹⁸ The harmonised concept of *idem* by the Court is definitely in line with the concept of the ECJ, as elaborated in the area of liberty, security and justice in the EU (see point 6.2).

From the case law of the Court of Human Rights, also confirmed in the case *Zolotukhin v. Russia*, the Court defines the *bis* element as the commencement of a new prosecution, where a prior acquittal or convictions has already acquired the force of *res judicata*.¹⁹ Although there is no ECtHR decision on the definition of firm judgments that have been executed and settlements, it is also clear from the Strasbourg case law that the *ne bis in idem* principle is not limited to double punishment, but also includes double prosecution, which means that the ac-

¹² *Götktan v. France*, judgment of 2 July 2002. The same approach was applied in *Gauthier v. France*, judgment of 24 June 2003 and *Ongun v. Turkey*, judgment of October 2006.

¹³ *Bachmaier v. Austria*, judgment of 2 September 2004.

¹⁴ *Hauser-Sporn v. Austria*, 7 December 2006.

¹⁵ *Garretta v. France*, judgment of 4 March 2008.

¹⁶ *Sergey Zolotukhin v. Russia*, judgment of 10 February 2009.

¹⁷ *Sergey Zolotukhin* judgment, 70.

¹⁸ *Sergey Zolotukhin* judgment, 82 & 84.

¹⁹ *Sergey Zolotukhin* judgment, 83.

counting principle is not enough to respect the principle of *ne bis in idem*. This underlines the importance of cooperation at the level of the inquiry and of preferably introducing *una via* provisions rather than the anti-cumulation of sanctions. In addition, the element of *bis* also includes the combination of two criminal charges in the sense of Article 6, for instance, the imposition of a criminal punitive sanction and an administrative punitive sanction.²⁰ In the case *Zolotukhin v. Russia*²¹ the Court qualifies the first administrative offence, by using the Engel criteria, as penal for the purposes of art. 4 of Protocol 7, mostly due to the nature of the offence and the severity of the penalty imposed.

3. The transnational (horizontal) *ne bis in idem* principle in Europe²²

Very few countries recognize the validity of a foreign judgment in criminal matters for execution or enforcement in their national legal systems without it being founded on a treaty. Even the recognition of *res judicata* in respect of a foreign criminal judgment is problematic, certainly when it concerns territorial offences. The recognition of foreign *res judicata* means that the prospect of a new prosecution or punishment is no longer possible (negative effect) or that the decision has to be taken into account in the context of judgments pending in other cases (positive effect). The majority of common law legal systems actually do recognize the *res judicata* effect of foreign judgments. In the civil law system, the Netherlands has the most far-reaching and liberal provisions. The Dutch Criminal Code contains a general *ne bis in idem* provision that is applicable to both domestic and foreign judgments, regardless of where the offence was committed.²³ The principle of *ne bis in idem* is also important as a basis for rejecting cooperation in extradition proceedings, and letters rogatory, etc. However, there is no rule of international law that imposes an international *ne bis in idem* principle. The application depends on the content of the international treaties. Even when States acknowledge the international *ne bis in idem* principle, different problems can arise in transnational scenarios due to the different interpretations of the principle in respect of *idem*, of *bis*, etc. (see *supra*).

²⁰ The double jeopardy clause in the Fifth Amendment is not limited to criminal law, but includes civil and administrative punitive sanctions. However, the leading case, *United States v. Halper*, 490 U.S. 435 (1989), has once again been restricted in *Hudson v. U.S.*, 522 U.S. 93 (1997); See also J. A. E. Vervaele: La saisie et la confiscation à la suite d'atteintes punissables au droit aux Etats-Unis, *Revue de Droit Pénal et de Criminologie* (1998), pp. 974-1003.

²¹ Sergey Zolotukhin judgment, 52-57.

²² B. Specht: *Die zwischenstaatliche Geltung des Grundsatzes ne bis in idem*, Springer, Berlin, 1999.

²³ For commentary on the Dutch *ne bis in idem* in Art. 68 of the Criminal Code, see P. Baauw: *Ne bis in idem*, in: B. Swart, A. Klip (eds.), *International Criminal Law in the Netherlands*, MPI, Freiburg im Breisgau, 1997, pp. 75-84.

In Europe, within the framework of the Council of Europe, efforts have been made since the 1970s to introduce a regional international *ne bis in idem* principle. In this cooperation framework the *ne bis in idem* principle only applies *inter partes*, which means that it can be or must be applied between the contracting States in case of a concrete request. It is not considered to be an individual right *erga omnes*. *Ne bis in idem* is a mandatory provision under the 1970 Convention of the Council of Europe on the International Validity of Criminal Judgments (Articles 53-57) and under the 1972 Convention on the Transfer of Proceedings in Criminal Matters (Articles 35-37). However, both Conventions have a rather low ratification rate and contain quite a number of exceptions to the *ne bis in idem* principle. In the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Article 18, paragraph 1e), which is more widely ratified, it is optional, but some Contracting States did include it in their ratification declaration as a ground for refusing cooperation requests.

European Justice Ministers were fully aware that the deepening and widening of European integration would lead to an increase in transborder crime and of transnational justice in Europe. In the framework of European Political Cooperation, before the coming into force of the Maastricht Treaty with its Third Pillar on Justice and Home Affairs, the 1987 Convention on Double Jeopardy was elaborated between the Member States of the EC. This Convention deals with the *ne bis in idem* principle in a transnational setting in the EC. The Convention has been poorly ratified,²⁴ but its substance has been integrated into the CISA to such an extent that it may qualify with good reason as the first multilateral convention that establishes an international *ne bis in idem* principle as an individual right *erga omnes*. The Schengen provisions have served as a model for several *ne bis in idem* provisions in the EU instruments on Justice and Home Affairs,²⁵ which is why the judgment of the ECJ in the cases of *Gözütok* and *Brügge* currently go beyond the regulations of the CISA. The Convention on the Financial Protection of the European Communities and its several protocols contain various provisions on *ne bis in idem*,²⁶ as does the Convention on the fight

²⁴ The *ne bis in idem* Convention has been ratified by Denmark, France, Italy, the Netherlands and Portugal and is provisionally applied between them.

²⁵ H.H. Kühne: *Ne bis in idem* in den Schengener Vertragsstaaten, *Juristenzeitung* (1998), pp. 876-880; W. Schomburg: Die Europäisierung des Verbots doppelter Strafverfolgung – Ein Zwischenbericht, *Neue Juristische Wochenschrift* (2000), pp. 1833-1840 and C. Van den Wyngaert, G. Stessens: The international non bis in idem principle: Resolving some of the unanswered questions, *International & Comparative Law Quarterly* (1999), pp. 786-788.

