

THEMIS Competition 2016 – Semi Final A

International Cooperation in Criminal Matters

SMUGGLING IN HUMAN BEINGS

Coordination – Cooperation – Communication

Austria – Hungary – Bulgaria

A Real-Life Case at the Heart of Europe

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1. Introduction

The current global migration crisis faces the European Union with an unparalleled humanitarian catastrophe. Throughout the year 2015, “[m]ore than one million migrants were smuggled into Europe [...]. This figure represents a 500 per cent increase over 2014, with 4.500 migrants reported to have died in 2015.”¹ Out of these 4.500 victims, 71 deceased refugees were found in the morning of 27 August 2015 on the motorway A4 in the Austrian village of Parndorf.

At 10:50 a.m. CET, two Austrian policemen were on duty on the A4 motorway. They saw a dilapidated white Volvo van, which was parking on the emergency lane. As the vehicle appeared suspicious to them, they stopped to inspect it. When they opened the back door, they discovered an – at first sight – undefinable, yet certainly high number of people who had passed away. It was instantly clear to the policemen that they were confronted with a case of human smuggling².

The Austrian authorities immediately started to investigate, as the case could preliminarily be subsumed under offences punishable under Austrian criminal law – which is the national prerequisite for opening up an investigation procedure –, namely the offences of murder (Art 75 of the *Austrian Criminal Code*, hereinafter, ATCC³), wilful endangering of the public resulting in death (Art 176 ATCC) and human smuggling (Art 114 *Austrian Aliens' Police Act*⁴).

After one month of investigation, the following facts became evident: Suspect A., a Bulgarian citizen, bought a white Volvo van including a cooling unit in Budapest for the purpose of illegally smuggling third country nationals from a Hungarian province near the Serbian-Hungarian border via Austria to – most certainly – Germany. Suspect B., an Afghan citizen, and suspect C., a Bulgarian citizen, were entrusted with the organisation of the smuggling. They contacted the migrants, recruited drivers for the van and an accompanying car and arranged for loading the 71 refugees into the van. The Bulgarian suspect D. offered to drive the van, whereas his compatriot E. agreed to steer the accompanying car. However, due to wrong testimonies of suspect A., which he had given in order to divert attention from his accomplice D., F., another Bulgarian citizen, was falsely suspected of having driven the van in the beginning of the pre-trial procedure. When B., C., D. and E. locked the loading area, which measured a mere 14 m², the vehicle was hermetically sealed. As a result, the refugees died from suffocation on the smuggling route.

Due to the suspects' different nationalities as well as the smuggling route including at least two countries, it soon became evident that this case held complicated issues with regard to

1 Eurojust, News and Announcements: Eurojust Tactical Meeting on Illegal Immigrant Smuggling, 8/2/2016.

2 In the terminology of the European Commission, “[t]he crime of human smuggling must not be mistaken with human trafficking: ‘Trafficking in human beings differs from human smuggling (facilitated migration) because it involves the use of force and involves exploitation [...]’” cf. European Commission, COM (2012) 286, 2.

3 BGBl. No. 60/1974.

4 BGBl. I No. 100/2005.

international competence that had to be solved.

2. Conflicts of Jurisdiction and the *Ne Bis in Idem* Principle⁵

After the discovery of the van on the Austrian motorway, the Austrian criminal police reported the case to their Hungarian colleagues and informed them about the fact that they had found the licence of the vehicle, which named A., a Bulgarian citizen and the first suspect, as the owner of the van. As the facts could be subsumed under offences defined by the *Hungarian Criminal Code* as well, a Hungarian investigation procedure was opened parallelly to the Austrian one, which led to a possible conflict of jurisdiction.

Generally, a conflict of jurisdiction concerns criminal proceedings against the same person and for the same criminal acts.⁶ These cases may lead to a *ne bis in idem* situation – an issue that was outlined by the leading prosecutor of the competent Austrian public prosecution unit (hereinafter, PPU) Eisenstadt/Austria at a bilateral meeting in Kecskemét/Hungary on 2 September 2015, who therefore suggested cooperation at the highest professional level.

A positive conflict of jurisdiction is assumed in a situation, where two or more countries have jurisdiction⁷ to prosecute, irrespective of whether the different national authorities are in actual disagreement.⁸ The detection of parallel proceedings is crucial to ensure a sensible decision on which jurisdiction should prosecute and a coordinated transfer of proceedings so that a *ne bis in idem* situation⁹ can eventually be avoided.

The most relevant EU legislation on conflicts of jurisdiction is the *Framework Decision 2009/948/JHA of 30 November 2009 on the Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings* (hereinafter, FD 2009/948). Art 5 FD 2009/948 obliges the competent authorities of a Member State which assume that parallel proceedings are being conducted to contact the competent authority of the other Member State.¹⁰ Usually, parallel proceedings are, as in the present example, identified via police cooperation or when a competent authority of a Member State receives a mutual legal assistance (hereinafter, MLA) request concerning a criminal case which it investigates itself. If performed in a coordinated way, parallel proceedings are considered beneficial in combating crime, as they enable prosecutors to exchange information and facilitate subsequent decisions on which jurisdiction should prosecute¹¹.

5 cf. Art 54 CISA; Art 4 Protocol No. 7 to the ECHR.

6 cf. *Eurojust*, Eurojust News Issue No. 14, 2.

7 The term “jurisdiction” refers to “a government’s general power to exercise authority over all persons and things within its territory” cf. *Black’s Law Dictionary*⁸, 2004, as cited in *Eurojust*, Eurojust News Issue No. 14, 2.

