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## Transnational cooperation in criminal matters and the safeguarding of human rights\*

Aukje A.H. van Hoek\*\* & Michiel J.J.P. Luchtman\*\*\*

### 1. Introduction

Sometime between April 1993 and January 1994 a number of employees of the *Kredietbank Luxembourg* (KB Lux) stole microfiches, documents and money from their employer. Thus, they obtained sensitive personal data concerning thousands of Dutch and other foreign account holders of KB Lux. After the bank had discovered the theft, the microfiches were used as a means of blackmail: only if the bank refrained from reporting the theft to the police would the employees return the microfiches to the bank. However, if the bank should contact the police, the material would be handed over to foreign authorities. It goes without saying that the latter would not only be awkward for KB Lux, but also in clear violation of Luxembourg banking secrecy. Unfortunately for the bank, this was what happened. In the following events some of the (by then former) employees of the bank were convicted of, *inter alia*, a violation of the Luxembourg banking secrecy legislation.

A few years later criminal investigations were opened in Belgium against Belgian taxpayers for criminal evasion of taxes. The cases were to a very large extent based on data obtained from the microfiches, although these microfiches contained no reference to any bank or other financial institution in particular. The Belgian prosecuting authorities were furthermore not able to account for the way in which the microfiches had been obtained. As a consequence, the courts ruled that the material could not be used as evidence. The material was also rejected in a non-criminal tax case.<sup>1</sup>

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1 District Court of Brussels 28 June 2002, no. 02/23379, published at <http://www.futd.nl/content/futd/achtergronden/dagbladen/20022872.html> (website last visited on 7 July 2005).

In the meantime, the KB Lux affair extended its impact beyond the Belgian borders. Based on EC Directive 77/799 on mutual administrative assistance in tax matters<sup>2</sup> the Belgian tax authorities passed on the information to other EU countries, including the Netherlands and Germany. The Dutch authorities commenced investigations into the matter. Thousands of Dutch taxpayers were approached and in a considerable number of cases criminal investigation proceedings were started.<sup>3</sup> An issue of central importance in these cases was, of course, the reliability of the information and the alleged illegality of the manner in which the microfiches had been obtained in Belgium.<sup>4</sup> The question as to the admissibility of the evidence was raised before the Dutch courts on a number of occasions. What is striking here is the extent to which the different judgments diverge. This is all the more surprising since all Dutch courts refer to the rule of non-inquiry as the starting point of their analyses.<sup>5</sup>

The rule of non-inquiry allows the courts in one country to refrain from investigations into legal, economic and/or social matters of another country. It has its basis in extradition law, but is now also used in other forms of international cooperation. The rationales of the rule are several. In the United States it is often conceived as a direct consequence of the division of powers between the executive and the judiciary.<sup>6</sup> International criminal cooperation, being a part of foreign policy, is a matter that has to be dealt with by the executive (the President or the Secretary of State on his behalf). Therefore, the courts should not – as a rule – entertain questions concerning the legitimacy of the acts of foreign authorities. This does not mean, however, that such types of questions are not dealt with at all. They are on the contrary conducted by the executive powers, which are considered to be better equipped for these kinds of investigation.<sup>7</sup>

Another rationale, which seems to have gained the upper hand in (continental) Europe, places emphasis on the mutual trust that underlies every system of legal cooperation between states. In criminal matters this trust can be expressed through the conclusion of treaties on mutual assistance. In this view, the existence of a treaty relationship implies an *a priori* and in-depth investigation by the competent authorities into the legal and social situation of other states.<sup>8</sup> There is thus no need for the courts to conduct their own investigations in individual cases.<sup>9</sup> This

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2 Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, *OJ L* 336/15, last amended by Council Directive 2004/106/EC, *OJ L* 359/30, 16.11.2004.

3 The KB Lux affair has given rise to extensive debate in the Netherlands; see, among others, 2003/04 *Tijdschrift voor formeel belastingrecht*; T. van Kempen et al., 'Het achterhalen van niet opgegeven tegoeden door de Belastingdienst; de zaak Kredietbank Luxemburg', 2003 *Nederlands Juristenblad*, no. 29, pp. 1497-1504; L. Wijsman et al., 'Het protocol inzake het rekeningenproject. Een inventarisatie van rechtsvragen', 2003 *Weekblad voor Fiscaal Recht*, no. 832; W. Valkenburg, 'Rubriek fiscaal strafrecht', 2004 *Tijdschrift voor onderneming en strafrecht*, no. 2, pp. 48-52; reference to the website of the Dutch Ministry of Finance is also recommended: <http://www.minfin.nl> (search for 'rekeningenproject'; website last visited on 7 July 2005).

4 To our knowledge the provision of the information by the Belgian authorities on the basis of Directive 77/799 (*OJ L* 336/15) was not as such a major issue in the Dutch cases.

5 In Dutch: *vertrouwensregel*; in Germany this rule is sometimes referred to as the *formelles Prüfungsprinzip*. The Dutch translation of the rule of non-inquiry is in our view not completely accurate. The term *vertrouwensregel* refers to a principle of mutual trust to be placed in foreign legal systems. The *rule of non-inquiry* refers to an unwillingness to investigate or a lack of jurisdiction to do so. See below.

6 In private international law similar rules exist – for example under the American doctrines of the 'act of state' and the 'political question'; see C. van der Plas, *De taak van de rechter en het IPR* (diss. Nijmegen), 2005, pp. 363 et seq. and pp. 317 et seq. with references.

7 Cf. C. Blakesley, 'National reports – United States of America', in A. Eser et al. (eds.), *The Individual as Subject of International Cooperation in Criminal Matters*, 2002, pp. 605-609; see also *in extenso* A. Smeulders, *In Staat van uitlevering* (diss. Maastricht), 2003, pp. 460-486, both authors with references to American case law. This reasoning also carries a risk: the accused's rights might be traded against other interests of foreign policy, such as trade interests.

8 This again could be explained by the division of powers: the executive is responsible for entering into treaties.

9 This rationale is often criticized, because for one thing it makes no distinction between bilateral and multilateral treaties. Especially in the latter case, the signing of a treaty certainly does not always imply an in-depth investigation into the domestic situation of all other treaty partners. Furthermore, sometimes regime changes may occur for the worse. In most cases this does not lead to the treaty being repealed.

is why the rule of non-inquiry and the treaty requirement that exists in international cooperation in criminal matters are often linked. Nowadays, not only treaties that deal specifically with criminal cooperation serve as the basis of such trust, but also treaties on the protection of human rights, for instance the European Convention on Human Rights (ECHR),<sup>10</sup> the logic being that because the Convention offers general guarantees for the protection of human rights in the party states, the authorities in one state need not check the human rights situation in another party state in individual cases of cooperation.

As concerns the American rule of non-inquiry, as was indicated above this does not allow courts to investigate the legitimacy of foreign acts of state based on the separation of powers.<sup>11</sup> By contrast, the continental rule of mutual trust relieves the courts (and sometimes the administration) from the duty to conduct such an investigation *ex officio*, but does not preclude the courts from conducting it if requested by the defendant. However, in practice the courts may only refuse to hear a complaint in all but the most extreme cases, thereby taking the principle of mutual trust one step further. How differently the rule is interpreted is demonstrated by the following judgments of the Dutch courts in the KB Lux affair:

– The District Courts of Alkmaar<sup>12</sup> and Groningen,<sup>13</sup> for instance, accept that the rule of non-inquiry may be left aside, if there are serious indications that the ECHR has been violated and that the suspect's interests have been damaged as a result. This means that they apply what is known as the *Schutznorm* principle to the case. In their opinion this situation did not occur in the present cases. As the investigations in Belgium were directed against a Belgian suspect, the interests of the Dutch suspects were not harmed in any way by the actions of the Belgian authorities. There was also no indication that the Dutch authorities were involved in the alleged irregularities in the Belgian investigation. As a consequence, the materials could therefore be used as evidence.

– The District Court of Leeuwarden<sup>14</sup> also ruled that the irregularities did not harm the suspects' interests. Moreover, since the information was – apparently – only used as a basis for further investigations, there was no need to investigate any further. The District Court of The Hague<sup>15</sup> noted that the defence only questioned the lawfulness of the actions of the Belgian authorities and not the reliability of the evidence.

– A completely different approach was chosen by the District Courts of Breda<sup>16</sup> and Amsterdam.<sup>17</sup> The Breda court ruled that it could not be excluded that the Belgian authorities had not used their investigatory powers in accordance with the rights of defence, as laid down in the ECHR, and that the Dutch suspect's interests may also have been harmed by this. Although at the start of the Dutch investigation the Dutch authorities could rely on the information provided by the Belgian authorities, this did not mean that the information could also be used as evidence. On the contrary, due to the fact that the origin of the microfiches could not be traced and there

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10 There are also practical reasons for the rule of non-inquiry, one very important one being that it can be very difficult to (correctly) apply the rules of a foreign legal system. However, this argument is almost never explicitly mentioned by the courts.

11 Though also in the American system, the courts do in fact entertain political questions.

12 Rb. Alkmaar 19 February 2004, *LJN* AO5509, case no. 14.060137-02, to be found at <http://www.rechtspraak.nl>.

13 Rb. Groningen 16 October 2003, *LJN* AM1882, case no. 18/076010-01, published in 2003 *Vakstudienieuws*, 56.4 and at <http://www.rechtspraak.nl>.

14 Rb. Leeuwarden 6 December 2004, *LJN* AR7028, case no. 17/029023-01 VEV, to be found at <http://www.rechtspraak.nl>.

15 Rb. The Hague 5 November 2004, *LJN* AR5790, case no. 09/755139-02, to be found at <http://www.rechtspraak.nl>.

16 Rb. Breda 11 December 2003, *LJN* AN9917, case no. 02/003498-01, published in *Vakstudienieuws*, 2.8 and at <http://www.rechtspraak.nl>.

17 In this case the court never reached a final verdict, because of the demise of the suspect; Rb. Amsterdam 12 September 2002, *LJN* AE7569, case number 13/120067-01, published in 2002 *Vakstudienieuws*, 45.7 and at <http://www.rechtspraak.nl>.

were no further indications that the Belgian authorities would be prepared to clarify certain matters,<sup>18</sup> the material was not allowed as evidence.

It is striking to see how differently the responsibilities of the Dutch authorities in a transnational context are weighed by the courts. The application of the principle of mutual trust, combined with a strict interpretation of the *Schutznorm*, in some of the cited judgments places the defence in a position that is not to be envied. These courts apparently limit the responsibility of the Dutch authorities to the actions in which they were directly involved. Since they were not involved in *acquiring* the data, apparently no separate issue under Article 8 arose. To us, this is surprising. Does not the *subsequent use* of those data, covered by banking secrecy, indeed raise separate questions under Article 8? And considering that banking secrecy is often meant to protect the privacy of bank clients, why – according to some courts – are the interests of Dutch account holders not harmed?<sup>19</sup> These questions were now totally ignored, thereby depriving the Dutch defendant of a legal remedy, whereas Belgian account holders in a similar position did have such a remedy. Should not the Dutch courts at the very least have examined these aspects, possibly referring to the defendants in the Belgian courts? Or do transnational investigations bring about inherent limitations in legal protection?

In this article we will try to answer those questions. After introducing some general concepts of state liability (Section 2), we focus on the responsibility of states involved in mutual assistance in criminal matters (Section 3). We discuss the case law of the ECtHR and the current practice in order to pinpoint the problems inherent in the current system. Next we will take a look at the new models of co-operation, the joint investigation teams and the European Evidence Warrant, to see whether these will provide a remedy for the problems identified earlier or rather add to it (Section 4). The article concludes with a summary of our findings (Section 5). We confine ourselves to the articles of the Convention which were involved in the *KB Lux* case and which are – in our opinion – the most pertinent to mutual assistance in criminal matters: Articles 6 and 8. The focus will be on cooperation within the EU, so as to be able to take into account the special features of cooperation under the EU Treaty.

## **2. Human rights and transnational cooperation – general principles**

### ***2.1. Introduction***

The European Convention on Human Rights has a rather unique enforcement mechanism. Under Article 33 individuals who claim to be victims of a violation of their rights as guaranteed by the Convention, may file a complaint with the European Court of Human Rights - a specialized court established under the Convention. A prerequisite for admissibility is that the complainant has exhausted local remedies. This means that national avenues which could reasonably be expected to prevent or remedy the breach should be explored first. Contracting States are obliged to provide such local remedies in all cases in which a complainant has a *prima facie* case of a violation taking place. The requirement to provide an effective remedy at the national level,

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18 A salient detail was that the Dutch request for mutual assistance in criminal matters was turned down by the Belgian authorities on the basis of Article 2 (national interest of the requested state) of the 1959 European Convention on Mutual Assistance in Criminal Matters (ECMACM), 030 *European Treaty Series*.

19 See on banking secrecy in general the OECD survey *Improving access to Bank Information for Tax Purposes*, 2000: OECD and also ECJ 10 December 2002, Case C-153/00, *Paul der Weduwe*, [2002] ECR I-11319.

which is laid down in Article 13 of the Convention, does not only relieve the workload of the ECtHR, but further strengthens the enforcement of the other Convention rights. When a case is admitted by the Court, the Court will as a rule restrict itself to the individual case: has the Contracting State in question violated its duty vis-à-vis the complainant, given the circumstances of the case? This means that the Court does not pronounce on the compatibility of national (or international) arrangements as such, but only looks at the results of their application to the individual case. The Court only hears cases against Contracting States – it has no jurisdiction over other entities. As the EU/EC is not itself a party to the Convention, EU measures can only be contested in an indirect fashion: by citing one of the Contracting States before the Court. These basic restrictions to the jurisdiction of the ECtHR should be kept in mind when analyzing the case law on international cooperation. We will discuss four important elements of the case law on international cooperation in general before focusing on mutual assistance in criminal matters. These elements regard the applicability of the Convention to international cooperation as such, the standard to be applied and the influence of mutual trust and local remedies on the duties of the Contracting States. In a final subparagraph the position of the EU/EC is discussed.

## ***2.2. Within the jurisdiction – applicability of the Convention to international cooperation in criminal matters***

Article 1 of the Convention provides that ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined’ therein. This article defines the international scope of application of the Convention. According to the case law of the ECtHR it contains two distinct elements, being the application *ratione loci* (which refers to responsibility over territory) and the application *ratione personae* (responsibility towards persons ‘within the jurisdiction’ of the Contracting State). These two concepts are linked through the fact that the jurisdiction of states is predominantly territorial in character.<sup>20</sup> States, as a rule, exercise control over their territory. This is the most widely recognized basis for jurisdiction. According to the Human Rights Court all other, extraterritorial, grounds for jurisdiction are conditional on assent from the state having territorial jurisdiction.<sup>21</sup> This means that persons within the territory usually fall within the jurisdiction of the state involved, while those outside the territory of a Contracting State usually fall outside that state’s jurisdiction and hence outside the protective scope of the Convention.<sup>22</sup> The territorial responsibility of the Contracting States is further enhanced by the fact that the Convention imposes a duty of care upon the Contracting States. These are not only held liable for their acts, but also for any failures to adequately safeguard Convention rights within their territory (or within the territory under their effective control).<sup>23</sup>

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20 See amongst (many) others: *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, no. 45036/98, Merits, Grand Chamber 30 June 2005 Para. 138 (further referred to as *Bosphorus*) and *Banković e.a. v. Belgium and 16 other States*, no. 52207/99, Court (Grand Chamber), Admissibility decision 12 December 2001, *RJD* 2001-XII, Paras. 59-61. Compare ICJ Advisory Opinion of 9 July 2004 on the legal consequences of the Construction of a Wall in the Occupied Palestinian Territory, General list no. 131, <http://www.icj-cij.org> > decisions 2003, Para. 109.