²⁶ See Art. 7 of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, OJ C 316, 27 November 1995, p. 49.

against corruption involving officials of the European Communities or officials of member states of the European Union.²⁷

The importance of the principle of *ne bis in idem* is certainly not limited to the third pillar of the EU. The EC has administrative powers to impose sanctions in the field of competition and far-reaching powers to harmonize national administrative sanctioning in many EC policies. The ECJ has had occasion to address the issue of *ne bis in idem* in the field of competition.²⁸ In line with regulation 17/62,²⁹ the ECJ had already pointed out in the case of *Walt Wilhelm*,³⁰ as is expressed in article 4 of Protocol 7 of the ECHR, that double prosecution, once by the Commission and once by the national authorities, was in accordance with the Regulation and did not violate the *ne bis in idem* principle, given the fact that the scope of the European rules and the national rules differed. However, were this to result in the imposition of two consecutive sanctions, a general requirement of natural justice would demand that any previous punitive decisions be taken into account in determining any sanction that might be imposed (*Anrechnungsprinzip*).

For years now the ECJ has built on an old tradition that confirms that the *ne bis in idem* principle, as is expressed in article 4 of Protocol 7 of the ECHR, is a general principle of Community law,³¹ which means that it is not limited to criminal sanctions, but that it also applies in competition matters. However, the ECJ appears to limit the *ne bis in idem* principle to double punishment and still accepts *Anrechnungsprinzip*. This problem has not been solved by the new Competition Regulation 1/2003,³² which provides that, besides the European Commission, national competition authorities will also apply European competition rules, including the rules concerning enforcement (art. 35). The European Commission and the national authorities will form a network based on close

²⁷ Council Act of 26 May 1997 drawing up, on the basis of Article K.3 (2) (c) of the Treaty on European Union, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195, 25 June 1997, p. 1, Art. 10.

²⁸ W.P.J. Wils: The principle of '*ne bis in idem*' in EC Antitrust Enforcement: a Legal and Economic Analysis, 26 *World Competition* 2 (2003).

²⁹ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21 February 1962, pp. 204-211, English special edition: Series 1 Chapter 1959-1962 p. 87.

³⁰ Case 14/68, *Walt Wilhelm v. Bunderskartellamt*, [1969] ECR 3.

³¹ See for instance Judgment of 14/12/1972, *Boehringer Mannheim/Commission* (Rec.1972, p. 1281) (DK1972/00323 GR1972-1973/00313 P 1972/00447 ES1972/00261 SVII/00061 FIII/00059) and Judgment of the Court of 15 October 2002. *Limburgse Vinyl Maatschappij NV (LVM) (C-238/99 P)*, *DSM NV and DSM Kunststoffen BV (C-244/99 P)*, *Montedison SpA (C-245/99 P)*, *Elf Atochem SA (C-247/99 P)*, *Degussa AG (C-250/99 P)*, *Enichem SpA (C-251/99 P)*, *Wacker-Chemie GmbH and Hoechst AG (C-252/99 P) and Imperial Chemical Industries plc (ICI) (C-254/99 P) v. Commission of the European Communities*.

³² Regulation 1/2003, OJ L 1, 04 January 2003, pp. 1-25, in force from 1 May 2004.

cooperation. In practice, conflicts of jurisdiction and problems regarding *ne bis in idem* should be avoided through best practice on cooperation, after which competition authorities can suspend or terminate their proceedings (Article 13). There is however no obligation to do this, which means that double prosecution is not excluded as such. It is quite clear that the jurisprudence of the ECJ on international *ne bis in idem* in cases relating to competition is not totally in agreement with the jurisprudence of the ECtHR on the national *ne bis in idem* principle and that it accepts the principle of taking into account, the *Anrechnungsprinzip*.

Finally, the principle of transnational *ne bis in idem* only comes into effect in the European Union. This means that an enterprise can be penalised twice over for infringing different regulations on competition, for example by regulatory authorities in the USA and in Europe.³³

The *ne bis in idem* rule can be of importance in other sectors in which the EC has sanctioning power, e.g. within the area of European public procurement.³⁴ The EC has also harmonized sanctioning regimes in the Member States. The package on the protection of the financial interests of the EC is a good example. Member States have to impose administrative and criminal sanctions for irregularities and fraud. Article 6 of Regulation 2988/95³⁵ provides for the suspension of national administrative enforcement during criminal proceedings. However, the administrative proceedings must be resumed when the criminal proceedings are concluded and the administrative authority must impose the prescribed administrative sanctions, including fines. The administrative authority may take into account any penalty imposed by the judicial authority on the same person in respect of the same facts. It is obvious that these provisions do not reflect the full effect of the *ne bis in idem* principle. Article 6 provides only that the reopening of administrative proceedings after the criminal proceedings can be precluded by general legal principles. The *ne bis in idem* principle should bar such reopening if the same persons and the same facts are involved, but the regulation does not mention this explicitly.

The *Corpus Juris*³⁶ on European Criminal Law does not provide for a specific transnational *ne bis in idem* provision, but deals with the problem in Article 17

³³ Case n° T-223/00, *Kyowa Hakko Kogyo Co.*, sentence of 9th July, 2003, nyr.

³⁴ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities, Arts. 93-96, OJ L 248, 16 September 2002, pp. 1-48 and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, Art. 133, OJ L 357, 31 December 2002, pp. 1-71.

³⁵ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, OJ L 312, 23 December 1995, pp. 1-4.

³⁶ M. Delmas-Marty, J.A.E. Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States*, vol. 1-4, Intersentia, Antwerpen-Groningen, Oxford, 2000-2001, p. 394.

within the framework of concurring incriminations, as far as double criminal sanctioning is concerned, and imposes the accounting principle in case a criminal sanction is imposed after an administrative sanction.

Finally, another way of regulating the problem is not to consider double prosecution at a transnational level. Transnational consultation procedures are more than necessary. Certain EU instruments provide for consultation between Member States and give priority to some criteria of jurisdiction.³⁷ The need to coordinate judicial action in the EU has led to the creation of Eurojust, which among other matters is authorised to coordinate judicial investigations in order to avoid conflicts of jurisdiction and problems relating to the *ne bis in idem* principle. However, Eurojust³⁸ has to request a decision from Member States, and the authority of Eurojust is limited to the most serious crimes.

4. The *ne bis in idem* as the beginning of the development of general principles in the field of freedom, security and justice: the *Gözütok* and *Brügge* judgments of the ECJ

The CISA has been an important landmark for the establishment of a multilateral treaty-based international *ne bis in idem*. The interpretation of the Schengen *acquis* in the field of *ne bis in idem* has provided the ECJ with its first opportunity to pronounce on the third pillar, the legal nature of its rights and the general principles that are applicable.