8 *Eurojust*, Eurojust News, Issue No. 14, 2.

9 *Eurojust*, Eurojust News, Issue No. 14, 1.

10 *Eurojust*, Eurojust News, Issue No. 14, 3.

11 *Eurojust*, Eurojust News, Issue No. 14, 4.

Apart from the above-mentioned Framework Decision, the *ne bis in idem* principle is addressed in many national, European and international legal instruments. Within the European Union's Area of Freedom, Security and Justice, the main legal sources are Arts 54 to 58 of the *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders* (hereinafter, CISA) and Art 50 of the *Charter of Fundamental Rights of the European Union* (hereinafter, CFREU)¹². According to Art 54 CISA¹³, “[a] person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts [...]”. Art 50 CFREU states that, “[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted [...]”. Moreover, the principle is also included as a ground for refusing the initiation or maintenance of (further) proceedings in a large number of other EU instruments.

In the present case, it soon became evident that the investigation of the time and place of the immigrants' death was the central question to be answered in order to prevent a *ne bis in idem* situation. The investigating authorities of the countries involved consented that the country with the closer link to the case, namely the one where the immigrants had died, should eventually take over the entire proceedings. Until then, however, it was agreed that the proceedings should be carried on parallelly on the premise of the highest degree of cooperation.

The following chapters shed light on how the Austrian investigating authorities enacted the agreed procedure. At the beginning of each chapter, the relevant international sources of law¹⁴ are presented. Subsequently, the practical application of selected means of international cooperation, which were chosen by the Austrian investigating authorities in order to solve the criminal case as well as the conflict of jurisdiction, is demonstrated, namely the European Arrest Warrant (hereinafter, EAW), MLA requests and the involvement of Eurojust.

3. Selected Means of International Cooperation

3.1. European Arrest Warrants

The first contact between the Austrian and the Hungarian authorities took place in the early afternoon on 27 August 2015. The road charge system on the Hungarian motorway revealed that the

12 For the relevant case law cf. *ECJ, C 617/10 Aklagare vs Hans Akerberg Fransson* [2013]; *ECHR, C 6/8/1976 Engel et al vs The Netherlands* [1976]; *ECHR, C 50178/99 Nikitin vs Russia* [2004].

13 With regard to the interpretation of Art 54 CISA cf. *ECJ, C 297/07 Klaus Bourquain* [2008].

14 In order to ensure comprehensibility to a non-Austrian audience, this paper focusses on the cited international legal sources rather than the Austrian provisions implementing them. This approach seems reasonable, as the wording of the national and the underlying international provisions correspond to a high degree.

journey of suspect A.'s van had originated in Kecskemét/Hungary near the Serbian-Hungarian border at around 3:00 a.m. on 26 August 2015. In the course of the same day, the Austrian criminal police found out the names of four more suspects via Europol, namely of the Afghan citizen B. and the Bulgarian citizens C., D. and E., who were associated with the facts. Through the assistance of Europol, these facts were communicated to the Hungarian and Bulgarian criminal police.

In the evening of 27 August 2015, the Austrian investigating authorities were informed by phone by their Hungarian colleagues that A., B., C., D. and E. had been detained in Hungary. A., who had already been questioned, had accused a further Bulgarian citizen, F., whose location was yet unknown, of being involved in the case. The callers emphasised the fact that according to Hungarian law, the detained suspects would have to be released, unless the Austrian prosecution transferred respective EAWs providing for their arrest and extradition within one (!) hour.

The main legal source for issuing a EAW, which the competent Austrian investigating authority, namely the PPU Eisenstadt/Austria, had to apply, is the *Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedure between Member States* (hereinafter, FD EAW).

3.1.1. General Provisions

Art 1 (1) FD EAW defines the EAW as “*a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.*” According to Art 2 (1) FD EAW a EAW “*may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.*” Art 2 (2) provides a list of offences, which shall, “*without verification of the double criminality of the act, give rise to surrender*” pursuant to a EAW, provided that “*they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years [...].*” Under Austrian national law, the facts of the case could be subsumed under the following offences listed in Art 2 (2) FD EAW: (1) participation in a criminal organisation, (2) facilitation of unauthorised entry and (3) murder. Hence, the FD EAW was applicable, which is why the Austrian competent prosecutor issued a EAW indicating list offences for each requested suspect using the official forms provided for in the annex of the FD EAW.

3.1.2. Requirements for the Content of a EAW

Art 8 (1) FD EAW stipulates the requests for the content of a EAW. Special attention needs

to be paid to the requirement defined by subpara c of this Article, whereupon evidence of – in the present case – an arrest warrant within the scope of Arts 1 and 2 FD EAW has to be contained within the EAW. This meant that the Austrian prosecutor not only had to issue a EAW, but also an arrest warrant under Austrian national law, which in turn requires court approval. Due to the tight time frame of only one hour, an Austrian national provision allowing for this approval to be given orally in urgent circumstances¹⁵ was applied. The Austrian prosecutor received the written engrossment of the court approval in the morning of 28 August 2015.

From a linguistic point of view, Art 8 (2) FD EAW provides for the translation of the EAWs into (one of) the official language(s) of the executing state, unless a Member State accepts “*a translation in one or more other official languages of the Institutions of the European Communities*” by declaration deposited with the General Secretariat of the Council.

