VISITING EXPERTS' PAPERS

MERITS OF MULTILATERAL TREATIES ON EXTRADITION AND ON MUTUAL LEGAL ASSISTANCE INCRIMINAL MATTERS; THEORY AND PRACTICE

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I. INTRODUCTION

Co-operation in criminal matters has developed at rapid pace in Europe over the past 5-10 years. The major contributing factor to this development has been the incorporation of criminal law co-operation into the objectives of the European Union by the adoption of the so-called Treaty of Maastricht (entry into force on 1 November 1993), which defined, in its article K.1, judicial co-operation in criminal matters as a question of "common interest" to the Member States of the European Union.

Until then, criminal law co-operation in Europe had taken place, since 1957, within the framework of the Council of Europe, an international, intergovernmental organisation which has its seat in Strasbourg and has currently 41 Member States, including all 15 Member States of the European Union and a number of Central and Eastern European States such as Hungary, Poland, the Russian Federation and Ukraine.

With the advent of a number of terrorist organisations in (among other States) Italy, Spain and Germany, co-operation intensified in relation to certain types of offences already in the 1970s. In the middle of the 1980s, however, some of the Member States of the European Union decided to intensify their co-operation through more formalized channels. This took the form of the creation of some working groups within the framework of the European Political Co-operation set up under the Single European Act in 1987 and, in particular, by the adoption of the so-called Schengen Implementation Agreement (often referred to as "the Schengen Convention") in 1990. This latter agreement has now become part and parcel of the general legal framework of the European Union (in principle binding on 13 of the 15 Member States - the exceptions are UK and Ireland) with the entry into force, on 1 May 1999, of the Treaty of Amsterdam.

The idea behind the Schengen co-operation, which largely joins the objectives of the European Union, is to create one single "area" where all border controls are abolished and there is free movement of persons, goods, capital and services. However, in order to attain that objective, it is also necessary to ensure that the opening up of the borders do not create uncontrolled immigration or increased possibilities for criminals to commit their deeds without punishment. Therefore, so-called "compensatory measures" needed to be adopted, *inter alia* in the field of mutual assistance in criminal matters and in respect of extradition. I will deal with the significance of these compensatory measures to international co-operation later.

In spite of the developments that have taken place within the European Union over the past 5-10 years, it is fair to say

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that a substantial part of judicial co-operation in criminal matters is still based to a large extent on the instruments of the Council of Europe, although in practice some 75 -90 % of all requests for mutual assistance are made between the Member States of the EU. This is likely to change within the next 10 years with the intensified co-operation with the 13 applicant States that wish to become members of the European Union.

The European Conventions on Extradition and on Mutual assistance in criminal matters, drawn up in 1957 and in 1959, respectively, have been ratified by all 15 Member States of the European Union (the Extradition Convention has been ratified by an additional 24 States and the MLA Convention by another 22 States, figures which show their importance to co-operation in criminal matters within the wider family of European States). The additional protocol to the MLA Convention has been ratified by 13 of the Member States of the EU whereas the two additional Protocols to the Extradition Convention have been ratified by 6 and by 11 Member States of the EU, respectively.

II. MUTUAL ASSISTANCE IN CRIMINAL MATTERS

A. Basis for Mutual Assistance within the European Union

The single most important instrument in this context is, as previously indicated, the Council of Europe Convention of 1959 on mutual assistance in criminal matters, as modified by the additional protocol of 1978. At the time when it was adopted it was a very innovative instrument, and it has certainly proved its value over the years. In principle, all requests for mutual assistance made within the European Union are made on the basis of the Convention (exceptions are found in Nordic co-operation, Benelux co-operation and in relation to the 1990 Laundering Convention of the Council of Europe).

The Convention is designed to cover the widest measure of mutual assistance in criminal proceedings. It provides, in general, that the requested party shall execute letters rogatory for the purpose of procuring evidence or transmitting articles to be produced in evidence in criminal proceedings. It also provides for service of different types of procedural documents and the appearance of witnesses, experts and prosecuted persons for the purpose of criminal proceedings.

