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Force of Circumstance: The European Arrest Warrant and Human Rights

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This paper is divided into three parts. First, it considers the human rights implications of the European Arrest Warrant (EAW). Second, it considers how we reached these concerns by tracing the development of the EAW as a criminal measure driven in response to the 9/11 terrorist attacks and as an instrument to fight the "war on terrorism." Third, it considers the judicial concerns over the EAW and how the judicial structure of the European Union (EU) is not sufficient to ensure that individuals' human rights do not fall through the cracks when policy is dictated by overwhelming external situations such as terrorist attacks.

Keywords: Criminal Law, European Union, Extradition, Human Rights, Security, Terrorism

I. INTRODUCTION

The central argument of this paper is that the European Arrest Warrant[1] (EAW) serves as a paradigm example of the reason why EU criminal law development in the third pillar needs a coherent, principled approach built upon a constitutional framework suitable for EU criminal law cooperation. This framework is essential to ensure that criminal law cooperation is rooted in human rights compliance and that there is sufficient—and clear—judicial protection of human rights. The analysis begins in Part II where the main human rights concerns relating to the EAW are discussed. It contends that some provisions of the European Arrest Warrant Framework Decision (EAW-FD) engender a situation where there is potentially a disproportionate use of

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the sword of criminal law, a lack of legal certainty, and a concern that a surrendered individual may not receive a fair trial.

Part III explains how we reached this situation; it traces the development of the EAW from its early stages to its rapid acceleration after September 11, 2001. The factual analysis explains how the EAW was caught up in the "war on terrorism" and was the product of reactionary politics, not of clear and comprehensive debate and discussion. Part IV explains how European Union (EU) judicial protection is insufficient; national courts will do most of the work to protect defendant rights but the EU is in need of a supreme judicial body to adjudicate human rights and criminal law concerns. Finally, Part V argues that only a principled, constitutional framework will fill in the cracks that are present within the EAW system and ensure that future EU criminal law cooperation is not rooted in reactionary politics but in human rights compliance.

II. THE EUROPEAN ARREST WARRANT FROM A HUMAN RIGHTS PERSPECTIVE

Introduction

A fundamental relationship between individuals and a democratic state consists of the carefully balanced sword and shield functions of criminal (or penal) law. The sword symbolizes the state's internal monopoly of force[2] that can be used to impose penalties (such as the loss of liberty or financial property) on those who fail to comply with the rules and regulations laid down by a democratic, sovereign legislature (and informed by general principles of criminal responsibility). To counter potential abuse of this incredible power and to soften the blow of the sword's sharp edge, individual rights of defense and due process guaranteed by fundamental principles of criminal and constitutional law,[3] and regional[4] or international human rights instruments[5] are raised to shield the individual. This balance helps to bring about to the extent possible a fair and just penal system; it ensures that the outcome of a trial is not a forgone conclusion determined by interested state actors but rather a product of the *processes* of the legal system itself.

The EAW the new extradition system between EU Member States that operates pursuant to the principle of mutual recognition challenges two interrelated sets of relationships: first, the relationship between the individual and the state; and second, a sub-set of this relationship the sword/shield balance of criminal law. It does this because the EAW operates pursuant to the principle of mutual recognition of criminal decisions,[6] which means that Member States must recognize and execute an arrest warrant originating from another Member State as if it were originating from one of their own courts. Thus,

the sword function of criminal law is wielded (1) by a foreign state within the jurisdiction of an individual's home state in order to force the "surrender" of that individual, and (2) once the individual has been surrendered, against that individual in a foreign land while his or her domestic shield remains at home. The unique features of the EAW which can be used for either conducting a criminal prosecution or for executing a criminal sentence[7] that are cause for concern are considered under three aspects of fundamental rights and freedoms: (1) that surrender under the EAW to face trial in another State can be a disproportionate invasion of citizen's freedom; (2) that it generates a lack of certainty for individuals; and (3) that once surrendered, there is a concern that the defendant will not receive a fair trial.

Proportionality

A Summary Procedure with no Requirement to Demonstrate a Prima Facie Case. The issuing State no longer has to prove that there is a case to answer, it only has to produce an arrest warrant.[8] Liberty cites the Symeou case to illustrate this concern: "He is accused of manslaughter . . . Evidence against him includes statements given by two witnesses who say that Greek police officers pressured them to give false statements, which they retracted immediately after their release from police custody. Mr. Symeou denies the charge and available evidence strongly indicates that he is innocent, yet a British Court has never considered his case and the High Court has ordered his extradition."[9]

Peart J., of the Irish High Court, highlights this point in the *Stapleton* case:

> If the applicant enjoys a Convention [right] . . . that is a right which he is entitled to invoke and have protected on the first occasion in which it becomes relevant for argument, and that is not a matter to be postponed so that it can be ventilated at some date in future in another country . . . There is in my view, no meaningful distinction to be drawn between surrendering the respondent to the requesting state to face trial which would either be unfair or not within a reasonable time, and him actually facing trial.[10]

Without looking at the evidence behind the EAW, one runs the risk of surrendering an individual only to discover, during the foreign trial, that the evidence is indeed insufficient. His/Her surrender to a foreign State where he/she may not understand the language, may be unable to get bail because he/she has no residence in that State, and would have to instruct a lawyer in a legal system not his/her own and not in his/her own language—is arguably a disproportionate measure *vis-à-vis* the effort required to establish that there is a case to answer prior to surrender (i.e., in the previous extradition system a *prima facie* case had to be demonstrated).

However, it is questionable as to whether this would be sufficient in Mr. Symeou's case or other similar cases; for example, under the English procedural rules, a *prima facie* case exists where the prosecution evidence, if

believed, would justify a conviction. It may be that the evidence presented for Mr. Symeou, if believed, would indeed justify a conviction; in which case, to ensure against his surrender (assuming he is innocent), an English court would have to examine the credibility of the evidence, thereby effectively trying the case. This would be far less convenient than having the case tried in the Member State where it is alleged that the offense occurred. There is always going to be at least some risk that a surrendered individual did not commit the crime he/she is accused of; however, the abolition of the requirement to demonstrate a *prima facie* case has disproportionately (measured against the difficulties suffered by an individual surrendered to a foreign State) increased that risk.

Surrender for Relatively Minor Offenses. The situation is further compounded when the offense an individual is alleged to have committed is relatively minor; i.e., were an individual in his/her home State committed the same offense, it might not amount to anything more than the police giving him/her a fixed penalty (e.g., minor theft). As Spencer explains, "... certain countries in Europe (for example, Poland) issue warrants for behaviour which scarcely seems to justify the trouble involved in sending the suspect or convicted person back: minor shoplifting, for example, or in one case, the reckless riding of a pedal cycle...."[11] In this situation, surrender to a Member State may be considered disproportionate where: (1) the individual has not committed the offense and there is no *prima facie* case against him/her; and (2) an individual has committed the offense, or at the very least, there is a *prima facie* case against him/her, and he/she is surrendered to face trial in a foreign State, which is a considerably onerous, potentially oppressive requirement given the alleged offense.

To make matters worse, it appears that the introduction of the EAW has actually increased the number of surrender requests for minor offenses. In *Zak v. Regional Court in Bydgoszcz*, which concerned the offense of "receiving a stolen telephone," Maurice Kay L.J. remarked that "... one is becoming used to European extradition cases for less serious offenses than used to come before the courts... but in my reasonable experience under the 2003 Act I have never seen one quite as low down the calendar as this...."[12] Under the previous extradition system, the court had discretion to refuse extradition where it was satisfied that due to the minor or trivial nature of the case, it would be unjust or oppressive to extradite.[13] However, if individuals are not returned to the requesting State, this would result in an evasion of justice: it cannot be right that everyone should be able to escape prosecution for a range of relatively minor offenses committed abroad. With the right to free movement surely comes the responsibility to adhere to foreign criminal legal systems, and failure to prosecute simply creates safe havens for criminals. This conundrum has led to suggestions that factually minor cases are

excluded from the EAW process and "some other and gentler way is found of enforcing the law in these cases that does not involve sending the wanted person back."[14]

The problem is that Europe needs a parallel system for dealing with minor, small-scale crime committed across EU borders;[15] such a system could work where individuals (1) do not have to be surrendered, and (2) his/her Home State enforces a noncustodial penalty. With regards to the enforcement of financial penalties, there is the recently agreed (but not yet in force in all States; for example, the UK) framework decision on the mutual recognition of financial penalties.[16] Until such a parallel system is in force in all Member States, extradition for relatively minor offenses creates a disproportionate, sometimes oppressive result.

Legal Uncertainty

Partial Abolition of the Double Criminality Verification. The double criminality verification has been abolished for offenses that carry a maximum of at least three years' imprisonment[17] and fall within a list of 32 types of offenses. This could be a problem if a State Y uses the EAW procedure to prosecute an offense committed on the territory of State X and the offense is not a criminal offense (or not of the same severity) in State X. There is a safeguard built into the EAW-FD namely, that a requested State can refuse surrender either (1) on the basis the conduct took place wholly, or in part, on its territory; or (2) on the basis that it was committed outside the requested State's territory and the requested State does not allow prosecution for that particular offense when committed outside its territory.[18] However, this safeguard is *optional only*, leading to the concern that there might be a multitier system within the EU (potentially violating the *nullum crimen sine lege* principle), where some States would permit the use of the EAW for offenses not committed on the requesting State's territory. Although at present this has not manifested itself as a practical problem, it has the potential to become one.