In the joined cases of *Gözütok* and *Brügge*,³⁹ the national courts referred to the ECJ for a preliminary ruling under Article 35 EU on the interpretation of Article 54 of the CISA, raising interesting questions on the validity and the scope of an essential principle in the field of human rights, the *ne bis in idem* principle (or the prohibition of double criminality or *double jeopardy*)⁴⁰ in the EU/Schengen

³⁷ See, for example, art. 7(3) of the Framework Decision 2000/383/JAI on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140/1, 14 June 2000 and art. 3 of the Proposal for a Framework Decision concerning the application of the principle of *ne bis in idem*, D.O. 2003 C 100/12.

³⁸ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA) Council Decision of 28th February 2002, OJ L 63/1, 6 March 2002.

³⁹ Judgment of the Court of Justice, 11th February, 2003 in joined cases C-187/01 and C-385/01 (Request for a preliminary ruling from *Oberlandesgericht Köln* and *Rechtbank van eerste aanleg te Veurne*): Hüseyin Gözütok (Case C-187/01) and Klaus Brügge (Case C-385/01), (2003) ECR I-5689.

⁴⁰ The translation of this expression into Spanish is complicated. The Spanish High Court refers to it as 'doble peligro de condena' (see Sentence of the Second Chamber of the High Court of 27th January, 1996). For its part, the Initiative of the Hellenic Republic with a view to a Framework Decision concerning the application of the *ne bis in idem* principle uses 'the prohibition of double jeopardy' in the first recitals of the English version, which is translated into the Spanish version as 'prohibición de la doble penalización' [Translator's note].

context. As this was a landmark case, we will move on to analyse it in greater detail below, focusing on the transnational dimension.

4.1 Facts of the case

Mr Gözütok, a Turkish national who had lived in the Netherlands for several years, was suspected of the possession of illegal quantities of soft drugs. In the course of searches of his coffee and teahouse in 1996, the Dutch police did indeed find several kilos of hashish and marijuana. The criminal proceedings against Mr Gözütok were discontinued because he accepted a so-called '*transactie*' proposed by the Dutch Public Prosecutor's Office (an agreement offered by the Justice Ministry in the context of the abatement of a public prosecution), as provided for in Article 74(1) of the Dutch Criminal Code: 'The Public Prosecutor, prior to the trial, may set one or more conditions in order to avoid criminal proceedings for serious offences, excluding offences for which the law prescribes sentences of imprisonment of more than six years, and for lesser offences. The right to prosecute lapses when the conditions are met'. Mr Gözütok paid the proposed sums of Dfl. 3,000 and 750. Mr Gözütok subsequently drew the attention of the German authorities after a notification of suspicious transactions by a German Bank to the German financial intelligence unit, which had been set up within the framework of the EC obligations against money laundering.⁴¹ The German authorities obtained further information concerning the abovementioned offences from the Dutch authorities and decided to arrest Mr Gözütok and to prosecute him for dealing in narcotics in the Netherlands. In 1997, the District Court of Aachen (*Amtsgericht Aachen*) in Germany convicted Mr Gözütok and sentenced him to a period of one year and five months' imprisonment, suspended on probation. Both Mr Gözütok and the Public Prosecutor's Office appealed. The Regional Court of Aachen (*Landgericht Aachen*) discontinued the criminal proceedings brought against Mr Gözütok inter alia on the ground that under Article 54 of the CISA, the German prosecuting authorities were bound by the definitive discontinuance of the criminal proceedings in the Netherlands. In a second appeal by the Public Prosecutor's Office to the Higher Regional Court (*Oberlandesgericht Köln*), the Court decided to stay the proceedings and refer the matter to the ECJ for a preliminary ruling on the basis of Article 35 EU Treaty.

Mr Brügge, a German national living in Germany, was charged by the Belgian prosecution authorities with having intentionally assaulted and wounded Mrs Leliaert in Belgium, which constituted a violation of several provisions of the Belgian Criminal Code. Mr Brügge faced a double criminal investigation, one in Belgium and another in Germany. In the Belgian criminal proceedings, the

⁴¹ Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 28 June 1991, pp. 77-83.

District Court (*Rechtbank van eerste aanleg te Veurne*) had to deal with both the criminal and civil aspects of the case, due to the fact that Mrs Leliaert, who had become ill and unable to work because of the assault, claimed pecuniary and non-pecuniary damages as a civil party. In the course of the proceedings before the District Court of Veurne in Belgium, the Public Prosecutor's Office in Bonn in Germany offered Mr Brügge an out-of-court settlement in return for the payment of DM 1,000, in line with Section 153a in conjunction with Paragraph 153(1), second sentence, of the German Code of Criminal Procedure. The District Court of Veurne decided to stay the proceedings and refer the question to the ECJ for a preliminary ruling on the basis of Article 35 EU Treaty.

4.2 *Legal background and the preliminary questions*

In the *Gözütok* case, the German Higher Regional Court referred the following questions to the ECJ for a preliminary ruling: 'Is there a bar to prosecution in the Federal Republic of Germany under Article 54 of the Schengen Implementation Convention if, under Netherlands law, a prosecution on the same facts is barred in the Netherlands? In particular, is there a bar to prosecution where a decision by the Public Prosecutor's Office to discontinue proceedings after the fulfilment of the conditions imposed (*transactie* under Netherlands law), which under the law of other Contracting States requires judicial approval, bars prosecution before a Netherlands court?' The Belgian District Court referred the following question to the ECJ for a preliminary ruling: 'Under Article 54 of the Schengen Implementation Convention is the Belgian Public Prosecutor's Office permitted to require a German national to appear before a Belgian criminal court and be convicted on the same facts as those in respect of which the German Public Prosecutor's Office has made him an offer, by way of a settlement, to discontinue the case after payment of a certain sum, which was paid by the accused?' Given the similarity of the substance of the questions, the cases were joined and examined together.

4.3 *The opinion of the Advocate General D. Ruiz-Jarabo Colomer*

The AG stuck to a strict interpretation of Article 35 (1) TEU, which precludes any view on the application of the *ne bis in idem* principle to the case pending before the national court or with regard to the discontinuance of the criminal action. For this reason the AG declared that the ECJ had to disregard the terms in which the German Higher Regional Court formulated the first of its questions. For that reason the AG reformulated all the preliminary questions into two interpretative questions: '1. The first is whether the *ne bis in idem* principle stated in Article 54 of the Convention also applies when in one of the signatory States a criminal action is extinguished as the result of a decision to discontinue proceedings,

taken by the Public Prosecutor's Office once the defendant has fulfilled the conditions imposed on him. 2. If the reply to the above question is positive, the German court wonders whether it is necessary for the decision taken by the Public Prosecutor's Office to be approved by a court.'

