Double Criminality and Transnational Investigative Measures in EU Criminal Proceedings: Some Issues of Principle*

Von Prof. Dr. Petter Asp, Uppsala, Prof. Dr. Andrew von Hirsch, Cambridge, Prof. Dr. Dan Frände, Helsinki

I. Introduction

1. The proposals contained in the Report contain – not surprisingly – a great deal which we enthusiastically support, including:
   - reducing the scope for seizure and transfer of persons, under the European Arrest Warrant regime,
   - providing better representation for accused defendants, by creating the new institution of Eurodefensor,
   - giving convicted individuals greater influence regarding the place of execution of custodial sentences.

   Indeed, we support most of the recommendations presented in the Report, and have no wish to provide a lengthy catalogue of matters where we might in part have differing opinions.

   The purpose of our present statement is, instead, to highlight an issue of principle of utmost importance for judicial cooperation within the European Union, namely the question whether and to what extent a member state should be entitled to refuse cooperation in virtue of differences between its own law and the law of the state that requests assistance (be it by arresting and delivering a person, taking evidence, or search and seizure). The perspective of our discussion is explicitly normative; we discuss the reasons for using (or not using) a country’s own legal system as a standard for judging whether or not to assist other states in the context of a criminal law process.

2. The first substantive part of our remarks (sec. II.) deals with double criminality and the issues of principle it involves. We focus on whether, and to what extent, double criminality should be a necessary condition for issuing a European Arrest Warrant (However, these arguments will also have relevance in relation to other forms of legal assistance which we examine later). Our conclusion is that a double criminality requirement is, in principle, not indispensable as such; but this presupposes that the requested state – as an absolute minimum – is given the possibility of refusing to deliver the defendant in situations where the law of the requesting state is not consonant with either the constitutional order of the requested state or with its fundamental criminal-law principles. Nevertheless, we think there are strong pragmatic reasons for restoring (or retaining) the double criminality requirement. Thus, our paper argues that it is preferable to retain/restore the double criminality requirement, but that it might be normatively acceptable to replace it with certain somewhat less demanding standards relating to the fundamental criminal-law principles of the requested state.

3. Later in our discussion (sec. III.), we examine the Report’s proposals on transnational investigative measures; we consider whether the basic principles we suggest have properly been taken into account, in the Report’s proposals on transnational investigative measures.

II. Double criminality

1. Introduction

In this section, we focus on the double criminality requirement. Defenders of this requirement often assert that double criminality is an essential principle as regards international cooperation in the field of criminal law, that legislators should not sacrifice the principle for the sake of expediency, and that a scheme for extradition which does not respect the principle is not consonant with basic rule-of-law norms. It is, however, not often explained what reasons underlie such assertions.

2. The content of the requirement

   a) First, to avoid misunderstanding, we draw attention to the fact that the principle of double criminality has different meanings and different functions within different areas of (international) criminal law.

   b) As regards jurisdiction, the principle implies – when applicable – that a state has jurisdiction if, and only if, the offence in question constitutes an offence in the state where the offence was committed. Thus, if an offence is committed in state A and prosecuted in state B, the courts in state B will, when applying the principle, focus on the question whether the conduct is punishable also in state A. Consequently, this version of the principle of double criminality applies, in practice, only to offences committed outside the territory of the state in which the trial takes place.

   c) As regards the various forms of legal assistance, the situation is different. Let us assume that state A makes a request for legal assistance from state B. In this situation the authorities of state B (be it a court, a prosecution authority or some other body) would ordinarily assume that the act in relation to which assistance is required constitutes an offence in state A. The question to be considered, however, is whether the act constitutes an offence in their home state (i.e. in state B).

3. The function of the double-criminality principle

   a) In order to evaluate what status the principle of double criminality should have, we must first try to elaborate the functions fulfilled by the principle and the reasons behind it. P. O. Träskman states that “a review of the literature on this issue has little to offer us. Often, the authors satisfy themselves simply with noting that double punishment either is or

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is not required, without giving any details on the reasons for this.”

b) In relation to jurisdiction there are, at least, three possible rationales behind the principle of double criminality.

aa) First, it could be argued that the principle is based on the principle of legality (nulla poena sine lege). The argument would be that the principle of legality is violated if someone is punished for an act that is not criminalized at the place of commission. This argument is, however, not convincing. Much of the criminal law’s rules cover acts committed abroad (their ambit is not limited to offences committed within the state in question). Further, it is accepted both in international and national law that states may take jurisdiction over offences committed abroad without applying the requirement of double criminality (cf. for example the protective principle of international criminal jurisdiction); this seems to be enough to call into question the claim that the principle of legality – under existing international and national law – must be the basis for the double criminality requirement.

