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Transnational Access to Evidence, Witnesses, and Suspects

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Abstract and Keywords

This chapter examines issues surrounding transnational access to evidence, witnesses, and suspects. More specifically, it considers whether the evidence can be transferred between nation-states without negatively affecting the legitimacy, fairness, and reliability of the fact-finding procedure. The focus is on basic questions arising from the conflict between the criminal justice systems' genuine interest in comprehensive and reliable fact-finding and the specific restrictions on fact-finding when evidence exists beyond a state border. The chapter first traces the historical roots of transnational access to evidence and provides an overview of current legal practices before using the German and U.S. legal frameworks as case studies to illustrate the impact of mutual legal assistance in a civil law and a common law jurisdiction. It then outlines new approaches to transnational access to evidence such as the framework of the European Union, with emphasis on safeguards for reliability and fairness of fact-finding.

Keywords: transnational evidence access, witnesses, suspects, fact-finding, criminal justice, mutual legal assistance, European Union, reliability, fairness

I. Introduction

CRIMINAL proceedings have often been depicted as primarily national affairs, but today investigations often reach beyond state borders. Over the last century, a growing number of frameworks for transnational cooperation have been established to facilitate transnational transfer of evidence. Such international division of tasks in prosecuting crimes is crucial in certain situations if wrongdoers are to be prevented from taking advantage of international borders and the limits of national jurisdiction. However, transnational access to evidence—especially to witnesses and suspects—also raises a number of problems. States must define adequate requirements for cross-border inquiries that give consideration to their own interests as well as individual rights. Investigative

findings gleaned within the scope of transnational cooperation are of practical value to domestic law enforcement agencies only if they can be used as evidence. Often specific questions of reliability arise when foreign authorities gather evidence, or the fairness of proceedings is disputed when, for instance, evidence located abroad cannot be accessed by all parties.

Against this backdrop, the following analysis considers whether evidence can be transferred between nation-states without negatively affecting the legitimacy, fairness, and reliability of the fact-finding procedure.

The analysis focuses on basic questions arising from the conflict between the criminal justice systems' genuine interest in comprehensive and reliable fact-finding—a core aspect of the legitimacy of criminal justice globally—and the specific restrictions on fact-finding when evidence is located beyond a state border. Such restrictions protect (p. 588) the various interests of the states or individuals involved if law enforcement authorities pierce international borders.

An outline of the historical roots of transnational access to evidence provides the background of current legal practices (*see infra* Section II). In this chapter the German and U.S. legal frameworks are used as case studies, illustrating *pari pro toto* the impact of mutual legal assistance in a civil law and a common law jurisdiction (*see infra* Section III). Here as well as when looking at new approaches to transnational access to evidence such as the framework of the European Union (*see infra* Section IV), the emphasis is on safeguards for reliability and fairness of fact-finding. The core argument is that future transnational access to evidence must meet a standard that is functionally equivalent to the standard for evidence obtained in the domestic criminal justice systems (*see infra* Section V).

II. Historical Roots and Current Phenomena

Penal powers and jurisdiction in criminal matters can, in principle, be traced to the Westphalian model of sovereign states, endowed with a monopoly over the use of force in their territory. This understanding of the *ius puniendi* has not only proven favorable for building state power, but also gave rise to procedural codes that, generally, empower authorities to undertake comprehensive fact-finding while bound by certain procedural restrictions at the scene of the crime.¹ While a state can subpoena anyone who may be able to provide information relevant for a criminal case so the evidence can be secured by the authorities, the individual enjoys the guarantees of due process according to the law of the land.² The drawback, however, is that this concept leaves states powerless when they need to investigate an alleged crime with evidence located beyond their borders. Unless obligated by treaty, sovereign states are not required to produce documents, witnesses, or suspects for criminal proceedings taking place under another national jurisdiction.³ If an investigating state were to instigate investigations in a foreign country without giving notice to that country's authorities, it would risk infringing the principle of sovereign equality of states.⁴ States prosecuting a transnational case and in need of

witness testimony in a neighboring state thus need to follow certain procedures. Similarly, individuals who are approached by foreign authorities with a request to dissolve information that could possibly be used as evidence in a criminal trial abroad may wish to do so, but only if the procedure and conditions are clear.⁵ (p. 589)

Although current legal debates address problems of transnational access to evidence, the focus is often on practical problems of fact-finding and issues of legitimacy, reliability, and fairness. It has rarely been debated whether individuals affected by such outreaching state activity receive adequate protection by the law.⁶

1. From a Police Affair to Judicial Proceedings

Until well into the nineteenth century, obtaining information across borders was not perceived as a judicial act but as an intelligence gathering procedure that involved the swapping of information across borders based in principle on *do ut des* (or *quid pro quo*), when one state “scratched the back” of the other, still lingering in the principle of reciprocity. Prominent examples are provided by spies’ activity in Swiss border towns Germans fled to after the failed revolution of 1848 or during political persecution in 1878. Swiss informers reported to German police on involvement in petty crime or political agitation. Police intelligence, prosecution work, and the implications for individual rights were not yet set in strict legal concepts. Even in the Western world, within one jurisdiction, differences were huge: While in England, certain individual rights were secured by the Magna Charta in 1215, it was only during the seventeenth century that the state’s police power slowly transformed from an essentially unaccountable government power to a power constrained by, and subject to, the rule of law. The European continent followed suit in the eighteenth and nineteenth centuries with the idea of a *Rechtsstaat* introducing such concepts in Germany. Only during the twentieth and twenty-first centuries did countries gradually establish mutual legal assistance (MLA) in criminal matters on a legal basis, signing and ratifying multilateral mutual legal assistance treaties (MLATs).⁷ MLATs, at first, only were formal agreements among states, intended to facilitate law enforcement cooperation, but subsequently, with the adoption of corresponding domestic legislation, extended transnational cooperation to include judicial proceedings.⁸

Finally, proceedings became more formal. Today, for transnational access to evidence, witnesses, or suspects, by way of classic mutual legal assistance, authorities of the (p. 590) *requesting state* apply to the competent authorities in the *requested state* by issuing a formal letter (often called a letter rogatory). If the *requested state* agrees to grant assistance, it will in principle obtain the required evidence in accordance with its own procedural rules (*locus regit actum*). Such a course of action not only safeguards sovereign decision-making, but also protects the legal position of individuals who are eventually requested to provide information. Witnesses, suspects, or third persons are subject to coercive measures only according to the laws of the land, albeit subject to modification with regard to MLATs. For instance, among countries that work closely

together, such as Member States of the European Union, authorities may apply the law of the country that seeks information (“forum state”).⁹

2. Broadening Fact-Finding at the Expense of Reliability and Fairness?

The findings gleaned from transnational cooperation may be of little practical value to domestic law enforcement agencies. If, for instance, witness testimony obtained in Austria is presented before a U.S. federal court that has not been confronted by the defense, chances are high that its evidentiary value will be called into question because the relevant national rules covering the investigative procedure have not been observed in the foreign country. Furthermore, MLATs usually give consideration to protecting state interests. As a result, the execution of a request may be subject to political interests.¹⁰ The United States regularly maintains the right—as a *requested state*—to refrain from cooperation or to restrict the use of certain information as evidence. An exception clause, based on “political offenses” or “human rights,” can be drafted into MLATs as a specific basis for denying assistance; this releases a government from any obligation to collaborate with countries that do not share basic values, such as freedom of speech, civil rights, or the separation of powers.¹¹ The consequence, however, is that material evidence can be withheld from fact-finding. Indeed, there appears to be no accepted threshold as to when information may be withdrawn for the protection of states’ interests, since conditions for mutual assistance in criminal matters differ around the globe.