21 *Banković*, Paras. 59-60 and 67, *Öcalan v. Turkey*, no. 46221/99, Court (first section), Judgment (Merits and just satisfaction) 12 March 2003, Para. 93.

22 Compare *Ilascu and others v. Moldova and Russian Federation*, no. 48787/99, Court (Grand Chamber), Judgment (Merits and just satisfaction) 8 July 2004, Para. 311; *Assanidze v. Georgia*, no. 71503/01, Court (Grand Chamber), Judgment (Merits and just satisfaction) 8 April 2004, Paras. 137-139.

23 I. Brownlie, ‘State responsibility: the problem of delegation’, in K. Ginther et al. (eds.), *Völkerrecht zwischen normativem Anspruch und politischer Realität*, 1994, pp 300 and 306.

This duty of care also concerns the actions of a Contracting State who enters into different forms of (judicial) cooperation with other states. In the famous *Soering* case, for instance, the ECtHR decided that although the Convention does not require Contracting States to impose Convention standards on non-Contracting States, the actions of the cooperating Contracting State can be tested against the Convention in as far as its cooperation ‘ha[s] as a direct consequence the exposure of an individual to proscribed treatment.’<sup>24</sup> Or, in the wording of the recent *Ilascu* judgment: government acts which ‘sufficiently proximate repercussions on rights guaranteed by the Convention, (...) attract a state’s liability even if those repercussions occur outside its jurisdiction’.<sup>25</sup> In a series of judgments the ECtHR has elaborated upon the duties incumbent upon the Contracting States with regard to the different types of international cooperation, be it extradition, recognition of judgments or mutual assistance in criminal matter. We will not discuss this case law in detail (we refer to the extended version of this article, to be published in 2006)<sup>26</sup>, but will highlight the aspects of the case law which in our opinion are the most pertinent to the issue of mutual assistance.

### **2.3. Flagrant breach – the standard to be applied in case of mutual assistance**

As mentioned before, the *Soering* case<sup>27</sup> forms the benchmark case for all cases concerning international cooperation in criminal matters. It deals with extradition.

In this case the ECtHR decided on the application of the Convention to the extradition of a German citizen to the USA, a non-Contracting State. The point at issue was that the person to be extradited to the USA was accused of a crime carrying the death penalty in the State of Virginia. The person to be extradited, Mr Soering, claimed that his extradition would lead to a violation of Articles 3 and 6 by the extraditing state. In a much quoted consideration, the Court stated that it ‘does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.’<sup>28</sup> This quote is often used to suggest that only flagrant breaches of Article 6 by the requesting state may attract the liability of the cooperating state. This suggestion is further supported by the judgment in the *Drozd* case.<sup>29</sup>

The *Drozd* case involved the criminal justice system of Andorra. This state, which at the relevant time was not a party to the Convention,<sup>30</sup> has only a limited judicial and penal capacity. It makes use of French and Spanish lawyers to sit on the criminal bench.<sup>31</sup> Anyone sentenced to incarceration for a period longer than three months, is transferred to either Spain or France – at the choice

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24 See recently *Mamatkulov and Abdurasulovic v. Turkey*, no. 46827/99 and 46951/99, Court (first section), Judgment (Merits and Just Satisfaction) 6 February 2003, Para. 68.

25 *Ilascu and others v. Moldova and Russian Federation*, no. 48787/99, Court (Grand Chamber), Judgment (Merits and just satisfaction), 8 July 2004, *EHRC* 2004-9 pp. 862-866 note M. Gondek Para. 327.

26 A. van Hoek et al., ‘The European convention on human rights and transnational cooperation in criminal matters’, in A. van Hoek et al. (eds.), *Enforcement and adjudication in a multilevel environment – A user perspective on the growing diversity of legal sources*, Antwerp: Intersentia (to be published in 2006).

27 *Soering v. UK*, no. 14038/88, Court (Plenary), Judgment (Merits and just satisfaction) 7 July 1989, Series A no. 161.

28 *Soering* Para. 113. See on this issue S. Trechsel, ‘The Role of International Organs Controlling Human Rights in the Field of International Co-operation’, in A. Eser et al., *Principles and Procedures for a new Transnational Criminal Law*, 1992, pp. 658-659.

29 *Drozd and Janousek v. France and Spain*, no. 12747/87, Court (Plenary), Judgment (Merits) 26 June 1992, Series A no. 240.

30 *Drozd*, judgment Para. 84 et seq. Andorra became a member of the Council of Europe in 1994 and acceded to the ECHR. The Convention entered into force on 22 January 1996.

31 Judgment Para. 52.

of the convicted person – for the execution of the sentence.<sup>32</sup> In the *Drozd* case the Court had to answer the question whether violations of Convention rights by the Andorran justice system are imputable to France. The Court stated that though the French government is involved in the Andorran justice system, it bears no direct responsibility for the results thereof.<sup>33</sup> The fact that the sentence is executed in France, however, gives that country an independent responsibility vis-à-vis the convicted. This responsibility is based on Article 5, section 1, guaranteeing the right to liberty and security of person. Mr Drozd claimed that his detention was unlawful as he had been convicted without a fair trial. The Court admitted that the fairness of the proceedings in Andorra could affect the legality of the detention in France. However, ‘as the Convention does not require the Contracting Parties to impose its standards on third States or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.’<sup>34</sup>

As in the *Soering* case, the Court seems to mitigate the test applied in international cases to flagrant breaches of Article 6. This case law is however contradicted – at least so it seems – by the *Pellegrini* case.<sup>35</sup> In the latter case the Court dealt with the recognition by Italy of a decision by the Rota, the Vatican court, to annul the marriage between Ms Pellegrini and her husband of 25 years. The recognition was based on the Concordat between Italy and the Holy See. The Holy See is a recognized entity in public international law. Although situated within European territory,<sup>36</sup> it is not a party to the European Convention.<sup>37</sup> The procedures before the Rota are based on Canon law and do not fully comply with the requirements of Article 6.<sup>38</sup> In the case at hand, Ms Pellegrini claimed a violation of her right to a fair trial both in the procedure before the Rota and before the Italian courts. Her claim was rejected in both instances. She subsequently filed a complaint against Italy with the ECtHR. In its judgment the ECtHR decided that the procedure before the Rota had indeed violated Ms Pellegrini’s defence rights.<sup>39</sup> But as the Holy See itself is not bound by the Convention, only Italy could be called upon to uphold these rights. According to the Court, the Italian courts had the duty to duly satisfy themselves, before they

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32 Judgment Para. 55-56.

33 There is no jurisdiction *ratione loci*, because Andorra is not an area which is common to France and Spain, nor a Franco-Spanish condominium. Hence it cannot be regarded as French territory (Para. 89). There is no jurisdiction *ratione personae* because the French judges in the Andorran courts are not acting on behalf of France, but rather on behalf of Andorra. Moreover, there was no active involvement on the part of France in the specific cases (Paras. 96-97).

34 A similar position was taken in the case of *Iribarne Perex v. France*, which also involved the execution of an Andorran criminal conviction in France: no. 16462/90, Commission (admissibility decision) 19 January 1994.

35 *Pellegrini v. Italy*, no. 30882/96, Court (second section), Judgment (Merits and just satisfaction) 10 July 2001, *RJD* 2001-VIII. See for comments J-P. Costa, 2002 *Revue Trimestrielle des droits de l’homme*, no. 463, pp. 470-476; E. Dieni, ‘L’arrêt Pellegrini contre Italie de la Cour Européenne des Droits de l’Homme’, 2000 *Revue de Droit Canonique*, no. 2, pp. 141-161; C. Focarelli, ‘Equo processo e riconoscimento di sentenze straniere: il caso Pellegrini’, 2001 *Rivista di diritto internazionale*, no. 4, pp. 955-977; N. Mole, ‘From Rome to Brussels via Strasbourg – Pellegrini v. Italy and Brussels II’, 2002 *IFL*, pp. 9-15.

36 As far as one can say that the Holy See is situated in any specific place.

37 The Holy See has held observer status within the Council of Europe since 7 March 1970, but is not a party to the ECHR. See <http://www.coe.int>.

38 Dieni, *supra* note 35, p. 154.

39 In this the Human Rights Court’s assessment differs from the one by the Italian Courts, which did not find the canon procedure to be in breach of the right to a fair trial (as protected by the public policy clause).



authorized the enforcement of the decision annulling the marriage, that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of paramount importance to the parties.<sup>40</sup>

This means, therefore, that the Italian court should have embarked on a full scrutiny of the ecclesiastical proceedings to decide whether in the individual case the requirements of Article 6 had been met. How can this finding be reconciled with the judgments in the *Soering* and *Drozd* cases? In our opinion several elements distinguish the cases which may explain why the test to be applied differs from one case to another. Firstly, it should be kept in mind that the *Pellegrini* case was, to all intents and purposes, a *domestic* case. Both Ms Pelligrini and her husband were Italian citizens resident in that country. They had celebrated their marriage there and spent their conjugal life in that country. The ‘external’ element is introduced in the marriage through the status of the Holy See and its involvement with the family life of Italian Catholics.<sup>41</sup> In contrast to both the *Drozd* case and the *Soering* case, there is no cross-border element in the *Pellegrini* case. Rather, the concordats between the Catholic states and the Vatican contains an element of (quasi-) transfer of competences in the area of family law.

Even more importantly, the Court seemed to attach a great deal of weight to the fact that transnational cooperation in the case of the transfer of convicted persons is in the interest of the individuals concerned.<sup>42</sup> Demanding strict compliance with Article 6 in those cases would, by blocking such a transfer, thwart the effective protection of the convicted person. Again, the situation was different in the *Pellegrini* case. Ms Pelligrini derived no benefit from the recognition of the foreign judgment. On the contrary, her legal position vis-à-vis her husband was thereby severely worsened. This is in our opinion an important factor in explaining the different standards applied to the two cases involving the recognition of judgments. Whereas in the *Pellegrini* case all the requirements of Article 6 had to be met, in the *Drozd* case cooperation only had to be refused in the case of a flagrant denial of justice. Apparently in those extreme cases the protection of public policy prevails, even over the interests of the individual.<sup>43</sup>

The cases of *Drozd* and *Pellegrini* can be distinguished from the *Soering* case by the fact that the latter deals with a possible future infringement whereas in the two cases on recognition of judgments the breach of Article 6 had already materialized. This means inter alia that in the *Soering* case the Court had to overcome the fact that it normally does not hear cases on future potential violations of Convention rights. It did so by pointing out the serious and irreparable consequences of extradition for the rights of the person concerned. But the threshold for the complainant is rather high, even with regard to the right not to be submitted to cruel and unusual treatment. In order to activate the liability of the extraditing state there must be substantial grounds for believing that the person to be extradited faces a real risk of being subjected to

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40 *Pellegrini*, *supra* note 35, Para. 40.

41 The annulment of Catholic marriages by the Vatican courts is based on an agreement between the Italian state and the Holy See, granting the latter concurrent jurisdiction over these matters. The agreement deals only with the civil effects of such an annulment. The religious meaning of marriage and divorce is the sole provenance of the church. On the interaction between canon law and civil law in Italy, see Dieni, *supra* note 35, pp. 141-161.

42 Compare ECtHR, *Veermäe v. Finland*, no. 38704/03, Court (fourth section) 15 March 2005 (admissibility decision).

43 See also *Iribarne Perez v. France*, no. 16462/90, Commission (admissibility decision) 19 January 1994.

torture or to inhuman treatment. Moreover, the person to be extradited will have to substantiate a personal risk with regard to the proscribed treatment; general safety risks or poor prison condition do not suffice.<sup>44</sup> In this light it should come as no surprise that the test with regard to fair trial is also rather strict in these cases.

In respect of Article 6, therefore, the Court does not systematically restrict the protection in international cases to case of flagrant breaches of fair trial. A distinction should be made between future potential breaches and breaches which have already occurred. Moreover, a distinction should be made between different types of cooperation as these serve different interests. In those instances where international cooperation benefits the individual, the Court will give the cooperating state more leeway to cooperate.

The case law shows no evidence that the restriction to flagrant denial of Convention rights is also applied in cases dealing with (for example) Article 3 which prohibits torture or Article 8 on privacy. However, the international complications of the case may influence the standard used in a more indirect fashion. In the *Droz*d case the fairness of the Andorran trial was challenged through the requirement of a legal base for detention in Article 5. As we have seen, the fact that not all requirements of Article 6 had been met, did not corrupt the legal basis of the detention. Likewise, where Article 8 is concerned, the international element may enter the equation when the proportionality of an infringement is tested. This indirect effect of international cooperation on the effective protection of Convention rights will be discussed in more detail below.

#### **2.4. Mutual trust and local remedies**

In the case law of the Dutch Supreme Court on cooperation in criminal matters, the concept of mutual trust plays a pivotal role. A similar concept underlies the judicial and police cooperation within the EU. In both cases, mutual trust is founded (in part) on the fact that Contracting States to the Convention share a common set of values and have promised to uphold the rights contained in the Convention. This commitment is monitored by the ECtHR. In these circumstances the Contracting States could simply put their trust in the legal system of the other Contracting States and, if necessary, refer complainants to the local remedies of the state where the alleged infringement occurred. Hence, within the EU one could abolish extra safeguards and remove all refusal grounds from the instruments on recognition and cooperation. This doctrine, which is referred to as mutual recognition, has become one of the cornerstones of cooperation in the area of Justice and Home Affairs.

Strangely enough, this central role of mutual trust is not reflected by the case law of the ECtHR. In its reasoning the ECtHR often pays specific attention to the question whether the other state involved in the cooperation is or is not a party to the Convention. This would suggest that Contracting States may trust other Contracting States to uphold the Convention rights, but may not be so trusting towards non-Contracting States. The judgment in the *Pelligrini* case discussed above is clearly open to this interpretation. However, in the *Droz*d case the same argument worked the other way around: the fact that Andorra was not itself a party to the Convention was used as an argument to *lower* the standard to be applied. This means that non-Contracting States

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<sup>44</sup> *Mamatkulov* no. 46827/99 and 46951/99, Court (first section), Judgment (Merits and Just Satisfaction) 6 February 2003 Para. 66. *Mamatkulov* no. 46827/99 and 46951/99 Court (Grand Chamber), Judgment (Merits and just satisfaction) 4 February 2005 Para. 69 et seq.

are not necessarily put to a stricter test when it comes to international cooperation. Conversely, the fact that the other state involved *is* a Contracting State to the Convention does not relieve a state of its independent duty under the Convention. This is clearly demonstrated by the case of *T.I. v UK*.<sup>45</sup>

The case of *T.I. v. UK* deals with the expulsion of a so-called Dublin claimant from the UK to Germany, the country of first entry. In this case the Court found ‘that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the UK rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where states establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the object and purpose of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.’<sup>46</sup> The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered.’ So, Contracting States are held fully responsible for the international obligations which they adopt. Furthermore, the fact that expulsion took place to another Contracting State does not affect the responsibility of the UK. Apparently in this case the Court did not operate on the assumption of conformity which lies at the heart of the mutual trust concept in national law.

In our opinion, it should not make any difference to the standard to be applied whether a judgment is rendered by a co-Contracting State or not.<sup>47</sup> Being a Contracting State to the ECHR is not in itself a guarantee against breaches of Convention Rights, as is amply evidenced by the case law of the ECtHR. The standard to be used is, however, linked to and complicated by the issue of ‘local remedies’. In this context ‘local remedies’ refers to the duty to seek remedies in the country of primary breach. The issue plays an important role in, and is best explained through, the enforcement of judgments. The traditional instruments on recognition of judgments in private international law all contain a refusal ground permitting courts to refuse recognition to judgments that violate human rights. This means that foreign judgments are double tested on compliance with human rights standards – once in the country of origin (the vertical control mechanism) and once in the country of recognition (the horizontal control mechanism). The new instruments developed and developing in the EC/EU context often do away with the horizontal check. Recognition is automatic and any complaints concerning human rights violations should be addressed to the courts of the country of origin. In that sense, the complainant is made dependent on local remedies (i.e. remedies in the country of primary breach). Such a duty to

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45 Court (third section), Admissibility decision, 7 March 2000, *RJD* 2000-III.