It is compounded by the fact that the list of "32 types of offenses" is exactly that: merely "types" and not well-defined offenses. There is a fundamental lack of clarity with the list itself (for example, what kind of offenses fall under the phrase "racism and xenophobia"?) and a potential for definitions to vary from State to State (for example, murder may include "abortion" in some States whereas in others, abortion is practically a legal right). There are still some fundamental differences in the conduct criminalized in Member States. For example, this is seen in laws relating to abortion, homosexual marriage, and euthanasia: the first two are criminalized by some states yet in other states, prosecution of such conduct would itself be considered a human rights violation. Spencer argues that this objection is unconvincing since the differences between Northern Ireland (NI) and the rest of the UK (e.g., in NI abortion is a

criminal offense; the age of consent is 17 rather than 16, and so on) have not led to the failure of the "backing warrants" system.[19]

Indeed, so long as States comply with the rule of territoriality and only issue EAWs for offenses committed on their territory, there should not be a problem. It is not unreasonable to expect individuals to obey the law of the territory in which they find themselves. Indeed, this forms part of the underlying rationale for extradition in the first place. However, the fact that the territoriality rule could by ignored by States not implementing or applying the aforementioned ground for refusal means the potential for the violation of defendant rights cannot be ruled out.

Abolition of the "Political Offense" Bar to Extradition. Removal of the "political offense" exception is concerning from a legal certainty viewpoint because the list of 32 offenses that no longer require double criminality verification includes the broad categories of "terrorism," "participation in a criminal organization," and "racism and xenophobia."[20] These categories are highly susceptible to politicization and can capture both very serious and less serious crimes/conduct. It is not difficult to conceive of situations where extradition in this context might be used for political repression and/or amount to a human rights violation.

Limited Application of the Speciality Principle. The speciality principle expresses the notion that "a person who has been surrendered must not be prosecuted, sentenced or deprived of his or her liberty for any offence committed prior to his or her surrender that was not included in the extradition request."[21] The principle is an important safeguard against the violation of defendant rights and provides a degree of certainty to the individual. Articles 27(1) and 28(1) of the EAW-FD provide that Member States can issue a declaration that acts as a waiver of the rule in relation to other Member States that have made the same declaration (unless the executing judicial authority makes a contrary decision in a particular case). This enables States to prosecute individuals who have been surrendered for offenses other than those for which the original surrender was granted. As Alegre and Leaf explain, this potentially allows States to circumvent prohibitions against surrender:

> Blanket abolition of speciality in relation to a particular state as opposed to consideration of speciality on a case-by-case basis will allow states to request surrender on the basis of one offence and then, if that charge fails, to investigate or prosecute another offence rather than return the suspect. These other offences may include ones for which extradition could not have been granted by virtue of the mandatory or optional bars to extradition in articles 3 EAW and 4 EAW. They may also include offences that do not exist in the executing state.[22]

To add further uncertainty to the matter, these declarations are optional, thereby creating the possibility of multitiered or variations in standards of

justice across Europe.[23] There are also no guidelines or suggestions as to how (or if) courts may derogate from these prior declarations.

In addition to these "blanket declarations," an individual giving his/her (irrevocable) consent to extradition will subject to the implementing law of the executing state not requiring an express waiver impliedly waive application of the speciality rule.[24] This must be done before the executing judicial authority, "in such a way as to show that the people concerned have expressed themselves voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel."[25] Regrettably, there is no provision to ensure that legal advice is freely available in all Member States and before the individual is presented to the executing authority. A lack of sufficient legal representation, especially where an individual elects to waive his or her rights, is a grave concern for fundamental rights. Again, it means that depending on the Member State in question, there is likely to be variable treatment and standards of justice.

Risk That a Defendant, Once Surrendered, Will Not Receive a Fair Trial

Once surrendered, the individual's domestic shield remains at home as it did under previous extradition arrangements. It is not unreasonable *per se*, but it becomes unreasonable and potentially a violation of the defendants fundamental rights if (1) the requesting State's legal system does not comply with human rights standards and there is a substantial risk that the defendant's human rights might be violated (for example, the right to a fair trial or the right not to be subject to inhumane or degrading treatment); or (2) the sword of criminal law is being wielded in respect of offenses that the defendant was not originally extradited upon (especially if the new offense is one that the defendant would not have been extradited upon had it been part of the original request). The former (1) situation became a concern when a number of new States were allowed to join the EU whilst the legal systems were, for various reasons, not to a sufficient standard. Lithuania, for example, despite attempting to reform the legal system (but faltering due to a lack of enforcement agencies), still suffers from considerable corruption.[26]

The EAW-FD also abolished the State prerogative to decline extradition of nationals, which led to constitutional concerns for Germany,[27] Poland,[28] Cyprus,[29] and the Czech Republic[30] (indeed, prior to the EAW-FD, only the UK, the Netherlands, and Ireland waived this prerogative[31]). As the Bundesverfassungsgericht explained, the issue relates to the "special bond" between the citizen and the State; the citizen has a legitimate expectation to be protected within the framework of *their* State and must also be protected from legal uncertainty.[32]

There are three potential options for responding to this concern: (1) have the executing State examine the credibility of the evidence and legal system of the requesting State; (2) have a defense whereby the requested person can

argue that the requesting State has a reputation for unfair trails, and one in which the requesting State has to prove its system meets relevant human rights standards; and (3) implement harmonizing legislation that goes beyond what is contained in the European Convention on Human Rights (ECHR) and sets out minimum defense rights and mechanisms for redress (e.g., the draft Framework Decision on Defence Rights).

In relation to option 1, we have the same problems as previously discussed; examining a State's evidence effectively means the executing State is conducting the trial, which is too burdensome given that the crime allegedly took place in a different State. Examining another Member State's legal system would be equally impractical. The second option would be open to abuse and is considerably burdensome and politically controversial. The third option is perhaps the best solution: a detailed, well-thought-out set of defense rights and procedural safeguards that goes beyond the content of the ECHR. Any new proposal should also contain mechanisms for redress access to a "supreme judicial body" where substantial allegations of a failure to provide a fair trial can be examined. As will be discussed in Part IV, part of the problem with the present arrangement despite each Member State being a signatory to the ECHR is the lack of access (of individuals) to an EU-wide, independent (i.e., not just a higher court in the requesting State) court that can address concerns over a failure to provide a fair trial.

The Underlying Problem: The Individual and the State; The Sword and the Shield

All of these human rights concerns emanate from the challenge made to the relationship between the individual and the State and between the sword and the shield functions of criminal law. With the former relationship, what is often being threatened is the proportionate use of the criminal law sword in relation to the offense in question and defendant rights, as well as the need for legal certainty namely, the certainty of publically-accessible and clear rules an integral part of the individual-and-state relationship. In order for it to fulfill its function of delineating the relationship between an individual and the state in a democratic society ruled by law, criminal law itself must be publically negotiated, publically accessible, clear, certain, prospective in application, and enjoy substantial state compliance. The monopoly of power possessed by the State is (generally speaking) only legitimate in these circumstances.

The aforementioned human rights concerns raises two issues with regards to "certainty," or in the words of Mitsilegas, the "journey into the unknown":[33] (1) certainty as the law being applied (the offense itself and its definition; the development of a *procedure* to recognize national decisions but not the *substantive* rules being applied in these decisions; whether an optional provision in the EAW-FD applies, specifically the procedure and rights of defense

for decisions taken under Article 17 EAW-FD); and (2) "citizens in the other Member States are not in a position to know how other national systems have developed."[34]

The second relationship—the sword and the shield functions of criminal law —appears to be distinctly out of balance with the EAW. There are considerable coercive aspects to the EAW-FD and yet there are fewer safeguards. Even where "human rights protection" is mentioned, it is only in the preamble[35] and in the definition of the EAW itself.[36] A potential breach of human rights by the requesting state is not listed as either a mandatory or an optional ground for refusal of a warrant (though it is generally accepted that a potential human rights violation would amount to a legitimate ground in practice (though there is disagreement on how this might work[37]). Furthermore, it is not just the provisions of the EAW-FD decision itself that cause concern to the sword and shield dynamic but also the need to trust that other Member States will adhere to the same or equivalent human rights standards as the issuing state. The requirement that all EU Member States are party to the ECHR does not ensure human rights compliance. As Lord Justice Sedley explains, "There may be a degree of over-sanguinity in the belief that state signatories of the ECHR can be trusted to afford a fair trial . . . [It is] painfully well known that states which, with reason, have congratulated themselves on the fairness of their legal systems have been unexpectedly found wanting in Strasbourg."[38]

Furthermore, it is questionable as to whether this instrument is sufficient for the development of criminal law (for example, how much scope should be permitted for a margin of appreciation?). Perhaps a document with greater detail—reflecting more of what is available in national constitutions and criminal law systems—would yield greater trust amongst states and alleviate the concerns arising from the uneven sword-shield relationship.

This is not to say that the system will not function well in many cases or that States do not, on the whole, have legal systems that provide a fair trial. Furthermore, it is possible to mistake variations and differences in approach as potential human rights violations;[39] we must always be vigilant against ill-founded or unsubstantiated accusations and damaging "Europhobia." It is the cases that fall through the cracks that are concerning, as Spencer remarks: "Not only is it possible for defendants to vanish down the cracks that exist between the different national systems; the same thing can happen to defendant's rights."[40]

How Are EU Human Rights Principles Applied to the EAW?