In contrast, individuals wanting access to evidence located abroad find themselves shrouded by legal uncertainty, not least because they are often in fact excluded from using MLATs to obtain evidence in a foreign state. Individuals affected by transnational evidence obtainment—for instance, witnesses who are summoned to give (p. 591) testimony—also face ambiguous situations, as it may be unclear which authority asks them to provide information.

Fact-finding based on evidence obtained abroad thus may fall short of domestic standards in different ways. At the same time, it is crucial to use evidence located abroad in order to mitigate the risk of wrongdoers going unpunished. Ultimately, the responsibility to evaluate the reliability and fairness of fact-finding based on evidence gathered abroad falls on domestic courts and other competent national authorities. This begs the question: How is the MLA dilemma solved in individual criminal justice systems?

III. Transnational Access to Evidence

Based on the view that international borders should not offer protection to offenders, virtually all countries have signed MLATs and provided legal rules for transnational access to evidence, witnesses, and suspects.¹² As long as reciprocity is guaranteed, states will grant assistance to one another, irrespective of whether such assistance is underscored by a treaty formalizing such cooperation.¹³ Domestic law translates international treaties on transnational access to evidence in procedural rules in the

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requesting state as well as in the *requested state*. Mostly, states will have a specific set of rules governing MLA, but they also rely on general criminal procedure regulation for actually obtaining the evidence, for example, the interrogation of a witness or a suspect in the *requested state* and its evidentiary use in criminal proceedings in the *requesting state*.

From a criminal justice point of view, the laws actually governing access to, and use of, evidence are of particular interest. The following account of German and U.S. laws governing MLA reveals the features of two distinct models for the transnational access to evidence. The models differ because of legal traditions, geopolitical situations, and policy goals. Germany, with its inquisitorial tradition and civil law codification, is a member of various international treaties and agreements (e.g., the Council of Europe, European Union, and the Schengen Agreement) with the nine countries with which it shares a border. The U.S. criminal justice system, based on the adversarial process model and common law tradition, has only two neighboring countries, although it is responsible for four times as many inhabitants. Both countries agree that, for criminal proceedings, discovering the “truth” is a primary goal that can only be achieved with reliable and fair fact-finding. But the methods of achieving that goal differ in each country. During the last decades a number of developments have reduced disparities, especially with continental European countries signing up to a guarantee of a fair trial based on the idea of equality of arms.¹⁴ Nevertheless, the use of MLA causes different problems in an adversarial system, where two opposing parties investigate the facts and present their story to a neutral court, as opposed to an inquisitorial model, where a government agent (investigating magistrate, court, etc.) is in charge of the fact-finding and must look for exonerating evidence in the same way it looks for incriminating evidence, with little distinction between evidence presented by the defense and prosecution. Practitioners and scholars in both countries are aware that access to evidence abroad is continually growing in importance. At the same time, the MLA is also causing problems, because it is often slow, not always efficient, and creates hurdles if the domestic legal standards in proceedings cannot be enforced abroad.

1. Germany

German law on transnational access to evidence is based on the European blueprint for MLATs: the Council of Europe’s Convention on Mutual Assistance in Criminal Matters of April 20, 1959.¹⁵ With this treaty, Germany and its neighboring states (as well as forty other countries) agree to afford each other the widest measure of mutual assistance with a view to gathering evidence, hearing witnesses, experts, suspects, etc. The convention sets out detailed rules for the issuing requests by competent judicial authorities and their execution, which aims to procure or communicate evidence in criminal proceedings. Today, the Convention on Mutual Assistance in Criminal Matters of 1959 also provides a legal basis for facilitated MLA, such as cooperation under the Schengen Convention¹⁶ and

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various European Union (EU) legal instruments, which will be discussed in Sections IV and V.

Germany has a long tradition of cooperating closely with other countries, including the handling of incoming and outgoing requests with the *Bundesamt für Justiz* or other competent “judicial authorities” (including prosecutors and courts but not defense counsel). It maintains some right to refuse cooperation. The Convention of Mutual Assistance in Criminal Matters from 1959, for instance, stipulates as grounds for refusal of MLA so-called reservations with regard to political offenses, military offenses, or tax offenses. These have been incorporated into the German domestic law, the Act on Assistance in Criminal Matters.¹⁷ The Code of Criminal Procedure provides a subsidiary basis when obtaining evidence for a foreign country, for example, interviewing a witness (p. 593) for proceedings abroad (*locus regit actum*).¹⁸ If the assistance involves taking coercive measures, “dual criminality” is, in principle, required.¹⁹ This means that a witness will only be summoned for an interview if the criminal investigation of the respective offense is not only punishable in the requesting country—for instance, a fraudulent action must not only amount to fraud in the United States, but also in Germany. When it comes to executing a request, Germany, with its inquisitorial setup of authorities looking for incriminating and exonerating evidence, makes no distinction under procedural law as to whether the hearing of a witness is conducted for a foreign authority or in the context of a national criminal investigation.

The inquisitorial tradition also has consequences on outgoing requests. As the authority in charge is obligated to investigate “not only incriminating but also exonerating circumstances,” it must make use of MLATs on behalf of the defense.²⁰ In practice, however, the details of the complex German law for fact-finding, which maintains an inquisitorial approach and combines it with a commitment to “equality of arms,” often puts the defense on the back foot: the defense must submit a request to retrieve evidence from abroad to the court, which may decline the request if it can substantiate why it deems the evidence immaterial.²¹ German prosecution services may make use of MLATs in their own right.

Germany’s detailed laws and huge amount of case law on MLA is representative for continental Europe: With many states close to each other, domestic laws anticipate the need for MLA and clarify standard issues, as does the Swiss Criminal Procedure Code, which explicitly stipulates that the parties have, in general, a right to participate in witness interrogations, but this right may be curtailed when interviews take place abroad.²² Overall, states in Europe have closed ranks in cross-border prosecution of crimes.