The AG qualified Article 54 as a genuine expression of the *ne bis in idem* principle in a dynamic process of European integration. It is not a procedural rule but a fundamental safeguard, based on legal certainty and equity, for persons who are subject to the exercise of *ius puniendi* in a common area of Freedom, Security and Justice. He was also of the opinion that the *ne bis in idem* principle is not only applicable within the framework of one particular legal system of a Member State. A strict application of national territoriality is incompatible with many situations in which there are elements of extra-territoriality and in which the same act may have legal effects in different parts of the territory of the Union. On the other hand, the *ne bis in idem* rule is also an expression of mutual trust between the Member States in their criminal justice systems. In the same way as the Dutch '*transactie*', the penal settlement is not of a contractual nature, but rather an expression of criminal justice. They do exist in many national legal orders, they are a form of administering justice, which protects the rights of the accused and culminates in the imposition of a penalty. Since the rights of the individual are protected, it is irrelevant whether the decision to discontinue the criminal action is approved by a court. A verdict is given on the acts being judged and on the guilt of the perpetrator. It involves the delivery of an implicit final decision on the conduct of the accused and the imposition of penalising measures. The rights of the victims are not affected, while they are not barred from claiming compensation. The phrasing of the provision in Article 54 concerning *res iudicata* is, in the opinion of the AG, not homogenous in the various language versions (finally disposed, *rechtskräftig abgeurteilt, onherroepelijk vonnis, définitivement jugée, juzgada en sentencia firme...*). Member States do not agree on this point, however. France, Germany and Belgium are in favour of a restrictive interpretation limited to court decisions; the Netherlands and Italy, joined also by the European Commission, advocate a more extensive interpretation, including out-of-court judicial settlements. The AG underlined that the terms used by the various versions are not homogeneous and that a strict interpretation, limited to court judgments, may have absurd consequences that are contrary to reason and logic. Two persons suspected of the same offence could face a different application of the *ne bis in idem* principle if one is acquitted in a final judgment and the other accepts an out-of-court settlement.

The AG concluded: 'The *ne bis in idem* principle stated in Article 54 of the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders also applies when criminal proceedings are discontinued under the legal system of one Contracting Party as the consequence of a decision taken by the Public Prosecutor's Office, once the defendant

has fulfilled certain conditions – and it is irrelevant whether that decision has to be approved by a court – provided that: 1. the conditions imposed are in the nature of a penalty; 2. the agreement presupposes an express or implied acknowledgement of guilt and, accordingly, contains an express or implied decision that the act is culpable; and 3. the agreement does not prejudice the victim and other injured parties, who may be entitled to bring civil actions.⁴²

4.4 *The reasoning and interpretative answer of the Court*⁴²

The ECJ not only followed the rephrasing of the preliminary questions by the AG, but also subscribed to his main arguments. The discontinuation is due to a decision of the Public Prosecutor's Office, being part of the administration of criminal justice. The result of the procedure penalises the unlawful conduct, which the accused is alleged to have committed. The penalty is enforced for the purposes of Article 54 and further prosecution is barred. The ECJ considers the *ne bis in idem* principle as a principle having proper effect, regardless of matters of procedure or form, such as approval by a court. In the absence of an express indication to the contrary in Article 54, the principle of *ne bis in idem* must be regarded as sufficient to be applied. The area of freedom, security and justice implies mutual trust in each other's criminal justice systems. The validity of the *ne bis in idem* principle is not dependent upon further harmonisation.

The arguments of Germany, Belgium and France that the wording and the general scheme of Article 54, the relationship between Article 54 and Articles 55 and 58, the intentions of the Contracting Parties and certain other international provisions with a similar purpose preclude Article 54 from being construed in such a way as to apply to procedures barring further prosecution in which no court is involved, failed to convince the ECJ. The ECJ did not find any obstacle in Articles 55 and 58 and considered irrelevant the intentions of the Contracting Parties, since they predate the integration of the Schengen *acquis* into the EU. Concerning the Belgian Government's argument of possible prejudice to the rights of the victims, the ECJ followed the Opinion of the AG, underlining that the victim's rights to bring civil actions is not precluded by the application of the *ne bis in idem* principle.

For these reasons the ECJ ruled that the *ne bis in idem* principle, laid down in Article 54 of the CISA, 'also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a Member State discontinues criminal proceedings brought

⁴² For other comments in literature see M. Rübenthal, U. Krämer: *European Law Reporter* 4/2003, pp. 177-185; K. Adomeit, *Neue Juristische Wochenschrift* (2003), 1162-1164; M. Fletcher, *The Modern Law Review* (2003), pp. 769-780; O. Plöckinger, 58 *Osterreichische Juristenzeitung* (2003), pp. 98-101; N. Thwaites, *Revue de Droit de l'Union Européenne* 1 (2002), pp. 295-298; J. Vogel: *Europäisches ne bis in idem*, - EuGH, *Neue Juristische Wochenschrift* (2003), p. 1173.

in that State, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor’.

5. Evaluation of the Gözütok and Brügge judgments of the ECJ

With the entry into force of the Treaty of Amsterdam in May, 1999, the EU was much more aware of the need for a transnational *ne bis in idem* principle in the area of Freedom, Security and Justice. The provisions of international treaties relating to this principle were very different and their application in each Member State varies greatly. Point 49(e) of the Action Plan of the Council and the Commission on the implementation of the area of Freedom, Security and Justice⁴³ provides that measures will be established within five years of the entry into force of the Treaty ‘for the coordination of criminal investigations and prosecutions in progress in the Member States with the aim of preventing duplication and contradictory rulings, taking account of better use of the *ne bis in idem* principle’. In the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters,⁴⁴ the *ne bis in idem* principle is included among the immediate priorities of the EU and reference is *inter alia* made to the problem of out-of-court settlement. In effect it became clear, also through national case law, that national courts were experiencing problems with transactions and the application of the Schengen provisions on the transnational *ne bis in idem* principles. In fact, it had been made quite clear in national case law that national judges had problems with the Dutch style of *transactie* and the application of the Schengen regulations on the transnational *ne bis in idem*. In the meantime, the relevant Schengen *acquis* were brought in and are now in force, not as domestic governmental regulations, but as rules that are integrated into the third pillar in the field of freedom, security and justice. This means that the Tampere Conclusions of the Special European Council⁴⁵ that define mutual recognition as a cornerstone of judicial cooperation in criminal matters apply to the latter Schengen regulations.

The ECJ explicitly states that the area of freedom, security and justice implies mutual trust in the other criminal justice systems, and that the validity of the *ne bis in idem* principle is not dependent on further harmonization. The ECJ also considers that the intentions of the Contracting Schengen Parties are no longer of value, as they predate the integration of the Schengen *acquis* in the EU.

