The Perils of the ‘Europeanisation’ of Extradition Procedures in the EU

Mutuality, Fundamental Rights and Constitutional Guarantees

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Abstract

This article focuses at the main problems regarding the current application of EU extradition procedures in relation to the area of judicial cooperation in criminal matters. It introduces the ‘Europeanisation’ of extradition procedures through a discussion based on the continuity of the principle of mutual recognition from the EC Treaties to the EU Constitutional Treaty. The latest manifestation of this continuity is the introduction of the European Arrest Warrant (adopted on June 13, 2002) that is aimed to simplify the extradition procedures for suspected criminals within the territory of the European Union by creating a positive list of criminal areas. The author discusses the innovations introduced by the Framework Decision on the European Arrest Warrant (abolition of the test of dual criminality) and then focuses on two main problem areas based on the reaction of certain Member States: i) Compatibility with Constitutional Guarantees: where the author notices a change of attitude in the national courts from being eager to contest the constitutionality of EU Arrest Warrant implementation law to being more pragmatic about authorising the extradition of their own nationals ii) Compatibility with Human Rights: where the author argues that the principle of mutual recognition is not adequate for adjudicating interstate criminal cases when it operates in isolation. He therefore proposes the enforcement of mutual trust or ‘full faith and credit’ accompanied by the standards of procedural rights set out in the ECHR and the jurisprudence of the European Court of Human Rights.

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The Europeanisation of Extradition: The Continuity of Mutual Recognition

Extradition procedures between Member States had for long been based on intergovernmental arrangements controlled by the European Convention on Extradition (1957); its Protocols² and the Council of Europe European Convention on Terrorism (1977). The 1957 Convention was ultimately complimented by the ‘Convention on Simplified Extradition Procedure between the Member States of the EU’ (1996) and the ‘Convention on Extradition between Member States of the EU’ (1996). The former Convention not only provided the agreement of the requested state to the surrender but also emphasised the right of consent of the arrested person. The latter Convention contemplated the standard extradition procedure in compliance with Article 6 TEU, but precluded the arrested individual from consenting to the surrender. In terms of the Community Pillar, the Schengen Implementing Convention - itself an intergovernmental arrangement - was integrated into EC law by the Treaty of Amsterdam. The Schengen Convention includes, *inter alia*, extradition provisions shared between the participant states through lodging a request in the Schengen Information System.

The trend among Member States to establish a simplified and efficient procedure, founded on their mutual confidence and respect to the integrity of each others constitutions and judicial systems, was manifested in Articles 31(a)(b) and 34(2)(b) TEU. These Treaty provisions set out the first series of targets providing for judicial cooperation in criminal matters, the facilitation of extradition and the adoption of framework decisions for the purpose of approximating the laws and regulations of Member States. The Tampere European Council (1999) endorsed the principle of mutual recognition, which according to its conclusions should become ‘the cornerstone’ of judicial cooperation in civil and criminal matters³. Most significantly, The Heads of State or Government requested from the Council and the Commission to adopt by December 2000 implementation measures with reference to the principle of mutual recognition in criminal matters⁴. Thus, in line with Tampere, the European Union attempted to extend the principle of mutual recognition to

² Protocol 1 of European Convention on Extradition (1975) and Protocol 2 of European Convention on Extradition (1978)

³ the Presidency Conclusions at the Tampere European Council, October 15 and 16, 1999, Para 33-37 Available online at http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm (browsed 27.02.07)

⁴ Ibid. See Point 37 of the Presidency Conclusions.

judicial decisions between Member States in such a manner that a measure arising from a judgment of a Member State should be automatically accepted and produce the same effects in all Member States of the Union⁵. As a result, Member States were gradually encouraged to show mutual trust in their criminal justice systems to such an extent that each Member State would acknowledge and trust the criminal law in force in all the other Member States, even in cases when the outcome would be different from that applied in its domestic legislation.

The principle of mutual recognition was first applied as collateral to Community harmonisation during the building of the internal market. Like Community harmonisation, it gradually became an additional factor of limitation to national competence. Its operation between Member States on product requirements case law⁶ works on the basic premise that a State has to accept the marketing in its own territory of products lawfully produced and marketed in other Member States. This results in a double regulatory burden. By extension, EC Institutions introduced the principle of mutual recognition in terms of the direct execution of final criminal decisions in the whole territory of the European Union. Hence, the principle of mutual recognition appeared perfectly fit to ensure that an individual tried in a Member State for a particular offence should not be judged for a second time for the identical offence, either in the same state in which he offended or any other Member State of the Union (*ne bis in idem* principle⁷). This principle also applies in the Schengen Convention. Article 54 states that Schengen rules will prevent a second conviction after a person had been extradited to the issuing state. This was recently verified by the ECJ in *Gasparini and Others*⁸. In the context of the European Arrest Warrant, the Court clarified its position in relation to the *ne bis in idem* principle in *Gözütok and Brügge*⁹. This position has been integrated by the Framework decision:

“It is clear from this opinion that the principle of *ne bis in idem*, when applied within a context of mutual recognition in criminal proceedings

⁵ Ibid. See particularly Title VI. Mutual recognition of judicial decisions

⁶ Case 120/78 *Commission Rewe-Zentrale AG v Bundesverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649 For further discussion see Maduro, M.P. “We the Court: The European Court of Justice & The European Economic Constitution”, Hart (1997), See pp 33; 131-136

⁷ Translated from Latin as “not twice for the same”.

