



PC-OC 77th Plenary Meeting

**Special Session to Celebrate the 60th Anniversary of the
European Convention on Mutual Legal Assistance in Criminal Matters –
CETS n° 030**

Strasbourg, 14 November 2019

Erik VERBERT

Overview

1. A Brief History of Mutual Legal Assistance in Criminal Matters
2. Towards the 1959 CETS n° 030 Council of Europe MLA

Convention

3. The Human Rights Perspective : the Case Law of the ECtHR
4. Current and Future Challenges : Dealing with Data & Privacy

1. A Brief History of Mutual Legal Assistance in Criminal Matters

‘From Extradition of Objects to Transnational Gathering of Evidence’

- “letters rogatory” : a mere *Annex of Extradition*
- One or a few articles in Bilateral Extradition Treaties (late 19th – early 20th Century)
- Same conditions and exceptions for extraditions (may) still apply

1. A Very Brief History ... - *continued*

- **Just like Extradition : Strictly Intergovernmental / Diplomatic Cooperation**
- **Disadvantages :**
 - A) Limited list of extraditable offences : ‘MLA’ is also limited to these offences ;**
 - B) Nationality Exception : no ‘MLA’ when a national is a suspect ?**
 - C) Execution solely dependent & in accordance with the Law of the requested State**
 - D) Slow**

2. Towards the 1959 Council of Europe MLA Convention

“The Declaration of Independence of Mutual Legal Assistance”

Explanatory Report : Even today an excellent Manual – esp. pages 1-2

- Origins : 1953, “ (...) the Committee of Ministers instructed the Secretariat General to convene a Committee of governmental experts to draft an extradition Convention (...)”
- The 1956 experts report : “So far no multilateral Convention on MLA has been drawn up.”
- September 1956 : widening of the terms of reference & drafting of MLA-Convention.
- “It was decided that such assistance should be *independent of extradition* in that should be granted *even in cases where extradition was refused.*”

2. Towards the 1959 Council of Europe MLA Convention - - *continued*

‘If the 1957 Extradition Convention is (the) Adam of international co-operation in criminal matters, then the 1959 MLA-Convention is (the) Eve’

Advantages :

- The first *Multilateral* MLA-Convention : One Instrument, Many Parties
- MLA is no longer “bound” by Extradition : conditions and exceptions are alleviated
- Towards Interstate and even Interjudicial cooperation (see 2nd. Add. Protocol, 2001)
- However : still a *potential* link with extradition in art. 5 : MLA for house searches and seizure may be conditional to double criminality and / or the extraditable offence threshold – see the *reservations* that most Parties have made.

3. The Human Rights Perspective : the Case Law of the ECtHR

- Source : relevant **case law summaries on PC-OC website**
 - The fast growing impact of fundamental rights on international cooperation = consequence of the diminishing intergovernmental character of int. coop.
 - About, in all, 20 judgments or decisions of the ECtHR that deal *directly* with MLA.
- Far less than extradition : MLA has a remote / indirect impact on the individual
Compared to Extradition
- Also some domestic cases with an impact on MLA, esp. re. art. 6 (e.g. on undercover ops.)
 - Roughly 3 groups of cases and issues :

1) On **the obligation to cooperate** : matters of (literally) life & death, also related to jurisdiction – **art. 2** (and art. 1)

2) Most cases : **on evidence** : admissibility, use or non-use of evidence obtained abroad & procedural issues (esp. service of documents & in absentia trials) – **art. 6**

3) Recently : on the **collection of electronic data in relation to privacy** – **art. 8**

3. The Human Rights Perspective : the Case Law of the ECtHR – – continued

The independence of MLA : The division between extradition / surrender under the EAW *versus* MLA : *Pirozzi v. Belgium*, 21055/11, 17 April 2018, §§19-20 & 49