EU human rights principles apply to both the legislative aspect of the framework decision and the judicial protection provided by national courts and the European Court of Justice (ECJ).

Legislative: Human Rights Standards Applied to the EAW-FD Itself

Article 6(1) and (2) EU are interpreted as ensuring that all legislation in the EU respects fundamental rights:

> (1) The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> (2) The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

These provisions apply to the European Council when adopting framework decisions and the European Commission when designing, writing, and proposing legislative instruments.

Judicial Protection of Human Rights in Relation to the Operation of the EAW

Are individuals surrendered on the basis of a EAW able to enjoy the protection offered by Article 6(2) EU? The EAW itself does not include any bar to extradition mandatory or discretionary that operates on the basis that an individual's human rights have been or may be violated. However, it does make two separate references to fundamental rights in the EU. First, recitals 12 and 13 of the *preamble* state that

> (12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union in particular Chapter VI thereof . . .
>
> (13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhumane or degrading treatment or punishment.

Second, article 1(3) EAW-FD states:

> This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and the fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Curiously this provision is contained under Article 1, "Definition of the European arrest warrant," which begs the question: why was it felt unnecessary to put it under Article 3 (mandatory nonexecution) or 4 (optional nonexecution) of the EAW-FD? Alegre and Leaf suggest that "the absence of particular grounds of refusal in the text of the EAW . . . gives rise to the suspicion that Member States have not given serious consideration to the possibility of grave human rights abuses occurring in other Member States that

would give rise to an obligation to refuse surrender"[41] (this is supported by the analysis in Part III of this paper).

Article 1(3) EAW-FD makes reference to the fact that fundamental rights are also applied by the fact that Member States are party to the ECHR: national constitutions and laws must be in compliance with the Convention. For example, in the UK, the Human Rights Act 1998 declares it unlawful for a court as a public authority[42] to act incompatibly with ECHR rights.[43] Furthermore, in its implementing legislation the Extradition Act 2003 the UK included a requirement that a court must act in compliance with the ECHR and the judgments of the European Court of Human Rights (ECtHR).[44]

Indeed, as Mackarel notes, these provisions are the ones that underpin the principle of mutual recognition;[45] they allegedly ensure that Convention rights are respected. However, as previously discussed, in some cases this is insufficient; either because Member States do occasionally violate Convention rights or because the EAW system itself leads to a lack of certainty or sufficient protection against a violation of a defendant's procedural rights.

The Need For a Principled Approach

This article will demonstrate the need for a coherent, principled approach to EU criminal law development by analyzing (1) how the EU ended up with the EAW system (Part III), and (2) the EU judicial protection available for EAW cases (Part IV). The analysis will demonstrate that an unprincipled approach, lacking coherency, has led to the aforementioned human rights concerns, and that a principled criminal justice policy can lead us to a solution. This is not to say that the principle of mutual recognition cannot be used, but that there should be a guiding framework that will fill any cracks that emerge. Given the possibility that a EU-wide agreement on a comprehensive, coherent, and complete justice policy is a utopian vision unlikely to materialize in the near future, the final part of this paper argues in favour of Ms. Padfield's proposition that "we also have a duty to present this [a vision of EU criminal law cooperation] publically"[46] so as to bring a normative desire for EU criminal law closer towards a descriptive reality.

III. TAKING HUMAN RIGHTS INTO ACCOUNT DURING THE LEGISLATIVE PROCESS

In the Shadow of 9/11:[47] How Did the European Arrest Warrant Come Into Existence?

The story of the EAW is a story that involves numerous oscillating tensions: a desire for cooperation to combat cross-border crime (including frauds

on EU finances[48]) and a fear of vertical intrusions on sovereignty; a criminal law-orientated approach (sword) and a fundamental respect for human rights (shield); a need for security and a need to respect human rights; an overwhelming sympathy for the United States after 9/11 and the need to develop criminal law in a principled and nonreactionary manner; a climate of public fear and concern and the need to remain objective and clear-headed; a political desire to do something, anything because any action that demonstrates a commitment to countering terrorism avoids criticisms, and the need to look at the root cause of the 9/11 and other terrorist attacks and address these problems; and finally, a divisive tension developed through the rhetoric of politicians "us" and "them," i.e., you are either with "us" or with "them."

This next section illustrates these different tensions at various stages of development of the EAW-FD: (1) the attempts to create a single judicial area for extradition prior to September 11, 2001; (2) the decision to use mutual recognition of judicial decisions instead of a harmonization measure; and finally, (3) the accelerated development of the EAW-FD in response to the 9/11 attacks.

1957–1999: Attempts to Create a Single Judicial Area for Extradition Prior to September 11, 2001

The European Convention on Extradition 1957 (a Council of Europe instrument) was "one of the marvels of European recovery after the second world war"[49] and represented not only a quicker and more efficient method of extradition but also a sign of mutual trust among State parties. There were subsequently two additional Protocols that expanded and developed the law on extradition (but few States ratified these instruments), as well as numerous smaller agreements (for example, the Benelux Convention 1962 between Belgium, Luxemburg, and the Netherlands), other Conventions that affect extradition (for example, the European Convention on the Suppression of Terrorism 1977), and bilateral legal arrangements for example, between the UK and the Republic of Ireland (Backing of Warrants [Republic of Ireland] Act 1965). As of 1990, there was also the Schengen Implementation Convention and finally, in 1996, the EU Convention relating to Extradition or the Dublin Convention (not in force).

There were four primary (but by no means exhaustive) problems with the extradition system in Europe: (1) the time taken by national authorities to execute extradition requests defied the very term "efficiency" (often taking at least a year and involving both administrative and judicial authorities); (2) the political phase of extradition would often significantly delay cases; (3) the cost of the extradition process was immense the Home Office estimated the average cost of a contested extradition case was £125,000 (2002);[50] and (4) the complex web of instruments meant that the system was complex and often identifying which law applied in any given situation was a remarkable accomplishment.

In addition to the complex arrangements for extradition, there was an increase in cross-border crime, a consequence of the opening of the EU's borders. As Fabry remarks, "Criminal networks have proliferated with the purpose of . . . people smuggling . . . trafficking in human beings . . . and driving unsuspecting victims into forced labour or prostitution as soon as they enter the EU. The members of such networks have been able to take advantage of open borders to travel freely to commit crimes (such as theft, fraud or burglaries . . .), to increase their illegitimate profits and to escape punishment."[51]

The 1970s and the 1980s presented Europe with terrorist problems and led to the establishment of the Trevi Group (information exchange about terrorist activities and security initiatives; later expanded to include international organized crime and football hooliganism). For some European States, this problem still existed in the 1990s and there was certainly a concern over terrorism, but it formed only part of the cross-border crime problem. Extradition was seen as the answer to this solution; defendants should be transferred back to the scene of the crime and their attempts to evade prosecution should be thwarted.

It is against this background of complex and varied agreements, concern over cross-border crime, and a fear that the upcoming accession of States would make matters worse that the European Parliament passed a Resolution in 1997, calling upon Member States to make efforts to eliminate bureaucratic and administrative reasons for delays, as well as to consider harmonizing extradition legislation.[52] Attempts to do just that were largely thwarted by State concerns over intrusion into sovereignty and, in some cases, negative responses by the general public that prompted States to reject ideas for harmonization;[53] for example, the 1997 *Corpus Juris* project was met with little state or public enthusiasm. The recent history of extradition is driven by a need for cooperation to respond to cross-border crime and security concerns, but this is juxtaposed against a fear of pooling more State sovereignty in a sensitive area (criminal law). The British Presidency at the 1999 Council Meeting in Tampere believed they had found a solution to temper this tension: the principle of mutual recognition of judicial decisions.

1999–September 11, 2001: Mutual Recognition of Judicial Decisions

The principle of mutual recognition is based on the notion that home-country rules are applied and enforced in, and by, a host-country: the law of one State takes effect on the territory of another. The principle was first used at the European level to enhance cooperation within the EU Single Market; beginning with the internal prohibition of quantitative restrictions on imports and measures having equivalent effect,[54] and later extending the principle to mutual recognition of regulations.[55] Its success at opening up the European common market without having to resort to lengthy and complex harmonization provisions[56] (a point emphasised by Jack Straw whilst he was Home

Secretary for HM Government and arguing for use of the principle in EU criminal measures[57]) inspired the UK Government to put the idea forward of using the principle for EU cooperation in criminal law.[58]

This is hardly surprising given the British had already successfully used the principle for "backed warrants" within the UK and Ireland.[59] At the Tampere meeting in October 1999, the European Council concluded that "[t]he European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union."[60]

The Presidency Conclusions also articulated the initial areas where cooperation was envisaged, confirming the focus on cross-border crime (primarily financial and trafficking in drugs and humans): "... the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime."[61]

To achieve these aims, in January 2001 a program of 24 criminal law measures based on the principle of mutual recognition was adopted.[62]

Despite the successful use of the principle in the UK, there is an obvious concern with drawing upon "free market principles" and using them for criminal law cooperation. The idea for both the economic markets and for criminal law is to encourage the free movement of goods, services, or judicial decisions without harmonization in order to resolve the tension between desiring cooperation and avoiding significant intrusions into state sovereignty. However, the criminal law sphere is far more complex and involves the aforementioned relationships between the sword and shield functions and the individual and the State. Furthermore, the movement of national judicial decisions at the EU level logically involves the movement of national criminal law codes and national legal systems that are established and managed by a democratic, constitutional process specific to an individual State.