3.1.3. Procedure Determined by the FD EAW

In terms of competence, Art 6 FD EAW refers to the respective national provisions naming the judicial authority competent to issue or execute a EAW. By application of the Judicial Atlas¹⁶ provided online by the European Judicial Network (hereinafter, EJN), a network of national contact points for the facilitation of judicial cooperation in criminal matters created by the Council of the European Union,¹⁷ it was easy to find out for the Austrian prosecutor that the EAW concerning the suspects detained in Hungary had to be addressed to the Hungarian Ministry of Justice. The EAW requested by Bulgaria needed to be sent to the Bulgarian district court in Montana.

According to Art 9 (1) FD EAW, EAWs may be directly transmitted to the executing judicial authority “*when the location of the requested person is known*”. Art 9 (2) and (3) FD EAW provide that “[*t*]he issuing judicial authority may [...] decide to issue an alert for the requested person in the Schengen Information System” (SIS) in accordance with the respective provisions of CISA, which is equivalent to a EAW accompanied by the information set out in Art 8 (1) FD EAW.

Art 10 (4) FD EAW stipulates that “[*t*]he issuing judicial authority may forward the EAW by any secure means capable of producing written records under conditions allowing the executing Member to establish its authenticity.” Art 10 (5) FD EAW provides for the direct contact between the judicial authorities – where appropriate via the central national authorities – in case of difficulties concerning the transmission or the authenticity of any document needed for the execution of a EAW. Art 10 (5) FD EAW can be read in conjunction with the Preliminary Notes of

15 cf. Art 102 (1) ATCCP.

16 cf. <http://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry.aspx?Type=2> (18/3/2016).

17 Created through *Joint Action of 29 June 1998 Adopted by the Council on the basis of Article K.3 of the Treaty of the European Union on the Creation of a European Judicial Network Adopted by the Council*, replaced by CD 2008/976/JHA.

the Member States to the FD EAW, stating that the instrument of EAWs is based on a high level of mutual confidence.¹⁸

With regard to the time limits set for the transmission of EAWs in cases where a requested person has already been detained in a Member State, the FD EAW does not provide for a unified way of proceeding. Determining the time frames for the transmission of EAW in such cases rather depends on the respective national provisions of the Member States.¹⁹

3.1.4. Issuing the EAWs

In the present case, the main challenge the issuing Austrian judicial authority was faced with was the very tight time frame of one hour determined by the Hungarian authorities for the transmission of the EAWs. However, the fact that the Austrian prosecutor already knew the Hungarian judicial authority competent for the execution of the EAWs concerning the suspects A., B., C., D. and E., facilitated the further course of action to be taken. It soon turned out that the set deadline could not be met to the extent that the information required could be sent in written form. Hence, by application of Art 10 (5) FD EAW, the Austrian prosecutor directly contacted the Hungarian executing judicial authority and orally transmitted the information required by Art 8 (1) FD EAW. In order to prove that the requirement set out by Art 8 (1) (c) FD EAW, namely the evidence of the issue of a national arrest warrant approved by court, was fulfilled, the competent Austrian judge confirmed the respective approval by phone to the competent Hungarian judicial authority. It was agreed that the oral information was sufficient for the suspects to be further detained in Hungary unless the respective EAWs including all the relevant information was transmitted in written form as soon as possible. Within a couple of hours, the Austrian prosecutor complied with this agreement, not only sending written EAWs fulfilling the requirements set out by Art 8 (1) FD EAW via fax as a secure means of transfer as required by Art 10 (4) FD EAW, but also issuing respective alerts in the SIS according to Art 9 (2), (3) FD EAW in the course of 28 August 2015. As the Hungarian declaration to Art 8 (2) FD EAW allows for the transmission of EAWs in German, the EAWs were not translated.

Regarding suspect F., whose location had not yet been discovered, the prosecutor also issued a EAW and an alert in the SIS. Due to this alert, the SIRENE-Bureau of Bulgaria²⁰ informed its Austrian counterpart of the detention of suspect F. in Bulgaria via fax on the 31 August 2015. The information was transferred to the Austrian judicial authorities via Eurojust. Similarly to the

18 cf. para 10 of the Preliminary Notes to the FD EAW.

19 cf. *Council of the European Union*, European Handbook on how to Issue a European Arrest Warrant.

20 In the course of establishing the Schengen Information System (SIS) each Member State created an authority ensuring the exchange of information, i.e. a SIRENE Bureau, cf. List of N.SIS II.

Hungarian authorities, the Bulgarian senders emphasised the time frame to be maintained for the transmission of the EAW which was determined with 24 hours. The Austrian prosecutor succeeded in adhering to this deadline. However, contrary to their Hungarian colleagues, the Bulgarian judicial authorities could not accept the German version of the EAW due to a deviating declaration of Bulgaria on Art 8 (2) FD EAW. As it was not possible to send a Bulgarian translation of the EAW within the pre-defined time frame, the competent Austrian and Bulgarian judicial authorities – again based on Art 10 (5) FD EAW – agreed on a later transmission of the required translation.

3.1.5. Executing the EAWs

Executing the EAWs, both Hungary and Bulgaria arrested the suspects for surrender purposes by application of Art 12 FD EAW, whereupon they had to decide upon the question of keeping the suspects arrested on the basis of their national provisions.