⁸ Case C-467/04 , (September 28, 2006)

⁹ Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345; Conway, G., “Judicial Interpretation and the Third Pillar: Ireland’s Acceptance of the European Arrest Warrant and *Gözütok and Brügge* Case” (2005) 13 (2) European Journal of Crime 255-283

in the EU should be given a broad interpretation allowing for the differences in what is perceived to be a ‘final judgement’ in the various Member States. This European notion of *ne bis in idem* should be reflected in the text of the UK bill which will implement the European Arrest Warrant.”¹⁰

A similar standpoint has been taken time and again by the Council and the Commission¹¹. There, enhanced mutual recognition of judicial decisions and judgments followed by the necessary approximation of national legislation would facilitate co-operation between authorities and the judicial protection of individual rights. As a result, in the context of Third-Pillar criminal law, EC Institutions have set out to achieve a dual objective: First, to overcome problems arising from diversity (of national legal systems) through a joint respect for each others’ domestic judicial decisions. Second, to invest on the power of harmonisation (of national legislation) as part of an evolutionary process to bring to an end all national transitional procedures for the recognition of judgments and the guarantee of cross-border rights. This was implied to a certain extent by the Laeken Declaration on the Future of the European Union (2001)¹² where there was a suggestion that “all transnational issues which they (EU citizens) instinctively sense can only be tackled by working together...” However, the Laeken declaration merely posed the question of whether “...we want to adopt a more integrated approach to police and criminal law cooperation” instead of providing concrete guidelines as to how should the Community structure its objectives and priorities.

The Laeken guidelines were complimented by the Convention’s Working Group X on “Freedom, Security and Justice”¹³. The Group reached a consensus over a number of points including Judicial Cooperation in criminal matters. There the Group reiterated the dual basis of judicial cooperation in criminal matters which includes: i)

¹⁰ Justice Response to Draft Extradition Bill (2002), September 2002, Para 25. Available at <http://www.justice.org.uk/images/pdfs/extraditionbill.pdf> (last browsed 27.02.07)

¹¹ “Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters” [COM/2000/0495]; “Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union” [COM/2004/334]; “White Paper on exchanges of information on convictions and the effect of such convictions in the European Union” [COM/2005/10]; “Communication from the Commission to the Council and the EP on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States” [COM/2005/195]

¹² Available at http://europa.eu/constitution/futurum/documents/offtext/doc151201_en.htm

¹³ [CONV 449/02]; [CONV 614/03]

facilitation of mutual recognition of judicial decisions and ii) approximation of legislation on procedural and substantive criminal law (establishing minimum rules as to the definition of cross-border criminal offences and sanctions). The list of offences, later covered by the European Arrest Warrant, drew on Articles 29 and 31 TEU and the Tampere European Council Conclusions¹⁴.

However, the proposal did not preclude the Council from identifying and introducing - through unanimity and prior assent by the Parliament - other types of crime. One should note that the EU Constitutional Treaty¹⁵ will merge the European Community with the other two pillars of the European Union, therefore extending the competence of the Court in Police and Judicial Cooperation in criminal matters. But still, the principle of national borders remains intact in the EU Constitutional Treaty and according to Guild “criminal law is bound by the idea of borders”¹⁶. By extension, EU citizens are bound by the diversity of national criminal systems that operate within these borders.

The EU Constitutional Treaty, which has currently been surrounded by a paralysis, is aimed to offer EU Citizens an area of Freedom Security and Justice (Article III-257 – III-277). This constitutes an area of shared competence between the Union and the Member States. Article III-270 provides that:

“Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States...”

Article III-270 (2) provides that European framework laws shall establish ‘minimum rules’ that ‘shall take into account the differences between the legal traditions and systems of the Member States.’¹⁷ This, of course, ‘shall not prevent

¹⁴ Tampere European Council, Presidency Conclusions, (15-16.10.1999) Available at http://www.europarl.europa.eu/summits/tam_en.htm (last browsed 27.02.07) The list of offences includes: terrorism; human trafficking; arms trafficking; money laundering; corruption; counterfeiting; computer crime; organised crime.

¹⁵ Treaty Establishing a Constitution for Europe, OJC 310, (December 16 2004)

¹⁶ Guild, E., “The EU’s Constitutional Future and the European Arrest Warrant”, ‘Eurowarrant: European Extradition in the 21st Century’, Justice Conference held in London, (July 5 - 6, 2003). Available at <http://www.justice.org.uk/ourwork/eu/index.html> (browsed on September 26, 2006)

¹⁷ (a) mutual admissibility of evidence; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a European decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Member States from maintaining or introducing a higher level of protection for individuals.’ Thus, once the EU Constitutional Treaty is ratified and the current ‘pillarised’ structure is abandoned, the appropriate measures for regulating the old third-pillar issues would be ‘European laws’ or ‘framework laws’. Such legislative instruments - adopted by the Council acting unanimously and only after obtaining the consent of the European Parliament - would lay down the rules and procedures for ensuring that the principle of mutual recognition would operate throughout the Union of all forms of judicial decisions. The minimum rules set out by ‘European laws’ and ‘framework laws’ could possibly relate to citizens’ rights in criminal procedure; issues of admissibility of evidence and the rights of victims of crimes. However the unanimity requirement for their adoption, limits their potential to gradually construct a ‘European code of criminal procedure’ in an enlarged Union of 27 Member States by January 2007.

The European Arrest Warrant: Mutual Recognition vs Double Criminality Test

i) The European Arrest Warrant: Context, Adjudication and Competence

A thriving manifestation of the principle of mutual recognition in the context of European criminal law was the introduction of the European Arrest Warrant¹⁸ in 2004. The Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States¹⁹ replaced all multilateral extradition agreements and EU or Schengen extradition arrangements at the end of 2002. Already from Article 1 (2) the Framework Decision points to the principle of mutual recognition as the preliminary way of executing any European arrest warrant. To put it in the Commission’s phraseology, “the arrest warrant is the first and most symbolic measure applying the principle of mutual recognition”²⁰. Given the broadness of areas that it captures and the time that was introduced, it has been characterised by academics as

¹⁸ Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States (13 June 2002) (2002/584/JHA). See also Blextoon, R. (ed.), “Handbook on the European Arrest Warrant”, Cambridge University Press (2004)

¹⁹ 2002/584/JHA (called the Framework Decision hereafter)

²⁰ Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States”, COM (2005) 63

the “star rule on judicial cooperation in criminal matters”²¹ and as “an important procedural instrument in the fight against terrorism.”²²

Contextually, the European Arrest Warrant covers almost every offence punishable in the Member States by a custodial sentence or a detention order for a maximum period of at least three years²³. Moreover, it is aimed to simplify the extradition procedures for suspected criminals within the territory of the European Union by creating a positive list of criminal areas. When, therefore, a suspected crime is included on a designated ‘criminal area’ (e.g. illegal human trafficking²⁴, money laundering²⁵, drug importation²⁶ or terrorism²⁷), the arrested person can be extradited. Member States cannot refuse to surrender to another Member State any of their own citizens on the grounds that they are nationals²⁸. This implies that if a Member State issues an arrest warrant against another Member State, then the latter must surrender its national to the former without verification of the ‘double criminality principle’.