However, this means that mutual recognition might resolve one tension but paradoxically, without a high level of similarity or some form of harmonization, it generates other tensions: between the penal function of the criminal law system and human rights principles; between the extra-territorial application of judicial decisions and the need for clear, democratic, publically-negotiated rules; and between recognition of a patchwork of national systems and the need for a principled, coherent development of a criminal justice policy. As Mitsilegas explains, "Citizens must accept completely external standards, standards that were not the product of an open, democratic debate which would delimit the fundamental rules regulating the relationship between the individual and the State in criminal matters ... no debate has taken place on the

direction and aims of EU criminal law rendering EU action in the field far from coherent."[63]

After the 9/11 terrorist attacks, the tensions playing out in EU criminal law development would increase and principled and coherent development rooted in human rights protection is both absent and wanting.

September 11, 2001: The Birth of the European Arrest Warrant

The creation of a streamlined and efficient "single judicial area for extradition" was included as one measure of the EU Council's program for criminal law cooperation, but it only received priority level two.[64] Other measures to fight cross-border crime such as the enforcement of freezing orders for confiscation or restitution to victims were designated priority level one (the highest level).[65] Yet, the EAW-FD was the first criminal law instrument in the Third Pillar to use the principle of mutual recognition and the first measure of the Council's program to make it into law. The external influence of the 9/11 terrorist attacks altered the focus of EU criminal law cooperation as the "fight against terrorism took over as the top priority in affairs of the European Union."[66]

A mood of "overwhelming sympathy,"[67] combined with a desire to show support to the US and solidify the EU's position as a major player in international politics, presented the European Commission with the ideal opportunity to develop plans for EU criminal law cooperation. This is not to say that a streamlined extradition system was developed solely in response to 9/11; the Commission was working on a proposal since Tampere in 1999,[68] but it was the political mood in response to 9/11 that accelerated what should have been a considered debate and discussion on the Commission's proposal.

Responding to the Terrorist Attacks of September 11, 2001

The events that took place on September 11, 2001 are well documented and will not be rehearsed in this paper.[69] Furthermore, despite the obvious difficulties in assessing State responses to terrorism when scholars and States cannot first agree on a definition[70] (the definition of terrorism sits outside the scope of this paper), this article contends that the relevant actors undisputedly consider the events of September 11, 2001 as acts of terrorism. Although this is sufficient for the forthcoming analysis, it should be noted that the question of whether the term could ever possess a generally accepted definition is part of any broader analysis of any political or legal use of the term; indeed it could be argued that "the labelling of a particular act as terroristic tells less about that act than it does about the labeller's political perspective . . . it is more of a formulation of a social judgment than a description of a set of phenomena."[71]

The EU issued a Declaration on September 12, 2001 in which it advanced a *law-enforcement* response to the terrorist acts, calling upon on Member

States to "spare no efforts to help identify, bring to justice and punish those responsible."[72] The EU subsequently issued a Joint Declaration on September 14, 2001,[73] which called upon the EU to "... accelerate the implementation of a genuine European judicial area, which will entail, among other things, *the creation of a European warrant for arrest and extradition*, in accordance with the Tampere conclusions, and *the mutual recognition of legal decisions and verdicts*"[74].

On September 19, 2001 the European Commission announced that "Europe must have common instruments to tackle terrorism"[75] and adopted proposals for (1) a definition of terrorism and (2) a European Arrest Warrant.[76] The announcement quoted the Commissioner responsible for the Area of Freedom, Security, and Justice (formally known as the Justice and Home Affairs), António Vitorino, as having told the European Parliament that "Terrorist acts are committed by international groups with bases in several countries, exploiting loopholes in the law created by the geographical limits on investigators ... Terrorists take advantage of differences in legal treatment between States, in particular where the offense is not treated as such by national law, and that is where we have to begin."[77]

The EU and in particular the Commission was beginning to position itself as actor in the so-called "war against terrorism." President Bush declared that "we will rally the world"[78] and the EU was indeed rallying behind the US, with the Commission taking the lead.[79]

Linking "Extradition" with "Terrorism"

The Commission considered the two most pressing "common instruments to fight terrorism" to be (1) a definition of terrorism and (2) the European Arrest Warrant. Kaunert who has undertaken considerable empirical research into the response of Commissioners and EU Council Members to the 9/11 terrorist attacks explains that "... in Vitorino's view, anyone opposing these measures (the European Arrest Warrant) behaved out of line, inappropriately, and effectively supported terrorism indirectly by not closing the legal loopholes."[80]

Vitorino was continuing the divisive "us" and "them" language used by President Bush ("you are either with us or against us") and Prime Minister Blair ("the rules of the game have changed"), thereby developing a tension between those "cooperating to fight in the war against terrorism" and those "standing on the sidelines, effectively supporting the terrorists." This would translate into an overwhelming need to show progress with EU criminal law measures. The fact that measures for establishing a definition of terrorism were combined with efforts to establish the EAW solidified the relationship between extradition and counter-terrorism. Indeed, this new relationship displaced an original desire to focus on measures such as the "enforcement of

freezing orders for confiscation or restitution to victims" or other cross-border crime issues, which only nine months previously was perceived to be the highest priority in EU criminal law cooperation.[81]

A New Tool for Combating Terrorism: The European Arrest Warrant

Kaunert[82] conducted several interviews with officials in the Commission as part of his empirical research into the Commission's strategy for the EAW. These interviews confirmed that whilst the Commission was developing the EAW before September 11, 2001, it was the terrorist attacks that prompted the Commission to bring the proposal forward, packaged as an "anti-terrorist" measure.[83] He cites Occhipinti to explain that "Officials in the Directorate-General JHA under Sir Adrian Fortescue had to work at full speed over the weekend before the proposal for it to be approved by the College of Commissioners on 19 September 2001 . . . The timing was crucial in order to construct the EU response to the 'war on terror'."[84]

Thus, the proposal for the EAW-FD[85] was presented a mere eight days after the 9/11 terrorist attacks as a "counter-terrorism" measure, offering very little opportunity for consultations with national authorities.[86]

This blurred "the boundaries between the different contents—terrorism and crime more generally."[87] Indeed, the EAW has a scope far wider than terrorism with at least a list of 32 "types" of offenses where double criminality has been removed (ranging from terrorism and murder to racism and xenophobia[88]). Furthermore, as Vitorino himself acknowledged, whether national law has a specific offense for terrorism "differs widely from one Member State to another. In most of them, there are no specific rules on terrorism and terrorist acts are punished as offenses under the ordinary law."[89] This raises the question of whether terrorism is best viewed by the law as an "offense under the ordinary law" or whether it warrants existence as a separate offense. It illustrates two points. First, Member States do not all agree on how criminal law should deal with terrorism, and second, for some Member States and the EU Commission, terrorism or terrorist offenses are outside the "ordinary law": they are considered extraordinary or fall under emergency law.

The EAW-FD was politically adopted on December 14–15, 2001, at the Laeken Council summit (three months after the 9/11 attacks) and legally adopted by the EU Council on June 13, 2002. This was an exceedingly quick process that raises concerns over whether there was adequate time to properly debate and discuss the EAW: what exactly took place during this time frame?

In September 2001, the Belgians held the Presidency of the Council. Belgium was known to be opposed to the EAW, owing largely to ongoing problems with extradition procedures between Belgium and Spain over the surrender of "Basque terrorists."[90] These problems centered on contentions

arising from different interpretations of terrorism, and therefore whether requested persons had committed a crime under Belgian law. The interviews conducted by Kaunert explain how Vitorino personally addressed the Belgian Prime Minister, Guy Verhofstadt, so that he would convince his national delegation of the necessity of incorporating the EAW into the "war on terrorism" package.[91] It was also the perception of "driving the EU forward in the fight against terrorism" that brought the Belgians on board to support the Commission and convince reluctant Member States on the merits of the EAW.[92]

What followed was a divisive strategy that presented only a binary option to wavering states: work with the Commission and other Council Members to combat terrorism or let terrorists exploit democracy and the lack of cooperation. Notwithstanding the alignment of the EAW with the "war on terrorism" and explicit support from the US President,[93] there was considerable disagreement between Member States (and some Member States and the Commission) at the extraordinary summit on September 20–21 and at the Council meeting in Ghent on October 16, 2001. The key debates centred around: (1) whether the list of crimes within the scope of the EAW should be in the form of a negative list of offenses exempt from the EAW or a positive list of offenses included in the EAW; (2) the contents of a positive list of offenses (some States, such as Italy, wanted a shorter list of six crimes, whereas the Commission and other Member States were pushing for over thirty); and (3) whether to maintain the principle of double criminality.[94]

As the Laeken Council summit approached, the final objectors fell in line and supported the EAW; namely, Ireland[95] and Italy,[96] who had previously voiced strong criticisms over the offenses covered by the EAW. Ireland was primarily concerned that there were no agreed-upon definitions for crimes such as swindling and xenophobia.[97] Italy was "reportedly surprised at how quickly the legislation had evolved and wanted the new arrest warrant to be limited to the fight against only the most serious crimes, such as terrorism and the trafficking of drugs and human beings."[98] Ireland acquiesced sooner than Italy, who stood its ground despite accusations that Prime Minister Berluscoconi "feared being extradited himself for past tax-related financial wrongdoing."[99] Considerable pressure was put on Italy to conform; prior to the Laeken summit, Vitorino declared that "... we cannot be held hostage to Council unanimity ... the Council might try to proceed without Italy by using the option of enhanced co-operation to allow the 14 member states to go ahead ...."[100]

The leading columnist Eugenio Scalfari wrote on the front page of La Repubblica: "the damage is done, the international imagine of our government is already in ruins and the impact at home and abroad is devastating."[101] Berlusconi had at some point been "shamed by the Commission, his fellow EU prime ministers, as well as the European media,"[102] and the Italian press. This was an intense exercise of peer pressure that resulted in Member States

agreeing to a coercive criminal law instrument despite raising genuine and quite reasonable concerns.