bb) Second, the principle of double criminality could be based on the principle of non-intervention, which means that states should not interfere with the internal affairs of other states, i.e. that state A should not convict a person for having done something on the territory of state B if B does not prohibit it and the act does not have any other implications for state A. This basis for the double criminality requirement is consonant with the way the principle is applied in practice since it allows for exceptions from the double criminality requirement in cases where the offence committed in state B actually affects state A (e.g. when the jurisdiction of state A is based on the protective principle, – say, when a major tax offence against state A is planned in state B etc.).

c) Third, one could also argue that the principle of double criminality finds its basis in the interests of the individual, and in states’ duties to respect those interests. The idea would be that the individual should be given freedom to make use of the liberties granted by the state on the territory of which the individual is situated. One could also express this by saying that the home state has no general right to claim that the individual shall obey its own rules, once he has left its territory.

d) Since the double criminality requirement has another meaning within the area of legal assistance, it is quite natural that the principle also has other functions in this area.

aa) First, the double criminality requirement could be understood as a tool which could be used for the purpose of judging whether a state has any interest in using its resources for the purpose of assisting the judicial machinery of another state. The argument would be something like this: “only if we have criminalized X, have we an interest in prosecuting such acts and an interest in helping other states in doing so.” Understood in this way the double criminality requirement is more or less a principle for “allocating resources”.

bb) Second, one could argue that the principle finds its basis in the principle of legality. One could e.g. argue in line with Träskman:

“Let us assume that an act is punishable (on the basis of a penal provision with universal validity) in state A, but not in state B. If a person commits the act in the latter state, he is not guilty of an offence according to the law of the state of commission, but he is according to the law of state A.

The courts (and the other justice authorities) in state A always apply their own criminal law and criminal procedural law to a criminal case (lex fori). Since, according to the law of state A, the act is an offence, the principle of legality in criminal law is not a bar to prosecution and punishment. The situation is different in state B. In this state, the courts and authorities apply their own laws, and according to these the act is not an offence. In this state, it is not possible, without violating the principle of nulla poena sine lege, to punish the person for the act or undertake other measures in criminal law as a consequence of the act. Double criminality as a condition for extradition or for other legal assistance that involves the taking of measures of a criminal or procedural law nature against the person who committed the act is thus a direct consequence of the demand of the principle of legality that there be a legal basis for the measure.

The principle of legality therefore requires that a state where a certain act is not punishable refrains from all measures that would assist the conviction of a person for this act.”

If this line of reasoning is accepted, the double criminality requirement is indispensable (as directly linked to the generally accepted fundamental criminal law guarantee of nulla poena sine lege).

c) Third, the double criminality requirement could be understood as a tool which could be used for the purpose of judging whether a state is normatively justified in assisting the criminal justice system of another state; i.e. the purpose of applying the double criminality requirement would be to find out whether there are any value-based impediments against assisting the requesting state. The rationale behind this principle is that whenever a state uses its coercive powers it should be concerned that those powers are not used for the purpose of promoting aims which are in conflict with that state’s basic values. It is this rationale which will primarily concern us here.

4. Evaluation

a) In this subsection we will try to explain (i) why, at least tentatively, we think that the most reasonable understanding of the principle (as regards extradition, mutual legal assistance etc.) is the one expressed under 3. c) cc) above, and (ii) what this understanding implies for extradition policy.

b) It seems quite obvious that the first understanding of the double criminality requirement 3. c) cc) above, relating to allo-

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2 Träskman, (Fn. 1), p. 150.

3 As regards jurisdiction it seems clear that both functions 3. b) bb) and 3. b) cc) are of importance; the problem with invoking the principle of legality is that it makes it very hard to justify some of the (accepted) exceptions to the principle.
c) The second understanding discussed above 3. c) bb) is that the double criminality requirement has its basis in the principle of legality. This line of reasoning may also be questioned.

First, and perhaps most importantly, it is debatable whether the principle of legality applies to measures of legal assistance, and, if so, whether it requires that the act in question is punishable not only in the requesting state but also in the requested state. It is not the same thing a) for state A to punish M for doing X (without having criminalized X) and b) for state A to assist state B in punishing M for doing X (in a situation where state B, but not state A, has criminalized X and where state B has a legitimate basis for exercising jurisdiction).

Second, one could refer to the function of the principle of legality, which in our view is – mainly – to ensure that there is a reasonable degree of foreseeability in criminal law. In this respect one could, e.g., ask whether there are any problems as regards foreseeability in the following situation:

M has performed conduct X on the territory of state B. State B has criminalized X in a proper way. M is now present in state A which has not criminalized X, but which has rules that allow for surrendering/extradition even in the absence of double criminality. State B requests state A to extradite/surrender M to it for the purpose of exercising fully legitimate jurisdiction.

In this case, it is not clear why there exists a problem of foreseeability, since state B, the prosecuting state, has proscribed X in advance of M’s having committed this conduct. True, the principle of legality applies to the rules on extradition themselves – requiring that those rules are not applied retroactively etc. But it seems questionable whether the principle of legality requires that all measures connected to a criminal law process (in another state) presupposes criminalization in the state taking the measure.