The European Arrest Warrant involves a subordination of the adjudication of all extraditions between Member States to the jurisdiction of the EU, which will also be responsible for the interpretation of the Framework Decision in any case where a dispute arises. Disputes arising from the Framework Decision may be referred to the Council and then on to the Court in accordance with Article 35 TEU. However, under this provision not all national courts of last resort are capable of using the preliminary reference procedure under Article 234 EC as it is reserved to the courts of those Member States that have made a declaration according to Article 35(2) TEU. Furthermore, Article 35(6) and (7) TEU provide that the Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission jurisdiction to rule on any dispute

²¹ Jimeno - Bulnes, M., “European Judicial Cooperation in Criminal Matters”, (2003) European Law Journal 9 (5)

²² Jimeno-Bulnes, M., “After September 11th: The Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples” (2004) 10 (2) European Law Journal 235-253. Although one should take note that the Commission had almost finished work on the proposal when the terrorist attack of September 11, 2001 took place.

²³ See Article 2 (2) of the Framework Decision for a list of offences.

²⁴ *King’s Prosecutor (Brussels) v Armas* [2006] 1 All E.R. 647

²⁵ *Hunt v Belgium* [2006] EWHC 165

²⁶ *Hall v Germany* [2006] EWHC 462; *Parasiliti – Mollica v Deputy Public Prosecutor (Messina)* [2005] EWHC 3262

²⁷ Bundesverfassungsgericht (German Constitutional Court), decision of 18 July 2005 (2 BvR 2236/04) on the German European Arrest Warrant Law.

²⁸ See Articles 3; 4; 5; 6; 8; 9; 10; 11; 12; 17; 26; 27 of the Framework Decision as regards details on operation and procedures of the European Arrest Warrant.

between Member States regarding the interpretation or application of acts adopted under Article 34(2) TEU. Yet, one need to take into account that after assessing and interpreting a Member State's enabling legislation on the European Arrest Warrant, the Court may arrive to an interpretation that is contradictory to that of the national courts. Finally, Article 35 (5) TEU states that the Court has no jurisdiction in criminal matters, to review national action linked with the maintenance of law and order as well as internal security. This has been replicated in the EU Constitutional Treaty under Article III-377:

“...the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.”

Thus, the competence of the Court to adjudicate on the area of freedom, security, and justice is limited. This contradicts any view that the Union's competence will embrace the third EU pillar once the EU Constitutional Treaty is ratified. Gregory notes:

“...whilst the EU has the competence to be involved in 9/11 response management areas such as civil protection and security, its involvement is necessarily limited. The involvement is limited first by the principles of ‘subsidiarity’ and ‘proportionality’, which restricts the EU in terms of new measures, to those which are best achieved, in whole or in part, by a collective response.”²⁹

Second, Article III-270 (2)³⁰ of the EU Constitutional Treaty clarifies that the Union may only adopt minimum rules that may not prevent Member States from

²⁹ Gregory, F., “The EU's Response to 9/11: A Case Study of Institutional Roles and Policy Processes with Special Reference to Issues of Accountability and Human Rights” (2005) 17 *Terrorism and Political Violence* 105-123 To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

³⁰ To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, European

maintaining or introducing a higher level of protection. This, according to Article III-270(2)(b) also concerns the rights of individuals engaged into criminal proceedings. Yet, as previously discussed, the possibility of creating a ‘model criminal code’ with no binding legal force is a thorny process given the requirement of unanimity to adopt European laws or framework laws for regulating the previous third-pillar issues.

ii) The Abolition of the Double Criminality Test

Most significantly, the Framework Decision abolishes the ‘double criminality rule’ of the thirty-two offences listed in Article 2 (2) as well as abolishing - where the arrested person consents the ‘speciality rule’³¹. The ‘double criminality rule’ has only been reserved for offences other than those designated in Article 2 of the Council Framework Decision. What is more, the new system introduced by the European Arrest Warrant does not apply if the requesting Member State has not yet ratified the Council Framework Decision and incorporated it into its national law, either through specific legislation (i.e. European Arrest Warrant Act) or a constitutional amendment (Portugal, Slovenia). Currently, the European Arrest Warrant has been implemented by all Member States (Italy’s implementation was not completed until April 2005³²). Before the introduction of the Framework Decision, the jurisdiction of the European Court of Justice³³ in relation to extradition procedures went so far as the extradition rules found in the Schengen Convention.

As already mentioned, the European Arrest Warrant applies without the need to fulfill the condition of the double criminalisation of an act. Nevertheless, in some cases the old test of double criminality may coincide with the operation of the European Arrest Warrant. For instance, under section 64(3) (b) of the UK’s Extradition Act 2003³⁴ a person’s conduct...

framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

³¹ Article 13 (1)

³² Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (revised version) COM (2006) 8 final. The first Report from the Commission was issued in February 2005, COM (2005) 63

³³ Referred as ‘the Court’ hereafter

³⁴ The Extradition Act (2003) entered into force on January, 1st, 2004

“...also constitutes an extradition offence in relation to the category 1 territory (i.e. all EU countries operating the European Arrest Warrant System) if...the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom.”

In *Hosseini v France*³⁵ an agreement was reached between the Member States concerned that the conduct of illegal human trafficking constituted an offence in France and would have constituted an offence had it occurred in England. Therefore the conduct alleged in the warrant amounted to an ‘extradition offence’ pursuant to s. 64(3) of the Extradition Act 2003. The British High Court took into account the European Arrest Warrant concluding:

“...the relevant question, therefore, is whether his (Hosseini’s) extradition pursuant to the 2003 Act would be in accordance with the law; and, as I have already indicated, it plainly would be. The starting point under the 2003 Act is the issue of a European arrest warrant by a judicial authority in another member state. Consistently with the Council Framework Decision of 13 June 2002 which it implements, the 2003 Act recognises and gives effect to the issue of the warrant.”