In the end, Italy missed the deadline for implementing the EAW by sixteen months[103] and its implementing legislation[104] has so many built-in safeguards that it been described as "negating the Framework Decision, rather than implementing it."[105] For example, detailed definitions have been given to offenses in Article 2(2) of the EAW-FD and the executing judge has to verify that the charges under the law of the issuing State cohere with the definition in Article 8 of the Italian law.[106] Thus, Italian judges will compare and ensure that national and foreign definitions correspond.[107] These safeguards represent issues that Italy had during the negotiation process; it should have had the opportunity to properly discuss these concerns.

It was not just other Member States or the Commission that played a significant role in applying pressure; Member States' media was considerably critical of their own (and other) government(s) for not supporting measures ostensibly designed to "fight terrorism." Goggle-eyed headlines reported casualty estimates and potential threats; integral to the pressure campaign was not just the tragic circumstances surrounding 9/11 but also the future possibility of terrorist attacks, future atrocities, and future casualties. A powerful combination of shock and sympathy toward the attacks on America, and fear and distress about future catastrophes help to establish the argument that something must be done and it must be done now.

The Democratic Deficit Problem

The process that led to the EAW-FD experienced considerable democratic deficit for two reasons: (1) the lack of involvement and notice taken of the European Parliament, and (2) the lack of involvement of national Parliaments. This is because of both the political situation after 9/11 and the use of the mutual recognition framework principle (which is not subject to ratification by Member States). Indeed, there is a general democratic deficit problem for all third pillar measures.

The European Parliament (EP) was consulted twice but without the required three-month period prescribed by Article 39(1) EU. The EP debated the Commission's EAW-FD proposal at its plenary session on November 29, 2001. The committee report demonstrated support for the proposal but suggested numerous amendments designed to protect human rights of the defendant, including the provision of free legal counsel and the translation of the arrest warrant within three days.[108] Occhipinti also notes that the EP wanted to "raise the threshold for extradition to crimes with punishments of at least twelve months, which would insure that extradition would not be use for minor offices,"[109] and a safeguard against extradition to States with the death penalty (a safeguard against potential future developments in national legislation). Perhaps most importantly, the EP suggested that the ECJ have

jurisdiction for all issues concerning the arrest warrant.[110] However, despite these concerns the EP's influence on the EAW-FD was severely limited by the fact that the EU Council reached political agreement (December 2001) before the EP could formally adopt its opinion[111] in February 2002.[112]

Indeed, two minority opinions at the Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (JHA) complained about the "unprecedented pressure of time and totally inadequate preparations" and that "such a hasty procedure as does not allow scope for anything approaching serious consideration of the proposal and a measured assessment of its particularly wide-ranging implications."[113] Compounding matters further, only a few national Parliaments (Denmark, Finland, the Netherlands, Sweden, and the United Kingdom) were able to influence their governments during the negotiations; most were unable to make any contribution to the negotiation process.[114] Perhaps if the EAW-FD had been adopted with less haste and with greater efforts to involve both the EP and national parliaments, some of the human rights concerns would have been resolved or least discussed before adopting the framework decision.

EAW Receives Political Agreement

The EAW received political agreement at the Laeken summit on December 14–15, 2001, just three months after it was initially put forward by the Commission as part of the EU's "war on terrorism" strategy. This agreement was a result of a combination of both the Commission as a policy driver and the Council putting internal pressure on Member States and fulfilling a desperate need to demonstrate action in this incipit "war on terror." Meanwhile the European Parliament the bastion of European democracy had very little involvement in the process.

Evaluation: The Law-Making Process, Human Rights, Legitimacy, Democracy, and Principled Development

As this section has illustrated, new decision-making norms came into play very quickly and the process of decision-making itself was greatly expedited. There was little room or time to discuss, debate, and publically negotiate a direction for EU criminal cooperation in relation to an improved extradition system. This, in turn, meant that fundamental rights issues were largely sidestepped. The intense political pressure immediately post-9/11 demanded action in the "war against terrorism" and this was not conducive to detailed discussion of human rights issues. Any attempt to raise serious objections would likely have been met with the same coercive shaming tactics that Italy faced when it initially failed to acquiesce with the majority.

Experts and advisors also had little influence during the negotiations, and nongovernmental organizations (NGOs), interest groups, and individuals

were not able to take part in the process at all. With disappointment Judge Blekxtoon recalls, "I was told by people closely following the drafting of the [EAW-FD] that the officials responsible for the outcome did not really want to listen to the experts present at the negotiations who knew what they were talking about. It was more important to speed up matters for political reasons."[115] Speed over substance won the day, but at what cost? Part II highlighted a number of human rights issues with the EAW; although the EAW works in most cases, it does increase the danger that individuals' rights will be violated. Furthermore, the lack of principled application of the EAW arguably the result of using mutual recognition without some overriding framework, approximation, or harmonization of criminal law measures (and not just the ECHR) means an uneven, disparate application by Member States. Many States have implemented additional safeguards,[116] others have interpreted parts of the EAW-FD differently, and States collectively differ in their approach and definition to criminal offenses. The fact that so many States have added additional safeguards and qualifications in their implementing legislation as opposed to bringing up these concerns during negotiation and debate of the framework decision is a concern in itself.

Article 6 EU mandates that all EU institutions including the Council must act in accordance with fundamental rights derived from the ECHR and standards common to Member States. Taking the time to properly consider a legal measure is even more important if it is based on the principle of mutual recognition because this principle transfers the transaction costs of cooperation to the operational stage.[117] This means that the framework decision should be properly discussed, precise, clear, unambiguous, and rooted in human rights compliance in order to assist the national courts that must make the system work.

It is interesting to note that the European Commission raised concern at the fact that some Member States had exceeded the requirements of the framework decision by adding human rights protection in their implementing legislation.[118] The Commission found that providing a ground of refusal for violation of fundamental rights or discrimination, "which two thirds of the Member States have chosen to introduce expressly in various forms"[119] was "disturbing."[120] The Commission went on to say that "Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights an explicit ground for refusal in event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been vitiated by infringement of Article 6 of the Treaty on European Union . . . in a system based on mutual trust, such a situation should remain exceptional."[121]

On the one hand Member States collectively as the Council agreed on the EAW-FD, yet on the other hand, during its implementation, Member States

added additional safeguards. It seems peculiar for the Commission to accuse Member States of not following the Council's will when the Council is made up of Member States that unanimously agreed on the EAW-FD. Perhaps on reflection, and without the political pressure exerted during the negotiations process, Member States decided that additional safeguards were in fact required.

IV. JUDICIAL PROTECTION OF HUMAN RIGHTS

Introduction

Part II indentified the human rights concerns relating to the EAW and placed them within two constitutional relationships: the individual and the state (or Union), and the sword and shield functions of criminal law. Part III traced the development of the EAW, notably from September 11, 2001, to demonstrate that the expedited and politically pressurized process that gave birth to the EAW may explain why many of these concerns were not dealt with at the legislative stage, and why this legal instrument that can endanger fundamental rights, as protected by both national constitutions and the EU, was successfully agreed upon. It was argued that the development of a principled, coherent justice policy may have kept the negotiations on track (yielding greater debate and discussion), and prevented the EAW from being almost purely presented as a "counter-terrorism measure."

This section demonstrates the need for a principled approach to criminal law cooperation in the EU by considering the judicial protection of human rights in relation to the EAW. It will be argued that judicial control is marginal, patchy, unclear in places, and susceptible to allowing individuals to fall through the "cracks." There is one different and one familiar tension in play here: *national* constitutional principles against *regional* protection of human rights standards, and the protection of individuals from fundamental rights violations against deeper cooperation at the EU level in criminal law matters.

National Courts: Human Rights as a Barrier to Surrender

As outlined in Part II, the EAW-FD does not contain an express provision to refuse surrender on the basis of a human rights violation. Eleven Member States have incorporated this safeguard in their implementing legislation[122] and the European Commission has confirmed that a judicial authority is always entitled to refuse to extradite an individual if proceedings have been vitiated by infringement of the individual's human rights.