Regarding procedure, the main rule is that requests are dealt with between the Central Authorities, i.e. in principle the Ministry of Justice, of the parties. In urgent cases, the judicial authority may address the letter rogatory directly to its counterpart in the requested State and may, for that purpose, use Interpol channels. The return of the letter rogatory must however be made through the Central Authority. In principle, requests may be sent in any of the official languages of the Council of Europe (i.e. English or French although reservation possibilities exist).

The Convention does not require that a request for mutual assistance must be granted in every case. In particular, parties may refuse to execute requests which are linked to essential interests and to political or fiscal offences and on the grounds of national security. However, the exception for fiscal offences has been eliminated by the 1978 Protocol. In addition, parties having made a declaration to that effect, may refuse requests for search and seizure on the grounds of:

(i) double criminality,
(ii) non-extraditable offence, or
(iii) non-compatibility with its law.

The 1959 Convention is supplemented by a number of instruments or arrangements. There are, for example, the special arrangements between the Nordic countries and the Benelux Treaty of 1962, as modified by a Protocol of 1974. There are also mutual assistance provisions in, for example, the 1990 Council of Europe Convention on money laundering, search, seizure and confiscation of the proceeds from crime. There are also the mutual assistance provisions of the 1990 Schengen Convention.

It should in this context be noted that the relevant Schengen provisions do not so far apply to the UK and Ireland. However, that will almost certainly change in the future.

The mutual assistance provisions of the Schengen Convention are designed to supplement and facilitate the application of the 1959 Convention and the Benelux Treaty. The Schengen Convention provides, in particular, for the following:

(i) Mutual assistance in relation to certain administrative proceedings which may lead to criminal proceedings and certain proceedings which are linked to criminal proceedings (Art. 49),
(ii) Mutual assistance regarding excise duties, VAT and customs duties (Art. 50),
(iii) The possibility of refusing requests for search and seizure is limited as compared with the 1959 Convention (Art. 51),
(iv) Procedural documents may to a large extent be sent directly by post to persons in the territory of other Contracting Parties (Art. 52),
(v) Requests for mutual assistance may, as a rule, be processed directly between the judicial authorities involved (Art. 53).

It is in particular in relation to the last mentioned article where it can be said that the Schengen Convention has changed, or is about to change, mutual assistance within the European Union.

As the 1959 Convention only provided for the possibility of direct contacts between judicial authorities in cases of urgent requests, this leads in practice to the use of direct contacts in relatively few cases. The judicial authorities preferred to send their requests via the "normal channel". This could in practice mean that a request from an investigating judge would be given to the local prosecutor, who would send the request via the hierarchy to the prosecutor at the Court of Appeal who would forward the request to the General Prosecutor who, in turn, would forward the request to the Ministry of Justice, which perhaps would ensure translation of the request via the Ministry of Foreign Affairs. In the requested State the request would possibly be dealt with in the same (inverted) order and the end result would be that the mere process of sending the request and translating the documents would take 6-12 months.

The Schengen Convention has radically changed the situation in a number of Member States of the EU and is in the process of changing it in others, although it may be said that "old habits die hard" for some judicial authorities who still prefer to use the old procedures.

A country like the Netherlands receives some 26,000 letters of request on a yearly basis. Only about 10 % are received at the Central Authority (mostly from non-EU Members) and the remaining part is dealt with directly by the judicial authorities. The situation in other countries, such as Belgium and France is similar and changes are under way in Spain, Portugal and Italy. The Nordic co-operation has for decades

been based on direct contacts between judicial authorities and has, to some extent, served as a model and a precursor to the developments in the rest of Europe.

B. Achievements of the European Union

Within the EU a lot of work has been carried out in the area of mutual assistance since the introduction of formalised co-operation in the field of justice and home affairs following the entry into force of the Maastricht Treaty. In particular, the following steps have been taken:

(i) The EU Council adopted in 1997 an Action Plan to combat organized crime. The plan is multidisciplinary and it applies to police, customs and judicial co-operation as well as preventive measures. Regarding mutual assistance, the importance of the adoption of the draft EU Convention on that topic has been stressed. The fight against money laundering is also an essential element in the plan.

(ii) Further strategic elements have been added by the 1998 Action Plan of the EU Council and the Commission on how best to implement the provisions of the Amsterdam Treaty on an area of freedom, security and justice. That Action Plan also attached great importance to improving and speeding up judicial co-operation, especially in view of the development of intensified police co-operation.