2. United States

Common law jurisdictions have traditionally been more reluctant to get involved in cross-border activity, following the adage that “all crime is local.”²³ Before many parts of life became digitized, the actual physical territory on which an act took place or a piece of

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evidence was located clearly marked jurisdiction. Today, however, the realization (p. 594) that many crimes are transnational has led many countries to introduce forms of international cooperation.²⁴ The U.S. government has signed more than seventy mutual legal assistance treaties (MLATs). Nevertheless, a certain reservation against cross-border prosecution persists. It is only logical that U.S. federal courts developed an extraterritorial due process doctrine in criminal cases, which requires a sufficient nexus between the defendant and the United States for a case to be brought before its courts.²⁵ But if cases are heard before a court, MLATs generally provide for access to evidence (“outgoing requests”), as treaty arrangements obligate the competent “judicial authority” to handle “incoming requests.”²⁶ The treaties set international rules for the obligation to execute search warrants and take witness statements. In fact, the U.S. Congress has enacted a variety of measures to assist foreign law enforcement efforts, with the expectation of the United States receiving reciprocal treatment. Incoming requests for MLA are—in contrast to requests for extradition—normally not subject to the condition of dual criminality. The domestic laws governing the taking of evidence, however, offer some procedural protection for witnesses and suspects.²⁷

Regarding outgoing requests, if authorities bring cases in which evidence and potential witnesses are located overseas, the prosecution can make use of MLATs, but the defense faces difficulties. The compulsory process clause of the Sixth Amendment—which allows defendants in domestic cases to secure witnesses in their favor through the issuance of a court-ordered subpoena—does not include a right to secure testimony of a witness living in a foreign country.²⁸

Here, the adversarial structure of criminal investigations in common law jurisdictions gives an edge to the prosecution, since only government authorities can issue an MLAT-based request, not the defense.²⁹ This is, however, not an obligatory feature, as the first three MLATs signed by the United States apparently did include provisions granting access to defense counsel.³⁰

If only government agents—prosecutors and law enforcement agencies that investigate criminal conduct—have the power to trigger MLA, and the defense does not have access (p. 595) to evidence located abroad, the defense would be unfairly impaired. Such a grave imbalance in evidence gathering would never be tolerated at the domestic level; it is unclear why it should be tolerated in transnational evidence gathering.³¹

Federal courts have invoked their supervisory powers to order the DOJ to obtain evidence on behalf of defendants through MLAT procedural channels under Rule 15 of the Federal Rules of Criminal Procedure, which allows for a deposition of a witness instead of a witness’ oral testimony in exceptional circumstances.³² Thus today, defendants may petition a court with a “Rule 15” motion to direct the DOJ to request depositions of information in a foreign country,³³ or they can seek evidence from abroad directly through non-treaty-based letters rogatory. Choosing either option, the defendant faces various hurdles in obtaining exculpatory evidence. In fact, depositions of witnesses abroad pursuant to Rule 15 orders may be expressly contrary to MLATs.³⁴ Courts,

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however, appear to be quite hesitant to allow defendants' motions to obtain exonerating evidence abroad.³⁵

In cases in which requests for assistance are executed successfully, the United States, like all other countries, must ensure that information obtained abroad would also be admitted as evidence at home.³⁶ For instance, only if the taking of testimony in a foreign country follows the respective federal rules can it be presented before a federal court without further ado. Problems arise when domestic rules of procedure forbid a defendant's lawyer from engaging—or even being present—during the deposition of a witness conducted by a foreign authority. Federal rules aim at mitigating that problem, ensuring, for instance, that whenever a deposition is taken based on a Rule 15 motion, the defendant is not in custody and/or his attorney has the right to be present at the examination.³⁷ This upholds the “confrontation clause” as a reliability requirement.³⁸

3. Safeguarding Accuracy and Fairness of Fact-Finding

The examples of Germany and the United States illustrate that fact-finding by way of MLA, while quite distinct in operation, present similar problems: a quasi-international division of tasks in prosecuting crimes may impair safeguards that ensure accuracy and fairness at the domestic level. This problem is not solved at the international level; (p. 596) international treaties seem to be indifferent to consequences for reliability of evidence, as they prioritize efficient cooperation. Thus, the question arises whether counterbalancing measures should be adopted at the national level.

a. A Ubiquitous Problem ...

The capacity to obtain evidence abroad expands the information basis in a criminal trial and thus, in principle, strengthens the overall reliability of a fact-finding procedure. But risks are posed by, for instance, witness testimony that cannot be tested for its accuracy and authenticity because it has been obtained abroad. Indeed, if only the prosecution—and not the defense—can substantiate its story by witness testimony gathered outside the jurisdiction, the fact-finding appears unfair and unreliable. Furthermore, the growing networking of prosecution services based on MLATs and the establishment of close networks, especially in the European Union (e.g., the EU Judicial Network or Eurojust) substantially strengthens the prosecution.³⁹

When thinking about possible counterbalances for risks of accuracy and fairness of the fact-finding procedure in a particular criminal justice system, one must identify the real risks for that system. Sticking points are the obligations of judicial authorities put in charge of fact-finding, and thus usually empowered to issue a formal request for evidence obtainment abroad. If these authorities must look for incriminating *and* exonerating evidence, also in foreign jurisdictions, risk is low that MLA will distort fact-finding. If only prosecution services are involved that will not help the defendant to build his story; it may be necessary to see whether courts can be involved in evidence gathering, if

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evidence is located abroad, and the only means of obtaining it is via a government channel.

MLA fits as a natural part of the investigation in Continental European systems, but it is a more polarizing element in adversarial systems such as in the United States. However, the real world often looks different. In inquisitorial systems, the defense may also find itself in a weak position, as the example of Germany has shown. If the defense must substantiate a request for evidence taking abroad, but a court may decline such a request if it can argue that the evidence is either not material or “unobtainable” for the government using a standard of proof, then, in general, the prosecution is favored.⁴⁰ Therefore, the demand for a “transnational due process framework,” as proposed by L. Song Richardson for the United States,⁴¹ which would moderate inequality in cases in which evidence must be obtained abroad, appears to have potential for a valid application everywhere. This is because ubiquitously the use of MLA may impair instruments for safeguarding accuracy and fairness of fact-finding on the domestic level, namely, the (p. 597) answerability for the chain of custody and the accountability of government agents for evidence gathering in disciplinary proceedings or before a criminal court.

b. ... and a Ubiquitous Solution: Exclusionary Rules

Given that a “transnational due process framework” currently seems unrealistic, it is important to point out the last resort commonly available across jurisdictions for cases in which the use of evidence obtained abroad carries the risk of seriously affecting accuracy or fairness: the exclusion of evidence. Exclusionary rules can be found in all criminal justice systems, and in any event, the admission and ultimate use and evaluation of evidence is in the hands of the court or authority deciding the case. Thus, domestic exclusionary rules can be put to use to safeguard the reliability and fairness of transnational collection of evidence.

Today, in both inquisitorial and adversarial models, fact-finding is perceived as reliable and fair only if, at least in theory, the prosecution and defense have equal access to all material evidence and are afforded the opportunity to test it in court. Following these basic ideas, exclusionary rules might be used to omit evidence that could endanger the reliability or fairness of fact-finding. The use of such rules in the United States and Germany, however, indicates that courts are reluctant to utilize them, as they do not want to lose potentially relevant evidence.