The ‘double criminality rule’ has for long been considered by many Member States as the core feature of extradition law. Its abolition has created practical problems that render the application of the European Arrest Warrant open to discussion. One example is when the warrant does not provide particulars of the provision of national law that renders the conduct of the arrested person an offence under national law³⁶. In *Hunt v Belgium*³⁷ for instance the Administrative Court of England and Wales ruled that the warrant should contain a statement that “the person, in respect of whom the warrant was issued, was accused in the category 1 territory of the commission of an offence specified in the warrant”. In *Armas*³⁸, on the other hand, the warrant was clear as the nature and classification of the offence in question was

³⁵ CO/3261/2006 *Hosseini v France* [2006] EWHC 1333

³⁶ *Hall v Germany* [2006] EWHC 462

³⁷ [2006] WL 316106

³⁸ [2006] 1 All E.R. 647 The question in this case was whether a request by Belgium for the extradition of a fugitive offender could be successfully brought under section 65 of the British Extradition Act (2003) when part of the appellant’s conduct specified in the European Arrest Warrant took place in the UK.

identified as ‘systematic illegal immigration’ (framework list offence). Nonetheless, the warrant had to be quashed as some of the offences of the sentenced (*in absentia*) person had occurred in the UK. Thus the offender could not be surrendered to Belgium under section 65(2)(a) of the British Extradition Act 2003, which states that “the conduct constitutes an extradition offence in relation to the category 1 territory if.... the conduct occurs in the category 1 territory and no part of it occurs in the United Kingdom.”

Compatibility with Human Rights

Despite the notable progress at EU level in relation to judicial cooperation, exchange of information and monitoring³⁹, intergovernmental legislative mechanisms are still, to a certain extent, remote from the supranational, even on basic issues such as access to justice. Fair Trials Abroad⁴⁰, has reported certain individual cases during 2005 that actually depict the diverse practices of the application of justice across the European Union⁴¹. In the context of the European Arrest Warrant, there is no common agenda of legal rights to be activated once the procedure under the Framework Decision has been triggered. It appears that mutual judicial cooperation in criminal matters cannot operate alone without efficient cross-border criminal cooperation measures. For instance, as regards legal aid, there is no mechanism under which defence lawyers in either country can coordinate or jointly evaluate the evidence available throughout judicial proceedings. What is more, the right to legal representation varies among Member States. Individuals will reach a point where they will need to cover the costs of legal advice and translation and deal with delays during their transfer from the responding to the requesting state⁴².

According to the principle of mutual recognition, Member States shall meet the standards of human rights protection set out in the European Convention on Human Rights (ECHR)⁴³. This also constitutes a Treaty obligation under Article 6 TEU. However, the little experience of national authorities, deriving from the

³⁹ Council Decision 2005/876/JHA on the Exchange of Information Extracted from the Criminal Record OJ L 322

⁴⁰ Fair Trials Abroad is an organisation working to ensure that citizens accused of a crime in a state other than their native receive a fair trial.

⁴¹ See Jakobi, S., “Criminal Justice in the EU 2005: The Year of Lost Opportunities”; Available at <http://www.fairtrialsabroad.org/> (browsed on September 26, 2006)

⁴² *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 772 HL

⁴³ Available at <http://www.hri.org/docs/ECHR50.html> (browsed on September 26, 2006)

application of the European Arrest Warrant, demonstrates that this is rather an uncertain assumption. A reference of ‘respect to fundamental rights’ is made in the Preamble (Paragraphs 12; 13) and Article 1(3) of the Framework Decision⁴⁴. However, the ‘in absentia’ rules of Articles 35 of the Framework Decision do not allow a person to request a new trial on grounds that s/he was inadequately represented at the initial trial. This contradicts the Court’s decision in *Krombach v Bamberski*⁴⁵, where the ECHR was used as a guiding light in order to establish that the Court expressly recognizes the general principle that everyone is entitled to fair legal process⁴⁶. In this case the Court upheld the decision of a German court refusing on public policy grounds recognition and enforcement of a French judgment due to the fact that the German defendant was denied a hearing by a counsel on a civil claim for damages. Moreover, the Framework Decision omits to oblige Member States to refuse surrender on grounds of violations of the dual source of the European Union’s human rights streaming from the ECHR and the constitutional traditions of the Member States⁴⁷. This commitment has been strengthened by the adoption of the EU Charter of Fundamental Rights (2000).

Alegre and Leaf⁴⁸ comment that the assumption that Member States meet the ECHR standards “is open to discussion as, while it is true that all Member States and candidate countries have signed up to the ECHR, all have had and continue to have judgments against them in the Court of Human Rights.” Potentially, this would have a negative impact upon imminent individual claims that an issuing state is violating fundamental rights, such as review to detention (Article 5 ECHR) and the right to fair trial (Article 6 ECHR; Art. 47 of the European Charter of Fundamental Rights⁴⁹). In

⁴⁴ Preamble (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(7), in particular Chapter VI thereof.

Preamble (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 inhuman or degrading treatment or punishment.

Article 1 (3) This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

⁴⁵ Case C-7/98 *Krombach v Bamberski* [2001] All ER (EC) 584

⁴⁶ Case C-185/95 *Baustahlgewebe v Commission* [1998] ECR I-8417 (at Para 20, 21); C174/98 & C-189/98 *Netherlands and Van der Wal v Commission* [2000] ECR I-0000 (at Para 17)

⁴⁷ Article 6(2 TEU

⁴⁸ Alegre, S., and Leaf, M., “Judicial Cooperation: A Step too Far Too Soon? Case Study – The European Arrest Warrant” (2004) 10 (2) European Law Journal 200 – 217 at 201

⁴⁹ C364/8 (2000)

the interest of clarity and human rights protection, a clear system of appeal or judicial review should be formulated to be triggered once a serious breach occurs in the issuing Member State following surrender. Yet, looking at the way the EU Arrest Warrant operates being founded on mutual recognition, Alegre⁵⁰ adds that you also need a certain degree of ‘mutual trust’ and cases such as *Ramda* “have shown that mutual trust is not necessarily built solely on the fact that all Member States are signatories to the ECHR.”⁵¹ Thus, although we are talking about mutual trust between Member States, the margin of appreciation in the application of rights safeguarded by the ECHR related to the domestic administration of justice is difficult to sustain. Particularly, the admissibility of evidence extracted through torture or ill-treatment and the allegations of torture or ill treatment by law enforcement officers constitute major barriers to what Alegre calls ‘mutual trust’ between Member States and infringe Art 6 ECHR.