(iii) In December 1997, the EU Council adopted a Joint Action establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime as part of the implementation of the 1997 Action Plan. Under that instrument, a number of Member States have already been evaluated in relation to mutual legal assistance and urgent requests for the tracing and restraint of property. The procedure followed is that, first, a questionnaire is issued and replied to by each Member State regarding the issues to be examined. Then independent teams of experts visit the relevant authorities of the Member States to gather further information. This typically involves visiting the Ministry of Justice, the prosecution authorities and the police (Interpol office). On that basis, the experts draw up a draft report containing a description of the facts and conclusions with recommendations. The report is then finalised in collaboration with the Member State visited and adopted by the Multidisciplinary Working Party on Organized Crime, which is a Council working group specifically mandated to deal with the Action Plan on organized crime. The report remains confidential unless the Member State evaluated decides to make it public, which, so far, always has been the case. The process has proved to be extremely useful. In this way all Member States gain information on how the systems of other Member States work in practice and by the end of the process a kind of handbook on how MLA works in practice will have been drafted. Certain problems are identified to be addressed, not only in the Member State visited but also at more general level. The evaluation programme is a good example of focusing not only on the need to have

strong legal provisions on mutual assistance in international agreements, but also on the need to take appropriate legislative and administrative measures at national level for the purpose of ensuring efficient co-operation.

(iv) In December 1998, the EU Council adopted a Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. This instrument has, in particular, as its purpose to ensure efficient implementation of the 1990 Council of Europe Convention on money laundering, bearing in mind also the EU Directive of 1991 on money laundering and the 1988 United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances.

(v) In June 1998 the Council adopted two instruments:

- A Joint Action on the creation of the European Judicial Network. The purpose of the instrument is to set up a network of judicial contact points and Central Authorities in order to facilitate judicial co-operation and to help establish direct contacts between authorities involved in mutual assistance. The Network has regular meetings in Brussels and in Member States for contact points to get to know each other and for discussing practical and legal problems encountered. Where appropriate, experience gained may be fed into the relevant working parties of the EU for discussion and for the development of further legal and practical measures.

  The Network, which so far has met 5 times, has its own website where legal instruments and ratification status can be found (see http://ue.eu.int/JAI) and is in the process of creating its own Virtual Private Network - an Intranet - which can be used for transmitting requests, information and for creating discussion groups. A CD-ROM has been produced containing the same information and another is being produced which contains information on special investigative techniques, judicial organisation and contact data for the contact points.

- A joint Action on good practice in mutual legal assistance in criminal matters. The instrument requires each Member State to provide a statement of good practice, which must include certain minimum undertakings (e.g. to acknowledge requests where requested to do so, to give priority to requests marked "urgent" etc.). These statements have been prepared by Member States and have been made available to the European Judicial Network. Member States are also obliged to periodically review their compliance with their statements of good practice.

(vi) It would also be appropriate to mention in this context that the EU Council in 1997 adopted the Convention on mutual assistance and co-operation between customs authorities (Naples II). This Convention contains provisions on the relationship with mutual

assistance provided by judicial authorities. The principle involved is that where a criminal investigation within the area covered by the Convention is carried out by or under the direction of a judicial authority, that authority decides whether requests for mutual assistance should be made under the Convention or under arrangements for mutual assistance in criminal matters. The provisions of the Convention on controlled deliveries, joint investigation teams and covert investigations have, to a wide degree, served as a basis for drafting similar provisions in the draft EU Convention on mutual assistance.

(vii) A further EU instrument which is particularly relevant in relation to mutual legal assistance is the Joint Action adopted in April 1996 establishing a framework for the exchange of liaison magistrates to improve judicial co-operation within the Union. The main objective in creating that framework was to increase the speed and effectiveness of judicial co-operation. Liaison magistrates currently operate in France, Germany, Italy, the Netherlands and Spain.

C. Current Work on Legally Binding Instruments on Mutual Assistance in Criminal Matters within the European Union and elsewhere

The EU Council Working Party on co-operation in criminal matters has, for some time, worked on the elaboration of a Convention on mutual assistance in criminal matters between the Member States of the European Union. The draft (to a large extent in the way already agreed) has recently been published in the Official Journal of the European Communities and submitted to the European Parliament for consultation.