For instance, in the United States, if MLATs grant only the prosecution access to evidence located abroad, the defendant could seek on due process grounds the exclusion of evidence obtained abroad by MLAT procedures.⁴² And although prosecutors do not have a blanket duty to search for exonerating evidence either domestically or abroad, if they hold information favorable to the defense they are required to share it.⁴³ This duty accords with the more general obligation of prosecutors to place their interest in gaining convictions secondary to ensuring the reliability and fairness of the criminal trial.⁴⁴ Even if courts and prosecutors equalize the parties’ access to evidence in these ways, however, other problems of fairness and equal access remain. United States’ courts treat unlawful

searches and seizures abroad differently from confessions obtained unlawfully abroad. Generally, the Fourth Amendment does not apply to searches and seizures abroad, so U.S. courts do not exclude evidence that was obtained outside U.S. territory by means that would violate U.S. constitutional law if domestic officials had seized it within U.S. borders.⁴⁵ By contrast, whether a confession that is coerced abroad (rather (p. 598) than simply taken in violation of *Miranda*) would be admissible against a defendant in a U.S. trial is uncertain. Coerced confessions from domestic interrogations are excluded under the due process “involuntary confession rule,” but whether the same would be true for a confession coerced abroad is unclear under U.S. law, especially if a foreign official is responsible for the coercion.⁴⁶ Evidence transfer raises the questions of evidence reliability, and fairness.

This is also true for Germany, where courts have evaluated the admissibility of unchallenged evidence⁴⁷ not with a view to its reliability, but primarily with a view to whether the parties to the German trial had a chance to challenge the evidence or not.⁴⁸ If foreign laws, that is, the rules set by the *requested state*, limit the confrontation of incriminating testimony, the evidence may be used, but the curtailment must be taken into consideration when assessing the value of the evidence. This onus, however, has proven to be a weak threshold. The dilemma of wanting to include potentially valuable information, despite the risks for reliability of fact-finding, became obvious in the post 9/11 *Motassadeq* case, in which German courts first admitted, then excluded, and finally partially admitted statements from U.S. intelligence officials to German authorities. The statements took the form of summaries of interrogations of three persons who were suspected of terrorist activities and were then held at unknown locations by U.S. authorities.⁴⁹

IV. New Approaches to Transnational Access to Evidence

States increasingly need to include information located abroad. For certain countries, MLA has grown into a modern international division of tasks in prosecuting crimes, but other countries are still operating under a very traditional cooperation. Both sets of countries struggle with flaws consequential to the origin of MLA, and antiquated ideas of sovereignty and transnational assistance. The logical step forward seems to be to introduce more adequate MLATs. In the light of such considerations the United States and the EU, for instance, signed a MLAT in 2003 (EU-U.S.-MLAT),⁵⁰ which entered (p. 599) into force in 2010. This cooperation, a result from a post-9/11 alliance to improve cooperation between EU Member States and the United States, pushes ahead. One prime example of new forms of cooperation is the introduction of so-called Joint Investigation Teams (JITs). Based on case-by-case agreements, authorities put together a team of agents from both countries.⁵¹ JITs enhance efficiencies in gathering evidence without the need for international requests for mutual legal assistance. But the question remains

whether such a transnational transfer of evidence can take place without the loss of the legitimacy, fairness, and reliability to the fact-finding procedure.

1. Reforming MLA ...

The reform of MLA has been at the heart of various legal acts adopted in the EU framework. Various conventions⁵² strive to make MLA more efficient, for instance, by providing a treaty-based foundation for the “spontaneous exchange of information” or for JITs in Europe and the use of evidence collected during their operations.⁵³ Furthermore, they involve Europol and Eurojust, the EU agencies for criminal justice cooperation in Europe.

Particular convention rules aim to resolve the problem of admissibility of foreign evidence by allowing, for instance, the use of the law of the *requesting state* during evidence collection in another EU Member State. According to the rules governing interrogations of witnesses by videoconference the judicial authority of the requested Member State shall summon the witness to appear according to its law, but “the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own law.”⁵⁴ The latter concession, however, is restricted to compliance with the fundamental principles of the law of the requested Member State.⁵⁵ Thus even modern MLATs still hold on to certain requirements that have been viewed as safeguards for legitimate transnational access to evidence, witnesses, and suspects, namely, the requirement of dual criminality or political offense and humanitarian provisos (*ordre public*).⁵⁶ Such limitations of cross-border activity cover sovereignty issues, but also safeguard individual interests—such as legal certainty regarding the exercise of state power. Hence the reforms inside the EU also show the limits of reorganizing traditional cooperation if states still retain conditions for fact-finding.⁵⁷

(p. 600) 2. ... or Replacing MLA?

A more radical step has been taken in the EU, with Member States partly abandoning the fierce political struggle over a possible shift of the *ius puniendi* from the state level to a supranational level.⁵⁸ European institutions and a majority of EU Member States are committed to the political agenda of establishing a European-wide area of freedom, security and justice. Subsequently, different initiatives have been adopted to partly replace MLA with mutual recognition of judicial orders issued by competent authorities of Member States. The legal basis of this restructuring of cross-border cooperation is Article 82 TFEU, which—among other things—foresees the establishment of minimum rules concerning evidence admissibility or concerning the rights of individuals in criminal procedures. The broad legislative mandate thus addresses reliability and fairness. But to spell out the general commitment in detailed legal acts has turned out to be difficult, as different stakeholders have discovered during different legislative procedures.

a. The European Evidence Order and the European Investigation Order

After years of intense debate, a framework decision on a European Evidence Order (EEO)⁵⁹ was adopted in 2008. It aimed for transnational access to documents, witnesses and suspect statements already taken, based on the principle of mutual recognition. If, for instance, a German court needs witness testimony documented by Polish prosecutors, it will issue an EEO and gain access to it easily and swiftly. Broadly speaking, the EEO wanted to enable competent authorities to reach over borders and to be granted what they need. With consideration to such a radical change in access to evidence, the scope of the EEO had been limited to access to objects, documents, and data already held by judicial authorities in other Member States.

This limitation, however, derailed the initiative. Some Member States feared that the EEO would lead to a further segmentation of cross-border cooperation in a Europe of a *géométrie variable*, that is, a differentiated integration that acknowledges that certain EU Member States may group together to pursue a given goal, while allowing those opposed to hold back. In 2010, seven EU Member States⁶⁰ put forward an initiative for a European Investigation Order (EIO). The Directive that introduced the EIO⁶¹ and effectively replaced the EEO was adopted in 2014. Today, when seeking evidence in another EU (p. 601) Member State, judicial authorities may issue an EIO and—based on the principle of mutual recognition—the competent agency in another state will take the necessary investigative measures. If, for instance, a German prosecutor needs the testimony of a witness living in Paris, she will ask her French counterpart to interrogate the witness and send the minutes.⁶² The goal is to make cooperation easier and faster with a request-system that is effectively automated.⁶³ In contrast to the EEO, however, the EIO does not allow judicial authorities to reach over the border and retrieve evidence.

Prior to the adoption of the EIO, lawyers had campaigned for defense rights to be better protected. In the end, however, the directive provided only very limited extra protection, as it contained very few rules that were weak by nature:⁶⁴ It entitles defendants, or lawyers acting on their behalf, to request an EIO to be issued—but only in line with national criminal procedures. In substance, EU law does not strengthen the defendant's position, but maintains the status quo. Nonetheless, EU Member States are required to at least install legal remedies flanking the right to request EIOs, and all persons concerned must be properly informed about these rights.

b. Mutual Recognition of Evidence?