46 See e.g. *Waite and Kennedy v. FRG*, Appl. no. 26083/94, Court (Grand Chamber), Judgment (merits) 18 February 1999, *RJD* 1999-I, Para. 67.

47 Compare in this respect the case of *T.I. v. UK*, (Court (third section), Admissibility decision, 7 March 2000, *RJD* 2000-III) discussed in Section 2.4.

recognize and enforce judgments and court orders even if they were given in violation of Article 6 seems to be at odds with the duty of the Contracting States under the ECHR.<sup>48</sup>

However, even then the existence of local remedies may play a role at the stage of recognition and enforcement through the doctrine of estoppel. The Dutch Supreme Court, for one, accepted such an effect in a ruling rendered in 2002. In that case the party opposing recognition claimed breaches to his right to be heard in the country of origin of the judgment. However, he had refrained from contesting the judgment in the first instance by appealing or by any other means of recourse available to him. According to the Supreme Court, in these circumstances the court did not have to entertain his claim with regard to Article 6.<sup>49</sup> Likewise, the Brussels I Regulation in its rules on recognition and enforcement, although leaving room for refusal based on violations of Article 6 ECHR, refers to the country of origin in the case of a faulty notification (Article 34, section 2). Whether under the Human Rights Convention the applicant is required to introduce his complaint in the original proceedings and to use the available appeal options, is as yet unclear.<sup>50</sup> Also unclear is the position of the ECJ, which dealt with violations of the ECHR and the public policy exception in the Brussels Convention in the *Krombach* case.<sup>51</sup> So far neither court has been obliged to decide on the matter: in both the *Pellegrini* case and the *Krombach* case

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48 See also AIDC Resolution II-2: 'When confronted with conflicting obligations under public international law pursuant to conventions on the protection of human rights on the one hand and on international co-operation in criminal matters on the other hand, States should let their obligations with respect to human rights prevail, either by refusing assistance or by imposing conditions on the other State involved.' 1994 *International Review of Penal Law*, no. 1-2, pp. 604-605. See also for the European Enforcement Order: A. Stadler, 'Das Europäische Zivilprozessrecht – Wie viel Beschleunigung verträgt Europa?', 2004 *IPRax*, no. 1, pp. 2-11 and K. Stoppenbrink, 'Systemwechsel im internationalen Anerkennungsrecht', 2002 *European Review of Private Law*, no. 5, pp. 664 et seq. In private law circles there is little objection to the abolition of the public policy clause. See R. Hüsstege, 'Braucht die Verordnung über dem europäischen Vollstreckungstitel eigene ordre-public-Klausel?', in H.-P. Mansel et al., *Festschrift für Erik Jayme*, Band 1, 2002, pp. 371-385; A. Stein, 'Der Europäischen Vollstreckungstitel für unbestrittene Vorderungen tritt in Kraft', 2004 *IPRax*, no. 3, pp. 181-191 and M. Zilinsky, *De Europese Executoriale Titel*, 2005, pp. 188-191. This is different for the European Arrest Warrant, see P. Garlick, 'The European Arrest Warrant and the ECHR', in R. Blekxtoon et al. (eds.) *Handbook on the European Arrest Warrant*, 2005, pp. 167-194, i.a. pp. 175 and 177 et seq.; N. Keijzer, 'Extradition and human rights: a Dutch perspective', in R. Blekxtoon et al. (2005) pp. 183-194, 193; N. Rozemond, 'Een evaluatie van de Nederlandse overleveringswet, Preadvies voor de Vereniging voor de vergelijkende studie van het recht in België en Nederland 2005', to be published in *Delikt & Delinkwent* February 2006. For European executory titles under Art. 256 (former Art. 192) see the authors mentioned by I. Pernice, 'Vollstreckung gemeinschaftsrechtlicher Zahlungstitel und Grundrechtsschutz', 1986 *RIW*, p. 354; H.H. Rupp, 'Materielles Prüfungsrecht bei Erteilung der europarechtlichen Vollstreckungsklauseln?', *NJW* 1986, pp. 640-641; N.A. Schoible, 'Die 'Execution auf Grund von akten und Urkunden supranationaler Organisationen' in Österreich', in: F. Geimer, *Einheit und Vielfalt des Rechts*, 2002, pp. 980-1011.

49 HR 5 March 2002, *NJ* 2004, p. 170 (note P. Vlas). Likewise, in cases concerning extradition to other Convention states, the Dutch Supreme Court will refer a complainant to the local remedies of the requesting state for any complaints concerning fair trial. Keijzer, *supra* note 48, pp. 191-192; HR 11 March 2003, *NJ* 2004, p. 42, and 20 May 2003, *NJ* 2004, p. 41 (note Y. Buruma). We would argue however, that in these cases, the doctrine works differently. At the stage of recognition of judgments or measures (which is described here) the alleged breach has already occurred, but could have been remedied locally. In extradition cases, courts are mostly confronted with potential future breaches of Convention rights. In such cases, several special issues may arise. In the Dutch system the availability of a local remedy is a precondition for extradition in the case of a criminal conviction *in absentia*. The issue is also raised in cases of extradition for the purpose of execution of a criminal sentence, when the person to be extradited claims a breach of the requirement of trial within a reasonable time (Art. 6 ECHR). In the latter case the Dutch Supreme Court also referred to local remedies: the person to be extradited should challenge the execution in the requesting state, *after* being extradited (HR 11 March 2003, *NJ* 2004, p. 42). One could argue however, that if the execution is time-barred under Art. 6, so is the extradition, either because there is no longer a valid title to execute or because extradition is in itself an act of execution/prosecution. The District Court of Amsterdam, in a decision of 1 July 2005 (cited by N. Rozemond) relies on the argument that in case of a flagrant breach of the right to trial within a reasonable time, there is no *effective* remedy possible, hence extradition should be refused. In the English law of extradition a distinction is made between fair trial issues which are best decided during trial (in the requesting state) and issues leading to a refusal to extradite (by the requested state) – see *Ramda v. Secretary for the Home Department*, [2002] *EWHC* 1278 (admin.), discussed in Garlick, *supra* note 48, p. 179.

50 A minor indication to this effect might be derived from the case of *Dufay v. the EC and its Member States*, in which Ms Dufay filed a complaint regarding her dismissal by the EC. The complaint against the Member States was declared inadmissible because she had not exhausted the available EC remedies. It could also be argued that the judgment in the *Bosphorus* case (discussed in Section 2.5) should mainly be explained as a local remedies issue.

51 'Case C-7/98, *Krombach v. Bamberški*, *ECJ* 28 March 2000, ECR I-1395, note A.A.H. van Hoek', 2001 *Common Market Law Review*, no. 4, pp. 1011-1027.

the applicants had exhausted the local remedies. However, we would suggest that the recognizing court does not have to perform a full scrutiny of a foreign judgment when local remedies were available – both in law and in fact<sup>52</sup> – but remained unused. After all – people can forego their rights under Article 6. Even in those cases, however, recognition should be refused in case of a flagrant denial of justice, as this is where the public policy element of the refusal ground truly comes into play.

### ***2.5. Hiding behind the EU/EC: the impact of EC/EU measures on the responsibility of the Member States***

It is settled case law that Contracting States cannot absolve themselves from their responsibility under the Convention by entering into international agreements. The case of *T.I. v. UK* contains only one of many demonstrations of this rule. This basic tenet of international law does however not sit well with modern reality in which several government functions are transferred to international organizations, most notably the EC/EU. In several decisions, both the Strasbourg Court and Commission have struggled with their role vis-à-vis European law in general and the ECJ in particular. The current position of the ECtHR is, in our opinion, best explained by the recent judgment of *Bosphorus v. Ireland*.<sup>53</sup> This case concerned the impounding of an aircraft by Ireland following the proclamation of sanctions against the Former Republic of Yugoslavia. These sanctions were proclaimed by the UN Security Council and implemented in the EC by means of an EC regulation. The actions of the Irish Republic were based on the European regulation. The lessee of the aircraft filed a complaint against Ireland for breaching his property rights as protected by the First Protocol. In its judgment the Court noted that there seems to be a conflict of interests at stake here. On the one hand, the Contracting States have a legitimate interest in fulfilling their international obligations. On the other hand, the Contracting States are still responsible for fulfilling their obligations under the Convention. The balance between those two interests should be struck as follows: ‘In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.’<sup>54</sup> ‘If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.’<sup>55</sup> Next, the Court tested the general system of protection offered within the EC system, albeit exclusively with regard to procedural protection, and found it to be equivalent to that of the Convention system. In the present case, the Court found no disfunctioning of the control mechanisms, so the general assumption of conformity was not rebutted in the individual case. Hence, the Court found no violation of Article 1, Protocol 1 by the Contracting State.

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52 Settled case law, see *inter alia* *Djavit An v. Turkey*, no. 20652/92, Court (third section), Judgment (Merits and just satisfaction) 20 February 2003, *RJD* 2003-III, Paras. 28-29. The latter requirement also refers to the element of notification – there must have been a real opportunity to lodge an appeal, after gaining knowledge of the judgment and its reasoning.

53 *Bosphorus*, *supra* note 20.

54 *Ibid.*, Para. 155.

55 *Ibid.*, Para. 156.

In the *Bosphorus* case the ECtHR operates on the basis of (mutual?) trust in the EU/EC system. By referring complainants to the control function of the ECJ, the ECtHR makes Contracting States to a large extent ‘immune’ from responsibility under the Convention in as far as they merely implement European measures.<sup>56</sup> However, in our opinion this does not relieve the Contracting State of its responsibility under the Convention when cooperating with other States under the EU legislative measures on mutual assistance and cooperation. Under these measures the EU Member States do not simply implement or execute European measures, but are ordered to cooperate with other Member States and/or to give effect to administrative or judicial decisions originating in those states. The EC system itself does not guarantee or supervise the protection of Convention standards by the originating authorities, but leaves this to the national systems of the cooperating states. This means that the premise on which the *Bosphorus* case is based is not fulfilled in the case of mutual assistance and cooperation.

The role of the ECJ in the supervision of mutual assistance is limited to interpreting the European legislative instruments. This should be done in the light of human rights protection. In our opinion the ECJ can come to no other conclusion than to find that all regulations on mutual recognition and assistance contain an (explicit or inherent) ground for refusal which allows the Member States not to cooperate if such cooperation would contribute to a violation of Convention rights. Such a duty to refuse cooperation flows directly from the case law of the ECtHR. If the ECJ does not recognize this duty of the individual Member States under the Convention, this amounts to a manifest disregard of the case law of the ECtHR. This would rebut the presumption of equivalent protection and revive the individual responsibility of the Member States.

### **3. Mutual assistance in criminal matters**

#### **3.1. Introduction**

The responsibility of Contracting States for safeguarding Convention rights shows some special characteristics in the case of mutual assistance in criminal matters. To fully understand the limitations of the current case law of the ECtHR, it is necessary to first give a short description of the current system of mutual assistance and its pitfalls from the point of view of effective protection. Mutual assistance in criminal matters refers to cooperation between investigating and prosecuting authorities, mostly in order to prepare a future criminal charge. Within the Council of Europe and the European Union this type of cooperation is based on the European Convention on Mutual Assistance in Criminal Matters (ECMACM).<sup>57</sup> In the system laid down in the Convention, state A (the requesting state) poses a request to state B (the requested state) to assist it in criminal procedures.<sup>58</sup> The requested assistance may consist of the exchange of information, searches and seizures, wire tapping, the hearing of witnesses, etc. Although the requested state is in principle obliged to render assistance,<sup>59</sup> this obligation is not absolute. The requested state

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<sup>56</sup> Where European legislation leaves discretionary powers for the Member States, they retain full liability for the way in which they make use of this discretion.

<sup>57</sup> 030 *European Treaty Series*. The treaty was amended by, *inter alia*, the 1990 Schengen agreement and more recently by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ* 2000 C 197, and the Protocol established by the Council in accordance with Art. 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ* 2001 C 326.

<sup>58</sup> Newer treaty provisions, such as Art. 7 of the EU Convention also contain the obligation to spontaneously provide information to other states.

<sup>59</sup> Cf. Art. 1 ECMACM: ‘The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.’

is left with a relatively wide margin of appreciation to turn down a request for assistance.<sup>60</sup> The requested state usually applies its own laws when executing a request (*locus regit actum*), even though the information is intended for use in another country.<sup>61</sup> The requesting authorities cannot exercise any control over the requested authorities which remain fully responsible for their own actions.<sup>62</sup>

In practice, cooperation in the field of transnational evidence gathering causes problems with respect to the upholding of Convention rights for several reasons. First of all, within the framework of mutual assistance it may prove difficult to separate the individual actions of the cooperating states, which is a prerequisite for assigning responsibility. The person investigated often remains unaware of the authorities' actions, sometimes even until the results are entered as evidence. Furthermore, the separate actions of the authorities cannot always be judged on their own, as they all contribute to a single goal: criminal investigation and prosecution. This makes it more difficult for the states involved to identify and fulfil their separate duties. Persons claiming a violation will probably find it quite difficult to pinpoint the breach and the authority responsible for it. One might say that this is different in, for instance, extradition cases, where the act of extradition can be distinguished relatively easily from the actual trial in the requesting state. As a rule, it is less difficult to isolate each state's separate responsibilities under the Convention.<sup>63</sup>

Second, national legal orders are not necessarily geared to one another. A state providing information or documents to another state will first and foremost have to deal with possible infringements of Article 8 of the Convention. Actions taken, such as the *gathering* of evidence on behalf of another state and the following *provision* of the (personal) data to that state, readily entail obligations under that article. Such infringements must fulfil the requirements of paragraph 2 of Article 8. According to the settled case law of the Court, such infringements must not only be among other things accessible and foreseeable, but also proportionate. Furthermore, safeguards against the arbitrary use of investigation powers must be provided for.<sup>64</sup> The precise interpretation of these safeguards is often left to the discretion of the Contracting States. Some states may for instance provide guarantees against abuses, such as hierarchical supervision and/or judicial scrutiny *before* the investigations take place (for instance by means of judicial approval), whereas others rely on control mechanisms that operate *after* the fact (for instance by means of a special legal remedy or during the trial phase). The latter mechanisms do not always function properly in the international context. States also differ in the requirements for allowing certain

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60 Cf. Art. 2 ECMACM: 'Assistance may be refused: a. if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence, or a fiscal offence; b. if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country.'

61 Cf. Art. 3, 4 and 5 ECMACM. Newer instruments of transnational cooperation, such as Article 4 of the 2000 EU Convention, may alter these elements to a certain extent via the application of the *procedural* rules of the requesting state (*forum regit actum*), but this alteration does not interfere with the full control of the requested party over its own actions and its own *Kompetenzordnung*. Breaches of fundamental rights, for instance, still require a basis in national law; see also F. Wettner, 'Das allgemeine Verfahrensrecht der gemeinschaftlichen Amtshilfe', in E. Schmidt-Abmann et al. (eds.), *Der Europäische Verwaltungsverbund – Formen und Verfahren der Verwaltungszusammenarbeit in der EU*, 2005, pp. 132-133.

62 Cf. J. Sjöcrona, *De kleine rechtshulp* (diss. Leiden), 1990, pp. 68 and 70-71.

63 A. Klip, 'Extraterritorial investigations', in B. Swart et al. (eds.), *International Criminal Law in the Netherlands*, 1997, pp. 292 (hereafter referred to as Klip 1997).