Finally, since Member States have incorporated the ECHR into their national law, legal and criminal procedures must operate in compliance with

Convention rights. This means that *Soering v. UK*[123] and other judgments apply; *Soering* established the principle that a Member State will violate its obligations under the ECHR if it chooses to extradite an individual to a foreign state where the person, if extradited, would likely suffer inhumane or degrading treatment or torture contrary to Article 3 ECHR. Garlick argues that these provisions—as well as the EU's general commitment to fundamental rights, including the *Soering* judgment—mean that it "... is beyond argument that the judicial authority executing a EAW is responsible for ensuring fairness of EAW proceedings and, moreover, national courts in the executing state can, and if called upon to do so must make rulings in connection with an alleged potential violation of the ECHR in the issuing state."[124] It is difficult to discern a pattern or process involved in Member States that either do or do not refuse to surrender individuals on human rights grounds (not least because of differences in decision reporting). Mackarel summarizes this situation: "... it is clear that such arguments [human rights objections to surrender] are being considered on a regular basis. Thus, for example, in Sweden, it is reported that human rights arguments are often raised but are seldom successful[125] and this seems to reflect the pattern across the European Union. However, there are not a plethora of cases whereby the courts of the executing State have refused to surrender individuals under a EAW on human rights grounds nor any underlying pattern in those few cases where refusal has occurred on that basis."[126]

Some Member States have expressly incorporated a bar to surrender on the ground of human rights in their national legislation, whilst others have not. Some national courts consider the surrender process to be an administrative or procedural process, whilst others consider it to be part of the criminal process; human rights grounds are more easily applied in the latter situation than in the former. Some national courts are willing to accept, without investigation, the adequacy of rights protection in other Member States (English courts), whereas others are not (the Irish High Court: *Minister for Justice v. Stapleton*[127]). In other cases, national courts are compelled to look behind the warrant and examine the law and procedure of other Member States by virtue of the national implementing legislation. The point here is that there is a great diversity and variation in the approaches of national courts and legislatures such that a reliable and consistent pattern or principle cannot be discerned.

This raises concerns over the certainty and standards of justice applied across the European Member States; whether a court will look behind a warrant may well depend on where an individual is located. It is regretful that the Council did not include an express provision barring surrender on human rights grounds in the framework decision itself. Furthermore, a harmonized or approximation of national-law approach to defendant's rights for the purposes of criminal law cooperation (such as the Project for the Minimum Standards in Procedural Safeguards in Criminal Proceedings) would greatly enhance the

work of national courts at the same time as generating the sufficient trust required to make the EAW system run smoothly.

The European Court of Justice

The ECJ is considerably limited with regards to its role in the third pillar as compared to first pillar measures. There are only two available options: (1) a preliminary ruling in an appropriate case (where individuals have a form of indirect standing), and (2) an action brought on specific grounds but only by either Member States or the Commission:[128] standing is not extended to individuals.

This limited jurisdiction raises concerns for human rights protection given that third pillar measures are inherently linked with the freedom and fundamental rights of individuals. As previously discussed, elements of the EAW-FD challenge the individual-and-state relationship, while the Union handles traditional state matters through EU criminal law cooperation. There is a shift from the State to the Union, or more precisely, to all and any Union Member State that operates the EAW system. Yet the defendant's shield the ability to challenge coercive criminal law measures infringing rights guaranteed by constitutions and regional/international instruments, a fundamental part of the individual-and-state relationship is dangerously neglected by not providing access to an overarching tribunal for adjudication on matters of fundamental rights relating to measures taken in the field of criminal law cooperation.

In the *Advocaten voor de Wereld*[129] case, the ECJ considered the protection of fundamental rights in relation to the EAW. First, the Court affirmed the application of Article 6(2) EU to criminal cooperation in the form of framework decisions in the third pillar. The Court stated that the EU is built upon respect for the rule of law and fundamental rights consisting of the ECHR and constitutional provisions common to Member States as principles of Community law,[130] and that "[i]t follows that the institutions are subject to review of the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the Union."[131] Furthermore, following *SEGI,*[132] the court in *Advocaten voor de Wereld* was content to examine the validity of framework decisions under the third pillar in light of the aforementioned fundamental principles of Community law.[133]

Secondly, the Court considered the EAW-FD in light of the principle of the legality of criminal offenses and penalties[134] and concluded that "[t]he [EAW-FD] does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract . . . accordingly . . . the definition of those offences [in Article 2(2)] and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which . . . must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently,

the principle of the legality of criminal offences and penalties."[135] The Court essentially shifted responsibility of guaranteeing fundamental rights in relation to the EAW-FD to the Member States themselves. This could exacerbate the patchwork effect already generated by use of the mutual recognition principle, and negatively impact on the protection of fundamental rights standards. For example, "if in a future EAW procedure at national level the argument is raised that surrender is requested for an offence falling short of the principle of legality in criminal matters . . . [w]hich legal standards would apply to resolve this contention and which would be the judicial body in charge of finally doing so?"[136]

The Court states that it is the "fundamental rights and fundamental legal principles as enshrined in Article 6 EU,"[137] implying that the assessment of whether fundamental human rights standards have been observed is not entirely a national standard; it is an EU standard (albeit based, in part, on national standards)—with presumably the ECJ as the adjudicator (an adjudicator for which individuals have no standing). This raises two important points. The first relates to the autonomous nature of EU human rights provisions. The Court may have been positioning itself as a guardian of human rights standards themselves. The second point follows from this, since although the Court has limited competences in third pillar matters, ". . . who can foretell whether this judgment might not be cited as authority for a claim challenging a national provision of criminal law, applied within a mutual recognition context, as infringing Article 6 EU, due to its lack of precision, clarity and predictability?"[138] The Court may be simultaneously setting its own human rights review standards and also extending its review its reach into Member State affairs by considering whether a national provision of criminal law infringes Article 6 EU. National constitutional courts play a role they must determine if national measures infringe Article 6 EU—but the ECJ seems to be setting itself up to have the final review. It could develop, like other areas of the EU, into a "cooperative sharing of tasks in which both national and European courts are deeply involved"[139] (although the ECJ's jurisdiction is severely limited), but this still involves national and regional tensions that may play out to the detriment of fundamental rights.

The national constitutional concerns with the EAW illustrate this point. For example, the Bundesverfassungsgericht stated that the principle of mutual recognition cannot limit the constitutional guarantee of fundamental rights and that review of individual cases may be necessary. The Court essentially preferred the national constitutional standard rather than Article 6 EU or the ECJ as the final arbiter. This decision has been criticized as being contrary to the judgment in *Pupino*, where the ECJ strongly emphasised loyal cooperation for third pillar matters; instead, the German Court's decision seems to be too ready to infringe EU law. Despite these criticisms, the Cyprus Supreme Court

agreed with the German Court and made an express reference to its content[140] and Cypriot and Polish constitutions had to be amended to accommodate the EAW. Although by contrast, the Czech Court did not agree with the German decision, instead agreeing with one of the dissenting judges, Gerhardt. The decisions of these constitutional courts, and the ECJ, are indicative of a patchwork and uneven criminal justice policy. There is a danger that, through these webs of agreements and disagreements, rights protection becomes fragmented, and standards of justice, contingent on a particular geographical location, court, or case.

Another concerning aspect of the *Advocaten voor de Wereld* judgment is the way the Court characterized the EAW process. The Court's argument that "The Framework Decision does not seek to harmonise the criminal offenses . . . " is similar to judgments of the ECtHR that exclude extradition from the concept of punishment,[141] thereby declaring that extradition is not a criminal prosecution but mere procedural assistance.[142] This approach does not seem appropriate for a system of surrender based on the principle of mutual recognition, since it effectively extends the legal jurisdiction of a Member State such that it " . . . opens national criminal law systems to material provisions of 'foreign' criminal law, serving as a legal basis for the apprehension and arrest of persons."[143] Since this is an arguable issue that urgently needs to be addressed, it is regrettable that the Court did not resolve the problem.

The European Court of Human Rights

According to the *Bosphorus Airways* judgment, Member States can be subject to an unlimited review of EC measures by the ECtHR where there is discretion as to their implementation and a limited review where States lack discretion. The "limited review" exists so long as the ECtHR considers that the EU protects fundamental rights "as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent[144] to that for which the Convention provides."[145] "Equivalent," the Court explained, means "comparable" and not "identical."[146]

The ECJ went on to review the EU human rights framework, noting that "the effectiveness of . . . substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance,"[147] and of particular importance in this regard is the ECJ.[148] The presumption that the EU sufficiently protects Community rights can only be rebutted if "it is considered that the protection of Convention rights was manifestly deficient."[149] As Peers notes, it "seems from *Bosphorus Airways* that in practice the presumption extended to the EC will be well-nigh irrebuttable, due to the extent of human rights protection afforded by the EC Legal in order. . . ."[150] Indeed, it is

difficult to see how this standing might be applied in any given case, leaving one to wonder if the ECtHR has any real affect at all.

However, the ECtHR did not comment on whether the protection in policing and criminal law cases is sufficient, leaving room to argue as Peers suggests[151] that it is not sufficient under the present judicial arrangements, "...with the result that the EC's and EU's JHA policies do not benefit from any presumption of compliance with the ECHR, and there is no restriction on the 'indirect review' by the Strasbourg Court of EC/EU acts in this area."[152] Indeed, as previously demonstrated, the ECJ seems reluctant to do much more than to pass the buck back to Member States to ensure compliance with fundamental rights, whilst reserving the possibility of a final review in future cases.

Given the seriousness of some of the human rights concerns raised by the EAW, it is hard to argue that this approach is equivalent to Convention protection by the ECtHR. However, this might ultimately depend on whether the ECtHR views the EAW as "mere procedural cooperation" as in past extradition cases, or whether it recognizes the EAW process to be a new, more advanced creature that provides a legal basis for individuals to be subject to foreign substantive and procedural criminal law rules. If it does find that the EAW engages Article 6 (right to a fair trial) and Article 5 (right to liberty) ECHR, then the rebuttable presumption that the EU and the ECJ protects human rights to an equivalent level may come under scrutiny. This would be a welcome opportunity for a Court to properly review criminal law measures that, by their very nature, regularly engage fundamental rights.