With regard to the future surrender of suspect F., who was arrested in Bulgaria, the Bulgarian authorities demanded, by application of Art 5 (3) FD EAW, a guarantee to be given by Austria, whereupon the surrender of F. as a Bulgarian resident should be subject to the condition that he will, after being heard, be returned to Bulgaria in order to serve the custodial sentence or detention order passed against him in Austria. The Austrian court issued a respective guarantee including a Bulgarian translation. However, a surrender of F. has eventually never taken place, as it turned out in the course of the further proceedings that F. had wrongly been accused by his co-perpetrators. For that reason, the EAW was instantly withdrawn, of which step the Bulgarian judicial authorities were immediately informed. In order to accelerate the proceedings, the Austrian and Hungarian SIRENE-Bureaus transmitted this information to their Bulgarian counterpart. Again, a written confirmation of the withdrawal translated into Bulgarian was submitted later on.

In relation to Hungary, the surrender of the arrested suspects was not executed for another reason: As demonstrated below (chapter 4), the proceedings were finally transferred to Hungary, so that the EAWs for the remaining suspects were also withdrawn before their surrender.

3.2. Requests for Mutual Legal Assistance

After having been arrested only hours after the discovery of the victims on 27 August 2015, the suspects A., B., C., D. and E. were immediately questioned by the Hungarian criminal police officers. The (inconclusive) outcome of the questioning was reported to the Austrian criminal police officers in the course of a meeting of representatives of both national police authorities in Budapest on 29 August 2015. Apart from mutual updates on the first investigation results, the meeting also served the participants to agree upon unreserved collaboration on the case – which was

unanimously considered a priority. Upon request of the Austrian representatives, the Hungarian investigation authorities consented to the presence of the competent Austrian investigating authorities during prospective questionings of the arrested suspects A., B., C., D. and E. in Hungary. Back in Austria, the Austrian criminal police officers hence asked the responsible prosecutor to submit a corresponding MLA request to Hungary.

Similarly, after the notification of 31 August 2015 about F. being arrested in Bulgaria, the Austrian criminal police suggested a MLA request concerning the questioning of this suspect as well. In addition, F.'s property should be searched and seized. Moreover, the transmission of police intelligence evidence was proposed. However, it turned out in the course of the investigations, that F. might have been falsely accused by A. In order to clarify the facts, the Austrian criminal police additionally suggested a request for the collection of molecular material of F. for the purpose of comparing it to the DNA-traces found in the van. As they also had specific reasons to believe that D.'s brother, a Bulgarian resident, was able to give important information about the organisational background of the facts, they suggested the hearing of this witness by means of MLA.

Requesting MLA from the foreign authorities, the Austrian prosecutor had to comply with the *European Convention on Mutual Assistance in Criminal Matters of the Council of Europe of 1959* (hereinafter, Conv 1959) as amended by its *Additional Protocol of 1978* as the main legal sources for the MLA requests addressed to Hungary and Bulgaria. In addition, several Conventions ratified on the level of the European Union, namely the CISA and the *Convention on Mutual Assistance in Criminal Matters between Member States* (hereinafter, EU-MLA Conv 2000) as amended by its *Protocol of 2001* (hereinafter, Prot EU-MLA Conv 2000) have to be applied, as they supplement the provisions and facilitate the application of the before-mentioned Treaties.²¹ None of the Treaties concluded on the level of the European Union affect the application of (more favourable) provisions in bilateral or multilateral agreements between Member States in the field of mutual assistance in criminal matters²².

In relation to Hungary, the Austrian authorities requesting the questioning of the suspects additionally had to keep to the provisions of the bilateral *Treaty between the Republic of Austria and the Republic of Hungary*²³ in 1994 (hereinafter, Austro-Hungarian Treaty) to supplement the provisions and facilitate the enforcement of the EU-MLA Conv 2000 as amended by the Prot EU-MLA Conv 2000.

In view of potential conflicts between the various applicable sources of law, Art 26 Conv 1959 provides that subject to the provisions of its Art 15 (7) concerning the transmission of MLA

21 cf. Art 1 EU-MLA Conv 2000.

22 cf. Art 48 (2) CISA, Art 1 (2) EU-MLA Conv 2000.

23 BGBl. No. 801/1994.

requests and its Art 16 (3) concerning the language of a request, it shall supersede the provisions of any other bi- or multilateral Treaty concluded between its contracting parties.

3.2.1. General Provisions

Defining the field of application of the Conv 1959, Art 1 (1) Conv 1959 provides that the Contracting Parties shall “*afford each other [...] the widest measure of mutual assistance in proceedings in respect of offences the punishment of which [...] falls within the jurisdiction of the judicial authorities of the requesting Party.*” As the facts of the case could be subsumed under several offences of the ACC (see above), the prerequisites provided for in Art 1 (1) Conv 1959 were fulfilled. By definition, Art 1 (2) Conv 1959, which states that the Conv 1959 “*does not apply to arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law*”, did not result in the inapplicability of the Conv 1959. In order to prove that the cited prerequisites were met and allow the addressees to examine the requirements themselves, the respective Arts of the ATCC were annexed to the MLA requests sent to Hungary and Bulgaria.

Art 2 Conv 1959 infringes the scope of application of the Conv 1959 by defining offences allowing a requested Party to refuse assistance. The Prot Conv 1959 (Arts 1 to 3), the CISA (Arts 49 and 50), the EU-MLA Conv 2000 (Art 3) as well as the above-mentioned Austro-Hungarian Treaty (Arts I to III) all provide for the widening of the scope of application of mutual assistance in criminal law set by Art 2 of the Conv 1959, in particular with regard to fiscal offences and proceedings by the administrative authorities in respect of acts which are punishable. However, as the offences of the case are within the field of application of Art 2 Conv 1959 anyway, it was not necessary for the responsible Austrian prosecutor to further deal with this question, which is why this subject shall not be dwelled on any further in this paper either. It was important to the prosecutors, by contrast, to find out whether the offences were punishable under Hungarian law as Hungary, by reservation on Art 2 Conv 1959, reserved the right to afford assistance only in procedures instituted in respect of such offences which are also punishable under Hungarian law. Hence, one of the first steps was to contact the Austrian Ministry of Justice, which confirmed that the offences were punishable in Hungary and provided the English and German translations of the respective national Hungarian provisions.