64 Cf. ECtHR, *Funke v. France*, no. 10828/84, Court (Chamber), Judgment (Merits and Just Satisfaction) 25 February 1993, Series A 256-A, with regard to house searches, and ECtHR, *Klass and others v. Germany*, Court (Plenary), Judgment (Merits) 6 September 1978, Series A28, with respect to the surveillance of telecommunications.

measures to be taken. It may for instance be required that it is beyond reasonable doubt that the suspect has in fact committed the crime, or conversely only that a crime has been committed. Sometimes, especially in cases of serious infringements, such as may possibly be caused by search and seizure, coercion measures are only permitted for serious types of crime and/or after judicial approval.

On a transnational level, it is this national autonomy with respect to the organization of criminal law and procedure and the resulting relatively wide margin of appreciation that may easily cause an individual to become trapped between two criminal justice systems in cases of international cooperation. In 1983 the Dutch lawyer (now judge) A.M.M. Orié referred to this phenomenon as the crack in the system of international cooperation in criminal matters (in Dutch: *systeem-breuk*).<sup>65</sup> Although each system taken in isolation may be perfectly in line with the demands and requirements of Article 8, a combination of the two (or more) systems may cause problems. For example, in the case where one country relies on judicial scrutiny after the fact, while another asks for judicial approval beforehand, a combination of these two systems may result in either a double check, or a legal vacuum. Furthermore, the usual supervision as exercised by the public prosecutor over national inquiries has little or no effect in transnational investigations, now that the prosecutor as a representative of the requested state is not informed of the facts and circumstances in the foreign investigation. Although most countries have developed special legal remedies in the field of international cooperation, these are still not always sufficient. For one thing, as we will point out below the scope of review is often limited and, secondly, the measures in question have been taken on a national level only and are therefore not necessarily compatible with measures taken in another state.<sup>66</sup>

Thirdly, differences in legal systems and legal protection are not the only problem. One of the essential aspects of rendering legal assistance is that the requested authorities are not informed of the circumstances of the case in any detail. After all, they are not performing their own tasks, but are assisting others in performing theirs. Some measure of reliance on the other party is therefore necessary. In current inter-state practice, the result has been a rule of non-inquiry in which certain limitations with respect to the responsibilities of the requested state are inherent. The underlying rationale of this approach is an (otherwise implicit) international division of labour between the requesting and requested authorities. It is not considered to be up to the authorities of the requested state to establish guilt and to safeguard the principle *in dubio pro reo*, as this is the task of the requesting party.<sup>67</sup> Moreover, the requesting party has often already tested these matters on the basis of the evidence available to it. Testing the evidence again would be tantamount to demonstrating a considerable degree of distrust in the requesting authority's capabilities.<sup>68</sup> Following this line of reasoning, it is also evident that where an independent

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65 A. Orié, 'De verdachte tussen wal en schip òf de systeem-breuk in de kleine rechtshulp', in E. André de la Porte et al. (eds.), *Bij deze stand van zaken – Bundel opstellen aangeboden aan A.L. Melai*, 1983, pp. 351-361; see also A. Klip, *Criminal law in the European Union* (inaugural lecture Maastricht), 2005, p. 64 (hereafter referred to as Klip 2005); G. Corstens, 'Europeanisering van het strafrecht', in G. Corstens et al. (eds.), *Europeanisering van het Nederlands recht – Opstellen aangeboden aan Mr. W.E. Haak*, 2004.

66 Cf. Bert Swart, in 1994 *Revue internationale de droit penal*, 1e et 2e trimestres, p. 391.

67 Otto Lagodny, 'Comparative Overview', in A. Eser et al. (eds.), *The Individual as Subject of International Cooperation in Criminal Matters*, 2002, pp. 746 et seq. and 763.

68 The Swiss Bundesgericht, *Bundesgerichtsentscheid* (BGE) 110 Ib 173-184 (180), for instance, explicitly refers to the existence of a rule of non-inquiry, by stating that: 'Die Schweizerische Behörde hat sich beim Entscheid über ein Rechtshilfebegehren nicht über das Bestehen der angeführten Tatsachen auszusprechen. Sie ist an die darstellung des Sachverhaltes im Begehren des ersuchenden Staates gebunden, soweit diese nicht offensichtliche Fehler, Lücken oder Widersprüche enthält.' However, in fiscal matters things are somewhat different, due to the



appraisal of the evidence would be inappropriate, it is not necessary to hand over the material evidence either; a description of the facts will suffice. This mechanism simplifies the system of transnational cooperation to a considerable extent: when the requesting authorities are not required to disclose the information which they have gathered about the case to the requested authorities this lowers the threshold for posing a request. Another result, however, might also be that states are not prepared to test the actions of other states, even if for instance the origins of the material cannot be traced. The KB Lux affair has surely demonstrated this. Current inter-state practice thus creates a gap in legal protection that does not exist in purely national cases. Either an individual has to complain of the disproportionality of the requested measure (given that this is possible to begin with) in the state that is not responsible for the execution of this measure,<sup>69</sup> or he has to complain in the state that is responsible, but that refuses to assess proportionality. Neither option seems to be able to guarantee an adequate level of protection.

In short, transnational cooperation in the field of evidence gathering is not without problems, to put it mildly. Responsibilities may be difficult to distinguish, criminal justice systems may not be aligned and courts maybe unwilling to test the transnational elements of the case. It is therefore all the more striking that although the current ECMACM regime has for several decades now been the dominant model for cooperation it has only given rise to a very limited number of Court decisions. The bulk of the problems discussed here have never been put before the Court. This makes the exact position of the Court on matters such as the rule of non-inquiry and the *systeembreuk* difficult to determine. In Section 3.3 we will deal with this issue further. Next, however, we will first discuss the relevant case law as it stands at this point in time. The cases selected deal with the exchange of information, search and seizure and the hearing of witnesses.

### **3.2. The case law of the Human Rights Court and Commission**

#### **3.2.1. Exchange of information**

The case of *Chinoy v. UK*,<sup>70</sup> although on the face of it dealing with extradition, does in fact concern the field of mutual assistance in criminal matters. Mr Chinoy had been indicted by a US federal grand jury on charges of several drug-related crimes.<sup>71</sup> The US authorities requested the UK government to extradite him under the US-UK extradition treaty. The request was substantiated by evidence including transcripts of conversations between the defendant and third parties which had been intercepted by the US authorities in France. Mr Chinoy complained about the illegal character of the recordings, both before a French *magistrat* and in the English extradition proceedings. When both complaints were unsuccessful he turned to the Human Rights Commission claiming that the UK had violated his Convention rights in handling the offensive information. Both the acceptance and storage of the information and the subsequent use made thereof in assessing his case, he claimed, constituted a breach of Article 8 of the Convention. Moreover, the illegal evidence corrupted the legal basis for his detention, resulting in a breach of Article 5.

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Swiss approach to criminal tax matters: *BGE* 115 Ib 78; see also P. Popp, *Gründzüge der internationalen rechtshilfe in strafsachen*, 2001, pp. 123-124 and 159 et seq.

69 Now that the requested party bears the sole responsibility for its actions (*locus regit actum*) and the requesting party has no say over the matter.

70 No. 15199/89, Commission applicability decision 25 June 1991.

71 Possession of drugs with the intention to distribute as well as money laundering.

In order to judge the responsibility of the UK in the present case, the Commission considered the use made by UK officials of the (allegedly) illegal information. This consisted of the acceptance of the materials from the US, an examination as to its relevance and the production of the relevant parts as evidence in the proceedings. In the circumstances of the case, the Commission did not find a breach of Article 8. This conclusion seems to be based on a weighing of interests, among others the importance of international cooperation in the international campaign against drugs trafficking. The Commission seemed to balance the uncertainty with regard to the unlawfulness of the information against the clear relevance of the same to the extradition proceedings. In this respect it noted that the transcripts and tapes which were used in open court related solely to business matters and therefore did not invade the privacy of the complainant's family life.

The Commission thus did not attach any relevance to the acceptance, storage and internal use of the material by the British authorities, even though these aspects had been specifically raised by the applicant. It could be concluded from this that a breach of privacy during the stage of information gathering does not affect the legality of the receipt, storage and processing of this information. However, this would contradict the findings of the Court in the *Leander* case.<sup>72</sup> In this case, which predates *Chinoy*, the Court ruled that the storage and the exchange of personal data give rise to separate responsibilities under Article 8.

Where the alleged breach of Article 5 was concerned, the decision hinged on the admissibility of unlawfully obtained evidence. In this respect the Commission recalled that the Convention contains no express or implied requirement that evidence obtained unlawfully under domestic law must be ruled inadmissible. Moreover, the fact that the information was obtained in breach of French law did not prevent it from being lawfully included in the evidence under English law either. This means that there was a legal basis for detention under English law. Finally, the Commission found no indication of arbitrariness in the decision of the UK courts to admit the evidence.

The Commission based its decision on the assumption that *some doubt existed* as to the lawfulness of the recording under the Convention and under French law whereas Mr Chinoy had stated that the recordings had been made in *flagrant breach* of French law. However, the French courts had refused to hear his arguments on this issue. As a result of this refusal his position was severely weakened, both before the English courts and before the Commission. This element was ignored by the Commission, as the complaint was not directed against France.<sup>73</sup>

The reasoning in *Chinoy* was further built upon in the case of *Echeverri Rodriguez v. the Netherlands*.<sup>74</sup> In this case, which concerned illegal telephone taps that had been made in the US and were subsequently used in Dutch criminal proceedings, the Court decided that: 'Questions concerning the admissibility of evidence are primarily a matter for regulation by national law (...). The task of the Court under the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. (...) The Court considers that the

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72 ECtHR 26 March 1987 (judgment on the merits), no. 10/1985/96/144, Publ. ECHR Series A vo. 166 (*Leander v. Sweden*), later confirmed in ECtHR 16 February 2000, no. 27798/9 (*Amann v. Switzerland*); see also the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe, 108 *European Treaty Series*.

73 Decision, 'The law', Para 1.

74 ECtHR (first section) 27 July 2001 (admissibility decision), no. 43286/98, *NJ* 2002/102 (note Sch).

Convention does not preclude reliance, in the investigating stage, on information obtained by the investigating authorities from sources such as foreign criminal investigations. Nevertheless, the subsequent use of such information can raise issues under the Convention where there are reasons to assume that in this foreign investigation defence rights guaranteed in the Convention have been disrespected. However, the applicant has not substantiated in any way that such reasons existed in the instant case.’

Like the Commission, the Court seems to distinguish between the use of unlawfully obtained information during the investigation stage and during the stage where it is introduced as evidence. And like the Commission, it applies a stricter test in the latter case. However, complaints like the can only succeed if the applicant can gather sufficient information to prove unlawfulness and/or breaches of Convention rights during the stage of investigation. In most cases this is far from simple: the source of the information might not be known, or the authorities involved may not be subject to any type of effective scrutiny. A case in point is the unwillingness which France displayed to scrutinize the illegal American investigations within its territory. The two cases clearly demonstrate how such matters jeopardize the right to an effective remedy.

It is settled case law, that the rights protected by the Convention should be practical and effective, not theoretical and illusory.<sup>75</sup> In our opinion, the right to an effective remedy – in respect of both Article 6 and Article 8 – requires the disclosure of the source of the information under dispute unless there are compelling reasons to the contrary.<sup>76</sup> This is necessary both to identify the party responsible for a breach of privacy and to be able to challenge the evidence in court.<sup>77</sup> Information should not be used if the provenance thereof is unknown and cannot be identified. This requires willingness on the part of the cooperating authorities to disclose the necessary information.

### 3.2.2. *Searches and seizures on behalf of another state*

In the case of *S. v. Austria*, Austria had searched of the premises of S. in Austria and had seized several documents. These activities had been carried out upon the request of the German authorities.<sup>78</sup> In the decision on admissibility, the search which had been qualified as a violation of private and family life, home and correspondence (Article 8(1)) was subsequently tested against the requirements of Article 8(2). In this case the mutual assistance was based upon a specific provision under Austrian law, which meant that the search had a legal basis. The restriction imposed was also considered to serve a legitimate aim, namely ‘the prevention of crime’. This phrase refers to crime in general, both within and outside the territory of the Contracting State.<sup>79</sup> The final requirement under the Convention is that the particular search was necessary, appropriate and proportionate. This element however, could not be tested by the Austrian courts. Under Austrian law, the search had to be delegated to the requesting authorities, which in this case were German. According to the Commission, the impossibility under Austrian law to independently judge the proportionality of the measure does not in itself constitute a

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75 See most recently *Mamatkulov*, Grand Chamber, 4 February 2005, Para. 121.

76 Compare *Leander*, Para. 84.

77 The complainant needs to be able to raise an ‘arguable claim’ – see for example *Leander*, Para. 77.

78 *S. v. Austria* no. 12592/86 Commission, Admission Decision 6 March 1989.

79 ‘The Commission observes that Article 8 para 2 authorises interferences with the rights guaranteed by paragraph 1 of the same Article, *inter alia*, ‘for the prevention of crime’. And in this respect it does not distinguish between measures taken in connection with criminal proceedings in the State concerned or a foreign State.’

breach of the Convention. In the present case, there was no indication that the search carried out was in fact objectively unjustified and disproportionate. For this reason, the Commission found neither a violation of Article 8 nor of Article 13. The applicant was thus left without an effective remedy. However, on paper nothing is lost: Austria is still responsible for the proportionality and necessity of any search it carries out and the mutual trust provision under its laws does not absolve it of its responsibility. Still, one might wonder whether this responsibility should not also entail the possibility to supervise conformity, preferably beforehand. In several cases the ECtHR has stressed the need to prevent breaches of Convention rights.<sup>80</sup> Such preventive action again presupposes willingness to share the necessary information.

### *3.2.3. Hearing of witnesses*

In the case of *P.V. v. FRG*,<sup>81</sup> P.V. complained that in criminal proceedings against him the German court had made use of evidence obtained by commission rogatory in Turkey although he had been unable to cross-examine the witness thus questioned. The Court pointed out that ‘the German authorities cannot be held responsible for the non-observance of provisions of the Turkish law by a Turkish court’.<sup>82</sup> However, this does not exclude a separate responsibility of the German courts under Article 6: ‘Although this court was not responsible for the examination of C on commission it is in principle conceivable that the use of the evidence thereby contained could be contrary to that provision’ (i.e. Article 6(3)(d)). In the present case, however, the Court found that Article 6 had been complied with. This finding was based on an analysis of Article 6 itself. Although this provision (and notably Article 6(3)(d)) protects the right of a suspect to counter the evidence put forward, it does not contain an absolute right to cross-examine all witnesses. Article 6 is also respected if the accused and counsel for the accused can put questions to the witness through the court. ‘Especially, this holds true if witnesses are to be examined on commission (cf no. 5049/71)’

This means that a court which allows the introduction of evidence gathered abroad has an independent duty under Article 6 as regards the way in which the evidence was gathered. However, as was pointed out in the *Chinoy* case described above, the Convention contains no express or implied requirement that evidence obtained unlawfully under domestic law must be ruled inadmissible. Moreover, in the present case the contents of the Convention rights themselves were quite explicitly adapted to the transnational circumstances. A similar implicit lowering of the standard of protection can also be discerned with regard to the right to trial within a reasonable time. In case of *Sari v. Turkey and Denmark*, the international elements of the case were an important argument for not finding a breach of Article 6, despite the fact that the prosecution and trial of a simple homicide case took more than eight years.<sup>83</sup> The Court simply accepted that the current mechanisms of transnational co-operation are cumbersome and slow.

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80 Compare *Mamatkulov* Grand Chamber para 124: ‘The notion of an effective remedy under Article 13 requires a remedy capable of preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.’ Although this admittedly holds true especially with regard to deportation and extradition measures which may lead to irreparable harm to basic Convention rights, it seems to be a venerable starting point in all cases of transnational cooperation. Compare also ECHR *Chappel v. UK*, no. 10461/8330, Court (Chamber), Judgment (Merits) March 1989, Series A 152-A. and A. Smeulers, ‘The position of the individual in international criminal cooperation’ in: J. Vervaele (ed.), *European Evidence Warrant - Transnational Judicial Inquiries in the EU*, 2005, pp. 79-102 (hereafter Smeulers 2005).