The main objective of the Convention is to supplement what already exists. That means, in particular, the 1 959 Convention, the Benelux Treaty, and the 1990 Schengen Convention. That all sounds very simple. But it is not. The integration of the Schengen *acquis* into the EU implies in particular the following: All provisions of the draft Convention related to the Schengen *acquis* must be examined with Norway and Iceland (which was part of Schengen but are not Member States of the EU) before adoption of the instrument. In addition, the Schengen *acquis* does not for the time being apply to the United Kingdom and Ireland (which are Member States of the EU). These elements have given rise to complicated procedural discussions in Brussels.

The draft EU Convention contains in particular the following provisions :

(i) Further Development of Schengen:

Article 2: Mutual assistance shall be afforded in administrative proceedings which may give rise to proceedings before a court having jurisdiction, in particular, in criminal matters, in cases involving natural as well as legal persons.

Article 5: Procedural documents to be sent from one Member State to another shall be sent by post. There are certain limited exceptions to that obligation.

Article 6: Requests for mutual assistance shall be made directly between the judicial authorities concerned. However, it is possible in specific cases to make use of central authorities. Also, a Member State may declare that requests addressed to it should be sent to its central authority. Only

the UK and Ireland will make use of this option, which for these countries simply will mean the maintenance of the status quo (one could, however, question if this provision is fully compatible with the Schengen convention) .

Article 7: Spontaneous exchange of information.

Article 12: Controlled deliveries.

(ii) Non-Schengen

Article 4: The requested Member State shall comply with procedures indicated in a request unless doing so would be contrary to its fundamental principles of law. This is a new development in international mutual legal assistance practice and will considerably render mutual legal assistance more efficient as it lays down the principle of "*Forum Regit Actum*". Deadlines for execution set by the requesting State shall be respected to the maximum extent possible (see also the previously mentioned Joint Action).

Article 8: This Article is optional and provides that Member States may place articles obtained by criminal means at the disposal of another Member State with a view to their return to their rightful owner. It specifically provides that where, on request, property has been handed over to another Member State for the purpose of criminal proceedings under the 1959 Convention or the Benelux Treaty, the Member State supplying the property may waive the right to have it back for the purpose of its restitution to its rightful owner.

Article 9: The 1959 Convention is concerned with cases where the requesting State wants a person in custody transferred to it from another State. Article 9 deals with the situation where the requesting Member State wants to transfer a person in custody to the requested Member State for the purpose of criminal proceedings.

Article 10: This Article concerns the hearing of evidence by video conference and is one of the major achievements in the context of the convention. It provides that a Member State must comply with a request for hearing experts or witnesses by video conference unless it would be against its fundamental principles of law or it does not have the relevant technical facilities. The provision may, by mutual agreement, also be used for hearings involving accused persons.

Article 11: This Article is optional and concerns hearing witnesses and experts by telephone conference.

Articles 12, 13 and 14: The provisions on controlled deliveries, joint investigation teams and covert investigations have, to some extent, been based on provisions of the Naples II Convention. The articles are in particular of relevance in relation to the fight against organized crime and illustrate how the gap between traditional judicial co-operation and police co-operation is about to lessen.

Articles 15 to 20: Interception of telecommunications. This part of the Convention is considered to be very important by all Member States. The advantages of having clear legal provisions on co-operation in this very sensitive area are obvious. But more importantly, new technology; such as satellite telecommunications, has created new opportunities for organized crime to avoid interception and at the same time new challenges for law enforcement. Negotiations in respect of these provisions are still on-going.

It is possible that the draft Convention

also will contain some provisions relating to the protection of personal data. The EU Council took a decision recently to aim at drafting some provisions in that respect. Discussions are on-going.

D. Other Work of Relevance to Mutual Assistance within the European Union

Work is also going on in relation to mutual assistance in other fora. In the Council of Europe a draft Second Additional Protocol to the 1959 Convention is currently under discussion. That draft contains many provisions corresponding to those of the draft EU Convention and the draft EU Convention has of course to a great extent inspired the drafting of the Council of Europe Second additional Protocol. It will however have to be remembered that reservations possibly may be made to the Council of Europe Protocol whereas reservation possibilities in the EU Convention will be extremely limited.