⁴³ Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice Text adopted by the Justice and Home Affairs Council of 3 December 1998, OJ C 19, 23 January 1999, pp. 1-15.

⁴⁴ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15 January 2001, pp. 10-22.

⁴⁵ Tampere Conclusions, 15th and 16th October, 1999, <http://ue.eu.int>.

Although the CISA was fundamentally linked to the internal market and to the four freedoms, it was an intergovernmental instrument.

This is as such remarkable, since the Dutch proposal⁴⁶ at the time of the drafting of Article 54 to include out-of-court transaction settlements was rejected. The intention of the Contracting Parties to exclude transactions from the *ne bis in idem* principle was clear. However, the integration of the Schengen provisions in the EU, based upon the decision of the IGC and ratified by the national authorities, not only changed the conceptual framework of these provisions, but also their meaning and effect. A parallel can be drawn here with the general principles of Community law in the internal market. Community loyalty and non-discrimination, for example, influenced the meaning and effect of several national criminal provisions, without taking into account the intentions of the national legislator.

It is typical of an integrated legal order such as the EC that the conceptual framework of integration interferes with national sovereignty, also in respect of cooperation and transnational aspects.⁴⁷ What happened during the process of market integration in the EC is now repeated in the process of justice integration in the EU. Rights and remedies for the market citizen are transformed into rights and remedies for the Union citizen. National decisions, including criminal decisions, can have an EU-wide effect in a new setting of European territoriality. This is also what makes the European integration process so different from dual sovereignty in the USA, where the constitutional double jeopardy does not bar double prosecution in several states. When a defendant in a single act violates the 'peace and dignity' of two sovereign powers by breaking the laws of each, in the USA he has committed two distinct offences⁴⁸ with two different values to protect. In the EU we have a single area of Freedom, Security and Justice and an integrated legal order in which full effect should be given to fundamental standards.

However, with this decision the ECJ did not solve all the problems of the *ne bis in idem* principle. As mentioned above, the interpretation of the term final judgment is only one of the problem points. The ECJ points out in the joined case on *ne bis in idem* that it 'also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor in a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor', a wording that is much wider than the formula used by the AG

⁴⁶ As provided for under Art. 68(3) of the Dutch Criminal Code.

⁴⁷ See e.g. Judgment of the Court of 2 February 1989. *Ian William Cowan v. Trésor public*. Case 186/87, ECR 1989, p. 00195.

⁴⁸ *Heath v. Alabama*, 474 U.S. 82 (1985).

who spoke of conditions with the nature of a penalty, the decision of guilt and no prejudice to victims. More concretely, the question is whether procedural agreements, such as plea bargaining or full or partial immunity deals for collaboration with the law enforcement authorities, fall under the scope of the *ne bis in idem* principle. In some countries these deals can be connected to an out-of-court settlement in the form of a transaction. Another problem is the full application of the *ne bis in idem* rule if the first proceedings were conducted for the purpose of shielding the person concerned from criminal responsibility. Under which conditions can the *ne bis in idem* be set aside and by whom?

With the *Gözütok and Brügge* case on the agenda it was foreseeable that in the absence of European legislation the ECJ would receive other preliminary questions on the interpretation of the *ne bis in idem* principle. Preliminary questions might be expected on the scope of the principle as well as on the definition of *idem* and of *bis*. In that light it is important to underline that a couple of days after the ECJ ruling in the *Gözütok and Brügge* case, Greece submitted a proposal for a framework decision on *ne bis in idem*⁴⁹ with the aim being to establish common legal rules in order to ensure uniformity in both the interpretation of those rules and their practical implementation. The framework decision would replace Articles 54-58 of the CISA. The proposal defines criminal offences (Article 1) as offences *sensu strictu* and administrative offences or breaches punished with an administrative fine on the condition that they may be appealed before a criminal court. Judgments also include any extra-judicial mediated settlements in criminal matters and any decisions which have the status of *res judicata* under national law shall be considered as final judgments. Article 4 provides for exceptions to the *ne bis in idem* principle if the acts to which the foreign judgment relates constitute offences against the security or other equally essential interests of that Member State or were committed by a civil servant of the Member State in breach of official duties. It is a solid initiative, but its reach is rather too narrow. In fact, it is quite absurd to exclude punitive administrative sanctioning decisions if they are not appealable before a criminal court, and equally so in the light of the ECtHR case law, even though it does fit in with the German tradition of administrative criminal law (*Ordnungswidrigkeiten*). The draft also contains far too many exceptions to the *ne bis in idem* rule. Finally, the draft does not deal with the applicability of the principle to legal persons. The initiative was discussed in the Council of Ministers, but the multitude of divergent opinions between Member States rapidly brought to light the inviability of a legislative solution. Once again, it fell to the European Court of Justice to assume its prætorian role and fill the legal vacuum.

⁴⁹ Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the '*ne bis in idem*' principle, OJ C 2003 100/4.

6. The shower of preliminary questions on *ne bis in idem*

6.1 Judgment C-469/03, *Miraglia*: there has to be a judgment of substance

In the framework of a joint investigation between the Italian and the Dutch authorities, *Miraglia* was arrested in Italy in 2001. He was accused of having organised the transportation of 20 kilos of heroin from the Netherlands to Bologna. In 2002, the court of Bologna revoked all detention orders. At the same time, the judicial authorities in the Netherlands instigated a criminal investigation against *Miraglia* for the same facts. In 2001, the Dutch prosecutor's office decided not to pursue the action against the accused. It was clear to the ECJ that this decision was taken because criminal proceedings had been initiated against him in Italy for the same facts. That is to say, the decision of the Dutch authorities resolved a positive conflict of jurisdiction in favour of the Italian jurisdiction.

The Prosecutor's office of Bologna then requested judicial assistance in criminal matters. The request was denied by the authorities in Amsterdam, based on the reservation formulated by the Netherlands to art. 2 (b) of the European Convention on Judicial Assistance, as the Netherlands had decided 'to close the case without imposing any penalty'. The Dutch judicial authorities added that any request for judicial assistance would be turned down on the basis of article 54 of the CISA.

The aforementioned reservation of the Netherlands is formulated as follows: 'The Kingdom of the Netherlands has formulated the following reservation concerning Article 2(b) of the European Convention on Mutual Assistance: The Government of the Kingdom of the Netherlands reserves the right not to grant a request for assistance; (b) in so far as the request concerns a prosecution or proceedings incompatible with the principle *ne bis in idem*.'