3.2.2. Content and Execution of MLA Requests

According to Art 3 (1) Conv 1959 the requested Party (here: Hungary and Bulgaria) shall execute MLA requests relating to a criminal matter addressed by the judicial authorities of the requesting Party (here: Austria) in the manner provided for by its national law for the purpose of

procuring evidence (such as the questioning of suspects and witnesses) or transmitting articles producing evidence (such as collected molecular material), records and documents (such as police intelligence evidence). According to Art 3 (3) Conv 1959 the requested Party may transmit certified (photostat) copies of records or documents unless the requesting Party demands the transmission of the original versions. Art 4 (1) EU-MLA Conv 2000 supplements that unless regulated otherwise “*the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, [...] provided that [...] [they] are not contrary to the fundamental principles of law in the requested Member State.*” In order to enable Hungary and Bulgaria to comply with the Austrian procedural specifications of the *Austrian Code of Criminal Procedure* (hereinafter, ATCCP)²⁴, the latter were annexed to all MLA requests. In accordance with Art 7 EU-MLA Conv 2000, the MLA requests were sent in written form so that the receiving authorities could establish authenticity.

The request of certain specific forms of MLA required the consideration of some particularities:

Questioning the Suspects

As stipulated in Art 4 Conv 1959, the requested Party shall name the date and place of the execution of the MLA requests upon request. Officials and interested persons may be present if the requested Party consents. According to Art V (1) of the Austro-Hungarian Treaty these officials even have the right to ask additional questions and propose further investigation measures.

When requesting the questioning of the suspects from Hungary and Bulgaria in presence of the Austrian investigating authorities, the Austrian prosecutor explicitly pointed out the interest of the Austrian investigators to attend the questioning. For practical reasons, the Austrian prosecutor mentioned by name the criminal police officers and prosecutors who should be present at the questioning and added their phone numbers to facilitate the scheduling.

Search and Seizure

When requesting the search and seizure of the property of the suspect F. from Bulgaria, the Austrian prosecutor had to consider Art 5 (1) Conv 1959, which provides that any Contracting Party may reserve the right to make the execution of letters rogatory for search or seizure of property dependent on one or more of three conditions, which are specified in Art 50 CISA. According to Art 5 (2) Conv 1959, any other Party may apply reciprocity if such a declaration is made by a Contracting state.

When ratifying the Conv 1959, Bulgaria declared that it reserves the right to execute MLA requests for search or seizure of property only (a) if the offence motivating the letters rogatory is

24 BGBl. No. 631/1975.

punishable under both the law of the requesting and the requested Party and (c) if execution of the letters rogatory is consistent with the law of the requested Party. Hence, it was important to find out whether the facts of the case could be subsumed under the *Bulgarian Criminal Code* and whether Bulgarian procedural law provided for the requested means of investigation (both of which were affirmed). Again, the Austrian Ministry of Justice helped to verify the conditions and made available the respective Bulgarian provisions as well as their translation to the PPU Eisenstadt.

Police Intelligence Evidence / Molecular Material

When requesting and subsequently receiving police intelligence evidence, the Austrian authorities had to respect Art 23 EU-MLA Conv 2000, which – in order to protect personal data transferred due to a MLA request – names (related) proceedings, the consent of the executing Party or danger to the public as alternative conditions allowing for the use of these data.

3.2.3. Procedure

Art 14 Conv 1959 stipulates the formal requirements for MLA requests. In accordance with this provision, the MLA requests sent to Hungary and Bulgaria indicated the authority making the request, the object of and the reason for the request as well as the identity and the nationality of the suspect concerned. As the MLA requests all fell under Arts 3, 4 and 5 Conv 1959, it was also necessary to describe the offence(s) and to give a summary of the case (Art 14 (2) Conv 1959).

Art 15 Conv 1959 names the Ministries of Justice of the requesting and the requested Parties as the responsible authorities for receiving and sending MLA requests. However, Art 15 Conv 1959 is dispositive and – with relation to the parties involved in the present case – overruled by the CISA and the EU-MLA Conv 2000, whereupon MLA requests may be made and returned directly between judicial authorities and (additionally) between Ministries of Justice or through national central bureaux of the International Criminal Police Organisation. In relation to Hungary, the Austro-Hungarian Treaty had to be taken into account as well.

Applying the cited sources of law, the Austrian prosecutors had to keep to Arts 6 and 24 of the EU-MLA Conv 2000 in relation to Bulgaria, providing for a direct transmission of MLA requests between the judicial authorities in charge unless a member state demands MLA requests to be sent to a central authority. Bulgaria made use of the latter option so that the MLA requests addressed to Bulgaria were sent to the Bulgarian Supreme Prosecutor's Office of Cassation as the competent central authority.

In relation to Hungary, the prosecuting authorities may generally associate directly during the pre-trial phase of a criminal case (Art XII (1) Austro-Hungarian Treaty), which is why the PPU Eisenstadt/Austria sent the MLA request directly to the competent Hungarian prosecution unit.