Some see the “mutual recognition of evidence” as a logical corollary of a division of tasks in prosecuting crime in Europe. Others point out the risks it poses for fact-finding on the domestic level. The first proposal promoting the idea was put forward by the EU Commission in 2009.⁶⁵ The concept derived from the *principle of free movement*, which was developed in the early European Union (then European Community) to establish a single European market; it ensures that products legitimately produced in one EU country are also legal in any other EU country. Similarly, mutual recognition of evidence is based on the assumption that testimonial evidence legally produced in one EU Member

State may be used as testimony in any other EU Member State. For example, if Austrian prosecutors interrogated a suspect when his lawyer was present but unable to intervene, the testimony given could be used in a German court even if German law foresees defense participation in its Criminal Procedural Code.⁶⁶ But unlike with liquor, beer, or (p. 602) cheese,⁶⁷ the legitimacy gap—arising from reliability and fairness concerns—cannot be bridged by a legal fiction.

Meanwhile, however, the EU's policy agenda for evidence transfer in the so-called European Area of Freedom, Security and Justice appears to have changed. This is apparent, for instance, in the EU Member States' modifications⁶⁸ of the EU Commission's Proposal for the establishment of a European Public Prosecutor's Office (EPPO).⁶⁹ The European governments have discarded the vision of "one legal space" in favor of a concept of "European Delegated Prosecutors" who will act in their respective domestic jurisdiction and rely on EIO or MLA if evidence is needed from another country.⁷⁰ Early projects envisioned more ambitious instruments that set out a standard set of "core" evidence-gathering powers, applicable in transnational cases in all Member States, irrespective of their national rules, transferable throughout the EU as "European evidence."⁷¹

V. Relapses to Extrajudicial Ways?

The international community has come a long way in the transnational exchange of information—from eighteenth century espionage to a complex system of MLA handled by the judicial authorities. But this development is neither universal nor irrevocable. In many parts of the world, against the backdrop of extrajudicial cross-border cooperation, the rule of law has slowly colored transnational access to evidence in certain countries. But during this development, paralegal instruments have flanked mutual legal assistance in certain situations: The extrajudicial renditions for interrogation purposes⁷² (p. 603) between the United States and European countries and the establishment of "black site" prisons, where inmates were exposed to torture in order to gain information provide prominent recent examples.⁷³ Such cases, as horrible as they are, appear to be rather uncommon, rogue results.

Of more practical importance—and growing theoretical concern for the framework of transnational access to evidence—are phenomena in MLA, among them the Joint Investigation Teams that in a certain way manage to dismantle the strict and clear procedures of MLA. If, for instance, a JIT member learns about particular information during his deployment and uses it to look for evidence in his jurisdiction, he may never have to explain where he got the lead to start with. In line with this is the expansion of data sharing. Many databases not only serve criminal justice, but also cater to police and border controls and do not provide access to "real evidence" as witness testimony does; they merely provide information that may lead to evidence.

1. Data Sharing in Europe

EU Member States share data in Europol databases, the Schengen Information System (SIS),⁷⁴ and various specific databases. By doing so, they have access to information across borders without involving MLA procedures. The SIS, for instance, provides a broad spectrum of alerts on persons and objects. Another data-sharing instrument provides the Member States with the possibility to search each other's national DNA analysis files and automated dactyloscopic identification systems.⁷⁵ This search is carried out on a hit/no hit-basis, that is, the national authorities can automatically compare DNA profiles or fingerprints found at a crime scene with profiles held in the databases of other EU Member States. This system considerably speeds up existing procedures, enabling the respective national authority to determine whether information is available within the EU.⁷⁶ However, if matching data can be confirmed, the supply of further available data and other information is subject to MLATs.⁷⁷

The fact that states—including those in the broader European area, namely, the Council of Europe—wish to maintain certain limits even with digitalized evidence-transfer in (p. 604) sight is illustrated by the Cybercrime Convention of 23 November 2001. That Convention grants:

Trans-border access to stored computer data with consent or where publicly available: A Party may, without the authorization of another Party: (a) access publicly available (open source) stored computer data, regardless of where the data is located geographically; or (b) access or receive, through a computer system in its territory, stored computer data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system.⁷⁸

Thus, in Europe, at present, data sharing is not completely disconnected from MLA. But electronic information traffic has the potential to outgrow MLATs, especially if systems are developed into fully automated data exchanges, that have compatibility and interconnectivity with other IT systems.⁷⁹

2. Trans-Atlantic Data Sharing

One aspect of data sharing between EU and U.S. authorities that may provide leads to evidence⁸⁰ is the passenger name record (PNR) data exchange.⁸¹ The EU directive on the use of PNR data for the prevention, detection, investigation, and prosecution of terrorist offenses and serious crime (PNR Directive)⁸² obliges EU Member States to establish special entities—passenger information units (PIUs)—responsible for the collection, storage and processing of PNR data and to ensure that air carriers transfer PNR data⁸³ so that risk assessment can be carried out. The PIUs must report to national law enforcement authorities, Europol, other Member States, or third countries such as the United States.⁸⁴ Obviously, such information again constitutes a lead and not hard (p. 605) evidence. But the boundaries are unclear. To draw a line between mere leads and hard evidence is increasingly difficult when different tools are combined, as for instance

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at Europol's European Cybercrime Centre (EC3), where U.S. liaison officers go on cyber patrol with Europeans on JITs and gather information that leads them to hard evidence, while the legal basis is vague. Two bilateral agreements between Europol and the United States allow for the exchange of strategic, technical and operational data. The latter refers to the exchange of information that includes personal data.⁸⁵ Furthermore, Europol hosts liaison officers from various law enforcement agencies of the United States, such as the Drug Enforcement Agency, the FBI, and the New York Police Department. As a consequence, U.S. officials are granted access to information in the Europol databases and they are able to use the Europol secure communication network for the exchange of operational and strategic information and intelligence.

3. Data Sharing and Private Business

On top of government databases, authorities are—under certain conditions—granted access to data stored by private enterprises, especially social media and internet enterprises, such as Facebook, Google, or Microsoft. EU-legislation obligated private companies to collect data and make it available for law enforcement purposes. The first important piece of legislation, the so-called “Data Retention Directive,”⁸⁶ sought to retain traffic and location data held by telecommunication service providers. If necessary, authorities would have been able to request access to details such as IP addresses and time of use of every email, phone call, and text message, sent or received. In 2014, the European Court of Justice declared the Data Retention Directive invalid since it unjustifiably encroached upon fundamental rights, namely, the respect for private life and the protection of personal data.⁸⁷ A potential recast of the data retention directive at the EU level is currently under debate.