In *Ramda*⁵², ill treatment and bodily harm was inflicted on the suspected offender by the French Police authorities as a result of an intense interrogation procedure. The French authorities denied an investigation of the complaints of ill treatment contrary to the request of the British Court. Thus the Secretary of State refused to surrender the suspected offender because “it is unlawful for a public authority, such as the Secretary of State, to act in a way which is incompatible with a Convention (ECHR) right, and of course Article 6(1) ECHR provides for the right to a fair trial. The test appears to be whether the evidence establishes a real risk of a flagrant denial of justice.”⁵³ Similarly, in the French case of *Irrastorza Dorronsoro*⁵⁴ the admissibility of evidence allegedly extracted from an ETA suspect through torture or other ill-treatment was considered contrary to a state’s obligations under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)⁵⁵. The outcome of both cases emphasizes the need to address the issue of lack of mutual trust in national procedural guarantees within the EU. It is

⁵⁰ Alegre, S., and Guild, E., Examination of Witnesses (Questions 144-159), Select Committee on European Scrutiny (02.04.2003). Available at:
<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxvi/3040201.htm>
 (browsed 27.02.2007)

⁵¹ Ibid, point 154

⁵² *Rachid Ramda v Secretary of State for the Home Department, The Government of France* [2005] EWHC 2626 (Admin)

⁵³ Ibid at Para 19

⁵⁴ No 238/2003 *Irrastorza Dorronsoro*, judgement of 16.05.2003, *Cour d’Appel de Pau* (France)

⁵⁵ Available at <http://www.ohchr.org/english/law/pdf/cat.pdf>

worth mentioning that as the Framework Decision is binding as to the end result leaving a choice of form and method to Member States, the UK has inserted a human rights clause in its Extradition Act (2003). Thereby, the executing judge has the authority to deny the extradition of a person on grounds of incompatibility with the Human Rights Act 1998⁵⁶.

The balance between the objectives of security and freedom is very delicate in the area of judicial cooperation in criminal matters. This writer suggests that the European Court of Justice should be given an active role in policing respect for human rights throughout the EU, alongside a wider competence to adjudicate on issues involving violations by Member States. This necessitates a relaxing of the current ‘standing rules’ under Article 230(4) EC of ‘direct and individual concern’ reflected in *Plaumann* and *UPA*⁵⁷ so that individuals may have a direct access to the Court in relation to fundamental rights. Unfortunately, Article III-365(4) of the EU Constitutional Treaty goes only so far as reflecting the current standing rules of Article 230(4) EC enabling the individual applicant to challenge a legislative act conditional on satisfaction of the dual requirement of ‘direct and individual concern’. Even though Article III-365(4) leaves unmodified the current standing rules in relation to legislative acts, it allows more room for individuals to challenge a regulatory act that “is of direct and individual concern to him or her, and...a regulatory act which is of direct concern to him or her and does not entail implementing measures”.

Still, the requirement of individual concern that has been interpreted restrictively by the Court is here despite Advocate General Jacobs view that a person should be allowed to bring his case to the Court “by reason of the particular circumstances, the measures has, or is liable to have, a substantial adverse effect on his interests”⁵⁸. Arnall argues that the current rules on *locus standi* create a potential conflict with Article II-107 of the EU Constitutional Treaty as it diminishes the

⁵⁶ See *R (on application of Bermingham and others) v Director of the Serious Fraud Office; Bermingham and others v Government of the United States of America* [2006] All ER 239, at Para 4

⁵⁷ Case 25/62 *Plaumann v. Commission* [1963] ECR 95; Case C-50/2000 P, *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677

⁵⁸ *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677; See also Tridimas, T., “The ECJ and the Draft Constitution: A Supreme Court for the Union?” in Tridimas, T., and Nebia, P., “EU Law for the 21st Century: Rethinking the New Legal Order”, Hart Publishing, (Oxford, 2004)

individual's right to an effective remedy and to a fair trial⁵⁹. The same argument was used by the Court of First Instance in *Jégo-Quéré*⁶⁰ that was subsequently overruled by the Court of Justice in *UPA*. There, the Court of Justice emphasized that the Treaty has established a complete system of remedies and procedures designed to ensure judicial review before the Community courts (Articles 230, 234, 241 EC). In line with the Court, Papier argues that Article III-365 (4) only causes delays to access to justice and does not create a general barrier to legal protection⁶¹. But even delays (which constitute a factor in the general complexity to challenge an EC legislative act) are likely to lead, according to Arnall, to pressure and finally to a watering down of the individual concern test. This would be desirable especially in claims of fundamental rights violations.

The matter of access by individuals to the European Court of Justice⁶² was one of the points raised by The Convention's Working Group II working on human rights. The Convention's Working Group II examined both the incorporation of the EU Charter of Fundamental Rights into the EC Treaty and the possibility of accession of the EU to the ECHR. The ratification of the ECHR by the European Union would embody a transition of the Community legal system to a distinct organisation with its own legal principles, judicial structure and case law. It would "entail (as the Court said) a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order"⁶³ The Community would thus be subject to the external judicial control of the European Court of Human Rights (ECtHR). The accession to the ECHR that inter alia demanded a uniform interpretation of Community case law with that of the ECtHR is entirely different to the current human rights protection guaranteed by the Treaty by way of general principles of law drawn

⁵⁹ See Arnall, A., "Memorandum: Select Committee on European Law Memoranda", (2004) European Union Committee Publications, Session 2003 – 2004, Publications on the Internet. Available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/47/47we03.htm> (browsed on September 26, 2006)

⁶⁰ Case T-177/01 *Jégo-Quéré et Cie S.A. v. Commission*,

⁶¹ Papier, H.G., "Memorandum: Select Committee on European Law Memoranda", (2004) European Union Committee Publications, Session 2003 – 2004, Publications on the Internet. Available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/47/47we14.htm> (browsed on September 26, 2006)

⁶² CONV354/02, 22-10-2002, "Final Report of Working Group II".