A Patchy Framework

As a result of a lack of a principled and balanced approach to the development of EU criminal law, there is no approximation of the rights of defendants and little consideration as to how the judicial processes are designed to protect human rights standards. National courts are considering human rights objections, but whether a court will consider such objections is often dependent upon implementing legislation and the way in which national legal systems treat the EAW surrender system. The ECJ has placed emphasis on the fact that Member States are responsible for ensuring compliance with human rights standards, whilst maintaining the possibility that it might review any objections that reach the ECJ. At the same time, it does not seem prepared to review the legality of the EAW-FD itself. Furthermore, the ECtHR also appears to have limited its powers of review on the basis that there is a presumption that the EU provides sufficient human rights protection. The result is a patchy framework that lacks legal certainty, access to judicial mechanisms, and sufficient protection of fundamental rights.

V. CONCLUSION AND SUGGESTIONS FOR IMPROVEMENT

This paper has been critical of the EAW, and it is of course easier to identify problems than provide solutions. However, the underlying cause of all the problems has been the same: without a principled constitutional framework, the principle of mutual recognition is too weak a foundation to support EU criminal law cooperation and ensure that it is rooted in human rights compliance. Whether the concern is over the use of the EAW (disproportionate use, lack of clarity), the potential violation of defendant rights (including the right to a fair trial), the fact that negotiations, debates, and agreement over the EAW-FD were driven by the need to respond to the 9/11 attacks, or the lack of coherent, accessible, and comprehensive EU judicial protection, it all amounts to the same problem: the EAW, and EU criminal law measures in general, lack a principled approach, democratic accountability, and public, nonstate involvement. In place of the current patchwork system, where defendant rights could fall through the cracks, we need a coherent, comprehensive, and principled criminal justice framework.

What Would This Principled Criminal Justice Framework Involve?

A principled constitutional framework rooted in human rights compliance should set out the purpose, direction, and goals of EU criminal law cooperation. It should also provide a detailed list of fundamental rights guarantees (appropriate for criminal law) and the "establishment of a supreme judicial body charged with the uniform interpretation of JHA law,"[153] and the uniform application of human rights standards (the judicial body should have jurisdiction over all EU criminal law measures). Member States should agree on procedures, substantive crimes, rules of evidence (i.e., the types and forms of evidence admissible in every Member State and a common set of standards in specific areas of evidence gathering[154]), and minimum rights for those who are accused. The proper role of institutional structures of EU criminal law the legislative, executive and judicial organs should also be considered.

An example of balancing the sword functions of criminal law with necessary shield protections is the *Corpus Juris* project, originally published in 1997 but quickly ignored; it should be revised and reconsidered in light of the EAW and other criminal and public law measures. It could form the basis for a framework by extending its limited area of EU fraud into a wider set of transnational crimes and criminal law cooperation. Such an approach would bring the certainty, proportionality, and clarity that is absent in the EAW-FD. As Spencer explains in relation to other framework decisions, a lack of clarity means that when presented "... with an array of legal dishes, some Member States, like diners at smorgasbord, have chosen some things but rejected

others; and then, sometimes, they have not actually eaten what they have put on their plates."[155] This generates considerable confusion and difficulty for the practitioner who is confronted with a number of different implementations of the EAW-FD and therefore must determine what rules apply where, and how specific Member State courts will handle certain situations (will they look behind the warrant or just accept it as per the EAW-FD?). If the EU wants to achieve true cooperation without compromising its steadfast commitment to human rights, it will need to ensure better levels of certainty: common definitions in substantive, procedural, and evidential law and judicial protection of human rights.

Concluding Remarks

Such a comprehensive document would provide a framework for future discussion of EU criminal law cooperation and prevent negotiation from being directed by overwhelming external events. It would provide flexibility, but within a principled, human rights compliant framework. However, it is unlikely that it will be possible to implement a coherent and principled framework for EU criminal law cooperation in the near future, a utopian vision that remains in the hands of EU Council Members.

This paper therefore endorses Padfield's suggestion, namely that "... we need to develop a more principled approach, but we also have a duty to present this publically ... Politicians and academics both, I suggest, have a duty to try and help formulate and lead public opinion."[156] Part of the problem has been the principle of mutual recognition itself; it does not, by its very definition, promote or engage debate over the development of common EU criminal standards or the direction of EU criminal law. Padfield suggests the solution is to "keep talking" and publish "what we know, bringing it into the public arena in a straight-forward fashion designed to encourage a wide debate."[157] By fulfilling this duty, we help to foster a political climate capable of yielding agreement on a principled approach and we encourage the very essence of civil liberties, of the relationship between the individual and the state: engagement in the political process.

The Lisbon Treaty, if ratified, will bring about some positive changes. Granting the European Parliament co-decision powers will reduce the democratic deficit and there will be new competence for the EU to adopt measures in the field of criminal procedure including, hopefully, on the rights of the defendant (although this will still be using the governance method of mutual recognition). However, the continued use of mutual recognition instruments will avoid the need to discuss a principled and coherent policy for EU criminal cooperation, will remain opaque, will not necessarily lead to legitimacy, and ultimately does not guarantee that there will be no gaps or cracks in the protection of human rights.

Criminal law plays a role in demarcating the powers of the state and the rights of the individual and involves an open, transparent, and engaging process, with participation from all stakeholders. If the state-and-individual relationship is to experience the addition of a Union-and-individual relationship, it too needs to treat criminal law as a process not only of interstate cooperation but also a relationship between the Union and the individual, which demarcates the powers of the Union and the rights of the defendant. This means establishing a criminal justice policy where the content and aims of EU criminal law cooperation are discussed through an open, transparent debate, whilst engaging the citizens of Europe in the process itself.

NOTES

1. Council Framework Decision on 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L190, July 18, 2002 (EAW-FD).

2. Sandra Lavenex, "Mutual recognition and the monopoly of force." *Journal of European Public Policy*, 14(5) (2007): 762–779.

3. For example, in the United Kingdom, the Human Rights Act 1998 is considered to have "constitutional status"; the UK also has an unwritten constitution through which some of these fundamental principles have been developed.

4. For example, the European Convention on Human Rights (ECHR).

5. For example, the International Covenant on Civil and Political Rights (ICCPR).

6. Ibid., recital [2] and Article 1(2).

7. Ibid., Article 1(1).

8. EAW-FD Articles 3–4.

9. Ellen Berry, "Extradition Watch." *LIBERTY*, (Summer 2009): 4.

10. *Minister for Justice v. Stapleton* [2006] IEHC 43, cited in Eoin Carolan, "Reciprocity and Rights under the European Arrest Warrant Regime." *Law Quarterly Review*, 123(Apr) (2007): 197–202, at pp. 200–201.

11. John R. Spencer, "Mutual Recognition of Decisions in Criminal Justice and the United Kingdom," in Gisèle Vernimmen Van Tiggelen et al., eds., *The Future of Mutual Recognition in Criminal Matters in the European Union* (Brussels: Editions de l' Universite de Bruxelles, 2009), 18.

12. *Zak v. Regional Court in Bydgoszcz* [2008] EWHC 470: comments made at an adjourned appeal hearing and cited in R. Davidson, "A Sledgehammer to Crack a Nut? Should there be a Bar of Triviality in European Arrest Warrant Cases?" *Criminal Law Review*, 31(1) (2009): 31–36.

13. Fugitive Offenders Act 1881 s.10; Fugitive Offenders Act 1967 s.8(3); Extradition Act 1989 ss.11(3) and 12(3).

14. See note 13, 3.

15. Ibid.

16. Council Framework Decision 2005/214/JHA of February 24, 2005, on the application of the principle of mutual recognition to financial penalties.

17. EAW-FD Article 2(2).

18. EAW-FD, Article 4(7).

19. John R. Spencer, "The Problems of Trans-border Evidence and European Initiatives to Resolve Them." *CYELS* 9 (2006–2007): 479.

20. EAW-FD, Article 2(2).

21. Susie Alegre and Marisa Leaf, *European Arrest Warrant: A Solution Ahead of Its Time?* (London: Justice, 2003), 47.

22. Ibid., 50.

23. For example, Austria has made a declaration under Article 27(1) and Article 28(1) EAW-FD, whereas the UK initially intending to make a declaration under Article 27(1) bowing to pressure from parliamentarians and civil society chose to retain the speciality principle: JUSTICE briefing on the Extradition Bill 2002 for second reading in the House of Commons, December 9, 2002.

24. EAW-FD, Article 13.

25. Ibid., Article 13(2).

26. BBC News, "The Candidate Countries," http://news.bbc.co.uk/1/hi/world/europe/1385235.stm (accessed August 17, 2009).

27. *Judgment of 18 July 2005* 2 BvR 2236/04. Reported in [2006] 1 CMLR 16.

28. *Re Enforcement of a European Arrest Warrant*, Judgment of April 27, 2005, P 1/05. Reported in [2006] 1 CMLR 36.

29. *Attorney General of the Republic v. Konstantinou*, Decision of November 7, 2005, Council document 14281/05, Brussels, November 11, 2005. See also [2007] 3 CMLR 42.