81 *P.V. v. FRG*, no. 11853/85, ECHR Admissibility decision 13 July 1987.

82 Decision, Para. 4c.

83 ‘*Homicide volontaire*’. See Para. 10 of the judgment.

### 3.3. Analysis and recommendations

#### 3.3.1. General framework

The case law concerning provisions of the ECHR clearly shows that according to the Court and the Commission the European Convention was drafted so as to provide minimum norms for the European states which are parties to it. It does not have universal effect, but within the State Parties it has to apply in full. International complications should not detract from the protection thus offered. However, the protection of Convention rights is always balanced against (other) national interests.<sup>84</sup> In several cases, both the Court and the Commission have stressed the importance of transnational cooperation in criminal matters for the effective enforcement of criminal laws. Although in theory the existence of international agreements and transnational institutions does not affect the responsibility of the Contracting States, in transnational cases a certain loss of rights seems to be taken for granted.<sup>85</sup> This *effet attentué*<sup>86</sup> is most prominent in cases concerning fair trial. Sometimes the adjustments are based on the international complications of the case as such, for example with regard to trial within a reasonable time and the right to challenge the testimony of witnesses. The most common use for the term ‘*effet attentué*’, however, is to describe the cases in which the Court sanctions only ‘flagrant denials of justice’ and does not test against the requirements of Article 6 in full. In this respect, famous cases are the *Soering* case on extradition and the *Drozdz* case on the transfer of sentenced persons. In the first case the limited supervision can be explained by the fact that Soering had asked to be protected against a possible future infringement of Convention rights by a non-Convention state. Future infringements do not, as a rule, fall within the jurisdiction of the ECtHR. In the latter case the marginal control of the requirements of Article 6 can be explained by the fact that the transnational co-operation benefited the person whose Convention rights were involved.<sup>87</sup> The judgment can be explained by the desire to avoid the situation where the abstract protection of Convention rights actually damages the overall position of the person thus protected. So the lowering of the standard of review in international cases is not unequivocal. In the case of *Pellegrini* against Italy the recognition by Italy of a non-Convention judgment was tested in full against the requirements of Article 6. And, in our opinion, the case law does not show an ‘*effet attentué*’ as regards the other Convention rights, e.g. the right to life and the protection against torture and inhuman and degrading treatment.

This does not mean however, that the protection of Convention rights is currently sufficiently guaranteed in transnational cases. Several cases show that effective protection can be frustrated by a lack of information on the part of the complainant. Facts are needed, not only to substantiate the allegation that a violation of Convention rights has taken place, but also to pinpoint the responsible state. Especially in cases of mutual assistance in criminal matters it might prove difficult to trace the source of information, which in turn might make it difficult to assert one’s rights under Article 6 and Article 8.

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84 See also F. Bruinsma, ‘Judicial identities in the European Court of Human Rights’, in A. van Hoek et al. (eds.), *Enforcement and adjudication in a multilevel environment – A user perspective on the growing diversity of legal sources*, Antwerp: Intersentia (to be published in 2006).

85 And/or to be contributed to the applicant himself – see the case *Sari v. Turkey and Denmark*, discussed above.

86 This term is also used to describe the difference between domestic and international public policy in private international law: Mandatory provision and constitutional rights are not applied in full to international situations, but have a ‘*effet attentué*’. Compare ‘Case C-7/98 *Krombach v. Bamberski*, ECJ 28 March 2000, ECR I-1395, note A.A.H. van Hoek’ 2001 *Common Market Law Review*, no. 4, pp. 1011-1027.

87 Cf. H. van der Wilt, ‘Volkenrechtelijke aspecten van internationale rechtshulp’, in A. Klip et al. (eds.), *Het Wetboek van Strafvordering: Internationale en interregionale samenwerking in strafzaken*, Deventer: Kluwer (loosleaf), Par. 1.4.1, no. 6.

The position of the complainant is further exacerbated by the rule of non-inquiry. The experience of the KB Lux affair is somewhat ominous in this respect, as several Dutch courts explicitly refused to test the actions of the Belgian authorities, even though irregularities were ascertained in Belgium.<sup>88</sup> In other also mostly civil law countries such reliance on the rule of non-inquiry may also be observed.<sup>89</sup> This creates a gap in the legal protection of all persons involved. The original request for mutual assistance is often not checked by an independent court.<sup>90</sup> The requested state does not carry out a complete check *ex officio*, because it relies on the description of the facts provided by the requesting state. This means that if the trial state, which need not be the requesting state, does not take full responsibility for the way in which the evidence was gathered, no one does. Combined with a defence that is barely in a position to substantiate its claims, the defendant has to overcome an almost insurmountable hurdle. Surely the national courts should offer some assistance here?

It is important to note that the ECtHR has never explicitly ruled on the rule of non-inquiry. The case of *S. v. Austria* did indeed deal with this issue, but the EComHR did not give an unequivocal answer to the question of Austria's responsibility. It merely noted that although the question as to the admissibility of the search was left to the appreciation of the German authorities, this did not mean that the search actually lacked the necessary requirements. It remains unclear what the Court's opinion in this matter is. Another point which the Court did not rule on was (the admissibility of) a transnational local remedies rule, leaving unanswered the question of whether states are permitted (and if so, under what conditions) to refer a complaint regarding a Convention right to another state.

Finally, the Court has examined the responsibility of an individual Contracting State in a specific case, but did not pronounce on the compatibility with the Convention of the cooperation structures as such. Combined with the elements above, not much of an incentive is created for Contracting States to re-evaluate their international (or European) instruments.

As the current system evidently does not provide full protection, some authors have advocated the establishment of joint responsibility of all states involved in transnational cooperation.<sup>91</sup> They find some support for this in the case of *Sari v. Turkey and Denmark* in which the Court held that Turkey and Denmark were jointly responsible for the delay that occurred in the process of international cooperation. However, we remain unconvinced that this would be the solution to the problems identified. Liability only has substantive meaning if the parties held liable are in a position to prevent<sup>92</sup> and remedy the situation. This is not necessarily the case. Under the prevailing model of cooperation based on the 1959 Convention<sup>93</sup> the requesting state has only

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88 It is not yet clear if the Dutch Supreme Court will back this approach. This court never explicitly mentioned the rule of non-inquiry in the context of mutual assistance in criminal matters; cf. J. Koers, *Nederland als verzoekende staat bij de wederzijdse rechtshulp in strafzaken* (diss. Tilburg), 2001, pp. 458 - 480. However, this certainly does not mean that it does not play a role in practice; cf. Van der Wilt, *supra* note 87, Para. I.5.1, no. 4.

89 Cf. the country reports in 1994 *Revue internationale de droit penal*, 1e et 2e trimestres.

90 Of course, in the KB Lux affair the information was provided spontaneously via Council Directive 77/799 (mutual assistance in tax matters); *supra* note 2. But this decision was not tested in court either.

91 Klip (2005), *supra* note 65, pp. 64-65; also B. De Smet, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen*, 1999, pp. 171-172.

92 Cf. Smeulers (2005), *supra* note 80, pp. 79-102, who rightly states that the primary aim should be to prevent breaches. Therefore, it is not relevant that breaches can be rectified later during the trial stage.

93 See *supra* note 57.

limited powers concerning the investigations conducted in other states (see Section 3.1). On the other hand, it can and should take full responsibility for the use it makes of the materials provided. Likewise, the requested state should take full responsibility for its own actions and for those actions alone. However, it cannot influence the later use made by the requesting state of the information it furnishes. Joint liability in itself does not change this.

This does not mean that in our opinion the current model is not in need of change. Our main focus of attention will be the rule of non-inquiry. We take as a starting point that, according to standard case law,<sup>94</sup> the upholding of Convention rights should not be theoretical and illusory, but practical and effective. To realize this in the case of mutual assistance in criminal matters, we believe that the scope of the rule of non-inquiry must be reduced. Viewed against the background of the developments within the European Union this adjustment not only appears appropriate, but also feasible. Especially within the European Union and its area of freedom, security and justice, strict inter-state courtesy and self-imposed restraint are increasingly inappropriate.<sup>95</sup> Within an ever-closer European Union, we might question what the difference is between a check by a Berlin district court as to the lawfulness of investigation measures by the Frankfurt police and the same kind of check by the same court concerning an investigation by the Amsterdam police.<sup>96</sup> After all, the creation of a legal area indicates that this kind of cooperation is no longer the domain of foreign affairs, but rather that of the judiciary.<sup>97</sup> This was also emphasized by the Court of Justice in the *Brügge* and *Gözotik* cases.<sup>98</sup> Second, where the rule of non-inquiry is reduced in scope, other states should provide all the necessary information in order to enable the carrying out of, for instance, the proportionality test as required by Article 8. Such a duty might be derived from the duty of loyal cooperation that was recently established in the Third Pillar of the EU structure.<sup>99</sup> States should assist each other not only in the transnational gathering of evidence, but also in upholding Convention standards.<sup>100</sup> If the necessary information cannot be provided, the cooperation should not be effectuated. In the next paragraph we will take a closer look at these recommendations: will they work in practice and will they cure all ailments of the old system? These questions are discussed first for the requested state and then for the requesting state.

### 3.3.2. Recommendations for the requested/providing state

The main responsibility of the requested state would be to ensure that the measure it is asked to perform is legitimate and proportionate. To be able to do so, it needs information on the ongoing investigation – the crime committed, the degree of suspicion against the individual whose rights are at stake, etc. In our view, the requested state should check itself whether the criteria for taking

94 See most recently *Mamatkulov*, Grand Chamber, 4 February 2005, Para. 121.

95 Cf. Garlick, *supra* note 48, p. 169; Klip (1997), *supra* note 63, p. 307.

96 Cf. J. Sjöcrona et al., *Internationaal strafrecht vanuit Nederlands perspectief*, 2002, p. 208.

97 The German *Bundesverfassungsgericht* seemed to share this opinion, when assessing the constitutionality of the German implementation act of the European Arrest Warrant; see *Bundesverfassungsgericht* 18 July 2005, 2 BvR 2236/04, to be found at: <http://www.bundesverfassungsgericht.de>.

98 ECJ 11 February 2003, Case C-187/01 and C-385/01, *Brügge* and *Gözotik*; see on these cases J. Vervaele, 'Multilevel and multiple punishment in Europe. The ne bis in idem principle and the protection of human rights in Europe's Area of Freedom, Security and Justice', in A. van Hoek et al. (eds.), *Enforcement and adjudication in a multilevel environment – A user perspective on the growing diversity of legal sources*, Antwerp: Intersentia (to be published in 2006) and *European Criminal Law and General Principles of Union Law*, European Legal Studies Research Paper 5/2005, College of Europe (<http://www.coleurope.be>).

99 ECJ 16 June 2005, Case C-105/03, *Pupino*.

100 Compare the recent arbitration between Belgium and the Netherlands on the Iron Rhine – Arbitration under auspices of the Permanent Court of Arbitration, 24 May 2005, Para. 139-140 (to be found on the website of the PCA: <http://www.pca-cpa.org>, last visited 24 October 2005).

coercive measures are satisfied and not leave this decision entirely to the requesting state. Having said that, it still remains to be decided how intrusive the test must be. Should it take place *ex officio* or only upon request? Should it contain a full test of the material evidence in the case or merely consist of a cursory checking of the facts as laid down in the request for assistance? What if information from abroad is necessary, but other states are unwilling to provide this? On the one hand a full test of the facts of the case would hamper international cooperation in an unacceptable way; on the other blind faith in the other state, as was the case in *S. v. Austria*, is also dangerous, especially if questions are raised relating to Article 8 by the defence. How to deal with this dilemma?

In our view the approach which the European Court of Justice adopted in the case of *Roquettes Frère SA*<sup>101</sup> offers a fair starting point for answering these questions. In that case, which dealt with (suspected) infringements of competition law, the Court of Justice determined the lines along which responsibilities between the European Commission and national authorities are divided in case coercive measures are needed in one of the EC Member States (in this case France).<sup>102</sup> The ECJ made a distinction between, on the one hand, verification that the coercive measures are *not arbitrary or disproportionate* to the subject matter and, on the other, review of the justification of those measures that go beyond this test (for instance, the necessity of the measures). The latter is reserved for the European Commission which in this matter acts under the scrutiny of the European Court of Justice. The first question, however, is to be decided by the national authorities (if the national law – as was the case in France – prescribes this). On the Commission rests the task to make clear to the national court, *inter alia*, that it is in possession of information or evidence providing reasonable grounds for suspecting an infringement of competition rules.<sup>103</sup> The Commission does not need – as is also the case in mutual assistance in criminal matters – to hand over the material evidence, since this would be highly ineffective and possibly dangerous for the ongoing investigation. National courts may therefore not request the evidence on which the Commission's evidence is based. The same approach could be used in current inter-state practice. Nothing stands in the way of individual countries already applying this test.

The question remains, however, whether this solution covers every eventuality. For instance, also under this regime the interpretation of the facts of the case still remains in the hands of the requesting party. Furthermore, (severe) irregularities in the requesting state or, as was the case in the *Chinoy* case, in a third state are still unlikely to be discovered. What if the defence or a third party raises these questions? Should the requested state answer them? We think that it should. Their outcome may affect, for instance, the reasonableness of a suspicion and thereby make the requested measure arbitrary or disproportionate. Therefore, a duly substantiated defence would in our view require an answer by the requested authorities, based on a full scrutiny of all

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101 ECJ 22 October 2002, Case C-94/00, [2002] ECR I-9011.

102 One might argue that a comparison with the approach in EC competition law does not stand up to scrutiny, since the Commission is an administrative authority. Within the framework of mutual assistance, however, judicial authorities are responsible. This would explain the more lenient attitude under the mutual assistance regime, as illustrated by the case *S. v. Austria*, where Austrian courts refused to test the proportionality of the measure. In our view this approach should not be followed. First of all, it is to be doubted that all 'judicial authorities' qualify as 'judicial'. To an ever-increasing extent, administrative authorities such as for instance, customs or tax authorities may make use of judicial channels. Article 24 of the 1959 European Convention leaves it to the states to decide on this matter; see J. Vervaele et al. (eds), *European Cooperation between Tax, Customs and Judicial Authorities*, 2002, p. 291. Secondly, and even more importantly, this line of reasoning still does not discharge the requested authority from its own obligations under the ECHR as we have stressed above.

103 See Para. 61 of the judgment.



the facts of the case. As we have said, not only does this solution imply a reduction in the scope of the rule of non-inquiry, but it also presupposes a willingness on the part of other states to mutually provide each other with the relevant information in order to be able to carry out this test. The logical consequence of this approach would be that if the requesting state (or a third EU state) is unwilling or unable to provide additional information, the request should be turned down.

In practice, it is uncertain how often the latter situation will occur. After all, one of the main problems is that individuals encounter severe difficulties in substantiating their claim. The international elements of a case exacerbate this, as the *Chinoy* case demonstrates, and confront the defence or third parties with a *probatio diabolica*, i.e. the burden of proof concerning facts of which they are not (yet) aware. We are afraid that this issue cannot be easily resolved within the current system. What other alternatives are there? We could imagine a system that requires legal protection *before* the request is sent to the other state. This would allow the defence to challenge the reasonableness of a suspicion, thereby attacking the proportionality of the measure required and actually *preventing* possible breaches. However, such openness at the pre-trial stage might not be compatible with the interests of the ongoing proceedings. Another alternative would be a system that offers full disclosure to the authorities of the requested state, providing them with the opportunity to look into the case in detail. This might be a fair solution as it offers full legal protection also to the parties whose right to privacy is directly affected, including third parties. However, this option would also be highly impractical, since it would require the requested state to work over the ongoing criminal proceedings in other states. If the test is not performed *ex officio*, the problem third parties may have in substantiating their case resurfaces. So, when full prevention is not feasible, do the interested parties at least have a legal remedy? Not necessarily in the requested state. But what are the responsibilities of the adjudicating state in this respect?