In other areas, bilateral agreements arrange for the collection and trans-Atlantic transmission of data, such as from financial messaging. An agreement obligates the Society for Worldwide Interbank Financial Telecommunications (SWIFT)—a cooperative society under Belgian law that provides the most regularly used service communication platform for the worldwide exchange of financial information among financial institutions—to send financial payment messages referring to financial transfers and related data stored in the territory of the European Union to the U.S. Treasury Department. (p. 606) The agreement adds that the processing of the data in the United States is exclusively for the purpose of the prevention, investigation, detection, or prosecution of terrorism or terrorist financing.⁸⁸ The U.S. Treasury Department enters the financial messaging data into the Terrorist Finance Trading Program and analyzes the data. In return, relevant information obtained through that Program is provided to the national police and security authorities of EU Member States, Europol, and Eurojust for law enforcement purposes.⁸⁹

The legal interests and legal protection of the different stakeholders in this area are not yet resolved. The impact on the right to privacy in such data sharing, in particular, has to be clarified.⁹⁰ A human right to privacy is acknowledged in Article 12 of the Universal Declaration of Human Rights⁹¹ and codified in Article 17 of the Covenant on Civil and Political Rights.⁹² As the individual's legal position is valid across borders, an

understanding has emerged since the beginnings of MLA until today: an international division of tasks in prosecuting crimes must not be to the detriment of a defendant or witness.⁹³ This understanding is threatened by the growing trend toward data sharing.

VI. Conclusion

Transnational access to evidence has grown from a lawless to a rather densely regulated area. In part, this evolution may have been a mere necessity with transnational evidence transfer gaining importance. In part, it pertains to the general development of holding state power accountable, even in international cooperation. While international law has traditionally been perceived as establishing rights and duties for states (p. 607) only, the legal position of individuals affected by transnational state cooperation is at the core of many debates.⁹⁴

Legal accountability creates a climate favorable for accurate and fair fact-finding, which is a prerequisite for the legitimacy of criminal justice. Since the times of police informers spying on citizens of foreign countries, the terms for transnational access to evidence have changed. Today judicial authorities are in charge. But at the same time, the basic dilemma at the heart of MLA cannot be avoided, namely, that criminal justice systems all strive for comprehensive fact-finding, but cannot enforce the legal standards that bind their search for truth at home. Thus their (own) legal standards tend to be compromised when material evidence can be obtained only with the assistance of foreign state authority.

Although this dilemma plays out differently in domestic judicial systems—as exemplified in this chapter by Germany and the United States, an inquisitorial system and an adversarial system—a common feature seems to be that the defense is disadvantaged by MLA. In certain situations, this may endanger accuracy and fairness of fact-finding. As the public prosecution authorities have driven cross-border cooperation, the interests of defendants have been taken into account only in recent decades.⁹⁵

It seems unclear whether states will take adequate steps to mitigate the flaws of transnational evidence transfer. The need for closer cooperation between states has triggered dynamics that produced ideas for a supranational framework or even a “global” evidence concept.⁹⁶ However, instead of addressing basic concerns for reliability and fairness in fact-finding, states may try to evade formal MLA and tend toward an exchange of leads instead of evidence, hoping for fewer legal strings. This seems to be a danger, especially regarding cyber space, where territoriality presents less of an issue and thus traditional concepts may not apply.

Looking ahead the crucial question appears to be whether we will see continued development to closer cooperation over—and juridification of—access to evidence, witnesses, and suspects. If so, the risks to the accuracy and fairness of fact-finding and eventually to the legitimacy of criminal justice could be addressed with a common transnational approach. But perhaps the pendulum will swing back and countries—

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confronted with worldwide terror networks or cyberattacks, and thus tempted to partake in informal information exchange—will simply revert to fewer legislative hurdles when seeking to prosecute crime across borders.

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⁽¹⁾ Sabine Gless, *Bird's-Eye View and Worm's-Eye View: Towards a Defendant-Based Approach in Transnational Criminal Law*, 6 Transnat'l Legal Theory 117 (2015).

⁽²⁾ See Frederick Mark Gedicks, *Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585 (2009).

⁽³⁾ David Whedbee, *The Faint Shadow of the Sixth Amendment: Substantial Imbalance in Evidence-Gathering Capacity Abroad Under the U.S.-P.R.C. Mutual Legal Assistance Agreement in Criminal Matters*, 12 Pac. Rim L. & Pol'y J. 561, 569 (2003).

(⁴) See U.N. Charter, Art. 2, para. 1.

(⁵) Sabine Gless, *Transnational Cooperation in Criminal Matters and the Guarantee of a Fair Trial: Approaches to a General Principle*, 9 Utrecht L. Rev. 90, 96–97 (2013).

(⁶) Christopher L. Blakesley & Otto Lagodny, *Finding Harmony Amidst Disagreement over Extradition, Jurisdiction, The Role of Human Rights and Issues of Extraterritoriality Under International Criminal Law*, 24 Vand. J. Transnat'l L. 44–45 (1991); Daniel Schaffner, *Das Individuum im internationalen Rechtshilferecht in Strafsachen—Die dritte Dimension bei schweizerischer Unterstützung fremder Strafverfahren* 2–3 (2013).

(⁷) Wolfgang Schomburg et al., *Einleitung*, in *Internationale Rechtshilfe in Strafsachen* no. 25

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(⁸) Peter Rackow & Cornelius Birr, *Recent Developments in Legal Assistance in Criminal Matters*, 2 Goettingen J. Int'l L. 1087, 1091–93 (2010).

(⁹) See, e.g., Art. 4 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 [E.U.-Convention of 2000], O.J.C 197, 12.07.2000, p. 1.

(¹⁰) A reminder of the historical background are reservations of political nature that require among other things an authorization by an appropriate official before a federal judge may issue such an order to execute a request from a foreign authority, see 18 U.S.C. § 3512 para 1.

(¹¹) Whedbee, *supra* note 3, at 563.

(¹²) See, e.g., Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 Va. J. Int'l L. 261 (2006).

(¹³) A terminological distinction between assistance based on MLATs and non-treaty assistance as MLA based on letters rogatory, used in the United States, is not used globally.

(¹⁴) See, e.g., Gless, *supra* note 5, at 96–97.

(¹⁵) *Entered into force* 12 June 1962, E.T.S. No. 030, <https://www.coe.int/en/web/conventions/full-list/conventions/treaty/030>.

(¹⁶) The *Schengen Acquis* as Referred to in Art. 1(2) of Council Decision 1999/435/EC of 20 May 1999, O.J. L 239, 22.09.2000, p. 19.

(¹⁷) Gesetz über die Internationale Rechtshilfe in Strafsachen [Federal Act on International Mutual Assistance in Criminal Matters], *translation at* https://www.gesetze-im-internet.de/englisch_irg/index.html (last visited November 14, 2018).

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(¹⁸) Strafprozessordnung [StPO] [German Code of Criminal Procedure], translation at https://www.gesetze-im-internet.de/englisch_stpo/index.html (last visited November 14, 2018).

(¹⁹) Schomburg et al., *supra* note 7, at no. 31.

(²⁰) Sabine Gless, *Sachverhaltsaufklärung durch Auslandszeugen*, in *Festschrift für Ulrich Eisenberg* 499–509 (Henning Ernst Müller et al. eds., 2009).