Furthermore, article 255 of the Dutch Criminal Code foresees in its first section: 'Where a case does not proceed to judgment, (...) no further proceedings may be taken against the defendant in respect of the same acts, unless new evidence is brought forward'.

The Tribunal of Bologna decided to stay the proceedings and submit the following preliminary question to the European Court of Justice: 'Must Article 54 of the CISA apply when the decision of a court in the first State consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State?'

According to the ECJ, the decision of the Dutch prosecutor's office cannot be considered a decision finally disposing of the case against that person within the meaning of article 54 of the CISA, as it has been taken only on the ground that criminal proceedings have been initiated in another Member State against the

same accused and for the same facts and without there having been any substantive determination with regard to the merits of the case.

It is clear that the ECJ requires a determination of the merits in order to qualify a decision of the public prosecutor as a decision that finally disposes of the case. In this case, the ECJ could have been firmer. In fact, it is not a question of a classic dismissal of the criminal action, but of a decision that resolves a positive conflict of jurisdiction. It could have used the case to set out obligations in that respect, with regard to both the resolution of the jurisdictional conflicts and the obligations of mutual assistance.

6.2 Judgment C-150/05, *Van Straaten*: Acquittal due to a lack of evidence

Van Straaten was prosecuted in the Netherlands, in the first place for having imported a quantity of about 5 kilos of heroin from Italy to the Netherlands, in the second place for possessing a quantity of approximately 1 kilo of heroin in the Netherlands and, in the third place, for the possession of firearms and ammunition. Van Straaten was acquitted in 1983 of the first accusations by the district court of 's-Hertogenbosch (*Arrondissementsrechtbank te 's-Hertogenbosch*), which considered that this fact had not been legally and satisfactorily proven, in other words, due to a lack of evidence and with regard for the principle *in dubio pro reo*. However, Van Straaten was prosecuted in Italy, along with other people, for having exported a quantity of 5 kilos of heroin to the Netherlands on various occasions, through an *in absentia* sentence in 1999 delivered by a court in Milan. Based on this sentence and on an arrest warrant issued by the public prosecutor of Milan in 2002, the Italian judicial authorities placed a request in the Schengen Information System (SIS) for the detention of Van Straaten and his subsequent extradition. The Netherlands added a reservation to the SIS description, in accordance with section 95 (3) CISA, to the effect that the arrest could not be made on its territory. Van Straaten was informed of the SIS description in 2003 and requested the Dutch police to delete it. This request was refused by the Dutch police as they were not the issuing authority. In application of art. 111 of the CISA, a Dutch court was required to take cognizance of the case. Italy was obliged to execute the definitive decision of the Netherlands court, but the latter harboured doubts over the interpretation of art. 54 of the CISA, with respect to the definition of *idem* as well as with regard to the effects of the acquittal due to a lack of evidence in relation to *ne bis in idem*.

Reference to point 6.2 (*cf. infra*) may be made for the definition of *idem*. With regard to the second question, the Dutch judge asked if the *ne bis in idem* principle is applicable to a decision by the judicial authorities of a contracting State in which a defendant has been acquitted due to a lack of evidence. The ECJ responded in the affirmative, making reference to the principles of legal safety and legitimate trust and the right to free movement in the area of freedom,

security and justice under the condition that the decision by the judicial authorities is finally disposed of.

6.3. *The concept of 'finally disposed of' and suspension decisions taken by police authorities: Vladimir Turansky (C-491/07)*

Turansky, a Slovak national, was suspected of having robbed an Austrian national in Austria. An inquiry was opened in Austria and at the request of Austria also in Slovakia, by which the Austrian inquiry was suspended. However, the Slovak Police authorities suspended the proceedings due to a lack of evidence. The Court in Austria had doubts whether this decision to suspend precluded the continuation of the pending proceedings in Austria.

For the ECJ the final decision can come from a police authority that examined the merits of the case. However, in this case the suspension was not 'finally disposed of', as this decision did not, under national law, preclude the institution of new criminal proceedings in respect of the same acts in the territory of the Slovak Republic. Consequently, the Slovak decision of the police authorities did not preclude the Austrian proceedings.

6.4. *The definition of idem and the decision criteria: judgments in Van Esbroeck C-436/04; Van Straaten (C-150.05), Gasparini (C-467//04), Kretzinger (C-288/05) and Kraaijenbrink (C-367-05)*

The ECJ has had to respond to many questions relating to the definition of *idem*. The first case was that of *van Esbroeck*. Van Esbroeck, a Belgian citizen, was convicted by a court in Norway, when the Schengen agreement had still not come into force in that country, of the crime of illegally importing narcotic drugs. Having served half of his sentence he was freed on parole and returned to Belgium where he was accused of having exported the substances to Norway. In both cases it was a question of transporting the same drugs. A petition for a preliminary ruling was presented by the Belgian High Court: 'Can art. 54 of the CISAS be applied when a person is prosecuted for a second time for the same facts if the first conviction took place in a Member state when that provision was yet to come into force?' The ECJ upheld the possibility of applying the *ne bis in idem* principle provided that it was in force in the contracting States at the time of the assessment of the requirements for the application of the latter principle by the court dealing with the second proceeding. It may therefore be said that the ECJ opted for the application *ec nunc* and not *ex tunc*. Of greater importance is the response of the ECJ on *idem*. It clearly favours the *idem factum* criterion: 'the relevant criterion for the purposes of the application of that article [54 CAAS] is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to

them or the legal interest protected'. The punishable facts consisting of exporting and importing the same narcotic drugs and under prosecution in different contracting States of the CISAS should, therefore, be considered in principle as the same facts. However, the ECJ underlined that the definitive assessment, in particular, will correspond to the competent national courts.

The decision to opt for *idem factum* instead of *idem iure* (the legal qualification or the protected legal rights) was thrown into doubt by the Advocate General, Eleanor Sharpston, in the *Gasparini* case. The shareholders and administrators of the company Minerva agreed to import refined olive oil through the port of Setúbal (Portugal) from Tunis and Turkey, without making the required customs declaration and set up a system of false bookkeeping in an attempt to show that the oil came from Switzerland. The merchandise was subsequently transported in lorries from Setúbal to Málaga in Spain. In Portugal, a prosecution for Community fraud took place, which was time-barred, and subsequently a prosecution in Spain for smuggling.

AG Sharpston, with wide experience in Community matters, including in the field of free trade, perceived two areas of friction in the case law of the ECJ relating to the *ne bis in idem* principle. She criticised the ECJ for congratulating itself on applying the *ne bis in idem* principle when the 'identity of the material facts' exists and not requiring 'unity of the legal interest protected'. The second criticism is much more fundamental and interesting. The AG insisted on a coherent application of *ne bis in idem* (in Community law and the law of the third pillar), underlining that the ECJ requires, in order to apply *ne bis in idem*, a triple requirement: the identity of the material facts, the unity of the offender and the unity of the protected legal interest.