Another important draft international instrument containing mutual assistance provisions is the proposed UN Convention on transnational organized crime. It is to be expected that this Convention will be adopted by the end of the year, if negotiations are carried out as planned.

E. Final Remarks on Mutual Assistance

There is a considerable amount of activity in Europe for the purpose of improving mutual assistance in criminal matters. This applies both in respect of the need for appropriate legal provisions as a basis for co-operation and as regards the need to ensure efficient use of the relevant instruments at the practical level. One of the difficulties that has been experienced in Europe is that the borderline between what is regarded as mutual assistance in criminal matters and what is considered to belong elsewhere, be it police co-operation or customs co-operation, can be different from one Member State to another. This may make it difficult to agree on where in the system a particular issue should be dealt with (e.g. joint investigation teams). However, that is a problem that we simply have to live with and tackle as best as we can.

Another challenge is how to ensure that the situation in so far as the legal provisions are concerned is sufficiently clear and easy to access for practitioners. A practitioner will in a specific case need to know.

(i) what are the legal provisions governing mutual assistance in the case concerned, and
(ii) to whom does he have to address himself to get the assistance?

Of course, the proliferation of instruments, the possible conflict between instruments adopted in different fora and the variable geometry regarding the territorial application of the different instruments may sometimes make life a little difficult for practitioners. However, it is clear that significant progress has been, and continues to be, made in the development and operation of mutual legal assistance and it is undoubtedly an area where further improvements will take place in the future.

III. EXTRADITION

A. Basis for Extradition within the European Union

As with the mutual assistance in criminal matters, the single most important instrument for extradition within the European Union in this context is the Council of Europe Convention of 1957 on extradition, as supplemented and modified by the additional protocol of 1975

and the Second additional Protocol of 1978. At the time when the European Convention was adopted it was also considered to be a very innovative instrument, and it has been reported that it replaced some 200 bilateral Treaties at the time. All extraditions within the European Union are in principle based on the Convention which is a major achievement of the Council of Europe.

It should be recalled that the Convention has been ratified by all Member States of the European Union and is thus, in the same manner as the MLA-Convention, considered to be an inseparable part of the *acquis* of the Union. In fact, it is considered that the applicant States of Central- and Eastern Europe seeking membership of the European Union cannot become members of the Union unless they have ratified these two Conventions of the Council of Europe.

The Convention lays down an obligation for the Contracting Parties to surrender to each other, subject to certain conditions, persons against whom proceedings are commenced or who are wanted for the carrying out of sentences or detention orders. Extraditable offences are those which carry prison sentences in both States of at least one year or where the punishment awarded is at least 4 months imprisonment. The Convention thus avoids the so-called list method by which specific offences are enumerated.

The condition of double criminality must be fulfilled, although it can be argued that, on the side of the requested State, double criminality *in abstracto* may be sufficient.

The Convention makes a number of exceptions to the general obligation to extradite. Although some of these exceptions are in the form of a facultative possibility of refusing extradition, it is clear that some of them restrict the applicability of the Convention. It will later be shown how the European Union has sought to limit the exceptions between the Member States of the EU.

Extradition may be excluded by reason of the nature of the offence, for procedural reasons or for reasons relating to the person.

The exceptions concern (i) political offences, (ii) offences for which the requested State has "substantial grounds for believing" that the request was made for prosecution or punishment on account of race, religion, nationality or political opinion, (iii) military offences, (iv) fiscal offences, (v) own nationals (coupled with the principle of *aut dedere, aut judicare*), (vi) the place of commission of the crime, (vii) pending proceedings for the same offences, (viii) *non bis in idem*, (ix) lapse of time, and (x) capital punishment.

The Convention provided initially, in principle, for the forwarding of requests through diplomatic channels, although it allowed for exceptions to this rule. But in practice nowadays, because of article 5 of the Second additional Protocol to the Convention, within the European Union requests are in principle directly forwarded between Ministries of Justice.

The Protocols to the Convention amends the Convention in respect of certain offences such as crimes against humanity, certain fiscal offences, judgements *in absentia* and offences for which amnesty has been given.