The same argument holds if one invokes the notion of legislative supremacy. In the Group’s discussions, it was sometimes argued that the double criminality must be retained because only the legislature may decide what is punishable. In our view this argument is questionable. First, and as indicated above: to surrender a person (i.e. to assist another state in bringing a person to trial) is not to punish (the question is not whether to impose a criminal sanction, but rather whether to use the state’s coercive powers to assist another state in punishing a person) and given that there exists legislation as regards the giving of such assistance, the legislature has authorized this. Second, if one assumes the legality principle is at issue here, it may be that not even the double criminality requirement would be acceptable. Suppose the crime of which we are speaking in the above illustration were an offence under the law of both states – say, murder. The defendant is nevertheless being charged under state B’s homicide law, with its doctrines defining that offence and its rules concerning procedure and sentence. The defendant is not facing any charge under state A’s homicide law. Were legislative supremacy the issue, this could arguably be infringed even by delivery of the defendant in the homicide case, where double-criminality is satisfied – because the legislature’s prohibition of murder in state A is not being used.

d) This means that we are left with the third understanding 3. c) cc), that the function of the double criminality requirement is to ensure that there are no value-based impediments for assisting the criminal justice machinery of another state.

If this is the point of departure for further analysis, it seems possible to argue (a) the double criminality requirement is (or could in certain cases be) overinclusive, but (b) that there is need for the requested state to ascertain whether the assistance required is consonant with its own basic values.

e) The requirement is (a) overinclusive since there may be a number of situations in which state A has not criminalized X, but nevertheless would have no strong reasons of principle against the criminalisation of X. State B might, e.g., have problems (connected to X) that simply do not exist in state A; state A might have a set of administrative sanctions, not available to B, which are used for the purpose of reducing X; or state A and state B may – even though they agree on the legal interest (Rechtsgut) to be protected etc. – simply have drawn the line demarcating the offence in slightly different ways. The point to be made is the following: the fact that X is treated differently in states A and B does not necessarily indicate a conflict of values or that states A and B have different views as regards the reprehensibleness of X.\(^4\)

f) There is (b), however, a need for a possibility of refusing a request for assistance with reference to the content of criminal law. The main argument here is, in our view, that states should not take coercive measures against individuals without taking some responsibility for the decision that forms the basis for the measure. Taking such responsibility includes taking responsibility for the acceptability of the content of the criminal law on the basis of which the request is made (this line of reasoning finds support e.g. in the case law of the European Court of Human Rights; cf. the Soering-case). Thus, the requested state should have the possibility of evaluating whether criminalisation of the conduct would be consistent with its own fundamental criminal-law or human-rights principles. But this evaluation need not necessarily have the form of a double criminality requirement; it could also have the form of authority to refuse assistance under certain condi-

tions – not owing to simple “differences”, but rather to differences that amount to a problematic “conflict of values”. This is one indispensable limitation to the principle of mutual recognition; recognition without responsibility should be considered unacceptable.

5. An alternative approach?

a) If the above argument is accepted, it could in principle be implemented as an application (but a more specific and explicitly delineated application) of ordre publice.\(^5\) The standard would be something like this: cooperation in criminal matters (for example, under the European Arrest Warrant) could be authorised even in absence of double criminality; the courts and authorities in the requested state should, however, always and as a part of its ordre publice powers, have the possibility of refusing assistance in the following circumstances:

(i) the conduct has not been declared criminal in that state, and

(ii) the competent authority in the requested state determines that criminalizing the conduct would (1) be inconsistent with established constitutional human-rights principles in that country, or (2) be inconsistent with the recognized fundamental principles of criminal law in that state.

b) It is important to note that the foregoing authority would not call upon the courts in the requested state to find that the criminalisation of the conduct by the request state is “inhumane”, or infringes internationally-applicable human-rights standards (e.g. those of the ECHR). The required finding would simply be that, under the requested state’s constitutional order or basic criminal policies, criminalisation would not be appropriate – so that the state should not be obliged to use its own coercive powers to deliver the defendant to face charges in another country which would be deemed fundamentally obnoxious under its own legal order.

c) Further, our alternative proposal does not contemplate mere reliance on ordre publice principles, as these stand today – for they are much too imprecise. Rather, there would be explicit limits set forth in a revised EU framework decision, on when the European Arrest Warrant could not be carried out. These limits would rule out delivery of the defendant in certain circumstances, namely, when the court in the delivering country determines that the criminal statute with which the defendant is charged is one which, were it to be enacted in that country, would (1) be inconsistent with established constitutional human-rights principles in that country, or (2) be inconsistent with the recognized fundamental principles of criminal law in that country.

d) As an example of the first ('constitutional principles') provision of our proposal, consider the following case. England permits 'strict' criminal liability.\(^6\) A wide variety of English statutes prescribing economic and certain other crimes do not include a requirement of intent or negligence. Commission of the conduct itself suffices for liability, without regard to any intent on the part of the defendant or to his failure to exercise due care. Penalties for these violations may be substantial, and include significant periods of imprisonment. The rationale for these provisions is that they facilitate efficient prosecution, under circumstances when intent or negligence may be difficult to prove. These provisions have not been successfully challenged on human-rights grounds in England, because judicial review of the constitutionality of statutes has not been institutionalised there until 1998, and then only to a partial extent. The applicable constitutional document is only the ECHR, incorporated in English law by the Human Rights Act 1998, but the ECHR has relatively weak constraints on criminal liability without fault.