The provision of the Conv 1959 defining the language to be used for MLA requests is also dispositive (Art 16 (2) Conv 1959). For that reason, Bulgaria required the translation of MLA requests and annexed documents into Bulgarian – or into an official language of the Council of Europe – so that a respective translation was arranged by the Austrian prosecuting authorities. By contrast, there was no need to translate the MLA requests sent to Hungary owing to a respective provision in the Austro-Hungarian Treaty (Art XIII).

3.3 The Role of Eurojust in the Resolution of the Conflict of Jurisdiction

On 28 August 2016, the Hungarian authorities informed Eurojust about a possible conflict of jurisdiction between Austria and Hungary. On the same day, the Austrian Eurojust Desk forwarded this message to the PPU Eisenstadt. From an Austrian perspective, Eurojust has accompanied the proceedings all the way from the beginning of the investigations to Hungary's acceptance of Austria's transfer request. In order to analyse the role Eurojust has played in this process, the legislation on which it was founded as well as its relevant operational powers have to be examined.

3.3.1. Competences and Tasks of Eurojust

The legal framework on which Eurojust operates is installed in the EU legislation on multiple levels: On a Treaty level, Arts 82 (1) (b) and 85 (1) (c) of the *Treaty on the Functioning of the European Union* define the tasks of Eurojust as preventing, settling and resolving conflicts of jurisdiction. Art 85 (1) (c) explicitly states that the tasks entrusted to Eurojust may lie in “*the strengthening of judicial cooperation, including the settlement of conflicts of jurisdiction [...]*”.

Eurojust was founded by the Council with its Decision 2002/187/JHA as a “*body of the European Union with legal personality to stimulate and to improve coordination and cooperation between competent judicial authorities of the Member States*”²⁵ faced with serious cross-border crime, such as organised crime, corruption, drug trafficking and terrorism²⁶. In 2003, the original CD 2002/187/JHA was amended by CD 2003/659/JHA²⁷, while in 2008 it was renewed by the CD 2009/426/JHA²⁸. All three CDs have to be read together, which is why a consolidated version, the so-called CD on Eurojust (hereinafter, EJD) has been published by the Council as a Note²⁹ for the purpose of simpler readability.

Eurojust is not competent in all, but only in certain, more serious cross-border criminal acts. These selected offences are not directly named in the EJD. Art 4 (1) EJD, however, names

25 Para 1 of the Preliminary Notes to CD 2002/187/JHA.

26 cf. *European Judicial Network and Eurojust*, Joint Task Force Paper: Assistance in International Cooperation in Criminal Matters for Practitioners: What can we do for you?

27 CD 2003/659/JHA.

28 CD 2009/426/JHA.

29 Note from the General Secretariat of the Council 5347/3/09 Rev 3.

Eurojust's competences by way of referencing the competences of Eurojust's counterpart in the field of police cooperation, i.e. Europol, which are outlined in CD 2009/371/JHA (hereinafter, EPD)³⁰. This legislative technique of citation ensures that the competences of Eurojust and Europol are identical in this respect, covering the offences listed in the Annex to the EPD. As one of these crimes in the competence of Europol – and therefore also Eurojust – the Annex names illegal immigrant smuggling. For this reason, the Annex of the EPD can be identified as the legal foundation which allowed Eurojust to get involved in the case presented.

Having affirmed the general competence of Eurojust, it is necessary to point out the concrete powers it is entitled to exercise. As foreseen in Art 6 (1) (a) EJD, Eurojust has the power to coordinate between the competent authorities of the Member States concerned (Art 6 (1) (a) (iii) EJD), set up a joint investigation team (iv) and provide it with any information that is necessary for it to carry out its tasks (v). Moreover, Eurojust shall ensure that the competent authorities of the Member States concerned inform each other on investigations and prosecutions of which it has been informed (Art 6 (1) (b) EJD), assist the competent authorities of the Member States, at their request, in ensuring the best possible coordination of investigations and prosecutions (Art 6 (1) (c) EJD) and give assistance in order to improve cooperation between the competent national authorities (Art 6 (1) (d) EJD). What Eurojust is not allowed to do, however, is to make binding decisions for the Member States, because its role is designed as an advisory and supportive one³¹.

3.3.2. The Involvement of Eurojust

According to Art 13 (7) EJD, Member States are obliged to inform their National Desks at Eurojust of all cases in which a conflict of jurisdiction has arisen or is likely to arise, in order to guarantee that Eurojust is able to offer its support³². The Hungarian authorities fulfilled this obligation by opening up a case with Eurojust on 28 August 2015, the day after the discovery of the van with the 71 deceased refugees. Immediately after having received this information, Eurojust registered a case in their Case Management System (CMS)³³. Due to bilateral communication on police level, Hungary and Austria already knew that the other Member State had initiated an investigation. Already at this early stage of the pre-trial proceedings, Eurojust made use of its competence to assist the coordination between the countries involved³⁴: Via telephone and e-mail – and therefore much faster than via the official communication paths – it kept the PPU

30 Council Decision 2009/371/JHA.

31 cf. Art 7 (2) and (3) EJD and *Eurojust*, Eurojust News, Issue No. 14, 1.

32 cf. *Eurojust*, Eurojust News, Issue No. 14, 3.

33 This CMS has been established on the basis of Art 16 EJD in order to support the management and coordination of investigations and prosecutions for which Eurojust provides its assistance.

34 cf. Art 6 (1) (a) (iii), (c) and (d) as the legal basis of Eurojust offering its assistance.