B. Achievements of the European Union

The practitioner knows that extradition procedures are extremely slow and cumbersome. Also in cases where extradition is consented to by the person sought, extradition may take up to one year

because of internal procedures in the requested State.

This state of affairs cannot be considered satisfactory. Justice delayed is justice denied and in particular in the interest of the victim it is of importance not to delay extradition unnecessarily where the suspect consents to his extradition.

It was in recognition to these types of considerations that the European Union decided to supplement the 1957 Convention by the drafting of two Conventions; one dealing with simplified extradition and the other of a more general kind. It may be noted that according to some estimations made by extradition experts, within the European Union extradition requests are consented to in about 30 % of the cases and that the average time for extradition in such cases has been some 8 months for extradition.

The Convention on simplified extradition, adopted in 1995 and ratified to date by 6 Member States (more ratifications soon to follow), provides that the person sought may be returned without a formal court hearing, subject to the finding by a judicial authority that the consent has been expressed voluntarily and in full understanding of the legal consequences thereof.

The Convention has also addressed the question whether consent to extradition and waiver of a court hearing implies a waiver of the protection by the speciality principle. Since no agreement could be reached on this issue during the drafting of the Convention, the States which want to preserve the right to submit the extradition to the guarantee that the speciality principle shall be respected can do this through a declaration made at the time of ratification of the Convention. In principle, however, consent to be extradited implies consent to the possibility to be prosecuted also on other charges than those contained in the extradition request, or in the request for provisional arrest.

The second Convention, adopted in 1996 and currently ratified by 6 Member States (also here more ratifications will soon follow) addresses a number of the exceptions to extradition provided for in the 1957 Convention and seeks to lift a number of taboos in relations between the Member States of the European Union. It has been considered that between the Member States, which seek to create an area of freedom, security and justice by the entry into force of the Treaty of Amsterdam, traditional obstacles to extradition should be reduced as much as possible.

It has therefore been provided in the Convention as general principles that extradition should not be refused in relation to certain of the exceptions mentioned above under the 1957 Convention. These concern:

(i) political offences,
(ii) fiscal offences,
(iii) the requirement of double criminality for certain organized crime offences,
(iv) extradition of own nationals,
(v) speciality principle, and
(vi) time limitations.

During the negotiations on this Convention, it was not possible to reach full consensus even within such a closely integrated area as the European Union. Some of these issues, such as the non-extradition of own nationals, are dealt with in the constitutions of the Member States, and for that reason reservations have been made possible but with the clearly expressed intention that these reservations be lifted in due time. In particular in relation to the non-extradition of own nationals, this is clear as a specific system

of temporary reservations has been set up which must be extended from time to time, if they are not to lapse automatically.

The Convention states as a general rule that the political offence exception shall not apply between the Member States. It is, however, possible to enter a reservation to this provision, but not with respect to offences which are covered by the Council of Europe Convention on the suppression of terrorism from 1977. These include not only offences defined in a number of UN Conventions (on high-jacking, the safety of civil aviation and the taking of hostages) but more generally serious offences of violence affecting the life, physical integrity or health of persons.

Similarly, the Convention provides as a general rule that the fiscal offence exception shall not apply between Member States of the EU. Again, it is possible to enter a reservation, but not in respect of offences concerning customs duties, turnover tax and other indirect taxes. It is unlikely that more than one Member State will make a reservation in this context.

On double criminality in relation to certain serious offences, a new avenue has been explored. In principle the requirement has been retained, even if the existing thresholds of punishability have been lowered; it suffices that the offence carries as a maximum one year imprisonment in the requesting State and only six months in the requested State.

However, with a view to be able to better counter various forms of organized crime, and more particularly the various forms of participation in the activities of organized groups as they have been criminalized in the Member States, the Convention provides that with respect to these forms of participation a strict requirement of double criminality shall not apply. This is irrespective of whether the offence has been defined a conspiracy or an association of wrongdoers, or as an affiliation to mafia-type organisations or as membership of criminal organisations or as acts of participation in offences committed or to be committed by others.