Were a person charged with having violated such a strict liability statute while in England, and then arrested in Germany where he now is situated,\(^7\) our first provision (“constitutional principles”) could be invoked to prevent execution of the arrest warrant in Germany and the delivery of the defendant to England. The reason is that the German Constitutional Court has required culpability to be a precondition of criminal liability. The enactment in Germany of a criminal statute (especially one that permits substantial terms of imprisonment as a penalty) would be deemed to infringe the human-rights guarantees of the German Constitution, were it to dispense with intent or negligence on the part of the defendant.\(^8\) Applying our proposed exception, the court in Germany could refuse to execute the warrant, on grounds that any such 'strict liability' prohibition would be constitutionally impermissible in Germany.

It is important to note that the German court, in making this finding, would not be making an assertion that the England’s “strict liability” statutes would be invalid under that country’s law – e.g., under the English Human Rights Act or under the European Convention of Human Rights itself. The finding is simply that England may not validly call upon Germany to make use of its coercive legal processes to help enforce an English prohibition that could not be made criminal in Germany under basic constitutional doctrines there.

e) What of our second (‘fundamental principles of criminal law’) provision? To see how this would operate, suppose that defendant, after having committed the strict-liability offence in England, goes to Sweden instead of Germany –

\(^5\) Cf., e.g., Vogler, ZSW 81 (1969), p. 169 ff. (esp. 170 f.), for a discussion on the relation between the double criminality requirement and ordre publice.


\(^7\) To permit the arrest in Germany under the European Arrest Warrant as it presently stands, the offence would have to be one of those listed in Art. 2.2 of the framework decision. Whether an English strict liability offence would be included, would depend on which of the many such offences under English law was being charged. But Art 2.2 does not require that the listed offences be ones requiring intent or negligence, but only that the potential sanction involves at least 3 years’ imprisonment. A number of English strict-liability offences contemplate such potential sanctions.

and the arrest warrant calls upon the Swedish authorities to deliver him back to England. Sweden, unlike Germany, does not have a system of judicial review that authorises courts to invalidate legislation on grounds of its unconstitutionality. The Swedish constitutional documents also have more limited scope than the German, and deal less fully with criminal-law-related questions. However, the Swedish system of criminal law is one in which culpability plays a central role. The Swedish Criminal Code – and the case law and the commentary under it – requires intention (or negligence, at least) as a condition of criminal liability.

The advantage of the double criminality requirement in this context, is its straightforwardness. It does not necessitate evaluating the requesting state’s law, to the extent that our alternative proposal would. It would not be necessary, for example, to determine whether the prohibition would, in the requested state, be consistent with its constitutional order or basic criminal-law principles. Instead, the double criminality requirement relates simply to whether the requested state has a comparable prohibition. This also makes the court’s determination less politically sensitive, because no reason needs to be put forward that might be seen as implicitly critical of the laws of the requesting state. To have to say, as our proposal would contemplate, that English-style ‘strict liability’ would violate German constitutional rights involves a substantive finding about the merits of such liability. True, this would not, as we pointed out above, constitute a claim about its validity under English constitutional law. However, such a finding may appear to suggest that there would seem to be at least something problematic about the English measure – and this would be a more delicate matter for the courts to deal with than a simple assertion that the double criminality requirement has not been satisfied because German law does not provide for strict liability. This neutrality is an important advantage of the double criminality requirement, since at least some courts in Europe may well hesitate to refuse surrender of the defendant, when that would necessitate the making of controversial decisions on another state’s criminal policies, etc.

In this situation, our ‘fundamental principles of criminal law’ proposal could be invoked. Were a revised EU framework decision so to authorise, the Swedish courts could (and in all likelihood would) find that strict criminal liability would infringe the fundamental principles of Sweden’s criminal law. In making this finding, the Swedish courts would not be challenging the validity of strict liability under English law. The basis for refusing delivery would, instead, be that Sweden’s courts should not be required to invoke their country’s coercive processes to enforce a foreign statute that would, in Sweden, violate that country’s basic norms of criminal law.