⁶³ Opinion 2/94 *Accession by the Community to the ECHR* [1996] ECR I-1759

predominantly from the ECHR and the national constitutional traditions. It is therefore obvious that accession to the ECHR would entail an amendment of the Treaty structure being a constitutional change beyond the scope of Article 308 EC. If not, the Community would not have the competence to ratify such an international agreement.

Additionally, the metamorphosis of the Charter from a political declaration to a binding legal document would be an innovation within the EU legal structures. The violation of any right contained in the Charter either by the EC Institutions or by the Member States would render the relative measures related to Community law invalid and unable to coexist with the rights established by it. In terms of justiciability, the Court would be able to act as a Federal Constitutional Court since the Charter would “*give the European Judges a clear and systematic statement of rights which have been endorsed at the highest political level.*”⁶⁴ The Commission would be able under Article 226 EC to bring a Member State to the Court for an infringement of a fundamental right safeguarded by the Charter. Similarly a Member State would be in a position to bring another Member State before the Court for the very same reason under Article 227 EC. Finally a Member State would be able to institute proceedings against an EC Institution for infringement of a Charter provision under an application for annulment under Article 230 EC. Another mean of monitoring the Charter enforcement would still be the preliminary reference procedure under Article 234 EC concerning the interpretation of a human right provision included in the Charter.

Compatibility with Constitutional Guarantees: One’s Own Nationals

The most controversial measure under the system introduced by the European Arrest Warrant is that created by the obligation of a Member State to extradite its own nationals at the request of another Member State, even for offences that are not punishable in the former⁶⁵. The non-surrender of own nationals “has its origins in the sovereign authority of the ruler to control his subjects, the bond of allegiance between

⁶⁴ Hepple, B., “The EU Charter of Fundamental Rights” (2001) 30 Industrial Law Journal 225, at pp231

⁶⁵ See Opinion of the High Court of Justiciary delivered by Lord Justice Clerk in *Antonio La Torre v Her Majesty’s Advocate* [2006] HCJAC 56: “While under other United Kingdom legislation membership of certain terrorist organisations might be an offence *per se*, as in the case of certain Irish organisations for example, membership of an Italian organisation was not an offence known to the law of Scotland.”

them, and the lack of trust in other legal systems⁶⁶” Moreover, it constitutes an exceptionally delicate issue in extradition law⁶⁷, employed sometimes by governments as a political technique to revive patriotism⁶⁸. Against this, Articles 3 and 4 of the European Arrest Warrant do not recognise the long-standing absolute sovereign right to refuse extradition of a Member State’s own subjects.

In Article 6 of the 1957 European Convention on Extradition identified with the concerns of the Member States and allowed room for national authorities to refuse extradition on the grounds that the suspected person is a national of the requested state. This bar to extradition was put to an end by 1996 when Article 7 of the European Convention on Extradition provided that:

1. Extradition may not be refused on the ground that the person claimed is a national of the requested Member State within the meaning of Article 6 of the European Convention on Extradition.
2. When giving the notification referred to in Article 18 (2), any Member State may declare that it will not grant extradition of its nationals or will authorize it only under certain specified conditions.

Article 4(6) of the Framework Decision leaves room for non-execution in the case of a custodial sentence or a detention order. However, in principle, there is no exception for the surrender of a state’s own nationals, but an exception can be made in domestic law under Article 4 of the Framework Decision. Thus, under the Framework Decision and national implementing Acts there is some scope for Member States to safeguard their nationals from prosecution in another Member State.

The new extradition system practically prevents a national court of a Member State to protest against a crime that is not punishable under its own national constitution. Furthermore, it stands against a guarantee safeguarded by the constitutions of many Member States: that is the refusal to extradite a state’s own citizens. For instance, the Austrian Extradition and Mutual Legal Assistance Act

⁶⁶ Deen-Racsmany, Z and Blekxtoon, R, “The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-) Surrender of Nationals and Dual Criminality under the European Arrest Warrant”, (2005) 13 (3) European Journal of Crime, Criminal Law and Criminal Justice 317-364 at 317

⁶⁷ For a historical background on prohibition of surrender of own nationals look at para 36 of the Austrian Criminal Code (1852) and para 9 of the German Criminal Code.

⁶⁸ See Plachta, M, “Recent Developments in the Extradition Law” (1998) 2 Yearbook of Polish European Studies 93-116, at 109

(1980) exclusively prohibits the extradition of own nationals⁶⁹. The same prohibition also appears in Article 55 of the relatively recent Constitution of the Republic of Poland (1997); Article 16 (2) of the German Constitution (1949)⁷⁰ and Article 11 of the Cypriot Constitution (1960)⁷¹. One may argue that the Framework Decision was drafted without contemplation of the national criminal codes and constitutional provisions and therefore its application is impracticable. A counter argument would advocate that as EU Citizens enjoy the benefits of working and establishing themselves across the Union, they are equally responsible for their acts before the national courts of all Member States. Thus, if one accepts that a British citizen has to obey the laws of other Member States when abroad, it follows that s/he should be extradited back to those Member States once s/he has committed an offence in those Member States.