Eisenstadt/Austria updated. For example, Austria was informed through Eurojust that the Hungarian prosecutors in Kecskemét were intending to decide on the Austrian EAWs on the following day. Furthermore, Eurojust mentioned to the PPU Eisenstadt that the Hungarian authorities would like to receive all Austrian investigation results (such as expert opinions and hearings of witnesses).

3.3.3. Two of Eurojust's Instruments: Coordination Meetings and JITs

As the proceedings progressed, it turned out that two specific cooperation tools provided by Eurojust played an essential role, namely the creation of a joint investigation team (hereinafter, JIT)³⁵ on the one hand and of holding a coordination meeting³⁶ on the other hand. While JITs are regulated in Art 9f EJD in conj with Art 6 (1) (a) (iv) EJD, there is no Article in the EJD dealing exclusively with coordination meetings. However, such meetings lie in the general competences of Eurojust as addressed in Art 6 (1) (a) (iii), (b) and (c), which have been outlined above³⁷.

Practitioners' experience has shown that “[c]oordination meetings bring together both law enforcement and judicial authorities from Member States and third States, allowing for strategic, informed and targeted operations in cross-border crime cases and the resolution of legal and practical difficulties [...]. Eurojust is a proactive coordinator and offers its facilities, as well as accommodation and travel reimbursement, for up to two participants per State, translation services, and expertise in judicial cooperation in criminal matters to national authorities dealing with serious cross-border crime cases.”³⁸

JITs, on the other hand, are teams consisting of prosecutors, judges and law enforcement authorities, founded with a written agreement for a longer, fixed period of time and a determined objective between the States involved, to carry out criminal investigations in one or more of the involved States³⁹. The idea of establishing a JIT accompanied the practitioners throughout the case and was first raised by the Hungarian criminal police and prosecution. Due to the fact that a complex human smuggling criminal organisation was assumed behind the crime of 26 August 2015, Bulgaria, Hungary and Europol showed a high interest in initiating a JIT. Austria and Germany, on the other hand, had a slightly different opinion on this topic: They did not per se object the idea of founding a JIT, yet they pointed out to the other involved players that, judging from experience, the instalment of a JIT takes at least three months of preparation. Due to the fact that the time and place

35 cf. Art 9f EJD as well as Art 6 (1) (a) (iv) EJD; the legal basis of setting up a Joint Investigation Team between EU-Member States can be found in Art 13 EU-MLA Conv 2000.

36 *Eurojust*, Eurojust News, Issue No. 14, 3.

37 However, legislations on coordination meetings can be found in the *Rules of Procedure of Eurojust*, the Art 16 of which deals with operational meetings (level II meetings), stating that such meetings shall be convened when two or more Member States act in accordance with Art 5 (1) (a) EJD.

38 *Eurojust*, Operational and Strategic Activities: Coordination Meetings, <http://www.eurojust.europa.eu/Practitioners/operational/Pages/coordination-meetings.aspx> (18/3/2016).

39 cf. *Eurojust*, Eurojust News Issue No. 9 (June 2013) On Joint Investigation Teams, 2.

of the victims' death had already been identified as the crucial issues of investigation, Austria found it more practical to resort to other tools of international cooperation, such as intensive and constant exchange of information, especially through coordination meetings. This approach was finally agreed to by all Member States involved as well as by Europol.

Contrary to the dissenting opinions on the idea of setting up a JIT, the tool of holding a coordination meeting was instantly appreciated by all parties involved and was made use of on 18 September 2015 at the premises of Eurojust in The Hague/Netherlands. Representatives from Austria, Bulgaria, Eurojust, Europol, Germany and Hungary participated in the meeting, at which information was exchanged about the latest developments of the investigations. The case had been extended to Germany, because there were reasons to consider that the smuggling route may have been planned to finally lead to Germany. However, the inclusion of Germany did not result in this country opening another parallel procedure. Europol was invited to the meeting, because the majority of informal hints and investigation results had come from multinational cooperation through the Europol liaison officers.

At the time of the coordination meeting, it was already assumed that the 71 refugees had died on Hungarian territory, in case of which Hungary affirmed its competence with respect to criminal offences resulting in death. Bulgaria disclosed that its authorities were only investigating the offence of a criminal organisation, but not the crime of human smuggling. For that reason, a conflict of jurisdiction between Austria and Bulgaria and/or Hungary and Bulgaria could be ruled out. The investigators from Europol presented an overview of their insights into the underlying international criminal network, which had been identified by analysing multiple telephone connections. Moreover, Austria informed the other participants that the report from the medical expert had been handed in but that the identification of the victims still had to be completed. As a result of the meeting, it was agreed that the investigations should not be spread to the underlying criminal organisation at this point, but rather concentrate on the case of the 71 deceased refugees.

3.3.4. Practitioners' Experience with Eurojust's Support

In preparation for conceiving this paper, the authors interviewed the five public prosecutors at the PPU Eisenstadt/Austria involved in the case in order to get an impression of their experience regarding the quality of international cooperation. They all perceived Eurojust's support throughout the procedure as extremely helpful. The continuous involvement of Eurojust helped accelerating the flow of communication between the countries involved: not only did Eurojust assist with the exchange of translations and information of national procedural rules, but the Member States involved also had the opportunity to get in touch with their National Desks at every hour of the day.