6. Drawbacks of the alternative approach?

a) Our alternative proposal would, of course, have narrower scope than double criminality. Differences in criminal policy between the two countries would not suffice to invoke it. To give an example: In Sweden, intention is required for commercial fraud, whereas in Denmark gross negligence suffices under certain circumstances. In this situation, the arrest warrant could still be executed and the defendant delivered from Sweden to Denmark. This is because negligence-based criminality would not be ruled out in principle in Sweden. However, if one accepts the arguments above this is not necessarily a drawback of our alternative proposal (since its point of departure was that the double criminality requirement is somewhat over-inclusive).

b) Our proposed standard is also (and clearly) more demanding for the courts. Under double criminality, the courts of the delivering country would be called upon to determine simply whether the conduct in question is criminalised under the criminal law of that country. Here, the courts would be required to make further, possibly somewhat more controversial findings. But these findings would not seem to us to be excessively difficult. In our German example, above, the court would be called upon to determine whether the provision would violate the Grundgesetz, if attempted to be enacted in Germany. In the case of ‘strict liability’, for example, the answer should be clear enough under prevailing German constitutional doctrines.

Nevertheless, it is evident that a system built on the alternative proposal presupposes strong and independent courts that are prepared to make use of our proposed “ordre publice-clause” when it is needed. The advantage of the double criminality requirement in this context, is its straightforwardness. It does not necessitate evaluating the requesting state’s law, to the extent that our alternative proposal would. It would not be necessary, for example, to determine whether the prohibition would, in the requested state, be consistent with its constitutional order or basic criminal-law principles. Instead, the double criminality requirement relates simply to whether the requested state has a comparable prohibition. This also makes the court’s determination less politically sensitive, because no reason needs to be put forward that might be seen as implicitly critical of the laws of the requesting state. To have to say, as our proposal would contemplate, that English-style ‘strict liability’ would violate German constitutional rights involves a substantive finding about the merits of such liability. True, this would not, as we pointed out above, constitute a claim about its validity under English constitutional law. However, such a finding may appear to suggest that there would seem to be at least something problematic about the English measure – and this would be a more delicate matter for the courts to deal with than a simple assertion that the double criminality requirement has not been satisfied because German law does not provide for strict liability. This neutrality is an important advantage of the double criminality requirement, since at least some courts in Europe may well hesitate to refuse surrender of the defendant, when that would necessitate the making of controversial decisions on another state’s criminal policies, etc.

c) Another objection could concern the time-consuming character of our suggested scheme. Determinations of the kind of which we are speaking involve potentially complex issues of constitutionality and criminal-law principles in the requested state. Undertaking that task, it might be argued, would absorb much time and resources. In this respect one should, however, notice that the double criminality requirement must be applied in each and every case. If one makes use of the suggested alternative model one could assume that normally there will be no need for more thorough investigations (it is usually clear that there is nothing unusual and seemingly problematic about the law of the requesting state); thus, the suggested alternative standard would need to be invoked only in special cases.

d) Conceivably, the two approaches could also be synthesised. Courts, under such an approach, would use the double criminality requirement as an initial filtering device; according to this shortcut, the courts would, if delivery was challenged by the defendant, first apply the traditional double-criminality standard. If the conduct is prohibited in both jurisdictions, delivery could proceed without further findings required. The assumption would be that when the requested state has prohibited the conduct, it has considered already the consistency of such a prohibition with its own constitutional order and basic criminal-law principles. (Admittedly, this will not always in fact be the case, but it seems to be a rough approximation.) Our alternative scheme would then come into play, only if the double-criminality standard is found not to have been satisfied. In that event, delivery could still proceed – notwithstanding that the conduct is not prohibited in the requested state – if the courts there determine that it could
have been prohibited under that state’s constitutional order and basic criminal law principles. As the double-criminality standard would readily be met in the majority of cases, our proposed standard would actually need to be invoked only in a minority of cases.

7. Conclusion: degree of priority of the alternative approach compared with double-criminality

a) What would then be the conclusion of the arguments provided above? We have – on the one hand – argued that there are no fundamental value-based impediments against replacing the double criminality requirement with the alternative test, based on notions of *ordre publique*, suggested above (under II. 5.). On the other hand we have argued that it is not acceptable to give up the double criminality without replacing it by such a standard – since that would compel the state to use its coercive powers to deliver defendants to face charges elsewhere that would be inconsistent with its own basic constitutional or criminal-law norms. It also seems clear that our proposed alternative standard would be harder to apply for courts and authorities; this creates the risk of lax enforcement of that standard. We thus conclude that retaining/restoring the double criminality requirement is the preferable solution, but that the alternative standard would become acceptable if it proves impossible to secure agreement on restoration of double criminality.

b) What of the double-criminality standard’s ‘overbreadth’? The standard, as noted earlier, bars delivery of the defendant when the requesting state and the requested state come acceptable if it proves impossible to secure agreement concerning the limits of mutual recognition in extradition. Nevertheless, cross-border rendition of suspects in an EU context seems most urgent in situations when countries involved have ‘common’ – that is mutually similar – criminal policies. All EU countries penalise murder, (intentional) commercial fraud, etc., and it is in this “core” area of common policy that transfer of criminal suspects across national boundaries seems most needed and appropriate. When one country decides on atypical criminal prohibitions (for example, the prohibition of negligent commercial misrepresentation) that would fall outside this core area, then there would be less urgency to insist on enlisting neighbouring countries in enforcing such proscriptions. Perhaps, one might say it is still a pity if enforcement were not permitted. But compared with the importance of the EU’s having a simple and readily-applicable set of safeguards concerning transfers, such as double-criminality would allow, this would be an acceptable cost. The overinclusiveness of the double criminality requirement is, to put it simply, not the most important problem of the criminal law in Europe today.