The first national reaction to the new extradition procedures came from Poland in April 27, 2005. Despite the fact that the judicial authorities in Poland had issued 150 warrants (May 2004 – November 2004) of which thirty were executed, the Polish Constitutional Tribunal (*Trybunał Konstytucyjny*) decided that surrender of Polish nationals is incompatible with the Polish Constitution⁷². The Constitutional Tribunal examined a question of law referred by the Gdańsk Regional Court regarding the constitutionality and compatibility of Article 607t (1) of the Criminal Procedure Code (1997) with Article 55(1) of the Constitution of the Republic of Poland. Article 607t (1) of the Criminal Procedure Code permits the surrendering of a Polish citizen to the authorities of another Member State of the European Union in response to the European Arrest Warrant⁷³. On the contrary, Article 55(1) of the Polish Constitution makes clear that “the extradition of a Polish citizen shall be forbidden”. The Polish Tribunal underlined that it retains the competence to examine the conformity of normative acts of the Constitution as well as legal provisions serving to implement EU legislation. It highlighted that the Polish Constitution bestows certain rights and

⁶⁹ Art12 ARHG (Auslieferungs - und Rechtshilfegesetz), Federal Law Gazette No 529/1979

⁷⁰ Basic law for the Federal Republic of Germany written on May 23, 1949 and amended by the Unification Treaty of August 31, 1990

⁷¹ Available at <http://www.kypros.org/Constitution/English/> (browsed on September 26, 2006)

⁷² Summary of judgement available here:

http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_GB.pdf
(browsed: 17.10.06)

⁷³ It was inserted into the Criminal Procedure Code by an amendment (Amendment Act, March 16, 2004) that transposed the Framework Decision on the European Arrest Warrant into the Polish legal system.

obligations to polish citizens. National citizenship, according to the Polish Tribunal, is essential for assessing the legal status of an individual and EU Citizenship shall only ‘complement’ and not ‘replace’ it (Article 17 EC). In the same manner EU Citizenship, shall not diminish national constitutional guarantees linked to the individual’s fundamental rights. Therefore, according to the Polish Tribunal it was necessary to amend the current legislation in force to permit complete implementation of the Framework Decision in accordance with the Polish Constitution.

Almost three months later (July 18, 2005), on similar grounds, the German Federal Constitutional Court (*Bundesverfassungsgericht* - BVerfG hereafter) not only addressed the issue of extradition of own nationals among Member States but also put into question the very foundation of a politically united Europe. The BVerfG declared the European Arrest Warrant Act void for encroaching upon the freedom from extradition⁷⁴. The European Arrest Warrant Act was intended to implement the Framework Decision in German Basic Law. The case concerned, Mamoun Darkazanli, a German-Syrian dual national, accused by Spain of providing the terror network with logistical and financial support. He was held in custody for extradition to Spain under the European Arrest Warrant procedure. Yet on appeal the BVerfG ruled that the European Arrest Warrant Act violated the German Constitution that explicitly prohibits the extradition of its own citizens and the suspect’s basic rights. What is more, at the time the case was at issue, supporting a foreign terrorist organisation was not considered a punishable offence under German Basic Law.

The decision of the BVerfG was based on two points. First it held that the European Arrest Warrant Act was contrary to Article 16.2 Basic Law. The first sentence of Article 16.2 Basic Law asserts: “no German may be extradited to a foreign country”. According to the BVerfG, the European Arrest Warrant Act infringed the protection from extradition offered by the German Constitution to German nationals. According to the BVerfG, the German Legislature “had not exhausted the margins afforded to it by the Framework Decision in such a way that the implementation of the Framework Decision for incorporation into national law shows the highest possible consideration in respect of the fundamental right concerned”⁷⁵. Second, the BVerfG held that the European Arrest Warrant Act infringes the constitutionally protected freedom against extradition of German citizens

⁷⁴ *Re Constitutionality of German Law Implementing the Framework Decision on a European Arrest Warrant* (2 BVR 2236/04), July 18, 2005: [2006] 1 CMLR 16

⁷⁵ Ibid

disproportionately and contrary to Article 19.4 Basic Law. Article 19.4 Basic Law affirms that “should any person’s right be violated by public authority, recourse to the court shall be open to him. If no other court has jurisdiction, recourse shall be to the ordinary courts.” Thus, Article 19.4 Basic Law guarantees the right of the complainant German national to challenge the judicial decision that granted his extradition to the courts. According to the BVerfG the European Arrest Warrant Act excluded recourse to a court against the grant of extradition to a Member State and thus was contrary to the German Basic Law guarantee of recourse to a court.

The ruling of the BVerfG was not aimed to declare the European Arrest Warrant unconstitutional. Instead, similarly to the Polish Tribunal, it declared void the German national implementation law (European Arrest Warrant Act). It was made clear that the German legislature “could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of the Framework Decision”⁷⁶. The BVerfG, for instance, supported that the Framework Decision allows the refusal of a Member State’s judicial authorities to execute the European Arrest Warrant for offences committed in its territory. Hence, the effect of its ruling can be perceived as a short-term blow to European anti-terrorism plans and loyal cooperation in the area of police and judicial cooperation in criminal matters. This occurs as the European Arrest Warrant will not apply in Germany until a new national implementation law is introduced in the form of an Act implementing Article 16.2 Basic Law. This practically means that Germany is forced to infringe EU law despite the principle under national and EU law of avoiding violations of the Treaty.

Judge Brob’s dissenting Opinion did not differ from the original decision of the German Senate but considered the violation of the principle of subsidiarity as the main factor for declaring the European Arrest Warrant Act unconstitutional. Behind Judge Brob’s opinion hides the idea that the centralisation of competence at EU level would limit the ability of the Member States to guarantee constitutional rights currently enjoyed by their citizens. If therefore judicial cooperation throughout the EU is a step in the direction of a European Federal State then any concerns related to subsidiarity violations are rational. An unprecedented harmonisation of national legislation may result in unconstitutional amendments of the national constitutional provisions. One may criticize the Union for inflicting a gradual devaluation to the

⁷⁶ Ibid

capacity of the nation state to safeguard its own citizens against prosecution by other Member States. If this is confirmed as an accurate conclusion, then such a development will subsequently imply a seizure of the central meaning and function of national citizenship and sovereignty⁷⁷.

Yet, the attitude of Germany has been somewhat antipathetic in the recent case of *Tsokas*⁷⁸. In this case, which took place after the BVerfG declared the European Arrest Warrant domestic implementation law unconstitutional, the German Public Prosecution issued a European Arrest against two Greek nationals for the offence of tax evasion. The execution of the warrants was initially allowed. However, on appeal, the Greek Court decided to allow the appeal on the grounds of absence of legal basis for extradition. The argument was based on the fact that the domestic European Arrest Warrant Act had been declared null and void by the BVerfG. Thus, in the absence of national implementation law on the Framework Decision, there was practically no legal basis where the German authorities could rely on to put forward an application for extradition under the European Arrest Warrant procedure. Moreover, the Greek Court clarified that the German approach towards the mode of execution of the European Arrest Warrant was contradicting the principle of reciprocity. This decision is very important not only in terms of the functioning of the European Arrest Warrant but on the way Member States abide to the principles of mutual recognition and reciprocity as fundamental constitutional values of Community law.