Between 28 August and 5 November 2015 – the date when Hungary accepted the transfer of procedures – Eurojust exchanged 11 phone calls and 25 e-mails with Austria. Many more acts of communication must have taken place between Eurojust and the other Member States involved. According to the Austrian prosecutors dealing with the case presented, it was extremely helpful for them to achieve relevant information much faster than via the official, bilateral means of communication. Thus, the case at hand can be qualified as a best practice example for the supportive role of Eurojust in international cooperation in criminal matters. The practitioners' experience shows that *“Eurojust can facilitate the exchange of information in such complex cases, and can support the discovery of links between members of criminal networks involved”*⁴⁰

4. Transfer of Proceedings

There are no rules provided by the EU to decide which Member State should prosecute in cases of conflicts of jurisdiction. Therefore, the criteria actually followed by national authorities and the importance given to each of them may vary. Equally, the majority of Member States do not have set criteria to decide on the best place to prosecute either.⁴¹ However, Eurojust has published the *Eurojust Guidelines for Deciding which Jurisdiction Should Prosecute* in its Annual Report 2003⁴². Thereupon, territoriality – and particularly the place in which the majority of the respective criminal act took place – remains the most dominant factor. Other criteria are the nationality/place of residence of the defendant(s) or victim(s), the more advanced stage of proceedings, the broader scope of investigations or the place in which most of the evidence is present⁴³.

With regard to the transfer of proceedings, the *European Convention on the Transfer of Proceedings in Criminal Matters of 1972* (Conv 1972) can be used by prosecution authorities if ratified by all Member States involved. Due to the fact that Hungary has not yet ratified this Convention, the transfer was carried out on the basis of Art 21 Conv 1959 in conj with Art 6 (1) EU-MLA Conv 2000.⁴⁴

As already mentioned, it was agreed in the bilateral meeting between Hungary and Austria as well as in the coordination meeting hosted by Eurojust that the proceedings should be transferred to the country where the refugees had died. Due to the fact that the dead bodies had been found on the territory of Austria, the Austrian authorities obtained expert evidence from a medical as well as a technical point of view. Both experts – the medical professor and the vehicle technician – confirmed that the immigrants had already died between 4:45 and 6:50 a.m. on 26 August 2015. As

40 *Eurojust*, Eurojust News, Issue No. 14, 3.

41 *Eurojust*, Eurojust News, Issue No. 14, 5.

42 *Eurojust*, Annual Report 2003, Annex, 60-66.

43 *Eurojust*, Eurojust News, Issue No. 14, 6.

44 *Eurojust*, Eurojust News, Issue No. 14, 7f.

the analysis of the road charge system rendered that the white Volvo van had still been on Hungarian territory by that time, it was clear that the closer connection for prosecution lay in Hungary rather than in Austria. For that reason, the Austrian authorities sent a respective request to transfer the proceedings to Hungary. However, before the transmission was executed, Austria finalised its pending investigations, namely the identification of the victims and the remaining DNA analyses. The Hungarian authorities accepted the transfer of proceedings by note of 5 November 2015. By application of Art 6 Conv 1959, evidence gained in the course of the Austrian pre-trial procedure, i.e. the expert reports, the DNA analyses, the protocols of the hearing of witnesses and the seized van, were transmitted to Hungary together with a copy of the Austrian investigation file.

5. Conclusion

When evaluating the success of investigation as well as cooperation, it is remarkable how efficiently the competent authorities in the countries involved have cooperated. Considering the vast extent of the case – six suspects with four different nationalities acting on the territory of two countries, 71 victims and (at least) three different competent jurisdictions – the result achieved is exemplary: Within a period of only two and a half months, the investigating authorities met their pre-defined goals of solving not only the criminal case, but above all the conflict of jurisdiction by applying the tools of international law, working on the highest cooperative level and making use of the aid provided by international coordinative instruments. The Austrian practitioners even went so far as to describe the order of events as a best practice example of international cooperation regarding organised international crime.

Analysing the case, it can be observed that one of the main accelerators of the process was the informal manner of communication between the authorities involved, which often preceded the (official) transmission of documents, evidence and other information. Although the channels of communication provided for by the international sources of law (i.e. the option to transfer documents via e-mail if authenticity is established) already ensure a quick and accurate exchange of information, the main key to success has proven to be mutual confidence. A lack of trust between the countries involved would have led to the refusal of the execution of the EAWs and to the release of the suspects, which might have frustrated the resolution of the case altogether.

The underlying reason, however, why mutual trust has become so important in the first place, lies in certain weaknesses or obstacles within the sources of international law that need to be overcome through combined efforts. One of these obstacles in the present case has been the existence of language barriers: While the Hungarian competent prosecutor's language competences – he speaks perfect German – has proven to be extremely helpful, it was more difficult to tackle

language differences with the Bulgarian authorities, because neither the Austrian prosecutors spoke Bulgarian nor did the Bulgarian prosecutors speak German. With regard to written communication, the Bulgarian authorities demanded a translation of the documents sent and received, while Hungary accepted the German original. As a result, it took a couple of hours to transfer requested documents to Hungary, whereas at least two days were needed to send the same information to Bulgaria. The unification of languages to be used in international criminal proceedings is thus a desirable aim. Similarly, the standardisation of procedural aspects such as deadlines (especially with regard to EAWs) would facilitate the work of authorities investigating on an international level.

On the positive side, the website and the Judicial Atlas of the EJM are perfect examples of how to overcome obstacles resulting from national disparities: While it can be very complicated and time-consuming to find the declarations of the Members of an international Treaty clarifying the question of national competence for the specific means of investigation requested, the Judicial Atlas provides for the same information by simple mouse click.

In conclusion, the case presented has illustrated that the key to successful international cooperation lies within the intensity of information exchange and the degree of mutual trust between practitioners as well as the quality of the international legal framework provided by the International Community.

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