Reservations are also in this case allowed for, but only if the Member State in question have criminal legislation in place criminalizing forms of participation or preparatory acts as defined in the Convention with respect to a wide range of serious offences, in particular those which are commonly committed by way of cross-border organized crime. This provision should reduce problems of double criminality to a minimum.

This solution to extradition in relation to certain serious crimes took quite some time to develop but may be seen as an interesting development in the field of extradition law. It is a way of reconciling the necessity of co-operation in relation in particular to serious crime with a drive towards greater harmonisation of the criminal laws of the Member States; something which was also debated in the meeting of the Heads of State and Govermment at Tampere referred to below.

The non-extradition of own nationals is commonly recognized as a principle of extradition law by States belonging to the civil law tradition whereas countries belonging to the common law tradition often extradite their own nationals. Coupled with these differences is the policy relating to the establishment of extraterritorial criminal jurisdiction over offences committed by nationals where common law countries usually take a more restrictive approach.

In view of the constitutional obstacles in some Member States such as Germany,

it was felt necessary during the drafting of the Convention to allow for a system of temporary reservations to be able to be submitted. The temporary reservations will have to be prolonged and if they are not they will lapse. Through the creation of this system, it became clear that the political will of the Member States is to make no distinctions, within the Union, between citizens of the Union something which can be seen as a rupture with concepts which have been taken for granted for centuries.

On the speciality principle the Convention has in the first place clarified which actions by the requesting Member State are not considered as falling under the actions which can only be performed subject to the consent of the requested State. In the second place the Convention has given the right to the person concerned to waive his claims to protection under the speciality principle, irrespective of the views held on this by the requested State.

On time limitations, finally, the Convention provides as a rule that provisions on time limitations in the law of the requested State should in principle be ignored, unless that State has, according to its laws, also jurisdiction over the offence for which extradition is requested.

C. Schengen Developments

The Schengen Convention of 1990 contains also provisions on extradition, some of which have been taken over in the previously mentioned two EU Conventions. These provisions relate, for instance, to amnesty, time limitation, certain simplified extradition, certain fiscal offences and channels for sending requests. One important consequence of the adoption of the Schengen regime is that an "alert" entered into the Schengen Information System, a computerized system which is available in all 13 Schengen Member States, has the automatic effect of a request for provisional arrest under article 16 of the European Convention on Extradition. This means in practice that if a border control officer finds out, when he controls a person in the SIS computers that an "alert" has been introduced in the system, he shall immediately arrest the person or ensure that the competent police authorities proceed to his arrest. It was in such a way that the Italian authorities arrested Mr Öçalan, the Kurdish leader for whom Germany had entered an "alert" on the basis of arrest warrants made by German judicial authorities. It is another matter that the German authorities thereafter did not proceed to a formal extradition request.

D. Current Work on Legally Binding Instruments on Extradition within the European Union

There is at present no work relating to extradition ongoing within the European Union. However, the Treaty of Amsterdam specifies expressly that work should be started to further facilitate extradition and the conclusions of Tampere also indicate that more work should be undertaken. Therefore, it is to be expected that new avenues will continue to be explored. Moreover it is possible that within the framework of the system set up for mutual evaluation of international undertakings, a new topic on extradition might be selected within the next 1-2 years. This would seem to be a logical consequence of the evaluations which have been carried out on mutual assistance in criminal matters and urgent requests for seizure of assets referred to above.

E. Final Remarks on Extradition

Extradition is still seen as a matter which is very close to the sovereignty of the Member States. However, it is clear that within the European Union there is a drive towards simplifying and speeding up

extradition, although we are probably still far away from the creation of an area of extradition law where the formalised extradition procedures are replaced by a simple system of return of fugitive offenders, based on simple mutual recognition and enforcement of arrest warrants, with only very limited cases left in which refusals to co-operate in this field would be justified.

Every time when calls have been made for more simple and rapid procedures, human rights lawyers have protested and claimed that the rights under the Geneva Convention would be violated if a simple system of rendition would be adopted and that not even within the European Union one can forego court procedures in spite of the fact that all Member States have subscribed to the European Convention on Human Rights and should have procedural legislation which is in conformity with that convention. The debate on this issue is by no means closed and will continue in particular in the light of the results of the Tampere Summit referred to below.