### 3.3.3. *Recommendations for the requesting/receiving/adjudicating state*

If foreign information is used as evidence in a criminal procedure, the responsibilities of the receiving/trial state are of a completely different nature. This state is responsible for the fairness of the proceedings as guaranteed in Article 6. This means that essential notions of ‘fairness’, such as the equality of arms and the adversarial character of the proceedings, will have to be guaranteed. The use of foreign information is an intrinsic part of the trial. Hence the right to test the evidence should primarily be enforced against the trial state. When the provenance of information is not accounted for, it cannot be tested - neither by the defence, nor by the court - and hence it should not be used as evidence. This would seem to be the simple and straightforward consequence of the responsibility of the receiving state for upholding Article 6. This is not so in practice, however. The KB Lux affair, which we discussed in the introduction, provides ample evidence of this.

So again the question arises whether alternatives are available to current inter-state practice, which relies heavily on the rule of non-inquiry. This time we focus on the trial state’s responsibility relating to Articles 6 and 8. Again, we are mainly concerned with the scope of the review by the courts, the ‘burden of proof’ (whether a full review or not; *ex officio* or not) and with the ‘chain of custody’ of the materials. Our aim is not so much to provide guidelines for the burden of proof resting on the defence, but mostly to strengthen the position of the trial state, with

respect to its access to foreign sources of information with relevance to the fairness of the trial. Closely related to the foregoing is the question whether or not it should *always* be the trial state that offers protection.

Our preferred model resembles to a great extent the test which the authorities of the requested state should apply when executing a request for assistance. We described this in the previous section. This would imply an *ex officio* check for eminent breaches and a more detailed inquiry into the facts, when substantiated.<sup>104</sup> Since we are now in the trial phase and the investigations have been completed, it seems reasonable to expect that the authorities of that state should account for the origin of the foreign materials in the case file (chain of custody) and – if necessary – to ensure that any additional information with respect to the origin of data or to their reliability can be easily acquired. The implications of this are, again, twofold: the trial state is responsible for the material it uses, and hence for the way this material was obtained, even if this was done by other states (*no rule of non-inquiry*), but, on the other hand, the requested state has a duty to facilitate the trial state (*disclosure*). It must, when requested, provide the trial state with all the necessary information. Such a duty to cooperate could – within the European Union – be derived from the duty of loyal cooperation.<sup>105</sup> Failing to live up to this obligation should, in our view, lead to the exclusion of that material, even when it is the requested authority (and not the trial state) that is unwilling to cooperate.

Legal protection, as far as Article 6 is concerned, is therefore to be concentrated in the trial state.<sup>106</sup> But is this state allowed to refer some aspects of this protection, especially the regularity of investigations in other countries, to other states? After all, under the *Rechtshilfe* model only the requested state has any say over its actions. It is presumably in a better position to assess the facts. A third party in the requested state, confronted with a search of his premises, would presumably prefer legal protection in that state. The defendant, on the other hand, might prefer proceedings to be concentrated in the trial state, also with regard to the aspects of the investigations that took place abroad. This means that the pertinent question is what the effects of local remedies are on the position of the parties at a later stage of the investigations and in the subsequent trial. It goes without saying that the existence and/or the creation of local remedies is an improvement as long as using them is conceived as a *right* of the individual, not as a means for states to dodge their responsibilities.<sup>107</sup>

It does not seem to be in conflict with the ECHR to refer a complaint to another state, as long as the referring state has checked that an effective remedy is indeed provided for.<sup>108</sup> However, we wonder whether this would really help to improve the position of the individual. Even assuming that remedies are available, the requested state is, as we discussed in the previous section, often not in a position to fully test the facts of the case. On the contrary, it is acting at the request of

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<sup>104</sup> It is up to the courts what burden of proof rests with the defence. But with a view to the central position of the trial court, in our opinion this court should not be too strict.

<sup>105</sup> ECJ 16 June 2005, C-105/03, *Pupino*.

<sup>106</sup> Cf. Vervaele et al., *supra* note 102, pp. 290-291.

<sup>107</sup> We take it that this is what André Klip means when he refers to a joint state responsibility: 'In my opinion, this is a sort of joint liability. Before the proceedings are considered as a whole, as the ECHR requires under the convention, a citizen should be able to use legal remedies in every state involved.' See Klip (2005), *supra* note 65, p. 65.

<sup>108</sup> If such a remedy is not provided, a referral to the other state would in our view constitute a breach of the Convention (cf. *M & Co v. Germany*, no. 13258/87, Commission (admissibility decision) 9 February 1990). See on the local remedies rule also Section 2.4.

another state. A referral to the requested state does not therefore necessarily provide an *effective* remedy. And yet again we wonder if the applicant will be in a position to substantiate its claim in the requested state. For a remedy to be more than just lip service to upholding the Convention, applicants should at the least have access to the case file. Is the requested state really the proper forum for this? Finally, the requested state can only test for conformity with Article 8. It has no responsibility as to the fairness of the trial (which will or will not take place at a later date). Guaranteeing a fair trial, as we have stated before, should be the sole responsibility of the trial state. That means that parties cannot be estopped from entering a complaint on the evidence in the trial state because they failed to exhaust the local remedies. Moreover, even if they did file a complaint in the requested state, the result thereof would not be conclusive. If new information on the irregularity of the actions of the requested state (or of the original request) surfaces, a new appraisal is needed as to the admissibility of the evidence thus gathered.<sup>109</sup>

Whereas the trial state is the main if not the sole guardian of Article 6, the situation is less clear-cut as to the responsibilities under Article 8. As the requesting state, it does not itself invade the privacy of the persons involved and thus should not incur responsibility for the breach. As the trial state it could only be liable if the use of the information gathered in breach of Article 8 would constitute a separate breach of Article 8. This could be argued on the ground that the use of personal data also entails responsibility for the way in which it was obtained.<sup>110</sup> For the defendant this question appears, at first sight, to be of only minor relevance, since his rights are also protected under Article 6. However, as the ECtHR ruled in the *Khan* case,<sup>111</sup> a breach of Article 8 does not necessarily render a trial unfair. A breach of Article 8 would thus call for a separate remedy (Article 13), for instance financial compensation. Even more problematic, however, seems to be the position of third parties. After all, these are not a party in the trial phase, whereas the domestic remedies in the requested state – if at all present – only offer limited protection (see the previous section). The changes we have proposed do not solve this problem altogether. The disadvantageous position of third parties in substantiating their claims therefore remains problematic. In the end, we are afraid that finding a solution to this problem will require such far-reaching adjustments to the current system that it would leave the whole system ineffective.

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109 Besides the scope of the test to be carried out by the trial state, the question also arises what laws are to be applied – those of the trial state or those of the requested state? This question concerns not only the question of *whether* irregularities have occurred in the requested state, but also the consequences attached thereto. A combination of the rules of the *lex fori* and the principles of the ECHR is currently gaining the upper hand. This was also laid down by the AIDP in 1994 at the XVth congress in Rio de Janeiro: ‘States where the laws of evidence in criminal proceedings restrict the use of evidence illicitly obtained, should apply the same restrictions with respect to evidence obtained through international assistance in criminal matters. In all states evidence that has been obtained in disregard of fundamental human rights should be excluded.’ This approach has also been chosen by the Dutch Supreme Court (Hoge Raad/HR): HR 18 May 1999, *NJ* 2000, p. 107 (4-M case); see also M. Embregts, *Uitsluiting over bewijsuitsluiting* (diss. Tilburg), 2003, and *in extenso* Koers, *supra* note 88, pp. 515-608. In Germany the *gathering* of evidence is apparently governed by the rules of the *lex loci*, while the *consequent use* thereof is determined by German rules, being the *lex fori*; S. Scheller, *Ermächtigungsgrundlagen für die internationale Rechts- und Amtshilfe zur Verbrechungs-bekämpfung*, 1997, pp. 94-101. In Article 33, paragraph 2, of the *Corpus Juris* 2000, this option was also chosen; see M. Delmas-Marty et al. (eds.), *The implementation of the Corpus Juris in the member states*, vol 1, 2000, pp. 209-210.

110 Some authors are indeed of the opinion that the use of illegally obtained personal data constitutes a new infringement; cf. the literature on the German *Recht auf informationelle Selbstbestimmung*; Bäuml, p. 696 in: Lisken/Denninger (eds.), *Handbuch des Polizeirechts*, 1996 and Sokol, pp. 784 et seq., in particular p. 807, in S. Simitis (ed.), *Kommentar zum Bundesdatenschutzgesetz*, 2003. Of course, the question then becomes what consequences should be attached to the consequent use of illegally obtained data: exclusion of the evidence, compensation for damages suffered, disciplinary sanctions, etc.?

111 ECtHR, *Khan v. the United Kingdom*, no. 35394/97, Court (third section), Judgment (Merits and Just Satisfaction) 12 May 2000, *Reports* 2000-V.

### **3.4. Conclusion – a return to KB Lux**

Let us at the end of this section return to the KB Lux affair. How is this affair to be appreciated in the light of the foregoing? As we saw in the introduction, the Dutch courts follow the continental approach of mutual trust. It is assumed that Belgium acted in accordance with the ECHR. This starting point is applied rigidly, however. Almost all the courts are of the opinion that testing the Belgian investigations is only appropriate where serious indications exist that the Convention has been breached. In doing so, the Dutch courts adopted too narrow a view with regard to their responsibilities under both Articles 6 and 8. After all, in Belgium evidence was excluded both in tax cases and in criminal cases, so the Dutch courts should have looked into the matter *ex officio*. Since the origin of the materials remained unaccounted for, it should not have been used.<sup>112</sup>

The Dutch approach is to a certain extent to be explained by the *Schutznorm*; it is repeatedly stated that the defendant was not harmed in his interests, because the Belgian investigations were aimed against Belgian account holders. We think that this is incorrect. First of all, we disagree with the court on the premise that the breach of Luxembourg banking secrecy and the consequent (irregular) acquisition by the Belgian authorities did not damage the interests of the Dutch account holders. After all, their personal data were stolen. The *Schutznorm* is therefore given too broad a scope. Moreover, even assuming it was applied correctly; the *Schutznorm* is an issue relating to the *admissibility* of evidence.<sup>113</sup> It is not a means to narrow court control as to the *reliability* and *lawfulness* of evidence used in court.<sup>114</sup> The trial state should at all times be able to account for the materials leading to the evidence it uses. With respect to Article 8, the responsibility for the use of the personal data, obtained by breaching banking secrecy, should also have been examined. The exclusion of the evidence by the Belgian courts in our view constitutes at the very least a *prima facie* case of a breach of Article 8, calling for an answer with respect to the consequent use of these data by the Dutch authorities. Did this use constitute a separate infringement that therefore calls for an effective remedy (Article 13) for Dutch account holders? Again, this matter should have been looked into *ex officio*. If the solutions proposed in our recommendations had been applied to the *KB Lux* cases, we believe that some of the problematic outcomes in those cases would have been avoided.

## **4. New models of cooperation**

Under the general rules of state responsibility, states can be held liable for all government acts and acts performed by their officials. Under the ECHR, Contracting States have a duty of care with regard to the protection of the Convention rights within their territory. The liability of states is therefore double-edged and has both a personal and a territorial aspect (see also Section 2.2). The case law of the ECtHR, with its emphasis on the individual responsibility of states for any

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<sup>112</sup> Following a request for mutual assistance by the Dutch public prosecutor, the Belgian authorities answered that they were unable to provide further information as to the origin of the information; cf. Rb. The Hague 5 November 2004, *LJN* AR5790, case no. 09/755139-02; *supra* note 15.

<sup>113</sup> This makes it, according to the standard case law of the ECtHR, primarily a matter for national law; cf. ECtHR *Schenk v. Switzerland*, no. 10862/84, Court (Plenary), Judgment (Merits), 12 July 1988, Series A-140; ECtHR *Khan v. the United Kingdom*, no. 35394/97, Court (third section), Judgment (Merits and Just Satisfaction) 12 May 2000, *Reports* 2000-V.

<sup>114</sup> Cf. M. Embregts, *Uitsluiting over bewijsuitsluiting* (diss. Tilburg), 2003. The position of the Dutch Supreme Court (Hoge Raad) on this issue is not entirely clear. Compare HR 6 July 2004, *NJ* 2004, p. 469; *Jurisprudentie Online* (JOL) 2004, 382 versus HR 30 March 2004, *NJ* 2004, p. 376.

actions taken by their officials within their own territory, builds upon these basic rules of state responsibility. But these tenets may be hard to maintain as new concepts of mutual assistance in criminal matters are developed. These new concepts may deviate from the traditional model on both counts. In current practice, four models for transnational evidence gathering may be distinguished:

1. The most common model is the one described in the previous section. At this point in time it is by far the dominant model. In German legal doctrine this concept is known as *Rechtshilfe*.
2. A second model that may be distinguished only differs gradually from the first model. Here the wide margin of appreciation of the requested state is strongly reduced or even abandoned. Under this model the ‘requested’ state – it might be more appropriate to refer to it as the ‘executing’ state – is obliged automatically to execute the other state’s request. However, like under the first model, the state that issues the request has no say over the actions of the executing state. The latter remains responsible for its actions, while applying its own laws.
3. In a third model the state that provides assistance effectively lends out its own authorities to the other state (compare the *Drozd* and *Janousek* case). The requested state loses control over its authorities, which act as the extended arm of the state seeking assistance. They operate within the framework of the foreign laws. This lending out of officials may occur both within and outside the territory of the requested state. With reference to German legal doctrine we may refer to this concept as *Organleihe*.<sup>115</sup>
4. At the other end of the scale the requested state permits the state seeking assistance to investigate directly on its territory. In this concept the role of the state providing assistance is limited to tolerating these actions. Beyond that, it has no say over the foreign authorities acting on its territory. It loses control over its territory, where foreign officials act with foreign competences, applying foreign laws.<sup>116</sup>

In the remainder of this article, we will look into two new forms of cooperation. Placed against the background of the four models introduced, we will discuss the so-called joint investigation teams (*infra* Section 4.1) and the (EU proposal for a) European Evidence Warrant (EEW) (*infra* Section 4.3). Both concepts are intended as an alternative to the ‘classic’ *Rechtshilfe* model and aim to enhance the transnational gathering of evidence. Although there is at this point in time little practical experience with these new concepts, they are certainly worth exploring. In particular it is interesting to see if and how these new concepts fit the model of individual state responsibility as propagated by the Court. It will also be interesting to explore whether they solve some of the problems concomitant with the traditional form of cooperation or rather give rise to new problems.<sup>117</sup>

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115 *Organleihe* was dealt with by the ECtHR in the cases of *X and Y v. Switzerland*, no. 7289/75 & 7349/76, Adm.dec. 14 July 1977, *Decisions & Reports IX*, March 1978, p. 57 and *Drozd and Janousek v. France and Spain*, described in Section 2.3.

116 Within the case law of the ECtHR, compare the case of *X and Y v. Switzerland*, no. 7289/75 & 7349/76, Adm.dec. 14 July 1977, *Decisions & Reports IX*, March 1978, p. 57.

117 The fourth model has been put into practice in Switzerland, where cantonal authorities are allowed to investigate on the territory of another canton subject to the no. of their own laws. See e.g. the *Konkordat vom 5. November 1992 über die Rechtshilfe und die interkantonale Zusammenarbeit in Strafsachen* published in *Amtliche Sammlung* 1993, 2876; also C. Siebert, ‘L’Évolution du modèle Suisse de l’entraide judiciaire et de la coopération intercantonale en matière pénale’, in J. Vervaele (ed.), *European Evidence Warrant - Transnational Judicial Inquiries in the EU*, 2005, pp. 187-210. In international law, however, it is relatively unknown.