(²¹) Strafprozessordnung [StPO] § 244 para. 2 (“in order to establish the truth [the court] shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision”); for the English translation, *see* https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (last visited July 31, 2017).

(²²) Schweizerische Strafprozessordnung [StPO] [Swiss Criminal Procedure Code] Art. 148, translation at <https://www.admin.ch/opc/en/classified-compilation/20052319/index.html> (last visited November 14, 2018).

(²³) *Macleod v. Attorney-General (NSW)* [1891] AC 455, 458.

(²⁴) Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence*, 40(2) *Litigation* 59 (2014).

(²⁵) *See* Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 *Mich. L. Rev.* 507, 512, 516–17 (2016).

(²⁶) Federal Judicial Center, *International Litigation Guide Mutual Legal Assistance Treaties and Letters Rogatory: A Guide for Judges* 4 (2014), <https://www.fjc.gov/sites/default/files/2017/MLAT-LR-Guide-Funk-FJC-2014.pdf> (last visited November 14, 2018).

(²⁷) For instance, 28 U.S.C. § 1782 can be used to obtain assistance such as the (1) production of government or corporate records or (2) performance of witness interviews. Generally, almost all evidence requiring the use of compulsory process (subpoena or judicial order) may be sought in accordance with U.S. law. The Foreign Evidence Efficiency Act, 18 U.S.C. § 3512, was enacted to help streamline the MLAT process, making it easier for the United States to respond to requests.

(²⁸) U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor. ...”); Lyman, *supra* note 12, at 262.

(²⁹) Michael Abbell, *DOJ Renews Assault on Defendants’ Right to Use Treaties to Obtain Evidence from Abroad*, 21 *The Champion* (1997); L. Song Richardson, *Due Process for the Global Crime Age: A Proposal*, 41 *Cornell Int’l L.J.* 347–48 (2008).

(³⁰) Kendall & Funk, *supra* note 24.

(³¹) *See, e.g.*, Richardson, *supra* note 29, at 374.

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(³²) For further information, see **In re Sindona*, 450 F. Supp. 672 (S.D.N.Y. 1978) (noting the U.S.-Switzerland MLAT was silent on the rights of “private persons”). See also *United States v. Filippi*, 918 F.2d 244, 246–48 (1st Cir. 1990); *United States v. Des Marteau*, 162 F.R.D. 364, 372 n.5 (M.D. Fla. 1995); Michael Abbell, *Obtaining Evidence Abroad in Criminal Cases* § 2 no. 5. (2002).

(³³) *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992).

(³⁴) Whedbee, *supra* note 3, at 582–83.

(³⁵) *United States v. Mejia*, 448 F.3d 436, 444 (D.C. Cir. 2006).

(³⁶) See, e.g., **United States v. Salim*, 855 F.2d 944 (2d Cir. 1988).

(³⁷) See *18 U.S.C. § 3503 (2002).

(³⁸) *United States v. Sines*, 761 F.2d 1434, 1441 (1985); *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989).

(³⁹) Lyman, *supra* note 12, at 278; Ilias Anagnostopoulos, *Criminal Justice Cooperation in the European Union After the First Few “Steps”: A Defence View*, 15 ERA Forum 9 (2014).

(⁴⁰) Strafprozessordnung [StPO] § 244 para. 3 [German Criminal Procedure Code]. For further information, see Gless, *supra* note 20, at 499–509. For a discussion on the obligation to issue a subpoena outside the territorial jurisdiction, see Lyman, *supra* note 12, at 266.

(⁴¹) Richardson, *supra* note 29, at 374.

(⁴²) Lyman, *supra* note 12, at 290.

(⁴³) *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963); **Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. 419, 435, 437 (1995).

(⁴⁴) See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done”).

(⁴⁵) *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); Mark A. Godsey, *The New Frontier of Constitutional Confession Law—the International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 Geo. L.J. 851, 867–73 (2003).

(⁴⁶) Karen Nelson Moore, *Aliens and the Constitution*, 88 NYU L. Rev. 801, 830–33 (2013); Mark A. Godsey, *The New Frontier of Constitutional Confession Law—the International*

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Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad, 91 Geo. L.J. 851, 852-53 (2003).

(⁴⁷) For instance, witness testimony obtained abroad, without the possibility of the defense to ask questions or confront the witness.

(⁴⁸) Bundesgerichtshof [BGH] [Federal Court of Justice], BGHSt 55, 70.

(⁴⁹) Bundesgerichtshof [BGH] [Federal Court of Justice], BGHSt 51, 144.

(⁵⁰) Agreement on mutual legal assistance between the European Union and the United States of America [hereinafter EU-US-MLAT], O.J. L 181, 19.07.2003, p. 34.

(⁵¹) *See id.* Art. 5 EU-US-MLAT.

(⁵²) Schengen Convention, *supra* note 16; E.U.-Convention of 2000, *supra* note 9, with its additional Protocol, O.J. C 326, 21.11.2001, p. 1.

(⁵³) Nadine Zurkinden, *Joint Investigation Teams: Chancen und Grenzen von gemeinsamen Ermittlungsgruppen in der Schweiz, Europa und den USA* 175-77 (2013).

(⁵⁴) Arts. 10(4) and (5)(c) E.U. Convention of 2000, *supra* note 9.

(⁵⁵) *Id.* Art. 10(5)(a) E.U. Convention of 2000.

(⁵⁶) *See supra* Section II.2 and Section III.1. & 2.

(⁵⁷) Art. 7 E.U. Convention of 2000, *supra* note 9.

(⁵⁸) *See, e.g.*, the “*Lisbon judgment*” of the Bundesverfassungsgericht [BVerfG] [German Constitutional Court], 2 BvE 2/08, June 30, 2009, paras. 252-255, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html (Ger.); Petter Asp, *The Substantive Criminal Law Competence of the EU* 43-69 (2012).

(⁵⁹) The Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, O.J. L 350, 30.12.2008, p. 72.

(⁶⁰) Austria, Belgium, Bulgaria, Estonia, Slovenia, Spain, and Sweden.

(⁶¹) Directive 2014/41/EU of the European Parliament and of the Council of April 3, 2014 regarding the European Investigation Order, O.J. L 130, 01.05.2014, p. 1.

(⁶²) In fact, the receiving authority can only refuse to execute the order under certain circumstances, for example, if the request is against the country’s fundamental principles of law or harms national security interests.

(⁶³) Strict deadlines for gathering the evidence will be applied, Member States have a maximum of thirty days to decide to accept a request. If accepted, there is a ninety-day

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deadline to conduct the requested investigative measure. Any delay must be reported to the EU country issuing the investigation order.

⁽⁶⁴⁾ The issuing authorities must assess the necessity and proportionality of the investigative measure requested.

⁽⁶⁵⁾ *Green Paper on Obtaining Evidence In Criminal Matters from One Member State to Another and Securing Its Admissibility*, 11.1.2009, COM [2009] 624.