c) In summary, our suggested approach – with the restoration of the double criminality requirement as a first choice, and the alternative *ordre publique* standard as a fall-back position – is justified by the following considerations:

(i) that the restoration of the double criminality requirement is desirable, but may be difficult to achieve;
(ii) that there are in any event, clear principled objections to the present European Arrest Warrant scheme, because it can compel a member State to deliver a defendant to another state to face charges which would be fundamentally unacceptable under its own constitutional and legal order (see the example provided in II. 5. d).
(iii) that this latter undesirable situation will continue, if we do not provide arguments about what is really unacceptable (i.e. provide policymakers with workable minimum norms concerning the limits of mutual recognition in extradition situations).

III. Investigative measures in transnational criminal proceedings: What principles should apply?

1. Identifying the principles

We turn our attention, now, to another major subject of the Report: transnational criminal proceedings within the EU. This subject concerns situations where the criminal activities of accused defendants cross national boundaries within the EU. A criminal proceeding is brought in Member State A – which the report designates the *Ermittlungsstaat* (ES), or in English translation, the forum state. In aid of this proceeding, another Member State, in which relevant evidence is located, is called upon to use its police investigatory powers, search and seizure powers, powers to compel testimony, etc. to help supply evidence in aid of the proceeding. This second state is referred to in the report as the *Vollstreckungsstaat* (VS), or in translation, the executing state.

a) As regards such transnational criminal proceedings, the Report makes reference to several principles. When stated explicitly, these are the most important ones:

(i) *The Single-Proceeding Principle*. This calls for the principal criminal proceeding against a defendant to be located in a single country, ordinarily that in which the alleged criminal conduct has primarily occurred (see articles I.1-I.4 of the Draft Statute).
(ii) The Fundamental-Norms Principle (Grundlagenprinzip). This is the principle that a State ought not be required to use its compulsory processes in aid of criminal policies or procedures in another State, where those principles or procedures would be inconsistent with the fundamentals of its own legal order. This principle is the basis for the fallback position discussed in section II. 5. a) above. We thus argued that (even if the double criminality requirement were not restored) a person must not be delivered to face charges in another state, if the criminal prohibitions underlying those charges would be inconsistent with the constitutional norms of the requested state or its fundamental principles of criminal law. The Report’s proposal as regards transnational criminal proceedings also adopts this limitation (see articles 1.4.4 and I.7) as a minimum, although (as discussed in III. 3. c) below) in less clear form: the proposed article I.7 rules out any investigatory measures that would, in the executing state (VS) be inconsistent with the “fundamentals of its legal order”. The aim would be to relieve that state from having to carry out foreign procedures against persons within its borders, where these would be deemed violative of constitutional rights or fundamentally unfair.

(iii) The ‘Non-Importation’ Principle. This is the principle that a state should not be required to import the criminal policies or procedures of another jurisdiction, where substantially different from its own. This principle underlies our preferred solution with respect to the European Arrest Warrant – namely our support for retention of double criminality. The transfer of a defendant to another jurisdiction to face charges is not a situation of actual importation: the requested state does not literally adopt the requesting state’s laws. But the requested state is using its compulsory processes to transfer the defendant to the requesting state to face charges under the latter’s laws, and therefore is in a broader sense helping to enforce that state’s criminal-law prohibitions. The rationale for this limitation is that even if such a criminal prohibition would not be deemed fundamentally unjust or unconstitutional from the perspective of the requested state, it may still be inconsistent with important norms or policies of that state. For example, Sweden requires intention for commercial fraud, and hence should not be required to deliver a defendant to Denmark to face charges of negligent misrepresentation. Although there would be no constitutional objections to Sweden’s to extending its fraud prohibitions to negligence, Sweden has not found such liability desirable – and hence should not be required to use its compulsory processes to assist other countries in imposing it. In our own proposals on European Arrest Warrant, however, this principle was treated as having lower priority than the Fundamental-Norms Principle, the second principle. This is apparent because we suggest that should revival of double-criminality not prove feasible, we could live without it – provided that the Fundamental-Norms Principle is still observed.