#### **4.1. Joint investigation teams**

##### *4.1.1. Joint investigation teams as a concept*

Joint investigation teams are investigation teams with operational powers – including means of coercion – that are comprised of officials from several Member States. These officials may very well have different personal statuses; some of them may be part of the judiciary, while others are police officers or members of special investigation offices, for instance customs officers. Joint investigation teams are not necessarily bound to the territory of one Member State. On the contrary, they are allowed to be active on the territories of all the participating states.

The main question is what bearing these developments have on state responsibilities under the ECHR. How are joint teams to be classified under the four different models introduced in the above, and what impact does this have on state responsibility under the ECHR that is based on individual state responsibility? Joint teams may complicate matters, since they consist of officials from a number of states and they may be active in more than one Member State. Article 13 of the EU Convention on mutual assistance illustrates this.<sup>118</sup> This article deals with joint teams and offers several starting points for the determination of the responsible state(s). In the third paragraph of this article it is stated that:

‘A joint investigation team shall operate in the territory of the Member States setting up the team under the following general conditions:

- (a) the leader of the team shall be a representative of the competent authority participating in criminal investigations from the Member State in which the team operates. The leader of the team shall act within the limits of his or her competence under national law;
- (b) the team shall carry out its operations in accordance with the law of the Member State in which it operates. The members of the team shall carry out their tasks under the leadership of the person referred to in subparagraph (a), taking into account the conditions set by their own authorities in the agreement on setting up the team;
- (c) the Member State in which the team operates shall make the necessary organisational arrangements for it to do so.’<sup>119</sup>

So, the team is set up in one of the Member States in which the main part of the investigations is expected to be carried out.<sup>120</sup> The team leader must be a representative of the state where the investigations take place.<sup>121</sup> He is bound by local national law. Other team members act under his command and responsibility. They (of course) are also bound by the rules of the *lex loci*. Yet, this changes as soon as investigations in other participating states are necessary. For this situation paragraph 7 of Article 13 prescribes:

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118 See also the Council Framework decision of 13 June 2002 on joint investigation teams (2002/465/JHA), *OJL* 162/1, that resembles Articles 13 and 16 of the EU Convention. The Framework decision is in force at this point in time, but will be withdrawn when the EU Convention on mutual assistance enters into force. Other treaties also contain provisions with regard to joint teams.

119 In Article 1, Para. 3, of the Framework decision the same wording is used.

120 Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ C* 379/7, p. 18.

121 This state is not necessarily the state where the trial eventually takes place; see A. Klip et al., *Opsporing in de Euregio: gemeenschappelijke onderzoeksteams en parallelle opsporing* (not published), Maastricht: 2004.

‘Where the joint investigation team needs investigative measures to be taken in one of the Member States setting up the team, members seconded<sup>122</sup> to the team by that Member State may request their own competent authorities to take those measures. Those measures shall be considered in that Member State under the conditions which would apply if they were requested in a national investigation.’

Joint teams thus offer important advantages over the classical concept of mutual assistance. Instead of the time-consuming granting procedures and relatively wide-reaching grounds for refusal that are typical of mutual assistance in criminal matters one may simply ask the seconded members to take investigative measures. Then, responsibility also changes hands, as far as the specific measures in that state are concerned. The authorities of that state are fully and exclusively responsible for the investigations carried out.<sup>123</sup> Members of the team from other countries, if present during the investigations, act under their responsibility. Again, the *locus regit actum* rule (see Section 3.1) applies. The lawfulness of the investigations that were carried out is to be assessed by the laws of the state where the actions took place.

It is interesting to note that joint teams use an entirely different approach to international cooperation as described in the previous paragraph. They are conceived as a bundling of multiple national investigations.<sup>124</sup> A distinction between the responsibilities of the requested and requesting state, as was introduced in Sections 3.3.2 and 3.3.3, is out of place here. After all, instead of helping other states with their criminal investigations (as is the case under mutual assistance in criminal matters), under the joint team regime national interests are directly served. The aim is to equate investigations of joint teams as far as possible with national inquiries and to coordinate them.<sup>125</sup> We could therefore classify the cooperation within joint teams as a mixture of models 2 and 3 discussed above. On the one hand grounds for refusal are excluded once the team is established,<sup>126</sup> and, on the other, the state where the team acts is fully responsible for the team’s actions (model 2). Participating members from other states act under their instructions and responsibility (model 3; *Organleihe*). It therefore does not make sense to hold those other states liable as well. This approach is perfectly in line with the demands of the ECtHR, since it is always the state on whose territory actions take place that is responsible.

#### 4.1.2. State responsibility under the joint team regime

Although there is little practical experience with joint teams, it might be interesting to explore briefly the changes which this approach may bring with respect to the upholding of human rights. First of all, the way in which cooperation within joint teams is organized suggests that within the team there is no room left for the rule of non-inquiry. After all, information that was brought into

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122 In the fourth paragraph of Article 13 this term is described: ‘4. In this Article, members of the joint investigation team from Member States other than the Member State in which the team operates are referred to as being ‘seconded’ to the team.’

123 Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ C 379/7*, p. 18; see also G. Vermeulen (et al.), *Een nieuwe Belgische wetgeving inzake internationale rechtshulp in strafzaken*, Maklu 2002, p. 155 and Klip et al., *supra* note 121.

124 See the Dutch *travaux préparatoires* with respect to the implementation act of the EU Convention on mutual assistance; *Kamerstukken II*, 2001-1002, 28 351, no. 3, p. 9: ‘De achterliggende gedachte is dat het onderzoek van een gemeenschappelijk onderzoeksteam in feite een concentratie van nationale onderzoeken inhoudt’ [The underlying idea is that the investigation by a joint investigation team in fact represents a concentration of national investigations].

125 See the Dutch *travaux préparatoires* with respect to the ratification of the EU Convention on mutual assistance; *Kamerstukken II*, 2001-2002, 28 350, no. 3, p. 6.

126 The request to establish a joint team is a ‘classical’ request for mutual assistance, though; cf. Klip et al., *supra* note 121, pp. 10-11.

the team also serves the purpose of national inquiries.<sup>127</sup> It makes sense that national laws are fully applied, including an assessment of the proportionality of the case and a report on the actions taken. In our view this would be a significant improvement compared to the mutual assistance regime. On the other hand, it is striking to note that grounds for refusal are absent, once the team is established. It is unclear if this reduces the margin to refuse cooperation with a view to the protection of human rights and thus creates a conflict with the Convention.<sup>128</sup> In our view this is, at least in theory, not the case. On the contrary, grounds for refusal appear unnecessary because the state that conducts the investigations is (also) serving its own interests and is therefore fully responsible for its actions; other team members have no say over it. This is in line with the concept of joint teams as a bundling of national investigations.

What might be problematic, however, is how this state responsibility is given shape in practice. The competent authorities (referred to in paragraph 7 of Article 13 mentioned above) are not (only) conducting a national investigation under the usual supervision of their superiors and/or after judicial approval. They are carrying out investigations at the request of a colleague who takes part in a joint team. This is a strictly horizontal situation. Judicial approval is only required if national law so prescribes,<sup>129</sup> whereas the team leader (of the state where the team is set up) does not have any say over their actions either. Therefore, as is the case under the mutual assistance regime, the question arises who effectively supervises these activities. In essence, the difference between this situation and mutual assistance is however that under the latter regime this question concerns two states,<sup>130</sup> whereas under the joint team regime theoretically only one state is involved, namely the state where the investigations are actually carried out (be it the state where the team is set up or another state).

Another issue that needs to be addressed and in fact even gains weight under the joint team regime is that national laws are applied directly, without adjustments to the international setting of the inquiry. We have to keep in mind that the criminal justice system of one state is not necessarily compatible with that of another state (the *systeembreuk*; see Section 3.1). Under the regime of mutual assistance many countries created special legal remedies for this reason, especially when coercive measures are requested. Although the scope of these remedies may be limited due to the rule of non-inquiry, at least they offer some protection in transnational investigations. Under the joint team regime remedies are only present if they also exist in comparable national investigations.<sup>131</sup> National norms are applied directly without adjustments to the transnational setting of the investigations. This easily results in a loss of legal protection, if one regime, for instance, places emphasis on legal protection in the pre-trial stage (with a simultaneous reinforcement of the position of the suspect and/or third parties during that stage), while another state may rely heavily on the trial stage as the most suitable phase for legal

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127 Paragraph 10 of Article 13 does however contain limitations with regard to the use of the information obtained by the team.

128 As we have seen above, under the *Rechtshilfe* model such a conflict is overcome by invoking Art. 2 ECMAACM.

129 *Kamerstukken II*, 2001-2002, 38 351, no. 3, p. 9.

130 After all, as we saw in Section 3.1 current inter-state practice is based on a 'division of labour' between the requested and requesting state. The requested authority has to rely on the requesting party, as the latter is in a better position to assess, for instance, the appropriateness of a measure that is requested.

131 The Dutch Act implementing the EU Convention contains a special procedure for the use of materials obtained by – in short – the use of coercive measures (see the proposed Article 552qd of the Dutch Code of Criminal Procedure), because in the Dutch internal legal order, special remedies are provided for in those cases. The provisional use of such evidence within the team, which is based in another state, is permitted. For use as evidence, however, additional judicial approval is needed. According to the Dutch government, this regime would allow (third) parties to effectively exercise their appeal rights; see *Kamerstukken II*, 2001-2002, 28 351, no. 3, p. 9.



protection. To overcome this problem, much is (again) dependent on the trial state's willingness to ensure the fairness of the proceedings as a whole. But are trial judges willing to investigate (alleged) irregularities in other states or will they rely on the rule of non-inquiry once more?<sup>132</sup> Are they prepared to compensate for flaws in legal protection that have emerged earlier in the investigation in other states? In our view, they should be, since this is the trial state's primary responsibility.<sup>133</sup> National courts, in order to compensate for a loss of legal protection that might occur during the investigation stage, should therefore test the lawfulness (according to the *lex loci*) of the evidence obtained abroad, if so desired (and substantiated) by the defence. It is striking that international agreements barely pay attention to these matters, leaving them entirely to the individual states and thus taking a *systeembreuk* for granted.<sup>134</sup>

#### 4.2. (Proposal for a) European Evidence Warrant

##### 4.2.1. The Evidence Warrant as a concept

Like the joint teams, the European Evidence Warrant aims to improve international cooperation in criminal matters.<sup>135</sup> And again, like the joint teams, this is done by finding alternatives to the more classical approach of mutual assistance. The magic term for this new concept of cooperation is mutual recognition. After this concept was introduced in EU extradition law by means of the European Arrest Warrant (EAW),<sup>136</sup> the proposal for an European Evidence Warrant (EEW)<sup>137</sup> now introduces it in the field of mutual assistance. The scope of this proposal is rather limited, but the European Commission has already made it public that similar proposals are likely to follow.<sup>138</sup> These proposals also take the concept of mutual recognition as their starting point. In the Commission's view, the EEW is the first step towards a single mutual recognition instrument that will replace the entire existing mutual assistance regime.<sup>139</sup>

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132 Cf. Klip et al., *supra* note 121, p. 24. These authors also mention other practical problems, such as the fact that a joint team might be moved from one country to another during the investigation. Of course, this also hampers effective control over the team and its actions.

133 The Dutch implementation act, amongst other things, requires the Dutch authorities to stipulate that foreign officials are prepared to testify at the trial if necessary (see the proposed Article 552qa of the Dutch Code of Criminal Procedure; *Kamerstukken II*, 2001-2002, 28 351, nos. 1-2).

134 For instance, Klip et al., *supra* note 121, pp. 27-28 are sceptical as to (the feasibility of) Artikel 552qa of the Dutch Code of Criminal Procedure, since this is a national provision, which cannot be enforced against (officials of) other states.

135 See on the EEW, J. Vervaele (ed.), *European Evidence Warrant - Transnational Judicial Inquiries in the EU*, 2005.

136 Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, *OJEC L* 190/1; see on this framework decision R. Blekxtoon et al. (eds.), *Handbook on the European Arrest Warrant*, 2005.

137 Proposal of 14 November 2003 for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, COM (2003) 688 final.

138 The proposal applies to objects, documents or data obtained under various procedural powers, including seizure, production or search powers. However, it is not intended to be used to initiate the interviewing of suspects, the taking of statements, or the hearing of witnesses and victims. The taking of evidence from the body of a person, in particular DNA samples, is also excluded from the scope of the European Evidence Warrant. Thirdly, the European Evidence Warrant is not intended to be used to initiate procedural investigative measures which involve obtaining evidence in real-time such as the interception of communications and the monitoring of bank accounts. Finally, the European Evidence Warrant is intended to be used in order to obtain evidence that can only result from further investigation or analysis. It could therefore not be used to require the commissioning of an expert report; see COM (2003) 688 final.

139 The steps towards a single instrument could be as follows: a) the proposed European Evidence Warrant, which provides for the obtaining of evidence that already exists and that is directly available; b) to provide for the mutual recognition of orders for the obtaining of other types of evidence. These can be divided into two categories, namely evidence that does not yet exist but which is immediately available (interviews with suspects, witnesses or experts, and the taking of evidence through the monitoring of telephone calls or banking transactions) and evidence which, although already existing, is not immediately available without further investigation or analysis (e.g. evidence from the body of a person or the commissioning of an expert report); c) to bring together these separate instruments into a single consolidated instrument which would include a general part containing provisions applicable to all forms of cooperation; see COM (2003) 688 final.

The EEW requires a considerable amount of trust in each other's legal systems. It is in principle not up to the requested (or better: executing)<sup>140</sup> state to investigate matters, as this has already been done by the requesting (in the terminology of the EEW: issuing) authority. According to the principle of mutual recognition, the executing authority should only execute the warrant and provide the issuing state with the requested information. This is stipulated in Article 11 of the proposal:

‘Except as otherwise provided for in this Framework Decision [see especially Articles 15 and 16 of the proposal, AH/ML], the executing authority shall recognise a European Evidence Warrant, transmitted in accordance with Article 7, without any further formality being required, and shall forthwith take the necessary measures for its execution in the same way as the objects, documents or data would be obtained by an authority of the executing State.’

The recognition of the warrant is made possible by the rules that are provided for the *issuing* authority. In Article 6 of the proposal the following is provided:

‘Each Member State shall take the necessary measures to ensure that the European Evidence Warrant is issued only when the issuing authority is satisfied that the following conditions have been met:

- (a) the objects, documents or data sought are necessary and proportionate for the purpose of proceedings in Article 4 [in short, criminal proceedings, AH/ML].
- (b) the objects, documents or data can be obtained under the law of the issuing State in similar circumstances if they were available on the territory of the issuing State, even though different procedural measures might be used.
- (c) the objects, documents or data are likely to be admissible in the proceedings for which they are sought.’

The EEW would thus be directly enforceable in other Member States. The executing State is expected to enforce orders issued by the issuing State, with only limited grounds for refusal.<sup>141</sup> A specific ground for refusal on human rights grounds is not provided in the proposal.<sup>142</sup> Under the four different models which we introduced at the beginning of Section 4, an EEW would therefore constitute an example of the second model. On the one hand, it leaves the executing state with virtually no room not to execute an evidence warrant, while on the other hand this state remains responsible for the actions on its territory. How does the proposal for the EEW deal with this dilemma? This question is dealt with in the next section.

#### *4.2.2. State responsibility under the Evidence Warrant*

The foregoing suggests that the issuing state has a decisive say over the manner in which the warrants are executed, even though the competences and powers for the execution thereof are governed by the laws of the executing state. It is, for instance, not up to the executing authority to look into the substantial reasons for the issuing of the warrant (cf. Article 19(2)). We could maintain that the rule of non-inquiry has now officially been made the cornerstone of EU co-

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<sup>140</sup> After all, this state is obliged to perform the investigations asked for.