⁽⁶⁶⁾ For further elaboration, see, e.g., Silvia Allegrezza, *Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from One Member State to Another and Securing Its Admissibility*, 9 *Zeitschrift für Internationale Strafrechtsdogmatik* 569–79 (2010), http://zis-online.com/dat/artikel/2010_9_489.pdf (last visited November 14, 2018).

⁽⁶⁷⁾ See E.C.J. Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979], ECR 649; E.C.J. Case 178/84 *Commission v. Germany* [1987], ECR 1227; E.C.J. Case 286/86 *Ministère Public v. Deserbais* [1988], ECR 4907.

⁽⁶⁸⁾ See Council doc. 9941/17 of 30 June 2017; Valsamis Mitsilegas, *The European Public Prosecutor's Office Facing National Legal Diversity*, in *The European Public Prosecutor's Office and National Authorities* 11, 21 (Nowak ed., 2016).

⁽⁶⁹⁾ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17.7.2013, COM [2013] 0534 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013PC0534> (last visited Aug. 11, 2017).

⁽⁷⁰⁾ For critical assessment, see Ingeborg Zerbes, *Fragmentiertes Strafrecht, Beweiserhebung und Beweisverwertung nach dem Verordnungsentwurf der Europäischen Staatsanwaltschaft*, 10 *Zeitschrift für internationale Strafrechtsdogmatik* 145, 154 (2015), http://www.zis-online.com/dat/artikel/2015_3_907.pdf (last visited: Aug. 11, 2017).

⁽⁷¹⁾ John Spencer, *The Green Paper on Obtaining Evidence from One Member State to Another and Securing Its Admissibility: The Reaction of One British Lawyer*, 5 *Zeitschrift für internationale Strafrechtsdogmatik* 602–06 (2010), http://www.zis-online.com/dat/artikel/2010_9_492 (last visited November 14, 2018).

⁽⁷²⁾ Cf. C.o.E. Parliamentary Assembly, Committee on Legal Affairs and Human Rights, (Rapporteur: Dick Marty), Information Memorandum II, AS/Jur (2006) 03 rev, Jan. 22, 2006; C.o.E. Commissioner for Human Rights (Thomas Hammarberg), Memorandum from the Council of Europe Commissioner for Human Rights: Advancing Accountability in Respect of the CIA Black Site in Romania, CommDH (2012) 38, Dec. 18, 2012.

⁽⁷³⁾ See *Al Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R., July 24, 2014; *Husayn v. Poland*, App. No. 7511/13, Eur. Ct. H.R., July 24, 2014, www.un.org/docs/sc/committees/1267/1267mg.htm (last visited November 14, 2018).

⁽⁷⁴⁾ Paul de Hert & Serge Gutwirth, *Interoperability of Police Databases Within the EU: An Accountable Political Choice?* 30 (2006).

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⁽⁷⁵⁾ The Prüm Decision was initially launched to facilitate Schengen cooperation, but—mainly for political reasons—was not incorporated into the EU framework. For further details, see Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, O.J. L 210, 06.08.2008, p. 1.

⁽⁷⁶⁾ See also *id.*, Recitals 11, 12.

⁽⁷⁷⁾ For access to DNA and dactyloscopic data, see *id.*, arts. 2 and 8.

⁽⁷⁸⁾ Convention on Cybercrime, 23 Nov. 2001, E.T.S. 185, entered into force 1 July 2004, Art. 32, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf.

⁽⁷⁹⁾ European Comm'n, *Communication from the Commission to the European Parliament and the Council, Stronger and Smarter Information Systems for Borders and Security*, COM [2016] 205 final.

⁽⁸⁰⁾ PNR data consists of booking information provided at the time of booking and check-in to air carriers, such as dates of travel, contact details, meal choices, travel agent, means of payment, and baggage information.

⁽⁸¹⁾ Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, O.J. L. 215, 11.08.2012, p. 5.

⁽⁸²⁾ Directive (E.U.) 2016/681, O.J. L 119, 04.05.2016, p. 132. The Directive applies primarily to extra-EU flights. Member States can however decide to apply it also to intra-EU flights, or to selected intra-EU flights, subject to a notification in this respect to the Commission. Nearly all Member States already announced they will do so in view of the current security situation (see Council doc. no. 7829/16 ADD 1). Serious crime is defined by Article 3(9) which further refers to a list of offenses in Annex II of the Directive.

⁽⁸³⁾ See *id.* Annex I of Directive 2016/681.

⁽⁸⁴⁾ See *id.* Art. 6 of Directive 2016/681.

⁽⁸⁵⁾ The agreements are available at the Europol website: <https://www.europol.europa.eu/agreements/united-states-of-america> (last visited Jul. 31, 2017).

⁽⁸⁶⁾ Directive 2006/24/EC of the European Parliament and of the Council of March 15, 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, O.J. L 105, 13.04.2006, p. 54.

⁽⁸⁷⁾ E.C.J., Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others* [2014].

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⁽⁸⁸⁾ See Art. 1(a) of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, O.J. L. 195, 22.07.2010, p. 5.

⁽⁸⁹⁾ Art. 1(b) of the Agreement, *id.*

⁽⁹⁰⁾ See Anne Peters, *Surveillance Without Borders? The Unlawfulness of the NSA-Panopticon*, EJIL Talk! Blog of the European Journal of International Law 2013 (01.11), Parts 1 and 2), 1 and 4 November 2013, <https://www.ejiltalk.org/surveillance-without-borders-the-unlawfulness-of-the-nsa-panopticon-part-i/> (last visited November 14, 2018).

⁽⁹¹⁾ Universal Declaration of Human Rights, 10 Dec. 1948, U.N.G.A. Res. 217 A (III) (1948).

⁽⁹²⁾ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. and 1057 U.N.T.S. 407, *entered into force* 23 Mar. 1976 [the provisions of article 41 (Human Rights Committee) entered into force 28 Mar. 1979].

⁽⁹³⁾ Anne Peters & Sabine Gless, *Verwertungsverbot bei Verletzung der Pflicht zur Belehrung nach Art. 36 WÜK?*, 31 *Strafverteidiger* 369–377 (2011); Schomburg et al., *supra* note 7, at no. 11, with references to *LaGrand (Germany v. United States of America)* I.C.J. Rep. 2001, 466; International Criminal Tribunal for Rwanda (ICTR), Judgment, *Kayelesi* (ICTR-98-44-A-A), Appeals Chamber, 23.5.2005; *Soering v. The United Kingdom*, App. No. 14038/88, Eur. Ct. H.R., July 7, 1989; Bundesverfassungsgericht [BVerfG] [German Constitutional Court], Decision of 18.6.1997, no 2 BvR 483/95, 2501/95, 2990/95.

⁽⁹⁴⁾ See *e.g.*, Anne Peters, *Membership in the Global Constitutional Community*, in *The Constitutionalization of International Law* 153, 168–69 (Jan Klabbers et al. eds., 2009).

⁽⁹⁵⁾ Malin Thunberg Schunke, *Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions Within the EU*, 41–45 (2013).

⁽⁹⁶⁾ The idea of a pan-“European” evidence was put forward, for instance, by the E.U.-Commission for fraud prosecution, see Art. 9(2) E.C. Reg. 1073/99: “Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports.”

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