b) In a Europe which supposedly is becoming more unified in its criminal-law norms, however, why should we adopt a Non-Importation Principle which assigns such importance to particular national standards? The reason why the Principle has value, we think, is that notwithstanding claims about ‘convergence’ in the EU in the criminal-justice field, there remain very substantial differences in criminal-law norms among the member states. Suppose the forum state (ES) is Sweden, the state executing the warrant – the executing state (VS) – is Greece, and the investigative measure involves the taking of a blood sample without consent from the defendant. Sweden permits the taking of such evidence but Greece does not. Such divergences are not surprising: formulating criminal policy requires balancing personal-liberty and crime-prevention concerns, and jurisdictions with differing histories and legal traditions are likely to address such questions differently. In part, these issues are resolved through the constitutional order of the countries involved, and their principles differ substantially in different member states: Germany’s constitutional order, for example, gives substantially more weight to concerns about individual rights than does the considerably less demanding Human Rights Act in Britain. In part, however, many of these normative issues are addressed by national legislatures, and here again they are resolved differently in different states, reflecting their varying ideologies and legal traditions: compare, in the above illustration, Sweden’s and Greece’s different viewpoints about the taking of physical samples from a defendant without consent. The EU has no comparable representative body that can perform this weighing function adequately. Differing solutions of criminal-justice questions by national representative bodies thus remain important, and the Non-Importation Principle is a way of recognising this.

c) In the Report’s proposals on transnational criminal proceedings, however, the Non-Importation Principle disappears from view. This is apparent from the just-cited example of the taking of a blood sample. Under Article 4 of the Report’s proposed draft statute, the permissibility of investigative measures are to be determined by the law of the forum state – so that Swedish rather than Greek procedures apply, and those permit the taking of such evidence. This is a clear case form of importation of foreign procedures or policies, as the Greek authorities must take this evidence from the person in Greece, contrary to normally-applicable Greek law. This could also have the effect of undermining the Greek policy (of not taking physical-sample without consent) itself: because if such evidence must be taken by Greek authorities in transnational proceedings, it will be difficult in practice to resist political pressure extend that rule to locally-based criminal proceedings. This is precisely the sort of result which a Non-Importation Principle would help avoid.

Our question is, therefore: why should the Non-Importation Principle receive such scant consideration here? If the principle is important enough to have led the Report to propose revival of double-criminality as the preferred solution for the delivery of defendants under the European Arrest Warrant, what should be the Principle’s relevance here? It is true that in our own European Arrest Warrant proposals, we treat Non-Importation as a defeasible principle, having a somewhat less priority than the Fundamental-Norms Principle. But defeasibility still calls for giving reasons for derogating from the Non-Importation Principle.
2. Alternative approaches: Applying the procedures of the executing state? A Double-norm Approach?

a) What of the reverse approach: having the law of the executing state apply instead? In the Sweden/Greece example, Greek law would then govern the taking of evidence from defendants situated in Greece. If that law ruled out the taking of blood samples without consent, this procedure would become impermissible even if the law of forum state (Sweden) allowed it. If there were such investigations conducted in several countries, then the law of each executing state would need to be observed.

b) One question, here, is whether the Non-Importation Principle would then better be served. In this case just cited, it would seem so: the more permissive Swedish standards on police investigations could no longer be imported into Greece to govern the conduct of the investigation by Greek police officials.

In this illustration, the law of the executing state is more protective of the defendant than that of the forum state. But suppose the situation were reversed: that is, the law of the forum state were to bar the taking of blood samples without consent whereas the law of the executing state permitted it. Would this require the forum state to use the executing state’s procedures (including, in this hypothetical case, the taking of blood samples without consent) even if its own law barred that? And if so, would we not also be importing the policies of the executing state into the proceedings of the forum state? The answer to this question would depend on the drafting of the relevant rules. If the authorities of the forum state were to retain its discretion about whether or not to order the country’s investigative procedure, then it could refrain from making such an order if its own law barred it. The problem arises chiefly if such discretion does not exist.

c) In the extradition field, the Non-Importation Principle was implemented through a dual-standard approach: the double criminality rule requires that the conduct be proscribed by each country. To extend the Non-Importation Principle to the area being discussed here, a comparable approach would be adapted. An investigative measure could be ordered only if it is consistent with the procedural standards of the forum state and those of the executing state. The taking of physical samples from the defendant without consent would become permissible only if it were so under the procedural standards of both countries. Under such a dual-standard approach, the court (in the forum state) would, in the first instance, apply its own law in deciding on the taking of physical samples without consent from the defendant. If this were permissible, the court could order this procedure; but this would also be subject to limitations of the law of the executing state – so that blood samples without the consent of the person involved could not be ordered if the latter’s laws prohibited it.

d) What of questions of practicability? This approach does require that the court conducting the main proceeding need look not just at its own country’s laws but at the laws of countries in which the execution occurs. Would this be impracticable? It is easy enough to draw lurid pictures: of the Swedish judge, when considering whether to order execution of a blood-sample warrant in Greece, having to learn enough Greek so he could determine whether Greek law permits the taking of a blood sample without consent. But this assumes that the Swedish judge must undertake such tasks without institutional support. It is, however, an important aspect of the Report’s proposals that transnational criminal prosecutions be assisted by EU-wide technical-assistance bodies. One of the functions of such bodies should be to provide information regarding national rules and requirements on investigative measures. Instead of having to familiarise himself with Greek law, the Swedish judge could seek the relevant information from that body – for example, to ascertain through its website whether Greece ordinarily permits the taking of physical samples without the defendant’s consent. There would have to be further procedural details worked out for the harder cases where a ready answer cannot thus be provided. But the claim of ‘unworkability’ would need to be substantiated, not just asserted through worst-case illustrations.