<sup>141</sup> The influence of the double criminality requirement for instance is strongly reduced; see Article 16 of the proposal.

<sup>142</sup> This is much to the regret of organizations like Statewatch; see their comments on the proposal, published at: [www.statewatch.org](http://www.statewatch.org)

operation in criminal matters. As we have repeatedly stated in the above, this creates the danger that the executing state fails to perform a proportionality check, creating a conflict with its obligations under the Convention. The proportionality check required by Article 8 is left completely to the issuing authority.

Against this background, it must be noted that the executing authority is left with considerable discretion as to the means it chooses to execute the warrant. This is an important change (for the worse, in our view) compared to the ‘old’ situation, where the request for assistance also served as an important guideline for the requested authority. A request helps to prevent that the requested authority assumes the tasks of the requesting authority, which would run counter to the *rationale* behind the concept of mutual assistance.<sup>143</sup> Its aim is to support other states in the fulfilment of their tasks. However, under the new regime the executing authority, in order to enhance the effectiveness of the warrant, is almost entirely free in its choice of means of executing the warrant (freezing of evidence, extradition order, search and seizure, etc.).<sup>144</sup> Only in Article 12 certain limitations are formulated:

- ‘1. Each Member State shall take the necessary measures to ensure that the European Evidence Warrant is executed in accordance with the following minimum conditions:
- (a) the executing authority shall use the least intrusive means necessary to obtain the objects, documents or data [this provision, however, is restricted by Article 13 of the proposal, AH/ML];
  - (b) a natural person shall not be required to produce objects, documents or data which may result in self-incrimination; and
  - (c) the issuing authority shall be informed immediately if the executing authority discovers that the warrant was executed in a manner contrary to the law of the executing State.’<sup>145</sup>

This approach is surprising. After all, choosing the means of investigation forms an essential part of the activities of the authorities of the *issuing* state. Whether in a concrete investigation an extradition order to hand over documents will suffice or whether a far more intrusive search and seizure is necessary, can and should only be assessed by the authority that is actually in charge of the investigations, since this is its ‘core business’.<sup>146</sup> The authorities of the executing state are not introduced in the case file, so they are certainly not in a position to assess what measure would be best in a specific case. They are only able to assess whether one particular measure is appropriate and in accordance with their own laws and the ECHR. Under the new regime this guiding function of what under the ‘old’ regime would have been a ‘request’ has disappeared. Of course, as Article 12 (1a) stipulates, states must use the least intrusive means possible. But how do they know what these are? Choosing a means of investigation is surely a matter *par excellence* for the executing authority?

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143 Cf. Popp, *supra* note 68, p. 274.

144 Cf. COM (2003), 688, p. 9: ‘For this reason, the proposal for a European Evidence Warrant allows the issuing State to specify only the objective to be achieved (i.e. to obtain specific evidence), and leaves the executing State to obtain the evidence in accordance with its domestic procedural law. Although it is mandatory under the European Evidence Warrant to obtain the evidence, it is left to the executing State to determine, in the light of the information supplied by the issuing State, the most appropriate way to obtain the evidence in accordance with its domestic procedural law.’

145 The second paragraph of Article 12 also contains some (procedural) conditions.

146 Article 13 (a) of the proposal limits this discretion of the executing state. In some cases, the executing state may request coercive measures.

In the end the question again arises: what state is in charge under the EEW regime and in charge of what exactly? Although it remains to be seen in what direction developments will go precisely, we are not convinced beforehand that the EEW offers sufficient protection for individuals. In our view there is a danger that responsibilities of states will become mingled, since the executing state is left with a great deal of discretion as to the means it chooses for executing the request, whereas at the same time substantial grounds for issuing the request are not to be examined in the executing state, thus taking the principle of mutual trust one step further (cf. Article 19 (2)).<sup>147</sup> We are afraid that this not only leaves the parties in the executing state without effective remedies, but also makes it impossible for that state to live up to its obligations under the ECHR. After all, grounds for refusal are practically absent, so the executing state is, should the occasion arise, forced to choose between either the EEW or the ECHR.

Closely connected with the foregoing is, of course, the abolition of (time-consuming and allegedly hampering) national exequatur procedures. In the previous section on the joint investigation teams we argued that this is not necessarily a development in the right direction, since it increases the consequences of the *systeembreuk*, rather than diminishing them. The abolition of exequatur procedures implies that legal remedies that currently exist under the mutual assistance regime (at least as far as coercive measures are concerned; Section 3.1) are abandoned. Is this indeed what the proposal intends? If so, does this not require additional safeguards in the issuing state? In this respect it is interesting to note that Article 19, paragraphs 1 and 2, of the proposal provide the following:

- ‘1. Member States shall put in place the necessary arrangements to ensure that any interested party, including bona fide third parties, have legal remedies against a European Evidence Warrant executed pursuant to Article 11 using coercive measures, in order to preserve their legitimate interests.
2. The action shall be brought before a court in the issuing State or in the executing State in accordance with the national law of each. However, the substantial reasons for issuing the European Evidence Warrant, including whether the criteria in Article 6 have been met, may be challenged only in an action brought before a court in the issuing State.’

These provisions seem to introduce a duty for *all* states to create legal remedies for *all* the parties involved (also third parties in the executing state), as far as coercive measures are concerned.<sup>148</sup> We could even argue on the basis of this text that it is up to the individual to decide where he brings his action.<sup>149</sup> This would be a significant improvement, compared to the *Rechtshilfe* model. After all, as we saw in Section 3.1, especially the position of third parties is problematic. Another potential improvement is laid down in paragraph 4 of Article 19, where it is stipulated that ‘if the action is brought in the executing State, the judicial authority of the issuing State shall be informed thereof and of the grounds of the action, so that it can submit the arguments that it deems necessary. (...)’ Both states seem to be obliged to assist each other in offering legal protection. This is also what we propagated in Section 3.3. However, when substantial issues are

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<sup>147</sup> This issue will need even more attention, if later (as is the aim of the Commission; see note 137) the scope of the EEW is extended to other forms of evidence gathering, such as the hearing of witnesses. Will the executing state still be free to choose the means of execution?

<sup>148</sup> This obligation does not exist for information that is already in the possession of the executing authority; COM (2003) 688, p. 27.

<sup>149</sup> After all, as Article 19 (2) states ‘action shall be brought before a court in the issuing State *or* in the executing State in accordance with the national law of each [emphasis added, AH/ML].’ As we saw above (Section 3.4), the position of third parties is problematic.

involved, the complainant should address the issuing state. Here, the EEW introduces a local remedies rule. This would only be effective if the local remedy is available before the request is executed. Furthermore, to avoid conflict with the ECHR, the requested state should stay the execution until the issuing state has had an opportunity to decide on the matter. And even then, the executing state should still have an independent liability in case it finds the request would constitute a breach of Convention rights. Article 19 (2) of the current EEW proposal does not seem to deal conclusively with this matter.

In the end, it remains to be seen what the consequences of the EEW will be for the upholding of Convention standards in a transnational setting. Much is of course dependent on national implementation measures. How is the potential conflict between the duty to cooperate under the EEW and the duty to protect Convention rights solved? Will these solutions stand the test of, for instance, national constitutional courts?<sup>150</sup> Moreover, how is the abolishment of national exequatur procedures to be regarded? On the other hand, the EEW proposal also seems to offer some improvement in legal protection. For the first time, attention is not only paid to the effectiveness of the international cooperation in evidence gathering itself, but also to (the coordination of) legal remedies, without leaving simply leaving this to individual states and thus enhancing the danger of a *systeembreuk*. The question is, however, whether the proposal goes far enough. For instance, does Article 19 imply that states should make remedies available *before* the issuing of the warrant or should they offer protection *after* the fact? To what extent are states free to choose? Do these remedies have *res iudicata* status in other states? Should they also offer a remedy for actions of the authorities of the other state?<sup>151</sup> Moreover, since substantial reasons are only to be discussed in the issuing state, how are breaches of Article 8 to be *prevented* by the executing state, since there is virtually no ground for refusal left? These questions remain unanswered at this point in time. The EEW would offer a fair opportunity to mutually coordinate national laws in order to ensure that the individual does not become trapped between two or more criminal justice systems. It is up to the EU and its Member States to fulfil this task.

## 5. Summary and conclusions

In this study we have tested the current and proposed systems of mutual assistance in criminal matters against the guarantees of the European Convention on Human Rights. What responsibilities do states have under the Convention when cooperating in the field of transnational evidence gathering? Set against the background of an ever increasing EU cooperation this issue merits renewed attention not only because of new forms of international cooperation that are currently (being) developed, such as JITs and the EEW, but also because of changes in important political parameters, such as especially the development of a European area of freedom, security and justice. How does all this affect transnational cooperation in evidence gathering?

This article began by given a review of the case law of the ECtHR on the transnational application of the Convention. Case law in particular on transnational evidence gathering is scarce. This is surprising, since current inter-state practice certainly raises questions as to its compatibility

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150 After all, the German constitutional court already declared the implementation act of the EAW void; see *supra* note 97.

151 What happens, for instance, when the executing state violates Article 12 (1a)? Is the issuing state responsible for this, even if it had no say over the choosing of the means of execution (cf. Article 20 (1) of the proposal)?

with Convention standards. It could, for instance, be argued that the reluctance of many national courts to test the transnational elements of the case as demonstrated by the KB Lux affair is not in line with Articles 6 and 8 of the Convention. We could also imagine applicants challenging the fact that national criminal justice systems are not in line with each other, thereby causing flaws in transnational legal protection (the *systeembreuk*). Furthermore, should not national courts come to the aid of applicants by lowering the standard of proof resting upon applicants in cases of transnational investigations (possibly) breaching their Convention rights? These and other questions remain largely unanswered by the Court's case law.

From the case law that is present, two conclusions may be drawn. First, the ECtHR seems to adhere to a territorial interpretation of state responsibility. This duty also applies in the case of cooperation. In line with the accepted notions of state liability in international law, states parties cannot dispose of their responsibility by entering into international arrangements. They retain their pre-existent responsibility over their territory and their actions. In the case of international legal cooperation (in its widest sense) states parties are held responsible to the extent that their actions contribute to a violation of Convention rights, be it by other party states or by non-party states. Second, the Court does not seem to be blind to the difficulties which international cooperation may bring with it. This explains why Convention standards are sometimes lowered. It is most clearly demonstrated by the flagrant denial test which the Court applied in the *Soering* and *Drozd & Janousek* cases. However, it remains to be seen whether the Court also accepts a lowering of Convention standards in cases of the transnational gathering of evidence (mutual assistance), which is different from extradition (*Soering*) and transfers of execution (*Drozd & Janousek*).

In the remainder of the article we have taken a closer look at the current and future systems of mutual cooperation in criminal matters (used in a narrow sense as assistance in acquiring evidence). The problems described above have in legal doctrine led to the thesis that the Convention and its concept of individual state responsibility show shortcomings in this particular area of law. As a consequence, the system of the Convention is deemed not suitable for transnational application. Joint state responsibility has at times been advocated as a solution to these problems. We disagree. Apart from the emphasis on the principle of individual state responsibility derived from the territorial application of the Convention, the ECtHR has repeatedly stated that the rights granted by the Convention should first and foremost be practical and effective. In the field of mutual assistance we take this to mean that violations should be – firstly – prevented and – secondly – remedied. From these starting points we have derived a set of proposals (see Section 3.3) that may serve as a guideline:

1. A reduction of the rule of non-inquiry, meaning that an *ex officio* test of the facts of the case should always be performed in order to prevent flagrant breaches of Convention rights and that a more detailed inquiry is called for whenever a *prima facie* case of breach is demonstrated.
2. A duty upon other states to share information in case such an inquiry calls for additional information. Within the EC/EU context such willingness could flow from the duty of loyal cooperation. Member States should help one another to prevent breaches of human rights. After all, they are part of the Community legal order.
3. The possibility (duty) to refuse cooperation in case such assistance is refused or remains without effect, for example because the origin of the information is untraceable.

In Sections 3.3, 4.1 and 4.2 these proposals have been applied to the traditional system of mutual assistance based on the 1959 Convention of the Council of Europe, the Joint Investigation Teams and the proposal for a European Evidence Warrant. The traditional systems of *Rechtshilfe* create a more or less clear-cut division of labour between the cooperating states, each performing specific functions within the system of criminal justice and each bearing responsibilities for certain decisions and actions. When state A requests state B to take measures against X to obtain evidence, Article 8 is involved. In practice it is, in our view, mainly the requirement of proportionality which poses problems. To judge the proportionality of coercive measures State B has to ascertain *inter alia* the seriousness of the crime and the seriousness of the allegations against the suspect. Such an inquiry presupposes that state B has all the necessary information to make the assessment. In current practice this is not the case. To avoid breaches of the Convention the courts of state B should, in our opinion, carry out a marginal *ex officio* check for proportionality. Any irregularities in the request which are not immediately evident (e.g. when the suspicion is in its turn based on irregularly acquired evidence) should be looked into upon request: whenever an interested party has a *prima facie* case of a breach, a full inquiry is called for. This responsibility of state B can only be mitigated if the interested party has a remedy available to it in state A. However, a special remedy against a request for information will usually be absent.

The adjudicating state bears responsibilities under both Article 6 and Article 8. The use of illegally obtained evidence may render a trial unfair. Although this rule is not very strict (irregularity does not *ipso facto* lead to inadmissibility), we still think that the minimum requirement of fair trial would be that any evidence may be challenged both as to content and as to the mode of its acquisition. Evidence the provenance of which cannot be ascertained should not be admitted. With regard to the right to privacy, the use in open court of information gathered in breach of Article 8 may lead to an independent breach of Article 8. Hence, the adjudicating state should – if necessary – look into the provenance of any evidence used. Again, it might be compatible with the ECHR to refer an investigation into the evidence to the state of origin – provided a local remedy is available there. However, it seems preferable from the point of view of efficiency to have the trial state decide on any issues involving the legitimacy of evidence. This would require a willingness to share information on the part of the state of origin of the information involved.

In short, following the approach based on individual state responsibility, we hold each state liable for its own contribution to a breach of Convention rights. On this basis a model of cooperation is developed in which mutual trust still plays an important role, but is not absolute. It is overruled *ex officio* in the case of flagrant breaches of Convention rights. A more detailed inquiry is called for whenever the interested party demonstrates a *prima facie* case of breach. The system thus described will prevent a state from violating the ECHR, but will not always prevent breaches of personal rights from occurring. A person harmed may not be able to show *prima facie* evidence of breach, absolving the state of the need to provide a remedy (under the Convention). Moreover, this person might not even be a party to the proceedings in which the test is to be carried out. Both flaws could be remedied if, in every case, somewhere along the line, the evidence is tested *ex officio*. However, due to differences between the several systems of criminal law, such an *ex officio* test will not always be carried out in transnational cases. This problem can only be solved by either the coordination of national criminal law systems (providing a remedy at the early stages of the criminal investigations) and/or full disclosure by the cooperating authorities. Again,

the EU may prove to be the right forum for mutual coordination. The EEW proposal indeed contains such provisions.

Of the new models of cooperation that of the Joint Investigation Teams operates under a rather classic model of territorial control: the state in which the investigation measures are carried out bears full responsibility even over foreign agents participating in the JIT. At first sight, the system does not pose insurmountable problems with regard to the gathering of evidence. However, the fact that investigations within a JIT are treated as national inquiries may result in a loss of protection as all adaptations to the transnational character of the investigations are lost. The situation is slightly different with the European Evidence Warrant. The system introduced in the current proposal is quite problematic from the point of view of human rights as it obfuscates the separate responsibilities of cooperating states. Moreover, the proposed automatic recognition of the Evidence Warrant will almost certainly lead to a conflict of duties. Again, only a coordinated system of judicial protection, to be established together with the EEW itself, can remedy this.