IV. THE EUROPEAN COUNCIL AT TAMPERE

The entry into force of the Treaty of Amsterdam on 1 May 1999 has by many been seen as a qualitative leap for the European Union in the area of Justice and Home Affairs. For the first time, the objective of creation of "An area of Freedom, Security and Justice" was spelled out in the Treaty and specific actions to that end were provided for in the Treaty which is a kind of Constitution for the European Union. It was therefore not surprising that the European Council, consisting of the Heads of State and Government of all Member States decided to convene, only for the second time in the history of the EU, a special meeting to discuss the realisation of the new objectives.

This special meeting of the European Council was held at Tampere (Finland) under the Chairmanship of the Finnish Prime Minister who then held the Presidency of the Council. It debated three main themes: A common EU Asylum and Migration Policy, A Genuine European Area of Justice and A Unionwide Fight Against Crime and adopted the so-called 10 "Tampere Milestones".

These milestones contain specific decisions which are relevant to MLA and to extradition. Paragraphs 33, 35 and 36 of the conclusions provide:

"Enhanced mutual recognition of judicial decisions and judgements and the necessary Approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters between the Union. The principle should apply both to judgements and to other decisions of judicial authorities.... It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons... Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial.... The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable...."

In the background to these decisions was a proposal in particular by the United Kingdom to intensify work on mutual recognition in relation to MLA and to

extradition. As a result of the Tampere decision, it is probable that we will see a development whereby it is explored if extradition could be made more automatic, at least where a person has been finally convicted of an offence and then seeks to evade the consequences of his conviction. Work will also begin on the very difficult issue of freezing of assets in another country where there is a risk that the asset may be transferred out of the jurisdiction (for instance funds on bank accounts which may be quickly dissipated). It is probable that such work needs to be coupled with the question of certain minimum standards which must be adhered to and thus be extremely sensitive and difficult.

The discussion on the principle of mutual recognition should also be seen in conjunction with another decision of the European Council, namely the setting up of a unit called EUROJUST, composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. This unit would have the task of facilitating the proper co-ordination of national prosecuting authorities and of supporting criminal investigations in organized crime cases. A legal instrument on the setting up of this unit will have to be adopted before the end of 2001. One of the ideas which will be discussed in the context of EUROJUST is whether these national magistrates, which will probably be detached to The Hague as Europol also has its seat there, will be able to take provisional measures and freeze for instance bank accounts in their own countries in accordance with their national legislation.

V. CONCLUDING REMARKS

As will be understood from this brief exposé, which by necessity must be made in a cursory manner, the legal situation concerning both mutual assistance in criminal matters and extradition within the European Union is extremely complex. It has in fact become so complex so that also specialists have difficulties in fully understanding the law and grasping all the details. The practitioner will have to know a number of multilateral treaties (Council of Europe, EU, UN, Schengen, Benelux...), various Joint Actions of the EU and also internal legislation, guidelines, instructions and directives in order to be able to use efficiently all possibilities.

Moreover, since the tendency, in particular in mutual assistance, is to have more and more direct contacts between judicial authorities, it is clear that for instance a prosecutor who only deals with a few letters rogatory per year will have difficulties in carrying out his tasks efficiently. This has in turn led to measures in some countries whereby specific training, in particular in languages, has been given to certain prosecutors and clustering of prosecutors made so that only those specialised in mutual assistance actually send and receive requests. Computerised systems are also under way, whereby police and prosecutors are assisted in the drafting of mutual assistance requests, so that nothing is forgotten in the processing of the request and all translations of necessary legislation can be provided immediately by the system. An example of such a system is the so-called KRIS system developed in the Netherlands. At the same time, efforts undertaken by the European Union not only to set standards for norms but also actually to deal in practice with judicial co-operation are bearing fruit (setting up of the European Judicial Network, providing access to telecommunications, production of CD-Roms and creation of websites, standards of good practice, mutual evaluations...).

Although one can be reasonably optimistic about the future and about the fact that much finally is being done to bring judicial co-operation at least up to the same standards as police co-operation, one can still question whether the measures which are being taken are enough to ensure an efficient fight in particular against organized crime which has extremely powerful resources at its disposal. In any case, efforts at multilateral level, be it the European Union, Council of Europe or UN, are encouraging and should be intensified.