3. Derogating from the Non-Importation Principle?

a) Let us return, finally, to the Report’s suggested rule of having the law of the forum state govern: in the above illustration, following Swedish law. This means derogating from the Non-Importation Principle: Greek law-enforcement authorities will be required to apply the Swedish norm in carrying out their inquiries in Greece, although this (in the case of taking physical samples without consent from defendants) contravenes Greece’s own norms. Would this be appropriate?

b) The answer would depend, in part, on the practical feasibility of alternative schemes. Would it, for example, be feasible to rely instead on the law of the executing state, or else have a dual standard approach – as discussed above (see section III. 2.)? Feasibility depends not on whether the courts could do this unaided, but whether such alternatives could be made to work when assisted by an EU-wide technical-assistance scheme (see section III. 2. d).

c) The answer depends, also, on the formulation of the safety-net – that is, the Fundamental-Norms Principle. In the Report’s draft statute, this is formulated rather imprecisely: that the executing state need not apply the law of the forum state “wenn sie mit den Grundlagen der Rechtsordnung des VS nicht verträglich sind” [‘when it is inconsistent with the fundamentals of the legal order of the executing state’] (Art. I.4.4). What would be the scope of this exception? Would it only include constitutionally-based constraints? Or would it be broader than that, to include normatively important criminal-procedure standards even if they are not constitutionally required? Consider, again, Greece’s rule against the taking of physical samples without the defendant’s consent. It should not be necessary that this rule be deemed constitutionally mandated, in the way that the criminal law’s basic culpability requirements are considered in Germany to have a basis in the rights guaranteed in the German constitution. Even if this is not a constitutional matter, the rule regarding the taking of physical samples without consent (at least arguably) may be derived from certain important ethical values of privacy, respect for the person, etc. This would suggest that – even if
the standards of the forum state ordinarily would apply – they should not be utilised in an instance such as this one.

d) In our ‘fallback’ proposal on the European Arrest Warrant, we addressed a comparable question by adopting a broadly-fashioned version of the Fundamental-Norms Principle. The defendant could not be delivered under a European Arrest Warrant, we proposed, if the criminal prohibition with which he is charged would be inconsistent with the delivering country’s constitutional human-rights principles or with its recognised fundamental principles of criminal law. Thus Sweden could refuse to deliver a defendant to England to face charges based on ‘strict’ liability (i.e., liability without fault), since such liability (although not constitutionally barred) would violate basic principles of Swedish criminal law. A comparable approach could be employed here. Whereas normally the law of the forum state would be applicable, this would not be the case where the investigative procedures, to be carried out in the executing state, would contravene that country’s (i) established constitutional human-rights principles, or (ii) its fundamental norms of criminal procedure. In the case under discussion, Greece could argue that its no-physical samples without consent rule is based on norms of personal dignity and privacy, and thus possesses this fundamental importance (such determinations would be made, as with our European Arrest Warrant proposals, by the courts of the executing state). With this broader standard in place, arguably, the most troublesome forms of importation would be dealt with – namely, where the imported norm was normatively problematic from the perspective of the executing state. That would make it a matter of somewhat less urgency to preserve the Non-Importation Principle as a separate standard. In the less controversial cases, the law of the forum state could apply – so as to permit a single country’s procedures to govern to the entire proceedings. But where this allocation of responsibility would lead to seriously troublesome results from the perspective of the executing state, a failsafe would be in place.

e) The just-described approach could avoid the seeming ‘overbreadth’ of a Non-Importation Principle. Importation of another country’s procedural standards would be barred only where this would be normatively problematic from the viewpoint of the executing state (where the differences between the two countries are primarily of a technical nature, the rules of the forum state would apply – as this arguably would simplify the procedure overall). However, there would also be (as there was for our European Arrest Warrant proposals) a drawback to such a scheme. Instead of having a mechanical rule, there would now be a qualitative one: the Greek appellate courts could not merely point to the fact that the taking of blood samples without consent is impermissible in Greece, but would need to argue why the country’s ‘fundamental norms’ of criminal procedure precludes such a procedure. Not only would this burden of argument be less easy to sustain, it would also be politically more controversial. Were Greek courts to decide that the taking of blood samples without consent infringes Greece’s ‘fundamental procedural norms’, they will purportedly be speaking of Greek law, and would be making no explicit commentary on Sweden’s different rules. But it will not be easy to avoid implied disapproval of Sweden’s more lax standard. Notwithstanding this potential difficulty, however, we would think it would be essential to have a broadly-worded ‘failsafe’ – such as that proposed in sec. III. 3. d) above – if it is thought necessary as a practical matter to make law the law of the investigating state govern ordinarily.