Conclusion

The European Arrest Warrant is an important instrument in the fight against organised crime and terrorism. Yet, noticeable obstacles in its application arise due to the obvious differences between the Member States' criminal legal systems in assessing the severity of a crime (drug trafficking⁷⁹, euthanasia / assisted suicide⁸⁰, abortion⁸¹ or even plane-spotting inside a military zone⁸² to name but a few). For

⁷⁷ Shaw, J., "Sovereignty at the Boundaries of the Polity", (2002) Working Paper 44/02, ESRC "One Europe or Several?" Programme, 1-43

⁷⁸ Case 2483/2005 *Tsokas and Another* [2006] CMLR 61 Ar Pag (GR)

⁷⁹ Chatwin, C., "Drug Policy Developments within the European Union: the Destabilizing Effects of Dutch and Swedish Drug Policies", (2003) 43(3) British Journal of Criminology 567-582

⁸⁰ See *The Queen on the Application of Mrs Dianne Pretty v Director of Public Prosecutions and Secretary of State for the Home Department* [2002] 1 A.C. 800

⁸¹ See English, J., and Card, R., "Police Law", 9th Ed., (Oxford university Press, 2005), especially 30. Homicide and Abortion.

⁸² See BBC 'Greece Holds Plain-Spotting Spies', Available at :

instance, Belgium has adopted a critical approach over the Commission's exclusion of abortion and euthanasia from the offence of 'murder or Grievous Bodily Harm' in (32) of the listed offences⁸³. It seems that European criminal law suffers from a lack of any uniform definition of a crime, followed by a lack of mutually accepted procedural requirements.

The most obvious argument is that if under EU law it is possible for a citizen to be extradited to another Member State for an act committed and considered lawful in her/his own Member State, then national criminal law is stripped of its practical effect of safeguarding the well-being of the nation state against threats from overseas. Similarly, it is not possible for a citizen of one Member State to be aware that her/his actions in that Member State, which s/he may perform in good conscience, may be punishable in another. The operation of the European Arrest Warrant is an attempt to provide a panacea in the area of extradition procedures but its application produces turbulent effects. These arise in cases where there is lack of information in the actual warrant or when the offence is not an extraditable one. They also appear on a greater scale when certain Member States are confronted with human rights breaches (*inter alia* wrongful imprisonments or miscarriages of justice) and with what their own domestic constitutions regard as violations of constitutional guarantees.

The ECJ has adopted a stringent approach in dealing with national challenges. Most recently, in *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, Advocate-General Ruiz-Jarabo Colomer recommended that the European Court of Justice should dismiss a complaint by a Belgian lawyers' association challenging the validity of the Belgian law implementing the European Arrest Warrant. The basis of their claim was that the Framework Decision is in breach of Article 34(2)(b) TEU (legal status of Framework Decisions) and incompatible with Article 6(2) TEU (respect to fundamental rights)⁸⁴. There are also cases where actions for unconstitutionality have been dismissed by domestic courts. On May 3, 2006 for instance, the Czech Constitutional Court (*Ustavní Soud*), dismissed an action contesting the European Arrest Warrant implementation law, which according to certain senators and MPs was unconstitutional on the ground that it abolished the

http://news.bbc.co.uk/onthisday/hi/dates/stories/november/12/newsid_2518000/2518385.stm

⁸³ "Commission Staff Working Document Analysing Member States' implementation of the Framework Decision Article by Article" SEC (2006) 79

⁸⁴ Case C-303/05 Opinion of AG Ruiz-Jarabo Colomer delivered on September 12, 2006

double criminality rule and authorised the extradition of Czech nationals⁸⁵. However, there are still examples of Member States which have only partially adopted the Framework Decision, or have left a greater margin of competence to their judges⁸⁶. Those judges in many cases employ Article 6 of the Framework Decision to prosecute cases themselves rather than accepting another country's warrant⁸⁷.

The question of whether the European Arrest Warrant maintains a balance between procedural efficiency and civil liberties is still open to discussion. Ultimately, the Member States of the European Union need to combine their efforts for enhancing mutual cooperation and giving “full faith and credit”⁸⁸ to each others’ ‘criminal procedures’ in the fight against terrorism. Indeed, the principle of mutual recognition has gone through the danger of being disputed by the lack of genuine mutual trust between Member States. The question of how to move forward to a unified body of European criminal law could be answered by looking at the example of other jurisdictions. For instance, a clause can be inserted in Article 10 TEU or the revised version of the EU Constitutional Treaty that would resemble Article IV, Section I of the U.S. Constitution where “full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State”. A ‘full faith and credit’ clause accompanied by the standards of procedural rights set out in the ECHR and the jurisprudence of the European Court of Human Rights would create the ground framework for adjudicating interstate cases under the EU Arrest Warrant. Finally, the Commission needs to rigidly monitor the implementation in practice of the EU Arrest Warrant and ensure that any unilateral decisions to restrict the rights of EU citizens that may breach human rights are subject to judicial scrutiny and proportionality in order to ensure legal certainty. To what ends this effort? Practically, plane spotters will be able to spot – twitchers, twitch and true criminals

⁸⁵ See “Judicial Cooperation in Criminal Matters”, The Law Societies Joint Brussels Office, Brussels Office Law Reform Update Series (September 2006) pp6

⁸⁶ See Finland’s EU Presidency, Informal JHA Ministerial Meeting, Tampere, (September 20-22, 2006) Available at <http://www.statewatch.org/news/2006/sep/eu-jha-informal-decision-making.pdf> (browsed 18.10.2006)

⁸⁷ Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States”, COM (2005) 63

⁸⁸ For a summary of the origin and the subsequent interpretation of this phrase in U.S. Constitutional law, see the article by O Sargentich, T.O., in ‘The Oxford Companion to the Supreme Court of the United States’, edited by Hall, K.L., 2nd ed. (2005)

will be restored to face legitimate proceedings in the jurisdiction of their alleged offence.