However, the ECJ did not change its opinion and reaffirmed in the *Kretzinger* case the criterion of *idem factum* developed in the *Van Esbroeck* case. Kretzinger had transported cigarettes from non-EU member states and from Greece to Great Britain, through Italy and Germany, without making any customs declaration. Kretzinger was convicted for the first and second trip by a court in Italy (a judgment in contumacy) as well as by a court in Germany. The German court considered that the two firm sentences pronounced in Italy had still not been executed, for which reason there was no procedural obstacle under art. 54 CAAS. On the definition of *idem*, the ECJ clearly stated that 'the relevant criterion for the purposes of the application of that article [art. 54 of the CISA] is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected'.

The definition of *idem* is also covered in the *Kraaijenbrink* judgment. Mr Kraaijenbrink was convicted in the Netherlands of various crimes of receiving the proceeds of drug trafficking. On the one hand, a Belgian court in the city of Ghent convicted him of the same facts, but legally qualified as financial exchanges

made with the same money in Belgium. The ECJ reaffirmed the definition of *idem* applied in the *van Esbroeck* case and underlined that the mere fact that the competent national judicial organ confirms that the facts in question are linked to each other by a single criminal intention is not in itself decisive for the definition of *idem*. However, the rule in art. 54 of the CISA is a minimum standard. The contracting States are free to guarantee greater protection.

It is clear that the ECJ is not searching for unity in the case law between Community law and the law built up around the third pillar in this context, but rather for a consistent criterion that guarantees the free circulation of people in the area of freedom, security and justice and respect for human rights. Sharpston, who was also the Advocate General in the *Kretzinger* and *Kraaijenbrink* cases, did not stress coherence between Community law and the law of the third pillar any further and took up the criterion of *idem factum* from *van Esbroeck*, as was confirmed by the ECJ.

6.5 Can acquittal because the offence is time-barred be considered as an *idem*: *Gasparini* (C-467/04)?

In the *Gasparini* case, the ECJ showed itself to be very aware of the essential differences between the procedural rights of the Member States. It is true, the ECJ stated, that the legislation of the States in the field of limitation periods has not been harmonised. Nevertheless, neither the treaty, nor art. 54 of the CISA make the application of *ne bis in idem* conditional upon the requirement that States should harmonise their legislation. The ECJ pointed out that it must be added that the *ne bis in idem* principle necessarily implies the existence of mutual trust between the States. On these grounds, the ECJ declared the *ne bis in idem* principle in art. 54 of the CISA to be applicable to the decision of a court in a contracting State, delivered after having brought the criminal proceedings, by virtue of which a defendant is finally acquitted because the offence that caused the criminal prosecution is time-barred.

This decision is surprising in some ways. In fact, here it is not a matter of an acquittal following a judgment on the merits of the case. It is in reality a question of procedural grounds that bar prosecution. In this sense, it would have been more logical to refer to the content of the *ne bis in idem* principle. Traditionally, as stated in the opening section of this article, a distinction is made between *nemo debet bis vexari pro una et eadem causa* (no one should have to face more than one prosecution for the same offence) and *nemo debet bis puniri pro uno delicto* (nobody ought to be punished twice for the same offence). A *ne bis in idem* applicable to a time-barred prosecution has a much stronger link with *ne bis vexari* than with *ne bis puniri*. It is surprising that neither the AG nor the Court had studied whether the *ne bis in idem* of art. 54 of the CISA also includes the *ne bis in idem vexari*. They limited themselves to dealing with the time-barred

aspect of the criminal action in the context of a judgement considered *idem factum*. In my opinion, it is a mistaken path to follow.

6.6 Conviction in absentia, a time-barred criminal case and penalties that can no longer be enforced: Klaus Bourquain (C-297/07)

At stake was a 1961 death sentence in absentia by a permanent military tribunal, applying the Code of Military Justice for the French Army, finding Bourquain guilty of desertion and the intentional homicide of a German soldier in Algeria. Bourquain took refuge in the German Democratic Republic. An arrest warrant by the Federal Republic of Germany was rejected by the German Democratic Republic. In France all offences committed in connection with the war in Algeria were subject to amnesty and, moreover, penalties in criminal cases were time-barred after 20 years under French law, so the judgment could no longer be enforced in France from 1981 onwards. At the end of 2001 it was discovered that Bourquain was living in Regensburg. In 2002 he was charged by the Regensburg Public Prosecutor's Office with murder, in respect of the same facts in the 1961 French sentence. The regional Court in Regensburg asked the ECJ for a preliminary ruling on the following aspect: May a person whose trial has been finally disposed of in one Contracting party be prosecuted in another Contracting Party for the same act when, under the laws of the sentencing Contracting Party, the sentence imposed on him could never have been enforced?

First of all, the ECJ underlined that in principle convictions in absentia are also covered by the scope of art. 54 CISA and can therefore constitute a procedural bar to the opening of new proceedings. Concerning the concept of 'can no longer be enforced' the Court rejected the interpretation defended by the Hungarian government as 'must have been capable of being enforced under the rules of the sentencing Contracting State at least on the date when it was imposed'. The ECJ stated that the condition regarding enforcement is satisfied when it is established that, at the time when the second criminal proceedings were instituted against the same person in respect of the same acts as those which led to a conviction in the first Contracting State, the penalty imposed in that first State can no longer be enforced according to the laws of that State. Essential for the ECJ is the mutual trust between States in their respective criminal law systems and the right to freedom of movement. The fact that the first sentence could never have been enforced is of no value for the scope of art. 54 CISA.

6.7 Firm judgment and execution of the penalty: Kretzinger (C-288/05)

Is it to be understood that a sentence has been executed or is being executed if the prison term has been conditionally suspended? And, what happens if the accused has been held on remand or in custody? Can this also be considered

as the execution of a sentence? The *Kretzinger* case has assumed importance, given that Germany considered that Italy had suspended the prison sentence and had taken no steps to arrest and surrender the person convicted *in absentia*. The ECJ considered that the penalty imposed by the court of a contracting State 'has been enforced' or 'is being enforced' when, in application of the right of the latter contracting State, the defendant has been sentenced to a prison term the execution of which has been suspended. However, it should not be thought that the penalty that is imposed 'has been enforced' or 'is being enforced' when the defendant has been held on remand for a short time, and when, according to the law of the State enforcing the sentence, the length of time on remand should count towards the subsequent enforcement of the prison sentence, given that it concerned an arrest that took place at some point before the judgment was delivered.