30. *Re Constitutionality of Framework Decision on the European Arrest Warrant* [2007] 3 CMLR 24.

31. See note 22, 46.

32. *Judgment of 18 July 2005* 2 BvR 2236/04. Reported in [2006] 1 CMLR 16.

33. Valsamis Mitsilegas, *EU Criminal Law* (Oxford, UK: Hart Publishing, 2009), 124.

34. Ibid.

35. EAW-FD, preamble, paragraphs [12]–[13].

36. EAW-FD, Article 1(3).

37. See note 22, 16.

38. Lord Justice Sedley (Sir Stephen Sedley), "Eurowarrant: European Extradition in the 21st Century," Keynote Speech, JUSTICE conference, London, July 5–6, 2003.

39. See note 8, 201; see note 12.

40. John R. Spencer, "European Criminal Procedure—Fantasy a Fact?," *Archbold News* 4 (2003): 5.

41. See note 22, 15.

42. Human Rights Act 1998, s.6(3)(a).

43. Ibid., s.6(1).

44. Extradition Act 2003, s.21, s.2.

45. Mark Mackarel, "Human Rights as a Barrier to Surrender," in Nico Keijzer and Elies Van Sliedregt, eds., *The European Arrest Warrant in Practice* (The Hague, The Netherlands: T.M.C. Asser Press, 2009): 145.

46. Nicola Padfield, "The Future of EU Penal Integration: Hopes and Realities," Protection of the EC Financial Interests and the Developments of European Criminal Law Conference, Ljubljana, Slovenia, May 30–31, 2008.

47. The phrase "9/11" is shorthand for the terrorist attacks on the United States that killed just over three thousand people at the Pentagon, the twin towers of the World Trade Centre, and aboard the four hijacked planes on September 11, 2001.

48. The 1997 *Corpus Juris* project (an attempt to set out a substantive and procedural framework for the EU) originated in an initiative by the European Commission to protect the financial interests of the EU.

49. Nico Keijzer, "The European Arrest Warrant Framework Decision between Past and Future," in Elspeth Guild, ed., *Constitutional Challenges to the European Arrest Warrant* (Nijmegen, The Netherlands: Wolf Legal Publishers, 2006), 13.

50. Home Office Press Notice No.303/2002, November 14, 2002; quoted by Spencer, note 8 above, 4.

51. Kristof Fabry, "The European Arrest Warrant: No Security Without Human Rights" (SIPRI Project Paper, 2007, 3).

52. O.J. C304 of October 6, 1997, 131.

53. See note 12, 4.

54. *Dassonville* ECJ July 11, 1974, Case 8–74.

55. *Cassis de Dijon* ECJ February 20, 1979, case 120/78.

56. See note 34, 116.

57. Ibid.

58. Ibid.

59. See note 8, 201–217.

60. Tampere European Council, Presidency Conclusions at [33].

61. Tampere European Council, Presidency Conclusions at [48].

62. OJ C12, January 15, 2001, 10.

63. See note 34, 158–159.

64. Ibid., 14.

65. Ibid.

66. John D. Occhipinti, *The Politics of EU Police Cooperation—Towards a European FBI?* (Boulder, CO: Lynne Rienner Publishers, 2003), 148.

67. "The 9/11 Commission Report," http://www.9-11commission.gov/report/911Report.pdf (accessed August 17, 2009).

68. Christian Kaunert, "Without the Power of Purse or Sword": The European Arrest Warrant and the Role of the Commission." *Journal of European Integration*, 29(4): 387–404, 397.

69. See note 67.

70. Myra Williamson, *Terrorism, War and International Law: The Legality of the Use of Force Against Afghanistan in 2001* (Farnham, UK: Ashgate Publishing Ltd., 2009), 70.

71. Joseph J. Lambert, *Terrorism and Hostages in International Law* (Cambridge, UK: Grotius Publications, 1990), 13.

72. Declaration by the European Union, "Terrorism in the US," CL01-052EN, 12 September 2001.

73. EU Joint Declaration: September 11 attacks in the US, CL01-054EN.

74. Ibid., 5.

75. European Commission, "Europe Must Have Common Instruments to Tackle Terrorism," IP/01/1284, September 19, 2001.

76. Ibid., 5, 6.

77. Ibid., at 2.

78. BBC News, "Text of Bush's Act of War Statement," http://news.bbc.co.uk/1/hi/world/americas/1540544.stm (accessed July 21, 2009).

79. See note 68, 387–404.

80. Ibid., 396.

81. OJ C12, 15 January 2001,14. Other matters were not entirely ignored, but they did not receive the same focus and energy as the terrorism definition and EAW-FD.

82. See note 68, 396.

83. Ibid.

84. Ibid. See also note 66, 149.

85. COM (2001) 522, final; O.J. 2001, C 332/E/305.

86. See note 51, 24.

87. See note 68, 397.

88. EAW-FD, Article 2(2).

89. European Commission, "Europe Must Have Common Instruments to Tackle Terrorism," IP/01/1284, September 19, 2001 at [3].

90. See note 68, 398.

91. Ibid., 398–399.

92. Ibid.

93. BBC News, "Washington Presses EU in Terror War," http://news.bbc.co.uk/1/hi/world/europe/1614139.stm (accessed July 21, 2009).

94. See note 66, 162.

95. Ibid., 163.

96. Ibid., 163, 170. See also, P. Ludlow *The Laeken Council* (Brussels: EuroComment, 2002).

97. Ibid., 163. See also "Justice and Home Affairs Council: Member States Agree to Thirty Crimes for EU Arrest Warrant," *European Report*, November 17, 2001.

98. Ibid. See also "Italy and Ireland Block Accord on EU Arrest Warrant," *Agence France Presse*, November 16, 2001.

99. See note 66, 170.

100. Ibid., 171.

101. Ibid., 401.

102. See note 68, 402.

103. Franco Impalà, "The European Arrest Warrant in the Italian Legal System." *Utrecht Law Review*, 1(2) (2005): 56.

104. Legge no. 69 of April 22, 2005.

105. See note 103, 56.

106. Ibid., 71.

107. Legge no. 69 of April 22, 2005, Article 8(2).

108. Legislative Res. of November 29, 2001, O.J. 2002, C 153/E/284 and corresponding Report (A5–0397/2001).

109. See note 66, 168.

110. Ibid.

111. Legislative Res., O.J. 2002, C 284/E/193; the corresponding report (A5–0003/2002) contains a minority opinion but no substantive discussion.

112. "Justice and Home Affairs Council: MEPs Express Anger at Council List of Terrorist Groups," *European Report*, January 12, 2002.

113. European Parliament Document A5-0397/2001 final, November 14, 2001.

114. See note 51, 24.

115. Rob Blekxtoon, "Forward," in Nico Keijzer and Elies Van Sliedregt, eds., *The European Arrest Warrant in Practice* (The Hague, The Netherlands: T.M.C. Asser Press, 2009), 5.

116. See note 46, 151.

117. See Julia Sievers, "Managing Diversity: The European Arrest Warrant and the potential of mutual recognition as a mode of governance in EU Justice and Home Affairs." Presented at the EUSA Tenth Biennial International Conference, Montreal, Canada, May 17–19, 2007.

118. Report from the Commission based on Art. 54 of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (revised version), Brussels, January 24, 2006, COM(2006), 8 final.

119. Ibid., 5.

120. Ibid.

121. Ibid., 6.

122. See note 46, 151.

123. No. 14038/88, judgment of July 7, 1989.

124. Paul Garlick, "The European Arrest Warrant and the ECHR," in Rob Blekxtoon et al., eds., *Handbook on the European Arrest Warrant* (The Hague, The Netherlands: T.M.C. Asser Press, 2005), 175.

125. Swedish Supreme Court, Judgment, September 22, 2005, Case No. Ö 4202-05.

126. See note 46, 154.

127. *Minister for Justice v. Stapleton* [2006] IEHC 43.

128. Article 35(6) EU.

129. Case C-305/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, ECR [2007] I-3633.

130. Ibid., at 45.

131. Ibid.

132. Case C-355/04 P, *Segi and Others v. Council*, 2007 [ECR I-0000] at [52].

133. See note 129, 45–47.

134. Ibid., 47.

135. Ibid., 52–53.

136. Florian Geyer, "Advocaten voor de Wereld VZW v. Leden van de Ministerraad: Case Note." *European Constitutional Law Review*, 4(2008): 160.

137. See note 129, 53.

138. See note 136, 160.

139. Daniel Sarmiento, "European Union: The European Arrest Warrant and the quest for constitutional coherence." *International Journal of Constitutional Law*, 6(1) (2008): 182.

140. A. No. 294/2005, Supreme Court of Cyprus, November 7, 2005.

141. See judgments in *X v. Netherlands* (Case 7512/76), *Polley v. Belgium* (Case 12192/86), and *Bakhtiar v. Switzerland* (Case 27292/95).

142. See note 136, 159.

143. Ibid.

144. *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland* (Case C-84/95) (2005) 42 EHRR at [155].

145. Ibid.

146. Ibid.

147. Ibid., 160.

148. Ibid., 161.

149. Ibid., 156.

150. Steve Peers, *EU Justice and Home Affairs Law* (Oxford, UK: Oxford University Press, 2007), 67.

151. Ibid.

152. Ibid.

153. Ibid.

154. See note 20, 478–480.

155. Ibid., 478.

156. See note 47, 9.

157. Ibid.