- 1) The obligation to cooperate in order to investigate serious crime : *Rantsev v. Cyprus and Russia*, 25965/04, 7 January 2010 and *Güzelyürtlü and others v. Cyprus and Turkey*, 36925/07, 29 January 2019 (GC) – the *lack of* (adequate) cooperation creates a violation of art. 2 in these - murder - cases
- 2) Evidence issues : e.g. *Van Ingen v. Belgium*, 9987/03, 13 May 2008. A firefighter involved in trafficking of MDMA / XTC to the USA. Alleged difference between informally provided DEA reports (on undercover ops) and the original evidence, transmitted 1,5 years later, after the appeal trial. No violation art. 6 : unsubstantiated claim

3. The Human Rights Perspective : the Case Law of the ECtHR – – continued

Van Wezenbeek v. Belgium, 67496/10 & 52936/12, 23 May 2017 - aka 'Harry Potter' Belgian-Dutch undercover operation in large scale organized drug trafficking (inter alia 4.4 tons of MDMA / XTC seized in Sydney) – unable to question undercover agents 'live' during trial – no violation of art. 6, yet 4/3 divided court [Belgian-Dutch Netflix series *Undercover* is based upon the case]

*Subcategory : violation art. 6 *via art. 3, evidence obtained & used via torture abroad*

El Haski v. Belgium, 649/08, 25 September 2012 : extradition of a terrorist suspect to Morocco ; tried & convicted in Belgium earlier. Alleged use of testimonies obtained under torture in Morocco - via MLA : violation of art. 6. Compare : *Othman v. UK*, 8139/09, 12 January 2012, expulsion to Jordan - violation of art. 6 for *risk* of use of evidence obtained under torture in Jordan

3. The Human Rights Perspective : the Case Law of the ECtHR – – continued

* Subcategory : service of documents (summons) abroad & trial in absentia – inadequate cooperation to inform a suspect / defendant in another state may lead to in absentia trial & conviction, which may be contrary to art. 6 – e.g. *Somogyi v. Italy*, 67972/01, 18 May 2004, violation (§§ 70-) ; *Zhukovskiy v. Ukraine*, 31240/03, 3 March 2011 (§§ 45-46),

3) Electronic Evidence & Privacy : see 4

4. Current & Future Challenges : Dealing with Data & Privacy

- Kim DOTCOM case : USA requested extradition + MLA from New Zealand. Still going on since 2012 (!) US indicted Dotcom, founder and CEO of online file hosting and sharing service MegaUpload for massive copyright violations
- 20 January 2012 : raid on Dotcom's mansion for arrests & search + seizure of computers & electronic devices, in all 150 terabyte of data was shipped to the FBI
- High Court [2012] NZHC 1494, 28 June 2012 found the house search & seizures warrant on the basis of the US MLAR too broad – “general warrants” NZ should have allowed for a *contradictory “on- and offsite sorting process”* in collaboration w. the FBI *before* transmitting all the data that included unrelated private information
- Judgment was later – partially - *overruled* by Court of Appeal [2014] NZCA 19, 19 Feb 2013. This decision : confirmed by NZ Supreme Court [2014] NZSC 199, 23 December 2014 – <https://www.courtsofnz.govt.nz/>

4. Current & Future Challenges : Dealing with Data & Privacy – continued

ECtHR *Benedik v. Slovenia*, 62357/14, 24 April 2018 : in a *domestic* case, the Slovenian police - *without a court order* - requested and obtained user data from a Slovenian internet service provider. The suspect was charged w. distributing child pornography.

Violation of art. 8 given the absence of proper court order as required by Slovenian law – contrary to point of view of Constitutional Court's position re. "presumption of applicant's waiver of legitimate expectation of privacy" in this case.

ECtHR *Visy v. Slovenia*, 70288/13, 16 October 2018 (def.) Austria requested MLA from Slovakia. Electronic data, incl. privileged lawyer-client communication.

1st seizure without a proper judicial (court) order – unconstitutional : all electronic data / devices returned

2nd seizure to 'repair' the first seizure : found in violation with art. 8.

4. Current & Future Challenges : Dealing with Data & Privacy – continued

- The future will certainly see increasing legal challenges – up to the ECtHR – re. mass collection of electronic data in the light of privacy.
- The (initial) NZ Dotcom ruling may offer a legal and practical solution by assuring an “on- and offsite sorting process” before the actual transmission of the data.

QUESTIONS ?

THANK YOU FOR YOUR
ATTENTION