7. Conclusion

The rapid drafting of legal instruments in the field of JHA, in order to reinforce the efficacy of criminal justice in European territory (the European arrest warrant and surrender procedures, the European warrant on the freezing of assets and evidence, the European warrant on confiscation of crime-related proceeds, the European evidence warrant, the European warrant on the execution of sanctions and the proposed European warrants on the table), increases the legal protection of citizens (the framework decision for the protection of victims of crime, the framework decision on the protection of private life in the third pillar and the proposed framework decision on procedural guarantees for suspects and defendants in criminal proceedings throughout the European Union), but it also makes it clear that the ECJ will have a lot work in the near future in laying down the guiding principles of criminal justice in the European judicial area in criminal matters. The set of judgments on *ne bis in idem* is simply the start of the important role of the ECJ in the area of European criminal justice. It also underlines the important interaction between national courts and the ECJ in the preparation of the Union's general principles of law. For this reason, it is important that all the contracting States recognise the jurisdiction of the ECJ in order to interpret the law of the 'Third Pillar' and not to limit it (as Spain does) to courts of last instance. Furthermore, in this respect it is also important that no States decide to opt out.

The praetorian approach to the interpretation of *ne bis in idem* also illustrates that a real need exists to ratify the Reform Treaty Project, including the Charter of Fundamental Rights (CFR),⁵⁰ as a binding text. The CFR refers to the ECHR as a minimum standard and in accordance with the Reform Treaty Project, the

⁵⁰ Drawn up in Nice, 7th December 2000, but not legally binding.

EU could also be part of the ECHR. The scope of article 50 CFR⁵¹ relating to *ne bis in idem* is totally transnational in the EU, but its scope of application is disappointing due to the literal tone of the text: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'. Overly stressing the criminal procedures, this wording is not at all in line with current ECtHR case law. Moreover, the provision appears to allude only to final judgments.

In a common area of freedom, security and justice based on mutual trust, it is necessary to draw up objective criteria in order to resolve positive conflicts of jurisdiction and to avoid as much as possible *ne bis in idem* situations. For this reason, the European Commission has drafted a Green Paper on conflicts of jurisdiction and the *ne bis in idem* principle on criminal procedures.⁵² The European Commission stresses the relation between conflicts of jurisdiction and *ne bis in idem*. Without objective rules on positive conflicts of jurisdiction, *ne bis in idem* has a perverse consequence: whoever is first to exercise jurisdiction has priority. For this reason, the Green Paper proposes the drafting of a Framework Decision, based on article 31 TEU, that will replace articles 54–58 of the CISA. However, the Commission wishes to limit it to a general definition, leaving the ECJ with enough room to develop the principle. Furthermore, it is necessary to draw up a horizontal approach on *ne bis in idem* in the instruments on mutual recognition (Euro warrants). At present, *ne bis in idem* is a reason for obligatory or facultative non-execution, according to the instrument. It would have to be a reason for obligatory non-execution in all instruments, based on the common definition of the framework decision. With regard to the content of the principle, the Commission relies fundamentally on the case law built up by the ECJ. Bearing in mind the consultations on the Green Paper and the discussions with experts, the European Commission considers the preparation of a Framework Decision on this matter, politically speaking, to be unviable. However, the Commission has not come up with a proposal for a framework decision, contrary to the Hague agenda for the area of liberty, security and justice. Very recently the Czech Presidency has submitted a proposal for a framework decision on the prevention and settlement of conflicts of jurisdiction in criminal proceedings.⁵³ The proposal is under negotiation, but does not really contain any prioritisation

⁵¹ Council of the European Union, Charter of Fundamental Rights of the European Union – Explanation relating to the complete text of the Charter, December 2000, available in English http://ue.eu.int/df/docs/en/EN_2001_1023.pdf (accessed 5/12/07).

⁵² COM (2005) 696 final and Commission Staff working document SEC (2005) 1767. See M. Wasmeier, N. Thwaites: The development of *ne bis in idem* into a transnational fundamental right in EU law: comments on recent developments, *European Law Review* (2006), pp. 565–578.

⁵³ 20 January 2009, 5208/09, Copen 7, see <http://register.consilium.europa.eu/pdf/en/09/st05/st05208.en09.pdf>

of jurisdiction or stringent criteria for centralised prosecution. It is very much concentrated on strengthening cooperation and coordination between Member States concerning jurisdictional issues.

In contrast with the disagreement between the experts at the Ministries of Justice, academic experts have been able to reach agreement. The Max Planck Institute of foreign and international criminal law has brought together a group of experts in order to prepare the so-called Proposal of Friburg on Concurrent Jurisdiction and the Prohibition of Multiple Prosecutions in the EU.⁵⁴ The 2003 text refers to the prevention of multiple prosecutions at an international level through the imposition of *forum*/jurisdictional rules, the application of transnational *ne bis in idem* and, finally, as a security network, the application of the previously explained principle of 'taking into account'. With regard to the question of transnational *ne bis in idem*, it proposes a *ne bis in idem factum* law for natural and juridic persons. The *ne bis in idem* principle should be applied to all procedures and punitive sanctions, whether of an administrative or criminal nature, national or European. The text proposes using the expression '*finally disposed of*' instead of '*finally acquitted or convicted*'. This terminology includes all decisions adopted by the prosecuting authorities that put an end to the procedures, so that it would only be possible to reopen a case in exceptional circumstances. This means, for example, that the German or Dutch extrajudicial agreements (*Einstellung gegen Auflagen, transactie*) and the French *ordonnance de non-lieu motivée en fait* would be included in the definition of *ne bis in idem*. This proposal provides an excellent set of regulations *de lege lata*, both for the legislator and for the courts, and at a European as well as at a national level.

For the moment, the ECJ has drawn up an *ius comune* of *ne bis in idem*, considering it to be a fundamental transnational law principle in the area of freedom, security and justice. *Ne bis in idem* has moved from being a principle of sovereignty or of the State that is strictly related to its territory and its *ius puniendi*, to being a human right for European citizens in a common judicial area. The question as to the need to resolve conflicts of jurisdiction in a common area that is characterised by increasing transfrontier activity remains open, however. It will be necessary to draw up criteria on the choice of jurisdiction and grant Eurojust or a future European Public Ministry authority for coordination and decision making in matters relating to conflicts of criminal jurisdiction.

⁵⁴ <http://www.iuscrim.mpg.de/forsch/straf/projekte/nebisinidem.html> See also A. Eser, C. Burchard, Interlokales 'Ne bis in idem' in Europa? Von 'westfälischem' Souveränitätspathos zu europäischem Gemeinschaftsdenken, in: H.-J. Derra (ed.), Freiheit, Sicherheit und Recht. Festschrift für Jürgen Meyer, Nomos, 2006, pp. 499-524.

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